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# *R v Theriault*: A Case of Epistemic Injustice

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**Case Commented On:** *R v Theriault*, 2020 ONSC 3317 (CanLII)

On the morning of Friday, June 26, 2020 – among more than 20,000 other people – I tuned into the YouTube live stream on which Ontario Superior Court Justice Joseph DiLuca gave his judgment in the criminal trials of Michael and Christian Theriault (*R v Theriault*, 2020 ONSC 3317 (CanLII)). The brothers, one of whom is a Toronto police officer, stood accused of assault and aggravated assault on Dafonte Miller, a young Black man, who lost his eye in their clash.

Const. Michael Theriault was acquitted of aggravated assault and attempting to obstruct justice in the case, and was convicted only of the lesser charge of simple assault. His brother Christian Theriault was acquitted of all charges. On August 6, 2020, it was announced that the Crown has appealed the acquittals.

The *Theriault* acquittals unsettled me – persistently, in the weeks to follow. The accused were acquitted of aggravated assault, despite strong Crown evidence, and fact findings of the court, that the two grown white men had gratuitously and violently beaten Miller, a Black teenager. Nearly as unsettling was the fact that the trial judge had insisted, capably, and with sophistication, that he understood what he called the "racialized context" of the encounter (at para 11). The objective of this post is to explore the apparent contradiction in *Theriault* between the verdicts, on one hand, and Justice DiLuca's claim that he considered the racialized context, on the other. This post does not purport to be an appellate brief for the Crown, although some argument relates to potential legal and factual errors in *Theriault*.

Tellingly, in the same paragraph in which Justice DiLuca acknowledges the racialized context, as has become *de rigueur*, he sidelines contextual issues, stating that they require "further examination" in other cases (at para 11). He then redirects the balance of his reasons away from "matters involving race and policing" and toward "the evidence that was presented in court" (at paras 11-12). In this way, the reasons make a claim of objectivity or race-neutrality. The evidence is then interpreted in a manner that has no substantive regard to the race of the victim or the accused, or otherwise to the racialized context. The acquittals follow. I contend that this reasoning makes the *Theriault* decision a case study in racism. (I eschew the term "systemic racism" because it depersonalizes racist policy or racist action: Ibram X. Kendi, *How to be an Antiracist* (New York: Random House, 2019) at 18-19).

Like all court decisions, *Theriault* is a discursive, political act. It tells a story, constructed from and overlaid on the evidence, about who did what to whom and why. And because it is the story of the brutal beating of a Black teenager by grown white men, it is also a story about race. It tells

us who the white accused are, who the Black victim is, and at its conclusion it tells a story about what white men are allowed to do to Black teenagers.

The substance and effect of *Theriault*'s claim of objectivity or race-neutrality is to deny the existence of racism. Legal scholar and critical race theorist Joshua Sealy-Harrington quotes Kendi in "Untelling the Story of Race" (*The Walrus*, (13 October 2020)) for the idea that denial is "the heartbeat of racism." Sealy-Harrington continues, "Racism must be acknowledged to be fixed; its denial, conversely, ensures its persistence." In this spirit, I will parse the *Theriault* verdict into its constitutive narrative findings, to critique its assertion of objectivity.

**Race-Neutrality in *Theriault***

A stadium-sized virtual audience of members of the public tuned into the trial verdict. The verdict was given at the low ebb of a wave of protests in the United States and Canada that followed a series of racist killings of the Black Americans George Floyd, Ahmaud Arbery, and Breonna Taylor.

The public understood the *Theriault* case to be both important and symbolic – of the victim's credibility; of whether Canadian courts would condemn anti-Black violence, police violence, and street justice. Kingsley Gillam, founding member of the Black Action Defence Committee, commented that "If a case like this cannot be successfully prosecuted in Canada, then there is no hope for justice" (Wendy Gillis "Judge ruling Friday on a case involving an off-duty police officer, his brother, and Dafonte Miller — a young man left blind in one eye", *Toronto Star* (25 June 2020)).

Justice DiLuca signaled that he, too, was aware of the case's significance for the public perception of the Canadian legal system in relation to issues of race and policing. In a passage lauded by members of the legal community (see, for example, Alyshah Hasham and Laura Armstrong "Despite 'compromise' verdict, legal experts praise judge's attention to anti-Black racism in Dafonte Miller case" *Toronto Star* (6 July 2020) (Hasham and Armstrong)), he writes, "I am mindful of the need to carefully consider the racialized context within which this case arises. Beyond that, I also acknowledge that this case, and others like it, raise significant issues involving race and policing that should be further examined" (at para 11).

Justice DiLuca then poses the unsettling "race-flip" hypothetical:

> [How might this matter] have unfolded if the first responders arrived at a call late one winter evening and observed a black man dressed in socks with no shoes, claiming to be a police officer, asking for handcuffs while kneeling on top of a significantly injured white man[?]. (at para 11)

Yet in the very same paragraph that he purports to illustrate his context-sensitivity, Justice DiLuca insists that his "task is not to be swayed or influenced by the attention given to this case," nor is it to "conduct a public inquiry into matters involving race and policing." Rather, his task is "more focused": to decide whether the Crown has proven the offences charged beyond a reasonable doubt on the evidence that was presented in court (at paras 11-12).

In other words: this case is not, as the public perceives, really about race. It is about the evidence of the defendants' culpability. And to the extent that the issues of race and policing should be "further examined", such examination should be made by someone else, and not in this trial.

The legal community broadly approved of this "narrow focus" approach. They admonished the public that the purported significance of the case is exaggerated. John Struthers, president of the Criminal Lawyers' Association, commented:

> I think the really critical thing to remember is that we cannot expect any specific case to be guided by, influenced by or poisoned by the current political climate. Every case and every individual case has to be decided on its own individual merits. (Hasham and Armstrong, here)

Constitutional lawyer Nader R. Hasan of Stockwoods LLP summarized the legal community reaction in an incisive Tweet thread:

> "The problem with our system is not conscientious judges applying the reasonable doubt standard. It's that not all judges out there apply the reasonable doubt standard in every single case."

On this account, Justice DiLuca was conscientious and restrained in maintaining a narrow focus on the evidence, which all judges should do. He resisted the temptation to lower the burden of proof for extrinsic reasons, including the "current political climate", per Mr. Struthers. This, of course, should be a good thing for criminal accused, who are the constituency of criminal defence lawyers.

**Epistemic Injustice and the Story of Race**

To be sure, Justice DiLuca declined to convict because he was not satisfied that the evidence met the high standard of proof. However, his reasons for finding the evidence lacking deserve closer examination. Crucially, Justice DiLuca declined to convict because he did not accept the evidence of the Black victim.

From my perspective, *Theriault* exhibits what philosopher Miranda Fricker terms "testimonial injustice" (Miranda Fricker, *Epistemic Injustice: Power & the Ethics of Knowing* (Oxford University Press, Oxford, 2007)). In the "credibility economy", the accused Theriault brothers enjoyed a "credibility excess", while Miller suffered a "credibility deficit" (at 1). The racism in the *Theriault* reasons is thus, among other things, a "distinctively epistemic kind of injustice" – in contrast to the numerous theories of distributive unfairness (at 17). Fricker describes epistemic injustice as consisting, most fundamentally:

> …[I]n a wrong done to someone specifically in their capacity as a knower […] when a gap in collective interpretive resources puts someone at an unfair disadvantage when it comes to making sense of their social experiences. (at 17)

As I will argue, Justice DiLuca's rejection of Miller's evidence is directly attributable to his rejection of the racialized context of the events. Viewed this way, *Theriault* entrenches patterns of reasoning that undermine trial fairness for racialized accused.

It is true that a trial is about individual culpability and that the individual's liberty is at stake. It is also true that, by contrast, a public inquiry can make broad findings of moral fault in policies and political acts, in part, because the proceeding cannot sentence anyone to jail. Yet it is untenable to distinguish the accused Theriault brothers from the racialized political systems of which they are a part. While the men should not be held accountable for broader crimes than they own, they cannot be surgically excised from their context.

***Context as an Essential Determinant of Meaning***

Although facially reasonable, the court's commitment to focus exclusively on the "evidence" is impossible – linguistically, and practically. A division between facts and context, or between evidence and context, is untenable in criminal law as in language as a whole.

I will briefly digress into philosophy of language and hermeneutics (the philosophy of interpretation). These fields, from different perspectives, study the factors that can vary the meaning of human speech and behaviour from context to context, and what this variance means for the nature of language (Kepa Korta and John Perry, "Pragmatics" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, Spring 2020 edition). Even the simplest signs often require context to given them meaning, whether meaning comes from the interaction of a word with its linguistic context (the other words in a phrase or text), or their extra-linguistic context (the world around). Some terms are ambiguous – they contain multiple meanings – as a property of the terms themselves. (For example, the phrase "I love you too" has at least four meanings, as explored by Kent Bach, "Semantic Nonspecificity and Mixed Quantifiers" (1982) 4 *Linguistics and Philosophy* 593 at 593.)

Drawing from Hans-Georg Gadamer and Michel Foucault, hermeneutics challenges the "certainty of truth of language and doctrine" (T. Kirchengast, *The Criminal Trial in Law and Discourse*, (England: Palgrave Macmillan, 2010) at 1). In *Truth and Method* (New York: Seabury Press, 1975), Gadamer argues that hermeneutics is not merely a method of determining truth, but is an activity which aims to understand the conditions that make truth possible.

Truth, for Gadamer, is not just an alignment of signifier (a word) and signified (the denoted object). Truth is possible because of the inner structure of the reader or interpreter. The hermeneutic task is not only cognitive ("I understand what this means"), it is also normative ("my understanding is right") and reproductive ("I know what to do/ I know what this means *for me*") (at 310). Each of these dimensions of interpretation involve patterns and conventions, which the interpreter must seek to understand. By revealing these dimensions of the interpretive task, Gadamer moves the interpreter from a peripheral and incidental position into the center of philosophy (at 307).

Foucault emphasizes the importance of excavating and exposing the conventions that govern one's interpretation:

> We must question those ready-made syntheses, those groupings that we normally accept before any examination, those links whose validity is recognized from the outset; we must oust those forms and obscure forces by which we usually link the discourse of one man with that of another; they must be driven out from the darkness in which they reign. (Michel Foucault, *The Archaeology of Knowledge and the Discourse on Language* (New York: Pantheon Books, 1972) at 22)

He calls this an "archaeology" that is capable of revealing the arbitrariness of the "hermeneutic horizon of meaning." Meaning is neither a truth nor a certainty: it is "crossed with discontinuous discursive formations" (see Hubert L. Dreyfus and Paul Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* (Chicago: University of Chicago Press, 1982) at 106). To render Foucault's evocative prose in lawyerly pedantry, a "discursive formation" is a convention, a story or narrative.

***Hermeneutics and the Story of Race***

Legal theorists have recognized and described the ways that truth claims in law are crossed with discursive formations.

Consider the purported "fact" of an individual's race. In Justice DiLuca's clinical summary of the evidence in the *Theriault* case, the victim Miller is referred to 16 times as a "black male" or "black man" These references are put forth as factual references. But as Sealy-Harrington poignantly explains in "Untelling the Story of Race", race is not a fact: "race is a story." It is a story populated by racialized tropes, historical and modern, render race both "legible and legitimate."

Legal and critical race theorist Patricia Williams writes that “contract law reduces life to fairy tale": legal contracts are interpreted through simplifying fictions that categorize contract participants on strict binaries of good/evil: *The Alchemy of Race and Rights* (Cambridge: Harvard University Press, 1992). Similarly, criminal law reduces life to fairy tale, applying a literal binary of moral blameworthiness: guilty/not guilty.

Critical race theory in this vein has found some acceptance in Canadian law. In the case of *R v RDS*, 1997 CanLII 324 (SCC), [1997] 3 SCR 484, a Black Youth Court justice in Halifax was faced with making a determination of credibility in an encounter between a Black teenager and a white police officer. She preferred the evidence of the Black teenager and made comments in this regard on the racialized context of police interactions with non-white groups in Halifax. The Crown challenged her comments as raising a reasonable apprehension of bias. On this basis, the Crown's appeal was allowed and a new trial was ordered.

When the order for a new trial was appealed ultimately to the Supreme Court of Canada, Justices Claire L'Heureux-Dubé and Beverley McLachlin (as the latter then was), in concurring reasons, asked their colleagues on the bench to consider context when analyzing evidence:

> There is more to a case than who did what to whom, and the questions of fact and law to be determined in any given case do not arise in a vacuum. Rather, they are the consequence of numerous factors, influenced by the innumerable forces which impact on them in a particular context. Judges, acting as finders of fact, must inquire into those

> forces. In short, they must be aware of the context in which the alleged crime occurred. (at para 41)

In a detailed analysis of the *RDS* decision, professors Richard Devlin and Dianne Pothier succinctly state:

> If a judge dropped in from Mars and knew nothing of such things as race, gender, age, history or culture, that entity would be hopelessly lost in trying to reconcile conflicting testimony because there would be no reference points against which to measure anything. ("Redressing the Imbalances: Rethinking the Judicial Role after R. v. R.D.S." (1999) 31:1 Ottawa L Rev 1, 1999 CanLIIDocs 15)

These concepts are illustrated in the race-flip hypothetical in *Theriault*, in which a Black man is found outside in the snow wearing socks, with a bloodied metal pipe, near a wounded white teenager. He purports to be a police officer who was making a legal arrest. Justice DiLuca ponders what may then have befallen the hypothetical Black officer, summoning the specter of his statistically likely murder by police (at para 11).

In the race-flip story, the Black officer's race becomes legible, or is given meaning, through Black tropes or stereotypes of criminality and predation, as well as tropes of victimization. The reader understands how the Black accused is situated differently from the Theriault brother by reference to stereotypes, which are among the "collective interpretive resources" that are used to "make sense of social experiences" (Fricker at 1). These tropes and stereotypes can lead, not only in narrative but also in the real lives of Black men, to summary execution by white people and police.

In this way, the race-as-narrative theory illustrates the remaining element of Foucault's maxim, that meaning is crossed with "discontinuous discursive formations." With the word "discontinuous", Foucault signals that narratives have a non-linear relationship to the lives they purport to recount – something intervenes between signifier and signified and breaks the thread that connects them. What intervenes is the arbitrary, distorting influence of power. Thus, one can only orient oneself toward meaning by exposing the distorting influence of power within truth claims.

**Narrative findings in *Theriault***

Turning then to the findings in *Theriault*, one must ask how its fact findings exhibit – or conceal – stories of race, and the racism that these express. This analysis focuses on the findings as they relate to the serious charges of aggravated assault, of which both brothers were acquitted.

***The Issue***

The aggravated assault case was legally straightforward. The elements of the aggravated assault offence are (1) the application of non-consensual force by the defendant; (2) which caused an injury that "wounds, mains, disfigures or endangers the life of the complainant". The Crown does not need to prove that the wound was intentionally inflicted (*Theriault* at para 225, citing *R v Godin*, 1994 CanLII 97 (SCC), [1994] 2 SCR 484. Further, in *Theriault*, it was agreed that

Miller's facial and eye injuries satisfied the “wounds, maims, disfigures” element of aggravated assault.

The central issue in the case, under Justice DiLuca's analysis, was whether the Theriault brothers caused Miller's eye injury in the course of an unlawful assault, or whether they were acting in self-defence when they caused the injury.

The victim and the defendants advanced very different versions of the events. According to Miller, he and two friends were simply walking down the sidewalk when they were approached and questioned by Michael and Christian Theriault. The encounter became a chase and vicious beating, Michael using a metal pipe and Christian using his hands and feet. Having made it to the doorstep of a nearby home, while calling for help, Miller was then struck in the eye with the metal pipe, causing the injury (at para 2).

The Theriaults told a story whereby they heard a commotion in a vehicle parked on their parents' driveway, and discovered two males in the vehicle. When the males ran in different directions, they chased one – Miller. They wanted to arrest him and hold him for police. The chase ended in between two houses down the street, where Miller produced a metal pipe and began swinging it, hitting Christian in the head and elsewhere. They contended that it was in the course of disarming Miller and attempting to arrest him that his eye was injured. They denied that they had at any time struck him with the metal pipe (at para 3).

Thus the Court's decision in the case was, literally, a choice between stories.

The Court's choice of story was informed by significant independent evidence adduced at trial, including physical evidence, evidence as to the parties' injuries and expert medical evidence, evidence on police arrest training and procedure, and witness testimony. Justice DiLuca made findings in respect of the independent evidence that, in his analysis, were inconclusive as to whether the injury was caused during an assault, or by acts in self-defense.

It is important in this regard that Justice DiLuca's reasoning arguably contains a legal error. The self-defence analysis is to be carried out only after a positive finding of culpability on an assault charge. This is inherent in the statutory language of subsection 34(1) of the *Criminal Code*, RSC 1985, c C-46: a person is "not guilty of an offence if" the elements of the provision are met. *If* there is an aggravated assault – an assault that causes a disfiguring injury – *then* the question arises whether that assault is morally justified because it was made in self-defence. Justice DiLuca wrongly embedded the self-defence analysis within the offence itself (at para 322). Of note, the burden does not at any time shift from the Crown, who must prove beyond a reasonable doubt that the defence does not apply (*R v Cinous*, 2002 SCC 29 (CanLII)).

***The Court's Analysis***

Justice DiLuca held that, although the incident was "one continuous event", it was divided into three portions. Miller and the Theriaults were first engaged nearby a flowerbed. The struggle then moved over to a spot between two houses, during which time Miller was subdued, Michael Theriault tried to use his phone to call 911, and the fighting resumed. In the third portion, Miller made his way to the doorstep of a nearby house, owned by a man named Silverthorn. Michael Theriault retrieved the metal pole and struck Miller repeatedly (at paras 319-321).

Critically, Justice DiLuca found that Miller did not sustain his disfiguring eye injury when he was struck by the metal pole, as Miller testified had occurred. Rather, Justice DiLuca held that Miller's eye injury was caused by hard punches to the face. He did not draw a conclusion as to whether it was Michael or Christian Theriault who delivered the punches. In making the finding as to the cause of injury, Justice DiLuca relied on the expert opinion of a forensic pathologist (at paras 198-202).

Justice DiLuca found that the punches that caused the eye injury were delivered during the second portion of the incident, between the two houses. "Credibility issues" prevented him from making definitive findings about that stage of the incident (at paras 316 and 322). It was in the second stage that the Theriaults had claimed that Miller produced the metal pole, and they punched him to disarm him. On Miller's account, it was the Theriaults who produced the pipe and beat him with it, so that he sustained his injury in the course of a continuous unlawful assault.

***Credibility Analysis***

To assess the evidence, because credibility was a key issue, Justice DiLuca used the analytical framework in *R v W(D)*, 1991 CanLII 93 (SCC), [1991] 1 SCR 742 at 758:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

Justice DiLuca found that Miller did not bring the pipe with him and produce it during the assault. He drew no conclusion about the provenance of the pipe. He wrote that although, in his opinion, the Theriaults were "probaby *not*" acting in self-defence at the second stage, this is not the standard of proof in a criminal case. There was, possibly, a "razor thin" justification of self-defence at the second stage (at para 322).

Justice DiLuca did not indicate whether his analysis lay at the second or third branch of the *W(D)* test: whether (a) under the second branch, he disbelieved the accused, but was left in reasonable doubt, or (b) under the third branch, was not convinced beyond a reasonable doubt of their guilt. Either way, under the *W(D)* test, the Theriaults' acquittal necessarily turned on the fact that Justice DiLuca did not believe Dafonte Miller.

Justice DiLuca found that there were "significant credibility problems" with Miller. Chief among them, Justice DiLuca found as a fact that Miller was indeed entering cars to steal valuables when he was chased and then attacked. In finding that Miller was entering vehicles, Justice DiLuca relied on inconsistencies in the testimony of Miller and his friend, Jack, and on the testimony of Miller's acquaintance Goode. Goode had admitted to entering vehicles in a manner that Justice DiLuca found to be straightforward and credible (at paras 243-248).

Justice DiLuca made his sole substantive comment on the issue of race in connection with the alleged theft, noting "that as a young black man, Miller may well have had many reasons for denying any wrongdoing including a distrust of law enforcement" (at para 246). Although these comments ring true, one cannot detect any positive credibility assessment that followed them. Justice DiLuca by that time had cited *R v Vetrovec*, 1982 CanLII 20 (SCC), [1982] 1 SCR 811, which governs the treatment of witnesses who lie under oath. He called Miller a liar and a perjurer.

The treatment of Miller's evidence stands in contrast to the Court's treatment of the Theriaults' evidence. It was striking that throughout the reasons, Justice DiLuca referred to the Theriaults as "defendants", which is the proper term for the sued party in a civil proceeding (see para 1, and 61 other instances). The term is patently less prejudicial than the customary term in criminal law, "accused." It is perhaps also noteworthy that throughout the reasons, Justice DiLuca called the accused by their first names, Michael and Christian. Query whether accused of the same surname might have been distinguished from one another in a less familiar tone (*e.g.*, "Const." and "Mr.").

As to their credibility, Justice DiLuca stated, "there are significant aspects of their evidence that leave me *concerned about their overall credibility*" (at para 241, emphasis added). The characterization has a gentle tone, in comparison to Justice DiLuca's finding that Miller was an "unsavoury" *Vetrovec* witness (*Vetrovec* at 820). The gentle statement of a "concern" must stand together with his rejection of Theriault's evidence on key issues, including his intention to arrest Miller (at paras 269-276), and on the provenance of the metal pipe (at paras 254-266). Despite rejecting their evidence on several elements of the encounter, Justice DiLuca does not come close to applying *Vetrovec* to these witnesses.

The rejection of Miller's evidence is also striking in light of the independent evidence and fact findings that supported the victim's account. It was Miller's blood, not the Theriaults', which littered the scene and was plastered against the pipe, and Michael Theriault had no injuries whatsoever after the fight (at paras 289 and 291). Eye witnesses testified to seeing a one-sided fight (at para 287). The physical and witness evidence did not specifically support the contention that Miller had produced the pipe during the encounter (at para 264), nor that it was wielded by Miller so as to support self-defense (at paras 287-289). It was Miller who was heard pounding on Silverthorn's home screaming for help from the police, not Const. Theriault and his brother, who supposedly represented the police (at para 302). Justice DiLuca accepted that Miller was struck in the face with the metal pole while crying for help and for the police on the doorstep of the nearby home (at para 305).

As Justice DiLuca described Miller's experience:

> Mr. Miller had been involved in a violent struggle. He had been punched in the head and face many times. He was bleeding profusely and had significant injuries. On his version of events, he had essentially “stopped feeling” any hits while he was still on the ground in between the two homes. Further, while he had noticed some blood on his sweater prior to getting to the front door of the Silverthorn residence, he noticed the blood pooling on the ground once he was at the door. (at para 306)

For Justice DiLuca, against overwhelming independent evidence, and his own findings that the fight was one-sided and violent, it remained plausible that the Theriault brothers acted in self-defence.

**Comment: "Reasonable Doubt" as a Story about Race**

In its most objective form, the physical evidence and eye witness testimony tell the story of an encounter in which two grown men beat on a lone young teen for petty theft. When racialized narratives are layered onto the evidence, the Theriault brothers arguably enjoyed a credibility excess (Fricker at 17). In this way, the verdict stood to shock and disappoint the public.

Sealy-Harrington explains that the stories about race that white and Black people tell can create different world views, and indeed, different worlds:

> …[T]here is a long tradition of Black thinkers situating themselves apart from the world […] - what legal scholar Russell Robinson named "perceptual segregation." For example, in a 2016 survey, whereas 75 percent of white people said that "their local police do an excellent or good job when it comes to using the right amount of force for each situation," only 33 percent of Black people shared this view. Such views do not—indeed, cannot—reflect one common reality. Rather, they create divergent ones—they tell stories.

The *Theriault* case is a story of different worlds.

Justice DiLuca's is a world in which grown white men may be acting in self-defence against the backdrop of the following evidence and fact findings: the men were almost completely uninjured; Miller's blood covered the scene; Miller was Black; Miller was alone; he was young; he was stealing loose change; he was caught by the white property owners; he thought he would be killed; after being beaten, he ran to a stranger's door where he screamed for help from the police; he was blinded in one eye (at paras 236-334). For Justice DiLuca, against these facts, self-defence remained so reasonably likely a scenario that he felt duty-bound to acquit on the aggravated assault charge. This is striking when held against the Supreme Court's dictum that proof beyond a reasonable doubt "does not involve proof to an absolute certainty, it is not proof beyond any doubt nor is it an imaginary or frivolous doubt" (*R v Lifchus*, 1997 CanLII 319 (SCC), [1997] 3 SCR 320 at para 36).

That worldview, presumably, is not shared by the public spectators who attended court to support Miller, and who spoke out after the verdict. For Gillam, quoted above, one might infer that the evidence fits best within a different world: in which white men are not presumed to be valorous and moral; in which Black youths are not presumed to be dangerous or violent; in which Black men, youths, and children can be vulnerable; and in which they can and do suffer violence by whites.

To consider the trial evidence properly, as inextricable from its racialized context, Justice DiLuca was required to acknowledge the schism of world views that faced him. He was also required to locate himself within those world views, to excavate and expose his own narrative patterns, especially any patterns that are capable of lending a credibility excess to a white witness.

Reduced to its essence, the *Theriault* case acquitted two white men of beating a Black teenager, despite there being no doubt as to the fact that they beat him. The victim's evidence about the beating was rejected because he had not told the truth about the fact that he was stealing change. The case stands for the idea that it is acceptable to beat some types of people.

In *The Racial Contract* (New York: Cornell University Press, 1997), Jamaican philosopher Charles Mills argues that society is founded on a "racial contract" in which white people, through formal and informal agreements, support a societal structure that benefits them at the expense of nonwhites. Mills contrasts this idea against the social contract, which is an agreement between all people to support a just and equal society.

The following passage from Mills' book is instructive. It illustrates the moral consensus that can be inferred from the ruling and reasoning in *Theriault*:

> …[T]he Racial Contract […] is also epistemological, prescribing norms for cognition to which its signatories must adhere […] the moral and juridical rules normally regulating the behaviour of whites in their dealings with one another either do not apply at all in dealings with nonwhites or apply only in a qualified form […]. (at 11)

The core legal error in *Theriault* is revealing, in this regard. Justice DiLuca used self-defence to find that there was no aggravated assault, instead of asking whether the aggravated assault that did occur was justified. Had Justice DiLuca confronted the proper question, whether the violent beating was justified, he may have been forced to answer that questions within its racialized context. Considered contextually, the question is what actions by white people, against Black people, our society will condemn.

Recalling Foucault, a trial is more than the repository of legal power that holds wrongdoers to account for their conduct in particular ways. Trials provide for a sociological process that influences the development of the criminal law by "affirming principles of liability, rules of evidence, and standards of proof that, in the modern adversarial context, indicate who is 'heard' and who is 'silenced'" (Kirchengast at 1-2).

Among the tasks of a trial court is to strive for epistemic justice: to allow racialized justice system participants to convey their knowledge to others by telling them, and to make sense of their own social experiences (Fricker at 1).

Each sign in the *Theriault* case, in its proper context, speaks to the questions of what should be condemned or condoned, and who should be believed. A long metal pipe covered only in the victim's blood, signifies that it was wielded in violence against Miller's flesh. The observations of the neighbour, Silverthorn, speak to the one-sidedness of the assault. Theriault's words on the 911 call "you picked the wrong cars" (at para 169) signify the brothers' purported moral authority, white privilege, and violent intent. Miller's body, too, is a sign. It is no accident that trial spectators wore t-shirts bearing the image of Miller's blinded face and white glass eye. His body speaks a language of racist violence and suffering.

Applying the theory of political hermeneutics, courts must interpret evidence contextually, specifically, having regard to racialized context. As part of this, when confronted by a schism of

world views, race stories must be excavated and exposed. This is not a task to be tackled only in cases involving racialized accused: the credibility economy as it pertains to white witnesses and parties like the Theriaults must similarly be interrogated. Only in this way can an acquittal of a white accused, like *Theriault*, be characterized as a rigorous and principled trial decision, and stand as meaningful precedent for all accused persons.

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