

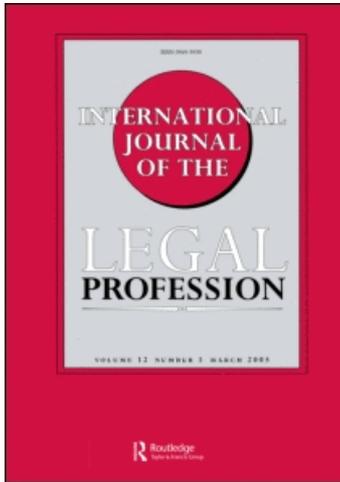
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Publisher Routledge

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International Journal of the Legal Profession

Publication details, including instructions for authors and subscription information:

<http://www.informaworld.com/smpp/title-content=t713426078>

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Online Publication Date: 01 March 2008

To cite this Article Graycar, Reg(2008)'Gender, race, bias and perspective: OR, how otherness colours your judgment',International Journal of the Legal Profession,15:1,73 — 86

To link to this Article: DOI: 10.1080/09695950802439734

URL: <http://dx.doi.org/10.1080/09695950802439734>

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Gender, race, bias and perspective: OR, how otherness colours your judgment

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ABSTRACT *This discussion considers assumptions about judges and judging and suggests that despite what is sometimes perceived as increasing diversity on the bench and in the legal profession, outsider decision makers' membership of the jurisprudential community is still marked by 'otherness'. The argument draws upon my ongoing interest in the law's concern with the concepts of 'objectivity', 'neutrality' and 'perspective'. I argue that the legal system is inherently suspicious of 'otherness' and most specifically so when 'others' occupy positions of 'judgment'. The consequence is to render decisions made by 'otherised' judges liable to attack for bias in a way that decisions made by insiders simply are not. The argument is illustrated by a review of a number of challenges made on the ground of 'bias' or recusal motions to judges whose failure to match the white Anglo hetero-normative standard of 'the judge' is seen as a limit on their ability to be 'impartial'. The examples used range across many jurisdictions, from Australia, Canada, the US and a challenge to the impartiality of a decision of the International Criminal Tribunal for the former Yugoslavia (ICTY).*

The project I discuss in this paper is an ongoing project that I return to from time to time: I feel that I can never consider it more than a work in progress as I keep finding new examples. It concerns an overarching theme in feminist engagements with law, and that is, how the concepts of 'bias', 'partiality' and 'perspective' are connected, via notions of 'otherness', to 'outsider' judges and other legal decision makers.¹ This particular incarnation of the ongoing project started life in 2002 as a critical reflection for a festschrift to mark the retirement of Justice Claire L'Heureux-Dubé from the Supreme Court of Canada,² on which she had served for 15 years, a period in which that court developed an equality jurisprudence that is widely considered the most sophisticated in the world.

The argument I make is that the legal system is inherently suspicious of 'otherness' and most specifically so when 'others' occupy positions of 'judgment'. The

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consequence is to render decisions made by judges seen as ‘other’ liable to attack for bias in a way that decisions made by insiders are not. By other, here I mean people who are other than white, male, able bodied, heterosexual etc. To put it another way, there is simply no corresponding assumption—indeed, it would probably be considered absurd in legal circles to assume—that white male decision-makers will be ‘blinded’ by their race or their gender. Nor does it ever seem to be assumed that white people are not in a position to fairly impose judgment on non-white people.³ Whiteness or maleness are not viewed as impediments to impartiality precisely because they are not recognised as *positions* as all, but the treatment of decision-makers who are racialised as ‘other’ (of whom, of course, we have very few in Australia), or the response to decisions that make explicit reference to gender, race or unequal race relations (at least if made by ‘others’), reveals a very different set of assumptions. It is in this context that we see the term ‘bias’ invoked in challenges (often by way of recusal, or judicial review applications) to the decision making authority of that person.

It is now more than ten years since the decision of the Supreme Court of Canada in *RDS v R*,⁴ and it is with that case that I will start this discussion. The lead judgment was written by Justices Claire L’Heureux-Dubé and Beverly McLachlin (now McLachlin CJ).⁵ However, lest the focus on this case suggest that this is a peculiarly Canadian phenomenon, I will refer to some other cases, including one from the international law arena,⁶ and another from the United States.⁷ In earlier work⁸ I have also discussed a number of analogous Australian cases. I will conclude with some preliminary questions about how (if at all) we might begin to think about moving away from this devaluing of legal system outsiders into a more genuinely diverse way of engaging with law and legal problems.

*R v. RDS*⁹

The facts of the case are fairly straightforward and involved events in what is effectively a children’s court. Judge Corinne Sparks, a provincial court trial judge in Nova Scotia (and at that time, the only African-Canadian woman judge in the province—note the use of adjectives to qualify the word ‘judge’), was hearing the case of a 15-year-old black youth who was alleged to have interfered with the arrest of another youth.¹⁰ He was charged with unlawfully assaulting a police officer and resisting arrest. While delivering an oral judgment (as is customary in the lower courts) dismissing the case against him,¹¹ having found that the prosecution had not proved its case beyond reasonable doubt, the judge said:

I am not saying that the Constable has misled the Court although police officers have been known to do that in the past. And I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are dealing with non-white groups . . . I believe that probably the situation in this particular case is the case of a young police officer who overreacted. And I do accept the evidence of [*RDS*] that he was told to shut up or he would be under arrest. It seems to be in keeping with the prevalent attitude of the day.¹²

The prosecution successfully argued in the Nova Scotia Supreme Court that these comments gave rise to a reasonable apprehension of bias,¹³ a decision confirmed by a majority of the Nova Scotia Court of Appeal.¹⁴ The Supreme Court of Canada overturned this decision,¹⁵ though not exactly overwhelmingly. The actual decision was 6:3; but the six was really four and two. L'Heureux Dubé and McLachlin JJ wrote the lead judgment, with which two other judges concurred. Another two judges agreed that the decision should be reversed, but clearly felt that while the judge had not actually crossed it she had, as it were, come 'very close to the line'.¹⁶ In dissent, three other judges would have affirmed the decision, that is, maintained the finding that the decision was tainted by the judge's bias.¹⁷

The court was assisted by two separate interventions, the first a joint intervention by the Women's Legal Education and Action Fund (known as LEAF) and the National Organization of Immigrant and Visible Minority Women of Canada; and the second by the African-Canadian Legal Clinic, the Afro-Canadian Caucus of Nova Scotia and the Congress of Black Women of Canada. I mention this, particularly the first joint intervention, because the collaboration between the LEAF women and the Visible Minority Women was itself quite significant in Canada. It followed a considerable period of introspection and reflection (not to mention conflict and controversy) about LEAF and about which 'women' it purported to speak for when it intervened in Supreme Court litigation on behalf of women.¹⁸

The dissenting judges¹⁹ took a fairly standard formal equality approach, and what is of particular interest is the way in which they drew strategically upon some of the discourses of stereotyping for rhetorical purposes:

It would be stereotypical reasoning to conclude that, since society is racist, and, in effect, tells minorities to 'shut up', we should infer that *this* police officer told *this* appellant minority youth to 'shut up'. This reasoning is flawed.²⁰

...

Canadian courts have, in recent years, criticized the stereotyping of people into what is said to be predictable behaviour patterns. If a judge in a sexual assault case instructed the jury or him- or herself that because the complainant was a prostitute he or she probably consented, or that prostitutes are likely to lie about such things as sexual assault, that decision would be reversed.²¹

By contrast, in their joint judgment, Justices L'Heureux-Dubé and McLachlin stated:

In our view, the test for reasonable apprehension of bias established in the jurisprudence is reflective of the reality that while judges can never be neutral, in the sense of purely objective, they can and must strive for impartiality. It therefore recognizes as inevitable and appropriate that the differing experiences of judges assist them in their decision-making process and will be reflected in their judgments, so long as those experiences are relevant to the cases, are not based on inappropriate stereotypes, and do not

prevent a fair and just determination of the cases based on the facts in evidence.²²

They drew heavily on Benjamin Cardozo's, *The Nature of the Judicial Process*²³ ... "where he affirmed the importance of impartiality, while at the same time recognizing the fallacy of judicial neutrality".²⁴

... Cardozo recognized that objectivity was an impossibility because judges, like all other humans, operate from their own perspectives. As the Canadian Judicial Council noted in *Commentaries on Judicial Conduct* (1991), at p. 12, "[t]here is no human being who is not the product of every social experience, every process of education, and every human contact". What is possible and desirable, they note, is impartiality:

True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.²⁵

In a comment on some analogous issues, Martha Minow described the same phenomenon in a different, but perhaps equally apposite, manner: she described the ability to approach things with an open mind, as "the ability to be surprised".²⁶

Returning to *RDS*, McLachlin and L'Heureux-Dubé went on to say that

[J]udges in a bilingual, multiracial and multicultural society will undoubtedly approach the task of judging from their varied perspectives. They will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench.²⁷

In their view, this was essential, among other reasons, to ensure diversity on the bench:

The reasonable person [*central to 'bias' doctrine*] ... is an informed and right-minded member of the community, a community which, in Canada, supports the fundamental principles entrenched in the Constitution by the *Canadian Charter of Rights and Freedoms*. Those fundamental principles include the principles of equality set out in s. 15 of the *Charter* ... The reasonable person must be taken to be aware of the history of discrimination faced by disadvantaged groups in Canadian society protected by the *Charter's* equality provisions. These are matters of which judicial notice may be taken.²⁸

And in support of this, they referred to judgments from Provincial Courts of Appeal, both in Ontario and in Nova Scotia, where those courts had made comments acknowledging the widespread existence of racism.²⁹

Not only was their reasonable person aware of disadvantage, but also, they pointed out, as a member of the local Nova Scotia community, someone who was aware of such issues as the extensive history of

... widespread and systemic discrimination against black and aboriginal people, and high profile clashes between the police and the visible minority population over policing issues. ... In *Nova Scotia (Minister of Community Services) v. SMS* (1992), 110 N.S.R. (2d) 91 (Fam. Ct.), it was stated at p. 108:

[Racism] is a pernicious reality. The issue of racism existing in Nova Scotia has been well documented in the Marshall Inquiry Report (sub. nom. *Royal Commission on the Donald Marshall, Jr, Prosecution*). A person would have to be stupid, complacent or ignorant not to acknowledge its presence, not only individually, but also systemically and institutionally.

So in summary then, the majority judgment acknowledges the context and says it is necessary to put the case into that context (including what is widely known about the existence and impact of racism in Nova Scotia) in order to be impartial (though 'neutrality' is impossible). The dissent, by contrast, uses 'formal equality' discourse to insist that even the mention of race/colour is a form of impermissible stereotyping: '[a]ll witnesses must be placed on equal footing before the court'.³⁰ So in that construction, the aggrieved person is of course the white police officer who is the victim of inappropriate stereotyping, while the history of racism in the province, including its acknowledgment by other courts and by royal commissions etc., is considered strictly irrelevant as evidence in this case.

In the article I wrote for the Justice L'Heureux-Dubé festschrift,³¹ I discussed a debate that that judgment had provoked in Australia, which resulted in two published papers by judges.³² For the purposes of this article, I take just one comment from that debate, coming from Justice Mason, President of the New South Wales Court of Appeal, in a very thoughtful article responding to the other judge's article and use it as a springboard for the remaining part of my discussion. Justice Mason discussed his judicial colleague's critique of the L'Heureux-Dubé/McLachlin judgment in *RDS*, and also of an extra judicial comment made by Justice L'Heureux-Dubé, and commented as follows:

Judges should not aspire to neutrality. When Judges have the opportunity to recognise inequalities in society, and then to make those inequalities legally relevant to the disputes before them in order to achieve a just result, then they should do so.³³

Justice Mason said:

If, in a judgment, a hypothetical female Aboriginal magistrate gives effect to her attitudes about police behaviour or systemic violence to women, we tend to sit up and take notice. The media will usually ensure publicity and there will be no lack of critical commentators. Similarly, a hypothetical white male judge who betrays a now controversial attitude about female sexual complainants can expect to be taken to task by a different section of the public.³⁴

He pointed out: "the same forces are at work in each situation (regardless of our approval or disapproval of the suppositions revealed in the remarks of the two

hypothetical judicial officers)".³⁵ This idea—that expressing a point of view (any point of view) that engages with issues of equality, whether for or against equality values, is inherently problematic—is central to my concern about the impact of otherness on the way judges are perceived. In a forum in the *Canadian Journal of Women and the Law* about the *RDS* case, Canadian Professor Constance Backhouse, calls this idea—that acknowledging and drawing attention to pervasive racism, or to the systemic disadvantages experienced by women, is the same as, or equivalent to (and equally impermissible for judges as) exhibiting sexism or racism—the “peas in a pod” approach.³⁶

Of course, another remarkable thing about this comment is that it assumes that the notion that police treat indigenous or racialised people badly, or that there is systemic violence against women, is ‘an opinion’ or ‘point of view’ and, moreover, an opinion or point of view on a par with the belief that women lie about rape. But unfortunately, the first ‘set of ideas’ is concerned with a real social problem that flows from disadvantage and inequality; the second is simply the perpetuation of long held myths and stereotypes.

Another interesting thing about the judgments in the Nova Scotia Supreme Court, the Court of Appeal and even in the Supreme Court of Canada decision is the almost complete absence of discussion of the racial dynamics of the courtroom on that day.³⁷ Some of the secondary discussions tell us that most of the personnel in the court room that day were African-Canadian and this had an impact on the perception of the prosecutor on the day of the trial.³⁸ Backhouse has suggested that this erasure of racial identity makes it easier to slip into this ‘peas in a pod’ approach, that is, to treat a bias complaint about racism as the same thing as a bias complaint about anti-racism. And the same applies to gender.³⁹

This is a false parallelism, unless one assumes that we inhabit a world that is scrupulously egalitarian. If our society did treat all races and genders equally, then it would be manifestly unfair for judges and adjudicators to take either race or gender into account. However, . . . [w]e live in a society in which there is a great deal of documented evidence to suggest that, at least systemically, whites continue to hold a position of dominance over people of colour, and men continue to hold a position of dominance over women. When judges are perceived to possess perspectives that support and reinforce these imbalances, you have a problem. When judges are perceived to possess perspectives that consider such imbalances to be improper and needing alteration, you have something quite different.⁴⁰

To illustrate her point Backhouse refers to a number of government sponsored inquiries, Royal Commission reports and the like, into either racism or sexism in parts of the Canadian justice system including, of course, the Royal Commission on the Donald Marshall Jr prosecution in Nova Scotia which was referred to in the judgment of the Supreme Court in *RDS*. While perhaps not as numerous, there are many counterparts to these in Australia,⁴¹ and in the US perhaps the best known examples are the taskforces on gender bias or racial bias or both in the justice system.⁴²

Surely if racism and anti-racism, sexism and anti-sexism, were equally bad and equivalent as social problems, we would have a shelf full of reports and inquiries into anti-racism, and into the problematic nature of equality-seeking activities more broadly. In fact, not only are there no such reports, but as Backhouse points out only too clearly, a contemporaneous development with the documenting of the disadvantage of some groups within the justice system is the tendency to challenge those small numbers of ‘outsider’ decision makers (such as Judge Sparks) who have been appointed to the judiciary on the grounds of ‘bias’.⁴³ There are many such challenges, including one to Backhouse herself in her role as a human rights adjudicator.⁴⁴

This issue—the use of challenges/recusal motions against outsider decision makers on the grounds of bias—is the one that I keep returning to as part of my interest in the marginalisation of women and other outsiders. And it is not a new issue. Derrick Bell has pointed out the unselfconscious way in which challenges have been made to racialised judges about the perceived difficulty of their being impartial in race discrimination cases.⁴⁵ He argues that in the US context: “Black judges hearing racial cases are eyed suspiciously and sometimes asked to recuse themselves in favour of a white judge—without those making the request even being aware of the paradox in their motions”.⁴⁶ Similarly, the late Justice Leon Higginbotham once remarked when asked to recuse himself from a race discrimination case, “[B]lack lawyers have litigated in the federal courts almost exclusively before white judges, yet they have not urged that white judges should be disqualified on matters of race relations”.⁴⁷ And Judge Constance Baker Motley, an ‘African-American woman judge’: notice how many adjectives I have to use? was asked to recuse herself and commented

If background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge . . . could hear this case or many others by virtue of the fact that all of them were attorneys, of a sex, often with distinguished lawfirm or public service backgrounds.⁴⁸

Of course, the very use of these adjectives of colour or gender or sexuality is a marker of otherness: we don’t often refer to white male judges, but a woman judge, or a racialised judge or a gay judge is frequently marked by the use of an adjective as ‘other’.⁴⁹ Some years ago, a national Australian newspaper reported a successful application for special leave to appeal to the High Court of Australia by an applicant for refugee status claiming that his sexuality was the cause of persecution, under the headline “Kirby grants gays a hearing”.⁵⁰ I am still waiting to see a headline that says “White male heterosexual judge grants convicted rapist a hearing”.

Lest you think that the cases I refer to, particularly the US cases from the 1970s, are old, and such things would not happen now, there are more recent examples. In a fascinating discussion of the *Bush v. Gore* litigation following the 2000 US election, Professor Sherilyn Ifill draws our attention to the fact that, for all the unorthodox behaviour of judges who played some role in that saga, right up to and including members of the Supreme Court, the only actual formal challenge on the ground of bias was against an African-American woman judge in one of the lower court hearings in Florida.⁵¹ Ifill’s discussion also draws our attention to the issue of recusal

challenges against African-American judges, in the context of a judiciary that remains characterised by its lack of diversity.⁵²

Also in the United States, in 2005, a department store facing a class action for racially profiling customers as potential shoplifters applied to have the judge recused from hearing the case.⁵³ The judge was not only an African-American woman, but she had been stopped by the police while driving a Jaguar and had appeared on television to discuss this incident. The defendant argued that this, combined with their perception that her decisions on preliminary matters were antithetical to them, demonstrated her inability to be impartial. That application was dismissed (as are most such applications) but their very existence is enough to indicate that the targets of such challenges are being marked for otherness. Indeed, the challenges serve a kind of disciplinary constraining function, and remind those whose racial or gender identities are indicated by adjectives where their white counterparts are not so described, of the tenuousness of their hold on their position. Can we think of an equivalent in a world where white male judges are not the subject of police harassment, or are not stopped when driving smart cars?

The final example I raise comes from the international law arena. The response to this 'bias' challenge may give us some cautious optimism that there are alternatives to the 'peas in a pod' approach.

In 1998 in the ICTY, a man called Anto Furundzija was convicted of several acts of torture, including, among other things, rape.⁵⁴ He appealed this conviction and among the grounds he raised in his appeal was the fact that the presiding judge, Judge Mumba, had, before her appointment to the ICTY, been a member (as a representative of her government, Zambia), on the UN Commission on the Status of Women.⁵⁵ One of the things that the Commission worked on was the issue of rape in war.

Furundzija argued that for this reason, Judge Mumba should have been disqualified from hearing his case. He argued that "an appearance was created that she had sat in judgment in a case that could advance and in fact did advance a legal and political agenda which she helped to create while a member of the UNCSW".⁵⁶ Of course, he did not argue that she was actually biased, but rather, that her involvement would cause a reasonable person to have an apprehension about her impartiality.

The appeals chamber rejected this ground and made a number of comments that are of particular interest to these concerns. First, they pointed out that Judge Mumba's involvement was as a representative of her country, rather than as an individual advocate;⁵⁷ but more interesting for our purposes is their view on the actual issues involved. The chamber said:

Secondly, even if it were established that Judge Mumba expressly shared the goals and objectives of the UNCSW and the Platform for Action, in promoting and protecting the human rights of women, that inclination, being of a general nature, is distinguishable from an inclination to implement those goals and objectives as a Judge in a particular case. It follows that she could still sit on a case and impartially decide upon issues affecting women.⁵⁸

After pointing out that the UNCSW's objectives "merely reflected the objectives of the United Nations", the appeals chamber could find "no reason why the fact that Judge Mumba may have shared these objectives should constitute a circumstance which would lead a reasonable and informed observer to reasonably apprehend bias".⁵⁹ They continued:

To endorse the view that rape as a crime is abhorrent and that those responsible for it should be prosecuted within the constraints of the law cannot in itself constitute grounds for disqualification.

The appeals court also referred to, among other authorities, the decision in *R v. RDS* and echoed the sentiment of Justices L'Heureux Dubé and McLachlin by commenting: "Absolute neutrality on the part of a judicial officer can hardly if ever be achieved".⁶⁰

Finally, the Appeals Chamber addressed the argument that had been made against Judge Mumba based upon her prior membership of the UNCSW. They drew attention to Article 13(1) of the Court's Statute, which provided that "[i]n the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law", and discussed the extent to which her previous role with the UNCSW and her broader general experience would be relevant to the statutory qualifications. As they noted:

The possession of this experience is a statutory requirement for Judges to be elected to this Tribunal. It would be an odd result if the operation of an eligibility requirement were to lead to an inference of bias. Therefore, Article 13(1) should be read to exclude from the category of matters or activities which could indicate bias, experience in the specific areas identified. In other words, the possession of experience in any of those areas by a Judge cannot, in the absence of the clearest contrary evidence, constitute evidence of bias or partiality.⁶¹

So what are we to make of these cases? How do we properly acknowledge the very real dynamics of racial or gender hierarchy in legal decision making? The minority dissenting judgment in *RDS*, or indeed the Australian judge's comments that I highlighted, would suggest that any recognition of racial difference is discriminatory and impermissible, and, likewise, to paraphrase the way this was dealt with in *Furundzija*, any acknowledgement of the gender-specific nature of a particular form of harm, such as rape in war, would give rise to a perception of bias. This presupposes that all references to race or gender hierarchy are racist or sexist and leaves no room for legal decision-making which seeks to recognise that racialisation and gender hierarchy impact upon people unequally and can negatively affect how people are treated and how their legal rights are infringed or upheld.

So my purpose in doing this work is to try to start a conversation about how we might try to identify when it is appropriate to explicitly take race or ethnic origin, gender, or sexuality into account and how, if at all, we might start to develop a language and a methodology for doing so effectively. As a start, we need to understand

that attention to race or gender or sexuality may well be essential to understanding the context in which a legal dispute arises, rather than assuming that any such reference is impermissible. But to do that effectively, we need to draw a distinction between negatively stereotyping on the one hand, and constructively recognising differences and disadvantage in a way that is sensitive to discrimination and inequality, on the other. We also need to work very hard at unpacking what lies behind law's use of notions of 'common sense' which, of course, accords with dominant euro-centric and patriarchal views. By means of the processes of naturalisation and rendering whiteness and maleness and other sorts of privilege and entitlement invisible, common sense notions have for too long been insulated from criticism or critical evaluation. By contrast, outsider perspectives are treated as specialised, emotionally-based, agenda-driven and political. It seems to me that our project is to try to redraw those boundaries between the natural or the 'neutral' and the 'other'.

Acknowledgements

This discussion has benefited from the opportunity to discuss the ideas in a number of different forums including Cornell Law School; Columbia Law School; Washington College of Law, American University; Santa Clara Law School; CUNY Law School; Cleveland-Marshall Law School; University of Sydney Law School; and the Gender and Judging group at the Law and Society Association Conference, Berlin, 2007. I should also like to thank the many people who have made comments and suggestions or assisted in other ways over the years: these include Christine Chinkin, Ruthann Robson, Jenny Morgan, Jane Wangmann, Fleur Beaupert and Tiffany Hambley. Thanks also to the anonymous referees for their helpful suggestions.

Notes

- [1] See Reg Graycar, The gender of judgments: an introduction, in: Margaret Thornton (Ed.) *Public and Private: Feminist Legal Debates* (Oxford University Press Australia and New Zealand, 1995); Reg Graycar, The gender of judgments: some reflections on 'bias' (1998) 32 *University of British Columbia Law Review* 1.
- [2] Reg Graycar, Claire L'Heureux-Dubé: some reflections from Down Under, in: Elizabeth Sheehy (Ed.) *Adding Feminism to Law: The Contribution of Justice Claire L'Heureux-Dubé* (Irwin Law Inc., 2004), pp. 81–107.
- [3] For an interesting discussion of the ways in which ascriptions (or in some cases the erasure) of racial identities is used, see Constance Backhouse, Bias in Canadian law: a lopsided precipice, in: Christine Boyle *et al.*, *R v. RDS: an Editor's forum* (1998) 10 *Canadian Journal of Women and the Law* 159 at 172–4.
- [4] *RDS v. R* [1997] 3 SCR 484 ('RDS').
- [5] At the time they were the only two women on the court; there are now four women among the nine judges of the Court: they are Chief Justice Beverley McLachlin, appointed to the Supreme Court of Canada on 30 March 1989 and appointed Chief Justice on 7 January 2000; Justice Marie Deschamps, appointed on 7 August 2002; Justice Rosalie Silberman Abella, appointed in August 2004; Justice Louise Charron, appointed on 30 August 2004: Supreme Court of Canada, Judges of the Court, Current Judges, available at: <http://www.scc-csc.gc.ca/court-cour/ju/cju-jua-eng.asp> (last accessed 8 October 2008).

- [6] *Prosecutor v. Furundzija* (Appeals Chamber) Case No IT-95-17/1 (21 July 2000), (Judgment) ('Furundzija'): International Criminal Tribunal for Yugoslavia, ICTY Cases & Judgments, available at: <http://www.un.org/icty/furundzija/appeal/judgement/index.htm> (last accessed 25 January 2008).
- [7] *Dillard's Inc. v. Michael J. Scott* [2005] 908 So.2d 93.
- [8] See Graycar (1995), *op. cit.*, (1998), *op. cit.* See also Regina Graycar and Jenny Morgan, *The Hidden Gender of Law*, 2nd edition (Sydney, Federation Press, 2002), Ch. 4.
- [9] For other discussions of this case, see Richard Devlin, We can't go on together with suspicious minds: judicial bias and racialized perspective in *R v RDS* (1995) 18 *Dalhousie Law Journal* 408; Boyle *et al.*, *op. cit.* at 159.
- [10] The proceedings were heard at first instance in the Nova Scotia Youth Court: [1994] NSJ No 629, cited in *RDS* at [70], per Cory J.
- [11] *R v. RDS*, Y093-168 (2 December 1994), cited in Devlin, *op. cit.* at 411 ('*R v. RDS* #1'). The judge issued supplementary reasons following the filing of the appeal to the Nova Scotia Supreme Court (Trial Division).
- [12] *R v. RDS* #1, cited in *RDS* [1997] 3 SCR 484 at [4], per Major J, his emphasis omitted.
- [13] *RDS v. R* [1995] NSJ No 184 (NSSC).
- [14] *R v. RDS* [1995] 145 NSR (2d) 284 (NSCA).
- [15] *RDS* [1997] 3 SCR 484. The main judgment was written by Justices McLachlin and L'Heureux-Dubé (with whom La Forest and Gonthier JJ agreed); Cory J wrote a separate concurring judgment (with which Iacobucci J agreed); Lamer CJ, Sopinka and Major JJ dissented.
- [16] Iacobucci and Cory JJ at [52].
- [17] Major and Sopinka JJ and Lamer CJ.
- [18] For a discussion of some of the issues of LEAF and its 'representativeness', see Lise Gotell, Towards a democratic practice of feminist litigation?: LEAF's changing approach to charter equality, in: Rahda Jhappan (Ed.) *Women's Legal Strategies in Canada* (University of Toronto Press, 2002).
- [19] Major J, with whose judgment Lamer CJ and Sopinka J agreed.
- [20] *RDS* [1997] 3 SCR 484 at [9].
- [21] *Ibid.*, at [16].
- [22] *RDS* [1997] 3 SCR 484 at 29.
- [23] Benjamin Cardozo, *The Nature of the Judicial Process* (New Haven, Yale University Press, 1921).
- [24] *RDS* [1997] 3 SCR 484 at [34].
- [25] *Ibid.*, at [34–5].
- [26] Martha Minow, Stripped down like a runner, or enriched by experience: bias and impartiality of judges and jurors (1992) 33 *William and Mary Law Review* 1201 at 1214.
- [27] *RDS* [1997] 3 SCR 484 at [38].
- [28] *Ibid.*, at [46].
- [29] See for example the decision of the Ontario Court of Appeal in *R v. Parks* [1993] 15 OR (3d) 324.
- [30] Major and Sopinka JJ and Lamer CJ at [20].
- [31] Graycar (1995), *op. cit.*
- [32] David Ipp, Judicial impartiality and judicial neutrality: is there a difference? (2000) 19 *Australian Bar Review* 212; Justice Keith Mason, Unconscious judicial prejudice (2001) 75 *Australian Law Journal* 676. Justice Ipp criticised the judgment on the grounds that it undermined the concept of judicial neutrality.
- [33] Mason, *op. cit.*, 676 at 678–9, quoting Justice Claire L'Heureux-Dubé, Reflections on judicial independence, impartiality and the foundations of equality (1999) 7 *CILJ Yearbook* 95 at 106.
- [34] Mason, *op. cit.*, at 680.
- [35] *Ibid.* Of course, in Australia, there is only one such easily identifiable woman, though there are probably many more of the latter type of judicial officer.
- [36] Backhouse, *op. cit.*, at 175. Boyle *et al.*, *op. cit.*, at 160, opened the discussion: "At a time when some, albeit limited, progress is being made in diversifying the bench, the decision provides food for thought on theories of judicial impartiality as well as on the role of 'the other' and, in particular, the racialized 'other' in perceptions of impartiality. It invites consideration of judicial notice, the

appropriate use of generalizations in assessments of credibility, the meaning of ‘evidence’, the role of storytelling in the construction of ‘facts’, and the values that construct the reasonable person”.

- [37] Having read the Supreme Court judgments knowing something of the background, I was intrigued to have pointed out to me by students that the judge’s racial identity was not mentioned until the last of the three separate judgments in the Supreme Court (by Cory J). Before the matter came to the Supreme Court, the only express mention of her racial identity was contained in the dissenting judgment of Freeman JA in the Nova Scotia Court of Appeal as follows:

[61] In supplementary reasons for judgment filed after the appeal, and which do not play a part in it, Judge Sparks referred to the racial configuration of the court “which consisted of the accused, the defence counsel, the court reporter and the judge all being of African-Canadian ancestry”.

[62] The case was racially charged, a classic confrontation between a white police officer representing the power of the state and a black youth charged with an offence. Judge Sparks was under a duty to be sensitive to the nuances and implications, and to rely on her own common sense which is necessarily informed by her own experience and understanding.

- [38] See, for example, Devlin, *op. cit.*, at 411.

[39] Backhouse, *op. cit.*, at 174–5.

[40] *Ibid.*

- [41] On the disadvantage of women in the Australian legal system, see for example Australian Law Reform Commission, *Equality Before the Law: Women’s Access to the Legal System, Interim Report No 67* (Sydney, ALRC, 1994); Australian Law Reform Commission, *Equality Before the Law: Justice for Women, Report No 69, Part I* (Sydney, ALRC, 1994); Australian Law Reform Commission, *Equality Before the Law, Women’s Equality, Report No 69, Part II* (Sydney, ALRC, 1994); *Gender Bias and the Judiciary, Report by the Senate Standing Committee on Legal and Constitutional Affairs* (Canberra, Australian Government Publishing Service, 1994). Note also non-government initiatives, such as: Law Society of NSW, *Getting Through the Door is Not Enough: An Examination of the Equal Opportunity Response of the Legal Profession in the 1990s* (Law Society of NSW, 1993); *Equality of Opportunity for Women at the Victorian Bar* (Victorian Bar Council, 1998). See Rosemary Hunter & Helen McKelvie, *Gender and legal practice* (1999) 24 *Alternative Law Journal* 57; Keys Young, *Research on Gender Bias and Women Working in the Legal Profession, Report Prepared for the Department for Women* (Department of Women, 1995); and NSW Ministry for the Status and Advancement of Women, *Gender Bias and the Law: Women Working in the Legal Profession in NSW, summary report*, (March 1995). On racism, see for example Commissioner Ronald Wilson, *Bringing Them Home: Report of the National Enquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families* (Sydney, Australian Government Publishing Service, 1997), full text available online at: <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/>; Commissioner Elliott Johnston, *National Report: Royal Commission into Aboriginal Deaths in Custody* (Canberra, Australian Government Publishing Service, 1991), available online at: <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/rciadic/>. Note also conferences and events such as *Beyond Tolerance: A National Conference on Racism*, convened by the Human Rights and Equal Opportunity Commission (HREOC), Sydney Opera House, 12 and 13 March 2002, speeches and papers reproduced online at: http://www.humanrights.gov.au/racial_discrimination/conferences/beyond_tolerance/speeches.html.

- [42] In the 1980s and 1990s, a majority of states and some of the Federal Circuit courts of appeal conducted task forces on Gender and/or Racial Bias in the Law: for an overview of task forces on gender and racial bias in the law and the history of the task force movement see Judith Resnik, *Gender matters, race matters* (1997) 14 *New York Law School Journal of Human Rights* 219; Myra C. Selby, *Examining race and gender bias in the courts: a legacy of indifference or opportunity* (1999) 32 *Indiana Law Review* 1167. For gender bias-specific commentary, see Barbara Allen Babcock, *Introduction: gender bias in the courts and civil and legal education* (1992–93) 16 *Stanford Law Review* 2143 at 2143–4; Kimberly A. Lonsway *et al.*, *Understanding the judicial role*

in addressing gender bias: a view from the Eighth Circuit federal court system (2002) 27 *Law and Social Inquiry* 205. More recently, studies of bias in the justice system have expanded to consider intersections between gender, race, and ethnicity. See, for example, Jay C. Carlisle, Synopsis of the report of the Second Circuit task force on gender, racial and ethnic fairness in the courts (1998–99) 19 *Pace Law Review* 431; the Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System, appointed in October 1999, contained a chapter on the intersection of racial and gender bias in which it was reported, inter alia, that “female litigants of color” experienced additional hurdles which were exacerbated by poverty and linked to the “gap in experience and understanding between middle-class Caucasian judges and poor minority litigants” (at 548): Interbranch Commission for Gender, Racial and Ethnic Fairness, available at: <http://www.courts.state.pa.us/NR/rdonlyres/EC162941-F233-4FC6-9247-54BFE3D2840D/0/FinalReport.pdf> (last accessed 8 October 2008).

- [43] Her article outlines the spate of “lopsided” challenges against decision makers presumed to be biased because of their racialisation, or their purported “feminism”: Backhouse, *op. cit.*, at 178–83. See also the discussion in Maryka Omatsu, The fiction of judicial impartiality (1995) 8 *Canadian Journal of Women and the Law* 528; and Graycar (1998), *op. cit.*, at 1. Interestingly, a number of white male judges have drawn attention to the existence of racism without incident: for some examples, see *R v. Parks* [1993] 15 OR (3d) 324 at 342 (per Doherty JA); and from Australia, *B and R and Separate Representative* [1995] FLC 92-636 (Family Court, Full Court). The present Chief Justice of the High Court of Australia, Gleeson CJ, once endorsed criticism of the defence of provocation on the grounds that, with respect to this defence, “the law’s concession to human frailty was very much, in its practical application, a concession to male frailty”: *Muy Ky Chhay* [1994] 72 A Crim R 1 at 11 (NSW Court of Criminal Appeal).
- [44] Backhouse recounts how in 1993, when she held a part-time appointment as a human rights adjudicator, she was successfully removed from a sex discrimination case for bias because she had been one of 120 complainants in a systemic discrimination case against a university: *Great Atlantic & Pacific Co of Canada v. Ontario (Human Rights Commission)* [1993] 13 OR (3d) 824 (Gen Div). She further notes that “bias challenges for ‘feminist’ perspectives have also affected the Supreme Court of Canada”, given that in the early 1990s both Justice Bertha Wilson and Justice Beverley McLachlin had complaints of bias lodged against them by the conservative women’s organisation, REAL Women of Canada. In both instances, “feminist perspective” or “feminist ideology” were said to negate the judge’s “impartiality” or to undermine “the integrity of the court”: Backhouse, *op. cit.*, at 180. Note also the controversy that followed the decision of the Supreme Court of Canada in *R v. Ewanchuk* [1999] 1 SCR 330; Ed Ratushny, Speaking as judges: how far can they go? (2000) 11 *National Journal of Constitutional Law* 293 at 387–401 provides an excellent overview of the vituperative response (particularly on the part of Justice McClung) that followed Justice L’Heureux-Dubé’s judgment in *Ewanchuk*. The complaints that followed from that are discussed in the chapter referred to in note 2 above.
- [45] Derrick Bell, *Faces at the Bottom of the Well: The Permanence of Racism* (New York, Basic Books, 1993).
- [46] *Ibid.*, at 113.
- [47] *Pennsylvania v. Local Union 542, International Union of Operating Engineers* 388 F Supp 155, at 177 (Ed Pa, 1974), per Higginbotham J.
- [48] *Blank v. Sullivan & Cromwell* 418 F. Supp. 1 (SDNY 1975).
- [49] See Graycar (1998), *op. cit.*, 1 at 2–3 where I suggest that, when we talk about judges, adjectives are almost invariably used only to indicate that a judge is NOT white, male, or heterosexual; we rarely use those descriptions, while ‘women’, ‘African-American or African-Canadian’, ‘Aboriginal’, or ‘gay’ are commonly used indicators of ‘difference’.
- [50] Benjamin Haslem, Kirby grants gays a hearing, *The Australian*, 24 October 2002, p. 3.
- [51] Sherilyn Ifill, Do appearances matter?: judicial impartiality and the Supreme Court in Bush v Gore (2002) 61 *Maryland Law Review* 606 at 639–41. The judge whose disqualification was sought, Judge Nikki Clark, denied President Bush’s recusal motion, as did the Federal Court of Appeals on appeal.
- [52] *Ibid.*, especially at 642–5.

- [53] *Dillard's Inc. v. Michael J. Scott* [2005] 908 So.2d 93.
- [54] *Furundzija* (Trial Chamber) Case No IT-95-17/1 (10 December 1998), (Judgment): International Criminal Tribunal for Yugoslavia, ICTY Cases & Judgments ('Furundzija'), available at: <http://www.un.org/icty/furundzija/trialc2/judgement/index.htm> (last accessed 8 October 2008).
- [55] *Prosecutor v Furundzija* (Appeals Chamber) Case No IT-95-17/1 (21 July 2000), available at: <http://www.un.org/icty/furundzija/appeal/judgement/index.htm> (last accessed 8 October 2008).
- [56] *Ibid.*, at 169.
- [57] *Ibid.*, at 199.
- [58] *Ibid.*, at 200.
- [59] *Ibid.*, at 202.
- [60] *Ibid.*, at 203.
- [61] *Ibid.*, at 200–5. There is a remarkable resonance here with an earlier Australian case in which an Aboriginal adjudicator, appointed to a human rights hearing body, was recused on the ground that she had indicated that her daughter had been refused service in a bar the subject of a complaint: *Koppen v. Commissioner for Community Relations* [1986] 67 ALR 215. This case was discussed in Graycar (1995), *op. cit.*, (1998), *op. cit.*; Graycar and Morgan, *op. cit.*