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A Deadly Response: Unconscious Racism and California’s Provocative Act Doctrine

KATHERINE N. HALLINAN*

Much of one’s inability to know racial discrimination when one sees it results from a failure to recognize that racism is both a crime and a disease. This failure is compounded by a reluctance to admit that the illness of racism affects almost everyone. Acknowledging and understanding the malignancy are prerequisites to the discovery of an appropriate cure. But the diagnosis is difficult, because our own contamination with the very illness for which a cure is sought impairs our comprehension of the disorder.¹

In Clearlake, California, three young men enter the home of an acquaintance late at night.² They claim they were there to purchase marijuana from the homeowner, an admitted drug dealer.³ The homeowner, Shannon Edmonds, claims they were there to burglarize his home and steal his drug supply.⁴ An altercation ensues inside the home.⁵ Edmonds’ stepson is badly injured in the struggle.⁶ Edmonds grabs a 9mm pistol and chases the three men out of his home.⁷ As they flee, he shoots two of them, Christian Foster and

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2. Malaika Fraley, Trial Hinges on Rare Argument, CONTRA COSTA TIMES, June 12, 2008.
4. Id.
6. Id.
7. Fraley, supra note 2.
Rashad Wallace, in the back from behind. They continue to flee, until Foster and Williams both collapse from their wounds. Edmonds pursues them down his driveway, hundreds of feet from his home, and shoots Foster again, in the back, at close range, as he lies wounded on the ground.

Williams, who was shot twice in the back, died at the scene; Foster, who was shot five times, died at the hospital soon afterwards. The third young man fled the scene. Later, the police arrested Renato Hughes claiming he was the alleged third man. Hughes says that he was not the third man who entered the Edmonds’ home, but rather that a fourth, unidentified young man had accompanied them to the Edmonds’ home and fled. Hughes claims he played no role in the violent melee. He says he had waited in the car and fled when he heard the gunshots. The descriptions Edmonds and his family gave of the third man did not resemble Hughes. Edmonds and his family did not identify Hughes in a photo line-up. Nonetheless, twenty-three-year-old Hughes, the murder victims’ childhood friend, was charged with their murders under California’s rarely used provocative act doctrine. It is undisputed that Hughes never fired a single gunshot. Edmonds, the admitted drug dealer and killer of two young men, faces no criminal charges. Shannon Edmonds, the admitted killer, is white.

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8. Yollin, supra note 3.
10. Fraley, supra note 2.
11. Id.
12. Id.
13. Id.
14. Id.
15. Id.
16. Edmonds and his family described the third intruder as over six feet tall and thin. Mr. Hughes is five feet eight inches tall and stocky. Id.
17. Id.
18. Id.
21. Id.
22. Fraley, supra note 2.
23. Lawless, supra note 19.
Introduction

The startling events culminating in the criminal prosecution of Renato Hughes reveal the weaknesses inherent in California’s provocative act doctrine. It is easy to dismiss this incident as an anomaly, an ill-conceived prosecution where the race of the participants is unfortunate, but likely arbitrary. In this paper, I will argue that the phenomenon of the provocative act doctrine being applied in racially suspect prosecutions is anything but arbitrary. Analyzing the doctrine in the context of implicit racial bias testing, I will argue that the doctrine’s reliance on notions of provocation and the attachment of criminal liability based on the reactions of actors independent of the defendant enables the infiltration of personal biases and stereotypes into the criminal process. The very elements of the doctrine lead to the conviction of minorities for provocative act murder under circumstances where similarly situated white persons would likely not be charged.

The provocative act doctrine is a lesser-known form of murder in California related to vicarious felony murder liability. It holds felons liable for killings that they and their accomplices did not commit. Instead, the killing is committed by one resisting the felony, such as a police officer or bystander. A defendant must commit some sort of “provocative act” during the commission of a felony, and that act must incite a fatal response from a third party. Examples of classic provocative acts are initiating a gun battle or participating in a car chase with the police. A conviction under the doctrine requires the jury to find that the defendant’s actions “provoked” the homicidal response. This notion of provocation, like the oft-debated notion of reasonableness, is problematic,

24. *See* People v. Gilbert, 408 P.2d 365, 373-74 (Cal. 1965) (holding that felony murder does not apply when the killing was committed by one resisting the underlying felony, but that the perpetrator of the felony could be liable for any deaths that occurred under vicarious liability principles), *vacated*, 388 U.S. 263 (1967) (finding that lineup without notice to counsel is unconstitutional).
26. Id.
27. Id.
28. Id. at 871.
particularly as a basis of homicide liability. The notion of provocation requires fact finders to make normative judgments as to what behavior qualifies as “provocative” and what the likely response to that behavior will be. The fact finder’s perception of a given act as sufficiently “provocative” to justify a lethal response is likely to be shaped by his or her perception of the various actors. Two identical acts may not be judged in the identical manner depending on the identities of the actors.

Recent scholarship in the arena of implicit bias testing offers new insights into the manner in which our hidden and unknown racial prejudices influence our everyday interactions and our reactions to other people. Implicit bias testing measures minute differences in the response times of test subjects performing tasks intended to implicate our hidden racial biases. The testing has been used to quantify the existence and prevalence of implicit biases, as well as to identify the effects of these implicit biases. For example, the shooter bias tests analyze how these hidden biases influence people’s decisions to shoot potentially dangerous individuals. Studies reveal implicit bias against a wide range of minority groups in the United States, including blacks, Latinos, Asians, Jews, foreigners, women, gays, and the elderly. Although scholars have begun to explore the implications of implicit bias testing in certain arenas, such as police shootings of minority civilians and equal protection, its implications have been largely unexplored in the area of criminal law. With further study, this scholarship has the potential to revolutionize the way that we analyze how race influences the criminal process and the law in general.

31. CalCrim defines a provocative act as “an act . . . [w]hose natural and probable consequences are dangerous to human life, because there is a high probability that the act will provoke a deadly response.” JUD. COUNCIL OF CAL. CRIM. JURY INSTRS. § 560 (2008). Thus, the finder of fact must decide the probability that someone would respond in a fatal manner to the defendant’s act.

32. See Jerry Kang, Trojan Horses of Race, 118 HARV. L. REV. 1489, 1490 (2005).
33. Id. at 1508-11.
34. Studies such as the Implicit Association Test have sought to document the existence of implicit bias; while the shooter bias testing studies have documented the effects of such implicit bias. See, e.g., id. at 1508-11, 25-27.
35. Id. at 1525-27.
36. Id. at 1512.
37. See Joshua Correll et al., The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals, 83 J. PERS. & SOC. PSYCH. 1314, 1325 (2002); Lawrence, supra note 1.
38. See, e.g., LEE, supra note 30, at 183.
Studies conducted in the United States have revealed that people of all races exhibit a prevalent implicit bias against black people. In particular, study participants display an implicit belief in the dangerousness or criminality of black people. Studies have shown that individuals, both black and white, react in more aggressive manners when confronted by a potentially dangerous black person than by a similar white person. The shooter bias tests reveal that individuals are more likely to shoot an armed black perpetrator than a similar white perpetrator; they are likely to shoot a black perpetrator more quickly; and they are more likely to mistakenly shoot an unarmed black perpetrator than a similarly unarmed white perpetrator. According to the Judicial Council of California Criminal Jury Instructions (“CalCrim”), an act is considered “provocative” if “there is a high probability that the act will provoke a deadly response.” The shooter bias testing indicates that an act is more likely to provoke a deadly response if it is committed by a black person than if it is committed by a white person. Thus, an act is in fact more likely to fulfill the elements of the provocative act doctrine if it is committed by a black person than if it is committed by a white person. In the context of implicit bias testing, it is exceedingly problematic to hold individuals criminally liable for the reactions their acts elicit, as these reactions may very well be dictated by their race.

In this article, I will explore why the provocative act doctrine lends itself to application in racially suspect prosecutions. In Part I, I will look at the development and structure of the doctrine. I will discuss felony murder, limitations that arose to curtail felony murder’s scope, and the rationales that led to the development of the provocative act doctrine as an alternative. I will analyze the structure of the provocative act doctrine itself, and how, by its very nature, it discriminates between similarly situated defendants.

In Part II, I will examine subconscious racial stereotyping, the prevalence of the black-as-criminal stereotype, and implicit bias testing. According to the results of implicit bias testing, individuals

40. See, e.g., id.
41. Id.
42. Correll et al., supra note 37.
43. JUD. COUNCIL OF CAL. CRIM. JURY INSTRS. § 560 (2008).
44. See, e.g., Correll et al., supra note 37; Kang, supra note 32.
are likely to react to people differently based solely on people's respective races.\textsuperscript{45} The studies reveal people of all races are likely to react more aggressively, or even violently, when confronted by a black person than by a similar white person.\textsuperscript{46} Moreover, the shooter bias testing indicates that when confronted by a potentially armed perpetrator, people are more likely to decide to shoot that perpetrator, and are likely to make that decision more quickly, when the perpetrator is black.\textsuperscript{47} Finally, the subliminal racial images studies found that participants need not even consciously see the black person for their image to affect the participant's behavior.\textsuperscript{48}

In Part III, I will explore how the results of implicit bias testing can be used to understand the racially suspect prosecutions for provocative act murder. Because individuals are more likely to respond in an aggressive or fatal manner to black people, a black actor's felonious act is more likely to elicit a lethal response from the victims, police and bystanders than a similar act committed by a white person. Furthermore, the doctrine's use of the notion of provocation to assign criminal liability compounds the problem. The same issues of normative bias that problematize notions of reasonableness in the context of heat-of-passion crimes and tort law are implicated by the notion of provocation used in the provocative act doctrine. Just as the third party is more likely to react to a black person's actions in a more aggressive manner, a prosecutor, judge, and jury are more likely to perceive the underlying act as sufficiently "provocative" to justify a murder charge when the actor is a black person. At each stage in the criminal process, starting with the commission of the crime and ending with the trial of the defendant, minorities, and particularly black people, are more likely to face a provocative act murder charge than similarly situated white defendants.

In Part IV, I will briefly explore the statistical evidence regarding convictions for provocative act murder. Although there are no statistics available as to the frequency with which provocative act murder is charged or how often those charges lead to convictions,\textsuperscript{49}

\begin{itemize}
\item \textsuperscript{45} See, e.g., Correll et al., \emph{supra} note 37; Kang, \emph{supra} note 32.
\item \textsuperscript{46} See, e.g., Correll et al., \emph{supra} note 37; Kang, \emph{supra} note 32.
\item \textsuperscript{47} See, e.g., Correll et al., \emph{supra} note 37.
\item \textsuperscript{48} Kang, \emph{supra} note 32, at 1491.
\item \textsuperscript{49} Although there are no databases that consistently compile records of all crimes charged or all criminal prosecutions, the FBI does maintain databases of crimes committed, along with
\end{itemize}
racial discrepancies in the conviction rates for felony murder nationwide do speak to the phenomenon I address in this article. Because many states do not have the agency limitation on felony murder, killings committed by third parties are prosecuted as felony murders. Thus, the high rate of prosecutions of black people for felony murder may partially be explained by the nature of implicit bias in our country.

In Part V, I will explore two particular provocative act cases: the prosecution of Renato Hughes for the murder of his two friends and the conviction of two Latino youths for the murder of their friend who was killed by a white teenager during a brawl. I will analyze the manner in which subconscious racial bias led to the prosecution of these particular minority defendants for provocative act murder.

In conclusion, I will advocate for the abolition of the provocative act doctrine. Because the doctrine’s very structure lends itself to use in racially suspect prosecutions, it should no longer be used as a basis for murder liability. Further, I will suggest how implicit bias testing may be useful in a wide variety of legal contexts. Indeed, with more study and dedication, implicit bias testing may help us better understand and eradicate the causes of the significant racial discrepancies in our criminal justice system.

The provocative act doctrine, by its very structure, discriminates between similarly situated defendants based on the reactions they receive to their “provocative” behavior. Implicit bias testing indicates that the reaction a person incites in a high stress, potentially

general offender characteristics, as reported by state law enforcement agencies. See FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES, http://www.fbi.gov/ucr/ucr.htm [hereinafter UNIFORM CRIME REPORTS] (last visited Mar. 18, 2009).


51. Although many states have adopted the agency limitation, like California, many others still allow felony murder prosecutions when someone besides the defendant or his accomplice commits the killing. Erwin S. Barbre, Annotation, Criminal Liability Where Act of Killing Is Done by One Resisting the Felony or Other Unlawful Act Committed by Defendant, 56 A.L.R. 3d 239 § 2[a] (1974).

52. See, e.g., Fraley, supra note 2.


violent situation is almost certain to be influenced by that defendant's race. Furthermore, the assignment of liability under the doctrine rests on the problematic and subjective notion of "provocation," which further enables the infiltration of implicit racial biases. In the context of the black-as-criminal stereotype, the nature of implicit bias leads to the prosecution of black men for provocative act murder in situations where similarly situated white men would not be prosecuted. Thus, independent of any neutral intent of the law, the provocative act doctrine is empirically a racially discriminatory legal doctrine, which should not be used to assign liability for murder.

I. The Development of the Provocative Act Doctrine in California

A. Felony Murder

Since its murky origins in 17th century England, felony murder has been a controversial criminal doctrine. Under the traditional felony murder doctrine, an individual is held liable for any killing that results from that individual's (or his accomplices') felonious act. The killing may be accidental, or may result from the actions of a third party. The actor need not have intended for the death to result, because the intent required is the intent to commit the underlying felony, not the killing itself.

There are a number of rationales cited as support for the continuation of the felony murder doctrine. Retribution, the retribution rationale rests on the idea that a crime that ends in death should be punished more severely than one that does not. Thus, one's mental state is irrelevant in comparison to the effects of one's crime. This theory minimizes the role of mental state in favor of a strict liability theory of punishment. Id. at 710.

59. The retribution rationale rests on the idea that a crime that ends in death should be punished more severely than one that does not. Thus, one's mental state is irrelevant in comparison to the effects of one's crime. This theory minimizes the role of mental state in favor of a strict liability theory of punishment. Id. at 710.
deterrence,60 and prosecutorial efficiency61 are some of the rationales often mentioned. Deterrence is commonly cited in support of felony murder. “[T]he purpose of the felony-murder rule is to deter felons from accidentally or negligently killing in the course of felonies by holding them strictly liable for the results of their dangerous conduct.”62 However, scholars have noted that, though there is no way to be certain of the number of killings that are deterred by the felony murder doctrine, it seems highly unlikely that the number is very high.63

Perhaps because of how controversial the doctrine is, many states impose limitations on felony murder, such that not every death occurring in the commission of every felony results in a felony murder charge. Two of the most common limitations are the enumerated felony rule and the agency rule. The enumerated felony rule limits felony murder to deaths occurring during the commission of certain inherently dangerous felonies, such as rape or armed robbery.64 The agency rule limits felony murder to acts committed by the perpetrators of the underlying felony.65 Under the agency rule, a perpetrator of the underlying felony cannot be liable for a killing committed by one resisting the felony, such as a police officer or bystander. It is as a result of the adoption of the agency rule that the provocative act doctrine developed in California.

60. The theory of deterrence as a rationale for the felony murder rule operates in two ways. First, the felony murder rule may deter the use of dangerous means for committing a felony. It may encourage felons to employ less dangerous methods of committing crimes, such as not using a firearm. Secondly, the felony murder may act to deter the execution of the underlying felony in the first place by leading felons to fear a murder charge for the commission of a non-violent felony. Id. at 712-13. See also Roth & Sundby, supra note 56, at 450-51.

61. The felony murder rule contributes to prosecutorial efficiency by minimizing the prosecutorial burden and providing prosecutors with greater leverage in the plea bargaining process. Baier, supra note 58, at 714.


63. “While the felony-murder rule must save some lives, the odds are that the number is small indeed. The number of killings during felonies is relatively low. The subset of such killings that are nonculpable – thus not already subject to the threat of a substantial sanction – is undoubtedly considerably smaller. Further, the addition of a small risk of a murder sanction for an unlikely event is probably not a major influence on some prospective felons’ behavior, and a good number of those who are affected in some way probably would not have killed in any event. Moreover, some who are aware of and even sensitive to the threatened sanction will probably still kill negligently or accidentally.” Tomkovicz, supra note 57, at 1456.

64. Id. at 1467.

B. The Agency Rule Limitation on Felony Murder

The provocative act doctrine arose in response to the development of the agency rule in California. In California adopted the agency limitation on felony murder in a series of cases in the 1960s. In *People v. Washington*, the Court reasoned that holding felons liable for killings that they did not commit would be ineffective in promoting the public policy rationales behind the felony murder rule. First, the Court stated that felony murder is meant to deter felons from committing negligent or accidental killings. The Court reasoned that the deterrent effect is negligible when the felon or his accomplice does not actually commit the killing. An additional purpose of the felony murder rule is to prevent the commission of felonies in the first place. The Court reasoned that to hold a defendant liable for the actions of the victim or a third party "would discriminate between robbers, not on the basis of any difference in their own conduct, but solely on the basis of the response by others that the robber’s conduct happened to produce." This draconian method of deterrence would "deter robbery haphazardly at best. To 'prevent stealing, (the law) would do better to hang one thief in every thousand by lot." For these reasons, the Court limited the application of the felony murder rule to deaths, accidental or negligent, committed by the felons themselves.

However, the Court in *Washington* speculated that if a defendant commits an act above and beyond the underlying felony with a "'wanton disregard for human life . . . that involves a high degree of probability that it will result in death' . . . it is unnecessary to imply malice." Although the Court stated that the intent to commit the

67. See *People v. Washington*, 402 P.2d 130, 134 (Cal. 1965) (holding that a defendant can only be liable for felony murder if the act of killing is committed by the defendant or an accomplice in furtherance of the underlying felony).
68. *Id.* at 133.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* (quoting OLIVER WENDELL HOLMES JR., THE COMMON LAW 58).
74. *Id.* at 134.
75. *Id.* (citation omitted) (quoting *People v. Thomas*, 261 P.2d 1, 10 (1953) (Traynor, J., concurring)).
underlying felony was not a sufficient basis from which to imply malice, if the felon had committed some additional act from which malice could be implied, the felon could be liable for the killing committed by a third party. It was this rationale of liability that evolved into the provocative act doctrine.

C. The Provocative Act Doctrine

In place of felony murder, the provocative act doctrine developed to allow for murder prosecutions in situations where someone other than the defendant commits the killing. The doctrine holds that an individual can be held liable for a killing committed by another, who is not an accomplice, under theories of implied malice. Under felony murder, malice aforethought is implied from the intent to commit the underlying felony. Under the provocative act doctrine, malice is implied from the commission of a so-called “provocative act” above and beyond the underlying felony. According to CalCrim,

[t]o prove that the defendant is guilty of murder under the provocative act doctrine, the People must prove that: 1. In (committing/ [or] attempting to commit) [the underlying felony], the defendant intentionally did a provocative act; 2. The defendant knew that the natural and probable consequences of the provocative act were dangerous to human life and then acted with conscious disregard for life; 3. In response to the defendant’s provocative act, [a third party] killed [the deceased]; AND 4. [the deceased]’s death was the natural and probable consequence of the defendant’s provocative act.

76. Id. at 133-34.
78. Washington, 402 P.2d at 133.
79. Id.
81. Id.
CalCrim defines a provocative act as “an act: 1. That goes beyond what is necessary to accomplish [the underlying felony] AND 2. Whose natural and probable consequences are dangerous to human life, because there is a high probability that the act will provoke a deadly response.”

Notably, the issues related to holding a defendant liable for a killing he or she did not commit, as articulated by the Court in Washington, are equally present in the provocative act doctrine. The doctrine continues to differentiate between similarly situated defendants “solely on the basis of the response by others that the robber’s conduct happened to produce,” despite the rationale behind the original implementation of the agency rule in California. This blatant contradiction seems to be rationalized by the fact that the provocative act doctrine imposes a higher burden on the prosecution than does felony murder. In a felony murder prosecution, the government only has to prove the defendant intentionally committed the underlying felony and a killing resulted. However, under the provocative act doctrine, the prosecution must additionally prove a provocative act above and beyond the underlying felony, except when the underlying felony requires malice, such as attempted murder. Furthermore, the prosecution must also prove a separate mental state, that while committing the provocative act, the defendant acted with a conscious disregard for life.

Yet, the provocative act doctrine contains the same internal weaknesses for which the agency limitation was developed initially. Two identical defendants, with the identical mens rea, who commit the same underlying felony and the same provocative act, may be liable for two entirely separate offenses on the basis of the responses their conduct receives. For example, two individuals each rob a bank carrying a loaded pistol. Both of them take a young woman hostage while making their escape. In the first instance, the police fire shots at the bank robber, wounding him in the leg. He lets go of the hostage when he gets hit and is arrested. He faces armed robbery and false imprisonment charges. In the second instance, everything

82. Id.
83. Washington, 402 P.2d at 134.
85. Id. § 560.
86. Id.
happens the same, except the police mistakenly shoot the hostage instead of the robber. Now, due to the unfortunate aim of the police, the defendant faces a murder charge (as well as armed robbery and false imprisonment) under the provocative act doctrine, although his conduct was identical to that of the first robber. Although one may argue that a felon should be liable for all the consequences of his acts, whether he intended them or not, we will see below that in the context of implicit racial bias, holding individuals liable for other people’s reactions to them is highly problematic. Because the doctrine allows for two similarly situated defendants to be treated very differently by the criminal justice system, it allows for human biases to affect the outcome of a criminal prosecution and enables the infiltration of racial and ethnic prejudice into the criminal process.

II. Implicit Racial Bias Testing

A. Racial Stereotyping in the United States

For centuries, race has been a pervasive element of the society and culture of the United States. From slavery and the Civil War, to the struggles for racial freedom in the Civil Rights Movement, race has shaped American history from its inception. As Charles Lawrence so eloquently phrased it, “Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role.” Although in the post-Civil Rights era our society has largely condemned racism and blatant racial discrimination, the effects of our racialized history cannot be discarded so easily. Lawrence continues:

Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual’s race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism. We do not recognize the ways in which our

87. See Lawrence, supra note 1, at 322.
88. See, e.g., id. at 322-23.
cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions.\textsuperscript{89}

In other words, the import placed on race throughout American history and in contemporary American culture influences the way that Americans view people of all races, consciously and subconsciously. On the crudest level, these cultural influences manifest themselves in overt racism, such as racially motivated hate crimes. However, in the vast majority of Americans, these cultural messages about race manifest themselves subconsciously, in the shape of racial stereotypes.

Studies have revealed a significant decline in explicit racial prejudice among the American people over the last fifty years.\textsuperscript{90} However, many implicit stereotypes remain. Furthermore, because stereotypes are not transmitted explicitly, but rather in implicit cultural messages, we all, as members of American society, absorb such stereotypes whether we are conscious of them or not.\textsuperscript{91} “Even if a child is not told that Blacks are inferior, he learns that lesson by observing the behavior of others. These tacit understandings, because they have never been articulated, are less likely to be experienced at a conscious level.”\textsuperscript{92} Thus, while our society has consciously moved toward the eradication of explicit racism, implicit racial stereotypes remain hidden under the surface, unrecognized by the majority in our society.\textsuperscript{93}

The nature of racial stereotyping in American society has a lot to do with the way in which our minds process the world. Jerry Kang argues that our minds operate through the use of automatic “schemas” or “knowledge structures,” which we use to categorize the barrage of information we receive.\textsuperscript{94} These schemas carry with them a variety of immediate assumptions and connections. For example, to borrow Kang’s innocuous illustration, “when we see something that has four legs, a horizontal plane, and a back, we immediately

\textsuperscript{89} Id. at 322.
\textsuperscript{90} Kang, supra note 32, at 1506.
\textsuperscript{91} Lawrence, supra note 1, at 323.
\textsuperscript{92} Id.
\textsuperscript{93} Id. at 335.
\textsuperscript{94} Kang, supra note 32, at 1498.
classify that object into the category of 'chair.'”

These schemas enable our minds to instantaneously categorize large amounts of disparate information, and make subconscious connections between different objects.

Because of the (artificial) importance placed on race in our society, our minds use racial schemas to classify individuals, and our mind attaches a variety of different “racial meanings” to the particular category in which we classify a person. Thus, like a chair, when one sees a particular individual, one’s mind automatically places that person into particular categories, for example: white, female, tall, or fat. Once someone has been placed in a particular category, all the meanings one associates with that category are triggered. For example, one might see an overweight person and subconsciously think: lazy, even if one does not consciously believe all overweight people are lazy. Our minds absorb stereotypes from all sorts of sources, and these stereotypes are triggered subconsciously whether we know it or not.

These schemas not only influence how we categorize information, they also influence what particular information our brain perceives and remembers. Our minds tend to look for information and behavior that is relevant to our minds’ subconscious frameworks. When a particular schema is well entrenched in one’s subconscious, it is easier for one to perceive information that is consistent with that schema. Thus, if we believe someone is likely to act violently or aggressively, we are more likely to perceive behavior as aggressive, or to remember those actions that may be

95. Id.
96. Id. at 1499-1500.
97. As Jerry Kang explains, generally “we see what we expect to see. Like well-accepted theories that guide our interpretation of data, schemas incline us to interpret data consistent with our biases.” Id. at 1515. However, because of the complexity of human memory, it is difficult to quantify the exact manner in which racial schemas influence our memories. “As a general matter, there is preferred recall for schema-relevant information. Schema-relevant does not necessarily mean schema-consistent. Whether schema-consistent or schema-inconsistent information is favored depends on numerous factors, including the stage of information processing (encoding versus retrieval); the strength of the schema (newly forming versus well-formed); and the degree of cognitive load (low versus high at the time of encoding and/or retrieval). Finally, to complicate matters further, these various factors may have nonlinear relationships with memory recall.” Id. at 1503 n.67 (citations omitted).
98. “If schemas are reasonably well-formed, people take longer to encode inconsistent information. By contrast, if schemas are weak, people may be more receptive to schema-inconsistent data.” Id. at 1503 n.66.
perceived as aggressive. If one considers the prominence of racial stereotypes in our society, it seems likely that racial schemas will be well entrenched in the minds of most people living in the United States. Because of our minds’ tendencies to look for expectation consistent behavior, rather than inconsistent behavior, the very behavior and character traits that we perceive and remember will likely be dictated by the subconscious schemas we attach to the actor. Thus, the very behavior and character traits that we perceive and remember will be affected by racial stereotypes.

Perhaps one of the most prominent of all racial stereotypes in modern American society is the perceived criminality of young black men. “People of all races tend to view Blacks as more dangerous and more threatening than Whites.” According to a poll conducted by the University of Chicago, “52.8 percent of individuals representing all different races polled in 1990 viewed violence as a trait characteristic of African Americans and 42.8 percent viewed violence as a trait characteristic of Latinos. In contrast, only 18.8 percent of the individuals polled attributed violence to Whites.”

The coverage of the Katrina disaster was a particularly blatant example of the black-as-criminal stereotype. While blacks that broke into stores to steal food or supplies were portrayed by the media as lawless looters, whites involved in similar activities were often described in sympathetic terms. The media images of young black men as criminals propagated during the Katrina disaster “rearticulate, the ‘Black brute,’ a violent and sexually aggressive Black male

99. “[S]chemas guide what we see, encode into memory, and subsequently recall. At the attentional stage, schemas influence what we notice and immediately reduce information complexity. At the encoding and recall phases, schemas are again influential, although the memory literature is conflicted and qualified. There is now evidence that schemas influence not only interpretation (that is, social perception), but also what we actually see and remember seeing (“visual perception”).” Id. at 1503-04.

100. See supra notes 87-93 and accompanying text; infra notes 102-10. “For most adults who have grown up in America, I believe racial schemas” are well formed. Kang, supra note 32, at 1503 n.66.

101. See LEE, supra note 30, at 183-84.
102. Id. at 184.
103. Id. at 140.
caricature that emerged in American popular culture (particularly in novels and film) during the late nineteen and early twentieth centuries."\(^{105}\)

However, it is not only in extraordinary situations, such as Katrina, where the black-as-criminal stereotype arises. Indeed, the American news media in general tends to over-report incidents of black criminality, especially black-on-white crime.\(^ {106}\) One study found that blacks and Latinos are twice as likely to appear in local crime reports than in human-interest stories.\(^ {107}\) Although the media is more likely to report black-on-white crime incidents than incidents where the victim is a minority, racial minorities are in fact more likely to be victims of crime than are whites.\(^ {108}\) Furthermore, whites accounted for over two-thirds of those arrested for committing crimes in 1999.\(^ {109}\) This over-reporting of black and minority criminality helps to foster the stereotype of black-as-criminal.

Until very recently, researchers had not found any substantive way to study the frequency or effects of subconscious racial biases. Implicit bias testing has provided scientific proof that the vast majority of our society has implicitly absorbed the stereotype of black criminality and that this stereotype affects people's behavior.\(^ {110}\) The acceptance of the prominence of this harmful stereotype offers a new chance for our society to actively eradicate the causes and effects of this particular implicit bias, and thus racism more generally.

**B. Implicit Bias Testing**

The fairly recent arena of implicit bias testing has lent significant scientific support to the contention that subconscious racial stereotypes pervade America's collective psyche.\(^ {111}\) Many of these studies have examined the effect of race and ethnicity on individuals'
subconscious reactions to others. Across the board, individuals of all races have been shown to exhibit implicit racial biases, which affect the ways in which their minds analyze the world around them. Many of these studies have focused on the perceived criminality and dangerousness of black men.

The Implicit Association Test ("IAT") is the most prominent methodology for testing implicit biases. The IAT is designed to quantify how closely participants associate two separate words or concepts. In order to make this assessment, the IAT measures the time it takes individuals to categorize different words and images. For example, in one study, individuals are shown images of black and white faces. The phrases “African American” and “European American” appear on either side of the screen. Subjects are shown a series of black and white faces and asked to place them in the proper category. The subjects are then shown words with positive and negative connotations, such as smart, kind, violent or lazy, interspersed with images of black and white faces, which they are told to categorize in a particular way. For example, in the first round, subjects are told to place all positive words in the same category as the white faces, e.g., the left side, and all negative words

112. See Correll et al., supra note 37, at 1314; Kang, supra note 32.
113. See Kang, supra note 32, at 1490.
114. See Correll et al., supra note 37, at 1320.
115. See Kang, supra note 32, at 1509. The Implicit Association Test is available online, at Project Implicit, https://implicit.harvard.edu/implicit/ (last visited Nov. 10, 2009).

The IAT requires respondents to rapidly sort from four different categories into groups. For example, imagine sorting a deck of playing cards — with red hearts, red diamonds, black clubs, and black spades — two times. For the first time, all the hearts and diamonds are sorted into one pile and all the clubs and spades are sorted into a second pile. This would be quite easy to do because the suits are being sorted by a common perceptual feature — color. Now imagine doing the same task but this time sorting clubs and hearts into one pile and diamond and spades into the other. This would probably be harder and take longer to complete because clubs and hearts are not as related to each other as are hearts and diamonds. The simple idea is that things that are associated by some feature are easier to put together than things that are not associated.

Id.
118. Kang, supra note 32, at 1510.
119. See Project Implicit, supra note 115.
120. Id.
121. See Kang, supra note 32, at 1510.
in the same category as the black faces. In the second round, they are told to place the positive words in the category with the black faces. Different words and images then flash quickly across the screen, and subjects are told to place them in their proper category as quickly as possible. The tests are intended to measure minute differences in response times. For example, it is assumed that if individuals' subconscious racial biases affect their cognition, it would be easier to place “kind” in the same category as the white face or “violent” in the same category as the black face, and that this implicit association would be reflected in the length of time it takes the individual to make that assessment. Thus, the IAT is used to measure the strength of an implicit stereotype, i.e., how closely the participant associates a social category with a particular attribute. So far, the results of such studies have conformed substantially to social scientists' expectations: in the United States, studies have revealed near universal biases against most minority groups, including blacks, Latinos, Asians, women, and gays.

i. Shooter Bias Studies

Implicit bias testing has been used to prove the existence of negative stereotypes and hostility against black people in a variety of different ways. Perhaps most critical to the arena of criminal law and the provocative act doctrine in particular is the so-called shooter bias testing. Black people are four times more likely to die during, or as a result of, an encounter with a law enforcement officer than whites. Prominent incidents of black people being killed by law enforcement officers have been the impetus for the shooter bias testing; however, the results are equally relevant to the provocative act doctrine. The studies have shown that under high-

122. See Project Implicit, supra note 115.
123. Id.
124. Id.
125. See Kang, supra note 32, at 1510.
126. See Carney et al., supra note 117.
127. See Kang, supra note 32, at 1512.
129. For example, the tragic death of Amadou Diallo, gunned down on his front step by New York City police officers, spurred several studies looking at implicit bias and the use of lethal force. Id.
pressure, threatening situations, individuals’ implicit racial stereotypes lead them to shoot black men faster than they would similar white men.130

In the first such study, conducted by B. Keith Payne at the University of North Carolina at Chapel Hill, participants were required to discriminate between guns and hand tools after being primed by a human face, either white or black.131 In one version, participants were only given half a second to respond; in the other they were self-timed.132 When self-timed, people identified guns more quickly when primed with a black face.133 When forced to make snap decisions, race greatly affected people’s decisions.134 Participants mistakenly saw a gun more often when the face was black, and mistakenly saw a tool more often when the face was white.135

In another study conducted by Joshua Correll at the University of Colorado at Boulder, participants played a video game designed to simulate the situation of a police officer being confronted by an “ambiguous” but potentially armed individual.136 The game included “target” images of twenty different young men, both black and white, holding either a gun or a neutral object, such as a wallet, cell phone or camera in a variety of different locations.137 All of the models were recruited on college campuses.138 Participants were required to make instantaneous decisions whether to shoot the “target” based on whether he was holding a gun or a harmless object.139

The study involved two different trials, which varied in length of time given to participants to make the shoot/don’t shoot decision.140 Both studies found that “[p]articipants fired at an armed target more quickly if he was African American . . . and they decided not to shoot an unarmed White target more quickly than an unarmed

130. See Kang, supra note 32, at 1525.
131. Payne, supra note 110, at 287.
132. Id.
133. Id.
134. Id.
135. Id. at 287-88.
136. Correll et al., supra note 37, at 1315.
137. Id.
138. Id.
139. Id.
140. Id. at 1325.
African American target.”

Furthermore, the studies also found that individuals’ assessments were more accurate when assessing armed black people and unarmed white people than the reverse. Participants were more likely to fail to shoot an armed white suspect than an armed black suspect. Perhaps most disturbing of all, participants were more likely to mistakenly shoot an unarmed black target, than an unarmed white target. Thus, participants “required less certainty that [the target] was in fact holding a gun before they decided to shoot” when the target was black. To offer a very disturbing illustration of this phenomenon, “one unarmed African American target was shot by more than 90% of our participants.”

Notably, the results did not change depending on the race of the participants. In one of the trials, the results of black participants and white participants were identical. Indeed, the prevalence of implicit racial stereotypes or schemas has little to no connection to how we consciously perceive race. Thus, in one study it was found that while whites admitted some personal preference for whites over blacks, their explicit preference was far lower than their implicit preferences. Yet, despite one’s conscious disavowal of racism, if one exhibits subconscious bias, it is still likely to affect one’s behavior and perceptions. As Kang states, “even if our sincere self-reports of bias score zero, we would still engage in disparate treatment of individuals on the basis of race, consistent with our racial schemas.” Kang analogizes racial schemas to a sort of Trojan Horse that has hijacked our subconscious minds without our consent.

The results of the shooter-bias studies reveal a deep-seated and largely subconscious societal perception that black men are more likely to be armed and are more dangerous than similar white men.

141. Id. at 1317.
142. Id. at 1320.
143. Id. at 1325.
144. Id. at 1319.
145. Id. at 1325.
146. Id. at 1325.
147. Id. at 1325.
148. “Testing both White and African American participants, we found that the two groups display equivalent level of bias.” Id.
149. Kang, supra note 32, at 1513.
150. Id.
151. Id. at 1514.
152. Id. at 1508.
“When ambiguous behavior is performed by an African American, it seems more hostile, more mean, and more threatening than when it is performed by a White person.” The shooter bias studies provide an explanation for a phenomenon we have all observed: a black person shot to death under strange, seemingly unprovoked circumstances. Amadou Diallo, Oscar Grant, and many others spring to mind. These studies prove scientifically what many have noticed circumstantially: that in a variety of situations, people are more likely to shoot a black person than a similarly situated white person.

ii. Subliminal Racial Image Studies

Other studies gauged participants’ reactions to subliminal references to blacks and whites. In the “computer crash” studies, participants were made to count the number of circles on a computer screen. After performing hundreds of such tasks, the computer “crashed” and the participants were told to start over. The participants were unaware that they had been shown repeated subliminal images of either a white or black face. The participants’ reactions to being told they had to start the activity over were assessed for frustration and hostility. Those participants who had been primed with a black face responded with greater hostility.

In another study looking at individuals’ reactions to racialized subliminal references, similar results were found. Participants were subliminally primed with words related to both the social category and the stereotypes of black people, excluding any words related to violence. Participants were then asked to rate a target’s ambiguously hostile behavior for level of hostility. The more words associated with black people with which the participant was

153. Correll et al., supra note 37, at 1320.
155. Id.
156. Id.
157. Id.
158. Id.
159. Correll et al., supra note 37, at 1315.
160. Id.
161. Id.
primed, the more likely he or she was to perceive ambiguous behavior as hostile.\textsuperscript{162}

iii. Race, Implicit Bias Testing, and the Criminal Justice System

All of these studies confirm the existence of something of which many Americans are already keenly aware. Namely, individuals tend to perceive black people as more aggressive, more dangerous, or more likely to be participating in illegal activity than equivalent white persons. The computer crash studies show that these stereotypes can affect an individual's behavior, leading them to react to situations in a more aggressive manner.\textsuperscript{163} And further, these studies indicate than an individual need not even consciously "see" the black person for negative racialized stereotypes to affect his or her behavior. The shooter bias testing studies show the profound consequences such stereotypes can have.\textsuperscript{164} Indeed, these studies reveal that people's subconscious racial stereotypes about others can affect the way people react to the world around them, and they are unlikely to even be aware of what has affected their behavior.

Notably, schematic thinking — the association of certain characteristics with particular categories — happens automatically and instantaneously,\textsuperscript{165} and has little to do with an individual's conscious beliefs about racial categories.\textsuperscript{166} Thus, when one sees a chair, one need not consciously consider whether the item is a chair. Rather, immediately upon seeing a chair, all the associated meanings are triggered subconsciously in one's mind.\textsuperscript{167} The same process occurs when one sees a person of a particular race or social category

\textsuperscript{162} Id.
\textsuperscript{163} Kang, supra note 32, at 1491.
\textsuperscript{164} See, e.g., Correll et al., supra note 37, at 1324-25.
\textsuperscript{165} Kang, supra note 32, at 1499.
\textsuperscript{166} Participants' results for the implicit association testing were shown to be nearly entirely disassociated from any measures of explicit racial bias. \textit{Id.} at 1512. In the studies conducted by Correll, it was found that individuals' implicit biases were in fact most closely correlated to their personal awareness of stereotypes of African American men as violent, hostile or dangerous, rather than their explicit adoption of those stereotypes. Correll et al., supra note 37. "If cultural stereotypes associating African Americans with violence do, in fact, lead to Shooter Bias, any person exposed to American culture should be liable to demonstrate the bias, regardless of his or her personal views about African Americans." \textit{Id.} at 1323.
\textsuperscript{167} Kang, supra note 32, at 1498-99.
that is associated with certain stereotypes. That this process is automatic is critical to the understanding of how race affects individuals’ momentary decisions to shoot or not shoot in the context of the provocative act doctrine. Because the process occurs automatically, in the subconscious, rather than conscious parts of our brains, people may react to another person’s race without even being aware of their own minds’ implicit associations. Furthermore, as the computer crash studies indicate, individuals need not even consciously process an individual as belonging to a particular racial category for the associated racial meanings to be triggered in their mind. “We do not have to consciously ‘see’ the Black male face for it to influence our behavior.” Thus, individuals may react to a black person based on pernicious racial prejudices without consciously endorsing such prejudices.

Finally, because schemas affect the way we perceive and remember particular situations, the race of the other person will shape the way a situation is remembered, and thus the way in which it is communicated to others. Because of the subconscious automaticity of racial schemas, participants may be entirely unaware that race even played a role in the interaction. Thus, it becomes nearly impossible after the fact to analyze the manner in which the actors’ subconscious racial biases influenced a particular interaction.

Implicit bias testing is groundbreaking for being able to identify and quantify the degree to which members of our society exhibit racial stereotypes or schemas. Racial schemas are triggered in our daily lives, and shape the ways in which we react to other people. Even people who are free from any conscious racial bias, and even members of a particular minority group, exhibit the same internal biases as members of the dominant class. In the United States, many of these racial biases reflect a belief in the criminality or dangerousness of black men. With such studies at our fingertips, it becomes more feasible to closely analyze the ways in which implicit bias influences the criminal justice system and contribute to the high incarceration rate of black men in particular, and minorities generally. Indeed, this scholarship suggests that many racial

168. Id. at 1499.
169. Id. at 1504-05.
170. Id.
171. Correll et al., supra note 37.
discrepancies in the criminal justice system may be due to the commonality of subconscious racial stereotypes and the ways in which they affect the perception and evaluation of individual actors’ behaviors by third parties.

III. The Reasonable Lethal Response: The Provocative Act Doctrine and Racial Bias

Under the provocative act doctrine, one is liable for murder if a third party kills in response to one’s “provocative” act. The doctrine bases liability on the reaction an individual’s act elicits from a third party. As the implicit bias studies show, people in the United States are likely to respond in a more aggressive and potentially lethal manner when confronted with a black actor than when confronted by a white actor. Indeed, these studies indicate that most individuals require less time and a lower threshold of certainty when deciding whether to shoot an armed black perpetrator than an identical or even more threatening white perpetrator. Thus, two identical defendants could commit the same actus reus, but their actions could elicit very different responses from the victims of the underlying felony or from the police due to the defendants’ respective races. Those differing responses by the third party could spell the difference between an armed robbery charge and first-degree murder under the provocative act doctrine for the defendant. When viewed in conjunction with automatic racial schemas and negative stereotypes regarding black criminality, it is

174. A defendant is liable for murder under the doctrine if a third party kills in response to the defendant’s provocative act. Id.
175. Kang, supra note 32, at 1504-05.
176. Correll et al., supra note 37.
177. Id. at 1319.
178. See, e.g., id. at 1325.
179. Provocative act murder is first-degree murder if the killing occurred during the course of certain enumerated felonies, such as robbery, and if the defendant intended to commit the underlying felony. JUD. COUNCIL OF CAL. CRIM. JURY INSTRS. § 560 (2008).
highly questionable to hold individuals accountable for the reactions their actions elicit from other, independent actors.

Furthermore, racial stereotypes affect the perception and interpretation of a particular incident after the fact. When a crime occurs and a suspect is taken into custody, it is still unclear what charges that person will face, if any at all. Sometimes it is clear what the person will be charged with, such as in a straightforward DUI case; yet at other times, it is a much more subjective decision. Provocative act doctrine cases almost inevitably involve messy, complicated circumstances, where it would be possible to charge multiple individuals with multiple different crimes. If individuals subconsciously perceive acts performed by black people as more aggressive than identical acts by white people, then police officers, district attorneys, judges and juries are more likely to perceive the black person as the aggressor in the situation.

Moreover, determining whether an act qualifies as “provocative” under the provocative act doctrine is an inherently subjective analysis. It requires the prosecutor and the finder of fact to make an assessment as to the probable consequences of an act after those consequences have already occurred. The implicit bias testing has shown that people perceive an act differently, and thus the probable consequences of that act, depending on the race of the actor. Thus, after the fact, the prosecutor, judge and jury are likely to assess a situation very differently depending on the races of the actors. Therefore, at every stage of the process, from the initial felony, through the killing, arrests, charging, and jury trial, implicit racial bias makes it more likely that a black person will be charged and convicted of provocative act murder than a similarly situated white person.

181. The circumstances that result in provocative act doctrine charges are almost by definition complex because any provocative act case necessarily involves an underlying felony, a provocative act, and a homicidal reaction by a third party to that act. See JUD. COUNCIL OF CAL. CRIM. JURY INSTRS. § 560 (2008). The Renato Hughes case is a prime example of the sort of chaotic melees that result in provocative act murder charges.
182. Id.
183. In one study conducted by Sagar and Schofield, 6th grade boys were shown line drawings and given descriptions of different scenarios, such as two boys bumping into each other in the hallway. They depicted race by shading in the skin on some of the images. “[T]hey found that when an actor was depicted as African American, rather than White, his behavior seemed more mean and threatening to the participants.” Correll et al., supra note 37, at 1314-15.
A. In the Moment: The Reaction by Victims and Witnesses to the Underlying Felony

Imagine a situation where two would-be robbers enter a liquor store intending to commit a robbery. Both are armed. They demand money from the owner behind the counter. One of them holds a gun to the owner’s head. The other continually threatens him, saying they will kill him if he doesn’t comply with their demands. Both robbers appear nervous; both seem ready to carry out their threats. The store owner’s wife, hiding in the back of the store and fearing the robbers might shoot her husband, pulls a gun out of her dress and fires. The robbers return fire, but do not hit her. Instead of hitting the assailants, the wife kills her husband. Under the provocative act doctrine, the robbers may be liable for the storeowner’s death, although they may not have intended to fire a single shot when they entered the store.  

The storeowner’s wife had to make a split-second decision how to respond to the acts of the robbers. True, she would not be in this position but for the actions of the defendant. Under the theory of the provocative act doctrine, because the robbers created the situation that led to the death of the storeowner, they should be liable for his death. However, the wife had a substantive choice as to how to respond to the would-be robbers’ actions. It was not inevitable that she would respond with lethal force. She could have submitted to the felony, she could have attempted to contact the police, or any number of other potential outcomes. What were the considerations that went into her decision? It is likely that she considered the chance that the robbers would in fact fire their guns. The more

185. “Thus, the victim’s self-defensive killing or the police officer’s killing in the performance of his duty cannot be considered an independent intervening cause for which the defendant is not liable, for it is a reasonable response to the dilemma thrust upon the victim or the policeman by the intentional act of the defendant or his accomplice.” People v. Gilbert, 408 P.2d 365, 374 (Cal. 1965), vacated, 388 U.S. 263 (1967).
dangerous she perceived the robbers to be, the more necessary it must have seemed to shoot first.

Notably, her decision was not made with a lot of time for deliberation. The situations that lead to convictions under the provocative act doctrine tend to involve highly explosive, tense, unpredictable situations. It is when making such split-second decisions, where one’s instincts more than one’s conscious mind controls, that racial prejudice can so easily affect the outcome. In that split second, the choice that the individual makes — whether to shoot, whether to hide, whether to pray — will be shaped, consciously or unconsciously, by the race of the person standing in front of him or her. The studies indicate that the average person is more likely to perceive a black person as dangerous than a similar white person, and will require a lower threshold of certainty when deciding whether to shoot a potentially dangerous black person than a similar white person. In other words, the studies indicate that the storeowner’s wife is more likely to make the decision to shoot the robbers, and is likely to make it more quickly, if the robbers are black. And it is the outcome of that choice that will decide the charges the defendants will face and the time they will spend behind bars.

The provocative act doctrine allows for an individual to be punished for murder, not on the basis of his own actions, but based on the response his actions receive. It is well-recognized by critics of felony murder that holding a defendant strictly liable for the unintended consequences of his actions is against the traditional
notions of intent that are so central to our criminal jurisprudence.\footnote{193}{See Baier, supra note 58, at 704.} However, the provocative act doctrine is problematic not only because of its divergence from norms of criminal culpability, but also because of its reliance on the reaction of a third party to the defendant. Individuals’ reactions to other people are shaped by their biases and stereotypes. These biases become even more relevant when people are forced to make split second decisions under highly stressful circumstances. Because people are more likely to react in an aggressive or lethal manner to a black person than a white person, a black person who commits a felony is more likely to end up in a provocative act situation than a white person who commits the same felony.

**B. Race and the Fact Finder: The Inherent Normative Bias in the Concept of Provocation**

Much has been written about the problematic nature of provocation in the area of voluntary manslaughter — so-called heat-of-passion crimes — and self defense.\footnote{194}{See, e.g., CAROLINE A. FORELL & DONNA M. MATTHEWS, A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN 5-7 (2000); CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE 93 (1989); LEE, supra note 30, at 203.} Heat-of-passion crimes generally require an assessment of whether the defendant was "provoked" by the victims’ behavior and whether his or her response to the provocation was "reasonable."\footnote{195}{LEE, supra note 30, at 3.} Self-defense requires a finding that the defendant’s fear of the victim and his lethal response to the victim’s behavior were reasonable.\footnote{196}{See JUD. COUNCIL OF CAL. CRIM. JURY INSTRS. § 505 (2008) ("Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of great bodily injury .... Defendant's belief must have been reasonable and .... . . . . [t]he defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation.").} This notion of reasonability relies on a concept of the "reasonable man."\footnote{197}{LEE, supra note 30, at 204.} According to Cynthia Lee in *Murder and the Reasonable Man*, "If the jury concludes that a reasonable person in the defendant’s shoes would have believed it necessary to use force in self-defense or would have been provoked into a heat of passion by the victim’s behavior, it generally will find the defendant not guilty of
murder." Assesments of provocation and reasonableness necessitate normative judgments about appropriate behavior, which tend to favor the dominant class of society. "Whites fit the mold better than Blacks and other minorities. Men fit the mold better than women. Individuals born in the United States fit the mold better than foreign-born immigrants. Heterosexual men and women fit the mold better than gays and lesbians."

The provocative act doctrine similarly requires an assessment of whether the defendant’s behavior was “provocative” and what response it was likely to elicit. This necessarily requires a determination of what one would expect, or what is somehow “normal” behavior in the circumstance. However, the provocative act doctrine is unique in its use of the notion of provocation. Instead of utilizing the existence of provocation as a mitigating factor in assessing the murderer’s culpability, the provocative act doctrine actually uses provocation to transfer culpability from the provoked to the provoker. Thus, any prejudice or bias in the application of the notion of provocation is liable to have dire consequences in the context of the provocative act doctrine. To use a subjective notion, fraught with the risk of bias and prejudice, to establish an individual’s liability for murder is extremely problematic.

The use of the concept of provocation to assign liability for murder allows for further infiltration of subconscious biases into prosecutions for provocative act murder. The definition of provocation used by CalCrim for the provocative act doctrine relies on the finder of fact’s assessment of the “natural and probable consequences” of the act and whether “there is a high probability that the act will provoke a deadly response.” Although at first glance this may seem like an objective formula, it requires a great deal of subjectivity. This formulation requires the jury to consider the potential consequences of an act and make a judgment after the fact whether the consequences were foreseeable before the act occurred.

198. Id. at 3.
199. “[S]ocial norms, particularly those regarding gender, race, and sexual orientation, can influence legal decision makers — judges, jurors, and prosecutors—deciding whether a particular defendant was reasonably provoked or acted reasonably in self-defense.” Id. at 4.
200. Id. at 204.
202. Id.
203. Id.
This is highly speculative. Further, what a juror (or judge or prosecutor, for that matter) may consider likely to provoke a deadly response will be shaped by the juror’s personal biases and stereotypes. People are likely to find behavior more provocative if it is committed by someone they would perceive as dangerous. And people are more likely to perceive acts by black people as dangerous than similar acts by white people.

Indeed, the very words of the provocative act doctrine jury instructions call to mind the implicit bias studies. We have seen that individuals are more likely to respond in a homicidal manner to a black man holding a gun than an identical white man.\textsuperscript{204} We have also seen that individuals are more likely to “see” a gun and respond with deadly force if the “assailant” is black.\textsuperscript{205} Furthermore, we have seen that individuals are less likely to shoot an armed assailant, if that assailant is white.\textsuperscript{206} When viewed in light of these studies, the sentence “there is a high probability that the act will provoke a deadly response,”\textsuperscript{207} takes on a different light. The same act may very well have a different probability of provoking a deadly response based on the race of the actor. Thus, an actor’s conduct is in fact more likely to fulfill the elements of the provocative act doctrine if that actor is black than if he is white.

In a precursor to the IATs, it was shown that ambiguous acts of hostility were more likely to be viewed as violent when perpetrated by a black person than by a white person.\textsuperscript{208} In the study, students were shown two people arguing with each other. One party shoves the other. It was found that when the person doing the shoving was black and the person being shoved was white, nearly seventy-five percent of the students characterized the shover’s actions as “violent” and only six percent characterized the action as “playing around.”\textsuperscript{209} When the races of the actors were reversed, the numbers shifted wildly. In that case, only seventeen percent characterized the white person’s act as “violent” while forty-two percent dismissed it as “playing around.”\textsuperscript{210} The elements of the provocative act doctrine

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{204} Correll et al., \textit{supra} note 37, at 1319.
\item \textsuperscript{205} \textit{Id}.
\item \textsuperscript{206} \textit{Id. at} 1320.
\item \textsuperscript{207} JUD. COUNCIL OF CAL. CRIM. JURY INSTRS. \textsection 560 (2008).
\item \textsuperscript{208} LEE, \textit{supra} note 30, at 140-41.
\item \textsuperscript{209} \textit{Id. at} 141.
\item \textsuperscript{210} \textit{Id}.
\end{itemize}
\end{footnotesize}
allow for the differentiation between two individuals based on the jurors’ belief in each individual’s apparent dangerousness. Black men appear more dangerous to the average person. Thus, the provocative act doctrine allows for the differentiation between two individuals who have committed identical acts based on those individuals’ races.

In light of these studies, it seems obvious that in assessing a particular incident, a prosecutor (and later the trier of fact) is likely to view the initiation of the felony and the “provocative act” as more violent and provocative if the actor is black than if he is white. Thus, in addition to the person resisting the felony, who is liable to react in a more aggressive manner to a black person’s felonious act than to a white person’s similar act, the prosecutor in assessing the circumstances is more likely to view that act as sufficiently culpable to warrant a murder charge under a provocative act theory when the defendant is black. Furthermore, the trier of fact is more likely to accept the prosecutor’s assessment of the act as provocative when the defendant is black. At each stage of the criminal process, black men face implicit racial prejudice, and at each stage, that prejudice makes it more likely they will end up charged and convicted of provocative act murder than similarly situated white men.

IV. The Numbers: Racial Disparities in Convictions for Provocative Act Murder

Unfortunately, there is no comprehensive data available to analyze all the prosecutions and convictions that have occurred using the provocative act doctrine. Although the Federal Bureau of Investigation compiles general statistics about crimes that have occurred in the United States, there is little information about convictions and even less about the specific theory of culpability used to convict particular defendants.211 Thus, it is nearly impossible to state with any certainty that numerically, people of color are charged with the provocative act doctrine more often than white people. As to felony murder, of which the provocative act doctrine is an intimate cousin, the Bureau of Justice Statistics, a subdivision of the U.S. Department of Justice, reports that black people

211. See Uniform Crime Reports, supra note 49.
commit a higher percentage of felony murders than white people.\textsuperscript{212} Furthermore, black people account for a higher percentage of all felony murders, as compared to other types of murder.\textsuperscript{213} According to the U.S. Department of Justice, black people committed 52.2 percent of the homicides that occurred in the United States between 1976 and 2005.\textsuperscript{214} White people accounted for 45.8 percent of all homicide offenders during that same time period.\textsuperscript{215} However, in the arena of felony murder, these numbers shifted significantly. White people only account for 39.1 percent of all felony murders, while black people are believed to have committed 59.3 percent of all felony murders.\textsuperscript{216}

It is important to note that these felony murder statistics include many of the crimes that would be tried as provocative act murders in California.\textsuperscript{217} Because many states do not have the agency rule limitation on felony murder, in such states, killings perpetrated by people other than the defendant and his accomplices qualify as felony murder.\textsuperscript{218} Thus, these statistics do include many of the situations that would be considered provocative act murder in California, where a third party or the victim, not the defendant or his accomplice, commits the killing. Thus, it seems likely that the extreme racial discrepancies in the felony murder statistics may at least partially be caused by the fact that people are more likely to respond in a homicidal manner to a black perpetrator than a white perpetrator.

Notably, it is largely irrelevant for the purpose of this article whether or not blacks and other people of color are in fact overrepresented in the prosecutions for the provocative act doctrine. Although it seems likely based on the available anecdotal evidence that one would find such a discrepancy if the data were available, it is not a requisite fact for proving the thesis of this article. Whether or not the discrepancy is reflected in the numbers, one may be certain

\begin{footnotes}
\item[212] Fox & Zawitz, supra note 50. These statistics are compiled from police reports and investigations, as reported by state law enforcement agencies. \textit{Id.}
\item[213] \textit{Id.}
\item[214] \textit{Id.}
\item[215] \textit{Id.}
\item[216] \textit{Id.}
\item[217] Although many states have adopted the agency limitation like California, many still allow felony murder prosecutions when the killing is committed by someone besides the defendant or his accomplice. See Barbre, supra note 51, § 2[a].
\item[218] \textit{Id.}
\end{footnotes}
that black people have been charged and convicted of provocative act murder due to the reaction they have received from others due to their race. In other words, whether or not a higher number of black people are charged with provocative act murder, many who are charged under the doctrine likely ended up in that position due to the color of their skin.

V. Racially Suspect Prosecutions: Some Egregious Examples

Analyzing the provocative act doctrine in conjunction with implicit bias testing helps to shed light on the Renato Hughes case discussed at the opening of this article. Indeed the strange series of events leading up to Hughes’ prosecution makes almost no sense absent a recognition of the role racial prejudice played in the event itself and the subsequent prosecution. It seems very likely that the actual murderer, Shannon Edmonds, acted with racial bias when he murdered Foster and Williams, whether or not Edmonds himself was conscious of it. Would Foster and Williams have been brutally murdered that day if they had been white? We will likely never know. However, in light of implicit bias testing, it seems nearly certain that Edmonds’ decision to shoot the two young men was at least partially shaped by their race.

Furthermore, the other participants in the prosecution — primarily the police and the District Attorney — were undoubtedly influenced by implicit racial stereotypes when making the assessment regarding what charges to file. No one truly knows what happened in the Edmonds’ home that night. 219 No matter whose version of the story one accepts, there are a lot of unanswered questions. 220 Were the young men there to buy drugs or to steal them? 221 Was Hughes in the house during the melee, or was he waiting in the car as he claims? 222 Why did Edmond’s description of the third assailant not match Hughes’ appearance? 223 Who initiated the violence? No one knows exactly what occurred in the

219. See Fraley, supra note 9.
220. Id.
221. “Lake County District Attorney . . . alleged that the three had broken into Edmonds’ home . . . to steal his medical marijuana . . . . The defense called it a pot purchase gone bad.” Yollin, supra note 3.
222. See Fraley, supra note 9.
223. See Fraley, supra note 2.
Edmonds' house that night, and no one except perhaps Hughes himself knows what role he played in the incident. Yet, the District Attorney felt that he had sufficient evidence to determine that it was Hughes' provocative behavior that led to the deaths of his friends. That decision necessarily requires a belief that it was Hughes and his friends who initiated the aggressive, violent encounter, and that Hughes himself committed a provocative act that led to the tragic outcome. Since it is nearly impossible to know what really happened, the only tools that the prosecutor had to make that judgment call was his personal assessment of the individual actors.

Taking into account the nature of racial prejudice in the United States and the results of the implicit bias testing, it is difficult to deny that the District Attorney's assessment was undoubtedly shaped to a certain degree by the race of the participants. The District Attorney likely subconsciously perceived the three young men as violent and aggressive, because they were black. The District Attorney likely subconsciously perceived Edmonds' actions as reasonable, because he was white. If Foster and Williams had not been black, they may not have ended up murdered that fateful night. If Hughes had not been black, he may not have been charged with his friends' murders. If Edmonds had not been white, he would likely not have walked away scot-free after wounding, chasing down and murdering two young men in cold blood.

Although there is insufficient data available in regards to implicit biases against Latinos, another prosecution for provocative act murder provides anecdotal evidence that Latinos face similar discrimination in the application of the doctrine. In 1999, two Vacaville youths were convicted of the murder of their friend, Jerry English, under a theory of provocative act murder. Chad O'Connell, sixteen, stabbed English, seventeen, during an alleged gang brawl. Neither English nor his friends were armed. O'Connell, the admitted killer, only faced a weapons charge for his
role in the death of English. Chad O’Connell was white. His victim and those charged with the murder he committed were Latino.

In the abstract, it seems nearly impossible to understand how English’s friends ended up convicted for his murder when they were not carrying any deadly weapons, and it was a rival gang member who actually perpetrated the killing. However, when viewed through the prism of the implicit bias studies, it becomes easier to see, although still difficult to understand, the phenomenon that led to the conviction of the two young men for a murder they did not commit. The prosecutor, judge and jury all viewed the situation through racial lenses. Even though all parties acted in violent, aggressive ways, the actions of O’Connell are interpreted as being somehow more innocent and the actions of the Latino youths more violent and provocative due to their respective races. By applying the racial schemas and related stereotypes to each youth’s behavior, suddenly O’Connell’s behavior appears reasonable, while the Latino youths’ behavior does not. The application of unconscious racial schemas to individual actors’ behaviors shifts perceptions of that behavior. Thus a black or Latino person’s behavior is more likely to be viewed as aggressive and provocative, while a white person’s behavior is likely to be viewed as reasonable.

By assessing these cases in light of the implicit bias testing, one can see how the notion of provocation to assign criminal liability is highly problematic. Because an assessment of an act as provocative necessarily requires an assessment of the reaction the act is likely to elicit, it carries with it notions of reasonability. Such notions of reasonability necessarily involve value judgments about normative behavior. Such value judgments tend to equate the behavior of white males as being normal and thus reasonable, while the reactions of non-whites are more likely to be viewed as unreasonable. Thus, the trier of fact is likely to interpret the acts of two similarly situated defendants in very different lights, based on the race of those

230. Id.
231. Id.
232. Id.
233. See, e.g., LEE, supra note 30, at 140-41.
234. See supra notes 96-100 and accompanying text.
235. LEE, supra note 30, at 4.
236. See id. at 204.
defendants. The defendants in the two cases discussed above were charged with murders they did not commit because of the police and prosecutor’s biases. These young men were charged with murders they did not commit because of their race.

Conclusion

When viewed in the light of implicit bias testing, it is apparent that the provocative act doctrine allows for the discrimination between similarly situated defendants based solely on their race. The doctrine’s reliance on the subjective notion of “provocation” to assign liability ensures an unequal application of the law. The very concept of “provocation” requires the finder of fact to speculate as to the likely reaction to a particular act after the fact. However, the likely reaction to a particular act differs based on the race of the actor. The implicit bias testing reveals that in the heat of the moment, individuals are more likely to respond to a black person’s felonious act with aggression. Thus a black person’s act is literally more likely to be “provocative” than an identical act committed by a white person. Furthermore, the assessment of the act after the fact will also be shaped by the participants’ race. At all stages of the criminal process, from the initial crime through the charging and trial, a black man is more likely to be charged with the provocative act doctrine than a similarly situated white defendant. This is an unconscionable fact that cannot be tolerated in our system of criminal justice.

Indeed, the same rationales upon which the agency rule was implemented in California are violated by the provocative act doctrine. The deterrent effect is negligible, since the defendants do not actually commit the homicidal act. Furthermore, it is simply contradictory to our system’s basic conception of culpability to hold an individual liable for a crime he did not commit. When you add in the racially suspect elements of the doctrine, it is obvious that our system cannot in good conscience continue to hold defendants liable

237. CalCrim defines a provocative act as “an act... [w]hose natural and probable consequences are dangerous to human life, because there is a high probability that the act will provoke a deadly response.” JUD. COUNCIL OF CAL. CRIM. JURY INSTRS. § 560 (2008).
238. Correll et al., supra note 37, at 1325.
239. See discussion supra Parts I.B, I.C.
for murder under the doctrine. I would propose a return to the principles that led to the adoption of the agency rule in the first place. I advocate a complete abolition of the provocative act doctrine.

The provocative act doctrine is only one, rather obscure, doctrine. Hopefully, scholars will continue to push the envelope and study unconscious racism and its effects in a wider variety of contexts. Implicit bias testing has the potential to be relevant in all legal fields, and beyond. Indeed, being able to quantify the nature and prevalence of racial stereotyping and prejudice could revolutionize the way we view bias in our society. The testing is already being analyzed in the context of police brutality.\textsuperscript{240} The critical arena of equal protection is also implicated by the results of implicit bias testing, as Charles Lawrence explored in his brilliant article, \textit{The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism}.\textsuperscript{241} Because we now have scientific proof that individuals react in predictably discriminatory ways absent any intent to discriminate or any conscious racial bias, we should perhaps rethink the way we address racial discrimination in the equal protection context.\textsuperscript{242} Indeed, intentional discrimination is rendered nearly meaningless as a threshold finding for claims of unconstitutional racial discrimination when one accepts the fact that most racism occurs at a subconscious, and thus unintentional, level. Implicit bias testing likely has many additional applications in the criminal context that are yet to be explored. For example, this article only briefly alludes to the implications of implicit bias testing on the doctrine of felony murder in general; a subject I hope another scholar will analyze in the future. Indeed, in the field of criminal law, where racial discrepancies are so severe, the possibilities are nearly endless.

Racism remains a significant problem in American society today. It is usually not the explicit racism of America's early years. Slavery ended more than a century ago. Lynchings are no longer commonplace. The days of "whites only" restaurants have ended. However, racism lives on in our society's collective subconscious, and its effects continue to be felt by people of color across our nation. It is critical that we begin, as a nation, to recognize the

\textsuperscript{240} See, e.g., Payne, supra note 110, at 287; LEE, supra note 30, at 175-99.

\textsuperscript{241} See Lawrence, supra note 1, at 323.

\textsuperscript{242} See Washington v. Davis, 426 U.S. 229 (1976) (holding plaintiffs who challenge the constitutionality of a facially neutral law must prove there was a racially discriminatory purpose on the part of those responsible for the law's enactment or administration).
reality of racism today, in order to eliminate its final vestiges. Implicit bias testing has the potential to remake the way we view racial bias in our society and allow us to move forward towards truly eradicating the many remnants of racism that continue to infect our society to this day.
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