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Cover Page Footnote

This article is part of a larger project: a full book on the RDS case.

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Turning the Tables on *RDS*: Racially Revealing Questions Asked by White Judges

In the 1997 RDS *case, the Supreme Court of Canada deliberated on the concept of judicial race bias. The decision subjected the oral ruling of a lower court trial judge in a busy Youth Court to close scrutiny. The majority of the nine-person, all-white bench reprimanded Canada's first Black female judge, whose words about police officers who "overreact" in dealing with racialized youth they found "troubling" and "worrisome." This article places the same close scrutiny on the words of the white judges who were most critical of the trial judge. It examines their informal interjections and comments at the Supreme Court oral hearing. Making use of the appellate transcript and video-recording of the oral argument, it concludes that the informal comments of the top court judges exemplified many of the patterns that anti-racist educators describe as indicative of a lack of understanding of racism.*

Dans l'affaire RDS *de 1997, la Cour suprême du Canada a délibéré sur le concept de partialité raciale judiciaire. La décision a soumis à un examen minutieux la décision prononcée oralement par une juge de première instance dans un tribunal pour adolescents très fréquenté. La majorité des neuf juges, tous de race blanche, ont réprimandé la première juge de race noire au Canada, dont les propos sur les agents de police qui « réagissent de façon excessive » lorsqu'ils traitent avec des jeunes racialisés ont été jugés « inquiétants ». Le présent article examine avec la même attention les propos des juges blancs qui ont le plus critiqué la juge de première instance. Il examine leurs interjections et commentaires informels lors de l'audience de la Cour suprême. S'appuyant sur la transcription de l'appel et l'enregistrement vidéo de la plaidoirie, il conclut que les commentaires informels des juges de la Cour suprême illustrent bon nombre des modèles que les éducateurs antiracistes décrivent comme révélateurs d'un manque de compréhension du racisme.*

* Professor of Law, University of Ottawa. This article is part of a larger project: a full book on the *RDS* case. I am indebted to Sylvia Rich and Stefanie Carsley for suggesting this article, and to Sylvia, Holland Stille, Mirsa Duka, Diana Majury, and Diana Backhouse for helping me think it through.

Introduction

RDS v The Queen is the most significant case on judicial race bias in Canadian history.[1] In 1994, Canada's first Black female judge, Corrine Sparks, acquitted a Black male teenager in the Youth Justice Court in Halifax, while remarking on the overreaction of police in their dealings with non-white youth. In 1997, the Supreme Court of Canada probed the words of her oral judgment so closely that even the Crown lawyer suggested that "we may be analyzing it in more depth" than "some of the words might deserve."[2] Ultimately, six of the nine justices on the all-white Supreme Court upheld Judge Sparks' decision to acquit.[3] But two of the judges in the majority, Justices Cory and Iacobucci, found that her "unfortunate" and "troubling" comments "were worrisome and came very close to the line."[4] Three others—Chief Justice Lamer and Justices Sopinka and Major—dissented, concluding that her words went over the line, raising a reasonable apprehension of bias sufficient to warrant quashing Judge Sparks' decision.[5] Significantly, that meant the majority

1. *R v RDS*, [1997] 3 SCR 484, 151 DLR (4th) 193 [*RDS*].
2. Supreme Court of Canada Appeal Transcript, *RDS v Her Majesty the Queen* Supreme Court of Canada, Library and Archives Canada RG 125, vol 5231, file 25063A [Appeal Transcript], Oral Argument, Robert E. Lutes, at 66.
3. Justices McLachlin, L'Heureux-Dubé, Gonthier, La Forest, Cory, and Iacobucci.
4. *RDS, supra* note 1 at 543-545.
5. *Ibid* at 500.

of the judges on the top court found that her reflections on white racism were improper.

What if the tables were turned? What if the white Supreme Court judges' questions and interjections in the courtroom hearing for the *RDS* appeal were given the same scrutiny for racial bias? Chief Justice Antonio Lamer's comments became notorious after his remarks provoked a Canadian Judicial Council complaint.[6] But a fuller examination of the words he and Justices Major and Sopinka uttered in the open courtroom offers a window into the minds of some of those tasked with ruling on racial bias. When judges freely articulate their thoughts in an in-person oral hearing, it can do more than foreshadow the ultimate decision. The off-the-cuff discussion can be quite different from formalized decisions written months later. The type of scrutiny one gives to a trial judge's oral decision may find a better analogue in appellate judges' questions and remarks in the hearing, rather than their heavily edited judgments. When the focus pivots away from Judge Sparks, to scrutinize the Supreme Court judges' spoken words, it is very revealing.

I should clarify that I self-identify as a white Canadian. While I hope to challenge the thinking that comes from white privilege, I do not want to suggest that I am free from the pervasive racism that generations of white Canadians have displayed. I acknowledge that it is easier to spot it in others, and I do not wish to suggest that the Supreme Court justices were not exemplary judges or persons in other respects. I am unsure whether I would have done substantially better in 1997, had I been a judge questioning the *RDS* counsel. The author of *So You Want to Talk About Race*, Ijeoma Oluo, emphasizes that upending centuries-old systems of racism "is not an easy fix."[7] The author of *White Fragility*, Robin DiAngelo, writes that "racism is deeply complex and nuanced, and given this, we can never consider our learning to be complete or finished."[8] Ibram X Kendi compares it to "fighting an addiction," noting that "being an antiracist requires persistent self-awareness, constant self-criticism, and regular self-examination."[9] I think we should take up the challenge to engage in an ongoing exercise to come to grips with our own racism. Anti-racist activists have urged white people to examine how our white institutions and whiteness bolster racism. Oluo, DiAngelo, Kendi, and Reni Eddo-Lodge have offered important theoretical and structural frameworks for

6. Letter from the Chinese Canadian National Council to the Canadian Judicial Council (28 October 1997). For fuller discussion, see below.
7. Ijeoma Oluo, *So You Want to Talk About Race* (New York: Seal Press, 2019) at 7.
8. Robin DiAngelo, *White Fragility* (Boston: Beacon Press, 2018) at xv.
9. Ibram X Kendi, *How to Be an Antiracist* (New York: One World, 2019) at 23.

the inquiry.[10] Their insights allow us to examine the *RDS* case from a new perspective and help emphasize why our judges (and all of us non-judges) must expand our understanding of the fullness of racism.

"Race" is a fiction, a socially-constructed myth that purports to divide human beings into distinct categories. The fictional classifications and terminologies have changed over time and place. "How the Irish Became White" is one of the most revealing of book titles, but others historically differentiated from the "white" category include English working-class communities, Jews, Muslims, French-Canadians, Indo-Canadians, Central Europeans, Eastern Europeans, Asians, and Indigenous peoples. Significantly, people already seen as "white" decided who was "white."[11]

This is why many anti-racist theorists describe "race" in scare quotes. It is why we refer to "racialized" people, to signify that "race" is a fiction, but racism is a pernicious reality. In this article, which deals with specific geographic settings and times, I have chosen to step beyond the complexities of race definitions. Following the self-identification of the individuals involved and for ease of reference, I shall make use of simplified descriptors for the actors as "white" or "Black." [12]

The article begins with a description of the *RDS* case and the trial decision of Judge Corrine Sparks. It then turns to the oral hearing of the appeal before the nine white judges of the Supreme Court of Canada. It considers the hypothetical questions Chief Justice Lamer put to the lawyers, and the ensuing complaint to the Canadian Judicial Council (later dismissed) that accused him of embracing racial stereotypes. The article analyzes the context within which the judges operated: a professional legal culture of whiteness and a tradition of deference that impedes calling white judges on their racism. Lastly, it examines the words and phrases of the three dissenting judges—Chief Justice Lamer and Justices Major and Sopinka—whose ruling was the most scathing about Judge Sparks' comments concerning police officers. This inquiry may help discern some of the patterns that white judges exhibit in discussions about racism.

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10. Oluo, *supra* note 7; DiAngelo, *supra* note 8; Kendi, *supra* note 9; Reni Eddo-Lodge, *Why I'm No Longer Talking to White People About Race* (New York: Bloomsbury, 2017).

11. Noel Ignatiev, *How the Irish Became White* (New York: Routledge, 1995); Nell Irvin Painter, *The History of White People* (New York: W.W. Norton, 2010); Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900–1950* (Toronto: University of Toronto Press, 1999).

12. The *New York Times* explains that it capitalizes Black when it describes people and cultures of African origin, because it signifies a race and a culture rather than a colour. Nancy Coleman, "Why We're Capitalizing Black", *New York Times* (5 July 2020), online <www.nytimes.com/2020/07/05/insider/capitalized-black.html> [perma.cc/E5YY-46NQ].

I. *The* RDS *Case: A Brief Summary*

The trial began in the Youth Justice Court in Halifax, Nova Scotia ("Youth Court") on 2 December 1994.[13] The courtroom configuration was apparently unprecedented in Canada: a Black accused (Rodney Darren Small), a Black defence lawyer (Burnley "Rocky" Jones), a Black court reporter (Marva Welch), a Black deputy sheriff (Ray Lawrence), and a Black judge (Corrine E Sparks). The only two white people in the room were the arresting officer (Constable Donald Stienburg) and the Crown prosecutor (Richard B Miller).[14]

There were just two witnesses: Rodney Small and Constable Stienburg. Rodney Small testified that on 17 October 1993, he rode his bike past the scene of an arrest in a predominantly Black Halifax neighbourhood. Fifteen-year-old Rodney knew the Black boy in handcuffs; he was a cousin. Rodney testified that he rode up close to the white police officer who was arresting his cousin, and came to a halt straddling his bike. Rodney called out to his cousin, "What's wrong? What happened?" Although Constable Donald Stienburg testified that Rodney drove the bike into his legs, Rodney denied that his bike was touching the officer. Rodney testified that the officer warned him to "shut up," or he would be arrested next. Instead, Rodney said he had shouted to his cousin, "Do you want me to go tell your mother?" The officer testified that in an altercation that lasted for "a couple of seconds," Rodney yelled at him and pushed him with his shoulders and hands. Rodney insisted that his hands were still on the handlebars and denied hitting the officer.[15]

Both agreed that the bike was not travelling at great speed, and that the officer was not knocked over. Both agreed that Rodney never got off his bike. Both agreed that Officer Stienburg grabbed Rodney while he was still straddling his bike, and placed Rodney and his cousin simultaneously in chokeholds.[16] Rodney was arrested and charged with assaulting a police officer, assaulting a police officer with intent to prevent the lawful arrest of another person, and obstruction of a police officer.[17]

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13. *RDS v Her Majesty the Queen*, Supreme Court of Canada, Library and Archives Canada RG 125, vol 5231, file 25063A [Trial Transcript].
14. James W St G Walker, "A Black Day in Court: 'Race' and Judging in *R v RDS*" in Barrington Walker, ed, *The African Canadian Legal Odyssey: Historical Essays* (Toronto: University of Toronto Press, 2012). Due to his age, the *Young Offenders Act* prohibited the publication of Rodney Small's name; the case is styled "R.D.S." Subsequently, he gave his permission to disclose his full name. Interview with Rodney D Small (14 August 2018) in Halifax.
15. Trial Transcript, *supra* note 13.
16. *Ibid.*
17. *Criminal Code,* RSC 1985, c C-46, ss 270(1)(a)(b), 129(a).

The disparities in age and physical stature between Constable Stienburg and Rodney Small were striking. The twenty-nine-year-old officer, a veteran of the SWAT team, stood more than six feet tall with a heavy-set athletic physique.[18] Younger-looking than his age, Rodney was five-foot-eight and "105 pounds soaking wringing wet." [19] The lawyer who defended Rodney called the charges "bogus," overkill from a police force intent on teaching a young Black teenager not to interfere with an officer of the law.[20]

Unlike higher courts, where judges often reserve their judgments to give themselves time to consider their reasons, judges in the hectic Youth Court deliver oral rulings immediately after trial. In her oral judgment, Judge Sparks emphasized that the burden of proof was "squarely placed upon the Crown [to] prove all the elements of the offence beyond a reasonable doubt." Because Rodney's handcuffed cousin no longer posed any "threat to the officer," she wondered why Constable Stienburg would be "threatened by another young person who was merely trying to assist his friend in a non-threatening manner?" Although she stressed that she did not accept "everything" Rodney had said in court, she noted that he "seemed to be a rather honest young boy" who said "quite openly on cross-examination he was being nosey." She observed that the officer "gave the Court the distinct impression that he had a rather difficult job in trying to restrain" the cousin, but had failed to mention that the boy was in handcuffs when Rodney arrived. "[W]hat was the big ordeal?" she added, "It's a teenager, young person." Counsel had not cited any of the multiple reports documenting disparate treatment of racialized individuals within the criminal justice system, and Judge Sparks made no mention of these, but she concluded that Rodney's testimony had "raised a doubt in my mind" about what transpired. She dismissed all three charges. [21] Her next words had explosive consequences:

> I'm not saying that the Constable has misled the court, although police officers have been known to do that in the past. I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are dealing with non-white groups. That to me, indicates a

18. Interview with Donald Stienburg (28 September 2018) in Halifax.
19. Interview with Rodney Small, *supra* note 14; Walker, *supra* note 14 at 439.
20. Interview with Rodney Small, *supra* note 14.
21. Trial Transcript, *supra* note 13 at 80-93. In Supplementary Reasons she issued after the conclusion of the trial, Judge Sparks made her first reference to the *Royal Commission on the Donald Marshall, Jr. Prosecution* (Halifax: Province of Nova Scotia, 1989). The appellate courts ruled her Supplementary Reasons invalid because they were not issued during the trial, but after the court was no longer seized with the case. For further discussion of the Marshall Inquiry and other studies disclosing race disparities in the criminal justice system, see below.

> state of mind right there that is questionable. I believe that probably the situation in this particular case is the case of a young police officer who overreacted. I do accept the evidence of R.D.S. that he was told to shut up or he would be under arrest. That seems to be in keeping with the prevalent attitude of the day. [22]

Although the word "racist" had never been said, the white officer believed that Judge Sparks had called him a racist.[23] His complaint, supported by the white police chief and the white Crown prosecutor, set in motion a chain of appeals that led to the Supreme Court of Canada.[24]

The Supreme Court hearing on 10 March 1997 involved an unprecedented number of Black lawyers. [25] Just two of the lawyers were white. Robert E Lutes QC represented the Crown and Dalhousie law professor Dianne Pothier appeared on behalf of Rodney Small. Rodney's other lawyer was Burnley "Rocky" Jones, one of Canada's foremost Black anti-racist activists.[26] Yola Grant and Carol Allen, Black lawyers from Toronto, represented two intervener women's groups.[27] Black lawyer April Burey represented three Black intervener groups.[28] The courtroom was jam-packed with Black observers who had arrived to bear witness to the historic case. Due to space limitations, most of the non-Blacks had moved to an overflow room, offering their seats to the Black observers. [29] The courtroom had become another version of the earlier Halifax Youth Court hearing. The difference this time was the all-white bench of judges.

What must the Supreme Court judges have thought that morning, as they looked out on so many Black lawyers and observers? Their days were typically spent listening to an all-white cast of lawyers, members of their own racial group, in a racial context deemed normal or neutral in legal circles. Had they seen such a large Black assemblage in their courtroom before? Did they recognize that they were experiencing a rare moment in which the whiteness of their professional world had been displaced in

22. Trial Transcript, *supra* note 13 at 80-93.
23. Interview with Donald Stienburg, *supra* note 18.
24. Interview with Rick Miller (17 August 2018) in Halifax; Eva Hoare, "Halifax Police Chief to complain about remarks from judge," *Halifax Chronicle-Herald* (13 December 1994).
25. Six Black lawyers and articling students were seated at the counsel tables: Burnley "Rocky" Jones, Yola Grant, Carol Allen, April Burey, Jewel Amoah, and Douglas Johnson. The first five argued in support of Judge Sparks' decision; the sixth was an articling student with the Crown Attorney.
26. Burnley "Rocky" Jones & James W St G Walker, *Burnley "Rocky" Jones: Revolutionary* (Black Point, Nova Scotia: Roseway/Fernwood, 2016).
27. The Women's Legal and Education Action Fund, and the National Organization of Immigrant and Visible Minority Women of Canada; Interview with Yola Grant (22 March 2018) in Toronto; Interview with Carol Allen (31 May 2018) in Meaford, Ontario.
28. The African Canadian Legal Clinic and the Afro-Canadian Caucus of Nova Scotia.
29. Interview with Lynn Jones (4 June 2018) in Halifax.

some respect? Did they find it novel? Did they find it unsettling? Would any of this affect their judgment?

II. *The most egregious example, Chief Justice Lamer: Honkies, frogs, Chinese gamblers, and Gypsies*

In order to highlight the comments voiced by the Supreme Court judges at the hearing, their words will be italicized except where it is obvious that it is a quotation because the passage is offset by an indentation. Chief Justice Antonio Lamer, who found Sparks' words so biased that he would have sent the case back for a new trial, interjected during the hearing with statements that were widely understood as racially problematic. The Francophone judge from Quebec cut off the lawyers' submissions to say, "*To some people I'm a honky, to others I am a frog. …Am I to say that…an English policeman arresting a French Canadian, that we take into account that there are social tensions right now and factor them into every case?*"[30] At first, general laughter greeted the references to "honky" and "frog," perhaps because Lamer CJ was referring to himself. To growing discomfort in the courtroom, he then referred to Chinese clients from his earlier law practice. The court's video recording shows Chief Justice Lamer shifting his gaze from the lawyers to scan the room.[31] Beside him on the bench, Justice Claire L'Heureux-Dubé rolled her eyes and swivelled in her chair with displeasure.[32]

Lamer CJ continued, "*For many, many years when I was practising as a lawyer, I had clients who were Chinese and the Chinese were very much into gambling and they are tremendous gamblers.*" He added, "*actually—there is a problem right now in Montreal [with] the casinos on Terre des Hommes.*" In an apparent attempt at humour, he added that he could take "*judicial cognizance*" of this because "*I didn't go to the casino, I read it in the papers.*" He remarked that "*the casino is constantly occupied by people of the Chinese community*" and emphasized that "*Chinese people have a propensity for gambling.*" As captured in the video, he continued:

> Now, can I take that into account if a Chinese is accused of [pause] I don't know, some illegal gambling, which is not an awful crime, but

30. Appeal Transcript, *supra* note 2 at 10-12. Dictionaries describe "honky" as a derogatory term used by Blacks to describe whites.

31. Video recording of the oral argument, filed with the Supreme Court of Canada. Laugher is evident only after the first two references. The growing discomfort was mentioned in the Interview with Yola Grant, *supra* note 27; Interview with Lynn Jones, *supra* note 29; Interview with Chantal Tie (30 July 2018) in Ottawa; Interview with Michelle Williams (5 June 2018) in Halifax.

32. On Justice L'Heureux-Dubé's pivot, see Interview with Yola Grant, *supra* note 27. On the strains between the two judges, see Constance Backhouse, *Claire L'Heureux-Dubé: A Life* (Vancouver: University of British Columbia Press, 2017).

> anyway some illegal gambling? [smile] Can I factor in that, well, he's Chinese, he says he wasn't gambling and the police officer is—ah, is ah—well, he's a non-Chinese, and can I factor this in, or start factoring in the fact that the non-Chinese police officer might have a bias against Chinese people? I understand your argument, and it is a fascinating one, but I am just trying to figure out how far down the slope we're going to go once we do this?[33]

Rodney Small's counsel, Dianne Pothier, diplomatically did not point out that Lamer CJ had just supported a negative stereotype about a racialized minority. But his conjecture was not parallel to Judge Sparks' comments. He referred to an entire racialized group. Judge Sparks referred to an institutional culture of a specific group of adults in a particular occupation.

Chief Justice Lamer continued to speculate. With his reference to the Roma, whom he mislabelled "gypsies," he further reinforced negative and racist stereotypes:

> But what if I take judicial notice of the fact that 95 per cent – and I'm saying this and I have no facts, and I wouldn't want to offend that community, but that 95 per cent of gypsies are pick pockets and it's like the Marshall Inquiry, and we have that data, and I am dealing with a pick pocket here and assessing the policeman's credibility. Of course, it is the accused and I have to be satisfied beyond a reasonable doubt…but can I factor in this judicial notice I have – and I'm not saying that that's a fact.[34]

Still later, he added, "*What, ah, what if we, we, there is empirical data to the effect that a certain ethnic group doesn't have great respect for the oath?*"[35]

Sitting in the courtroom behind the lawyers, Black anti-racist activist Lynn Jones recalled thinking, "Oh My God. [T]he man's so racist, so blatantly racist. How can he be sitting on the Supreme Court?"[36] Asian lawyer Chantal Tie, observing from the overflow room, was equally "appalled."[37] Black lawyer Michelle Williams was disheartened, wondering

33. Appeal Transcript, *supra* note 2 at 20-21. The "Terre des Hommes" reference is audible in the video, but the court reporter missed it, and the transcript refers to a single casino in Montreal. The pause and smile, neither captured in the transcript, are evident in the video.
34. *Ibid* at 23.
35. *Ibid* at 24. For further discussion of the Marshall Inquiry, see below.
36. Interview with Lynn Jones, *supra* note 29.
37. Interview with Chantal Tie, *supra* note 31 (co-chair of the legal committee of the intervener LEAF).

"What kind of decision can you expect…when the Chief Justice makes racist comments?"[38]

Chief Justice Lamer's questions prompted the Chinese Canadian National Council (CCNC) and twenty other social-justice organizations to file a formal complaint with the Canadian Judicial Council. The groups claimed that when he had described the Chinese "propensity to gamble" as a "matter of fact," he demonstrated an inadequate appreciation of racism. They noted that the false stereotype about Chinese gambling and criminality, rooted in the nineteenth-century terror of a "yellow peril," had culminated in racist head taxes and the *Chinese Exclusion Act*. In their letter to the Canadian Judicial Council, the CCNC addressed their concerns with Lamer CJ's reasoning:

> By putting forward examples of racial stereotype to counter the argument that judges should be made aware of the reality of racism, the Chief Justice's reasoning is reflective of a lack of understanding of what racism is all about. Racism is about the formation and promotion of stereotypes of racialized communities by those in power in order to justify discriminatory practices and laws. Judges who acknowledge and challenge racism will also have to acknowledge and challenge racial stereotypes. But when judges begin to embrace racial stereotypes as facts about certain racialized communities, then serious questions must be raised about the ability of our judiciary to deliver judgement in an even-handed manner, particularly when it comes to racial minority groups.[39]

A spokesperson for the Roma Advocacy Centre stated it also "had a problem with Lamer's statements, even if they were just oral arguments."[40] The complaint suggested that Chief Justice Lamer should acknowledge that his comments had hurt Canadian racialized communities, that he should apologize, and that all the Supreme Court judges should undergo anti-racism training.[41]

Robin DiAngelo's *White Fragility* has reviewed the responses that we, as whites, often display when faced with complaints about racist behavior: anger, argumentation, defensiveness, emotional incapacitation, withdrawal, and cognitive dissonance.[42] Lamer CJ responded with anger when the *Toronto Star* covered the complaint.[43] In what the press described

38. Interview with Michelle Williams, *supra* note 31.
39. Letter from the CCNC to the Canadian Judicial Council (28 October 1997).
40. "Antonio Lamer: Judge Referred to Chinese as 'Tremendous Gamblers,'" *Toronto Star* (4 November 1997), digital version retrieved with Factiva, Inc., no page number.
41. Letter CCNC to CJC, *supra* note 39.
42. DiAngelo, *supra* note 8 at 68, 101.
43. The printed version of the article appeared as Dale Anne Freed, "Top Judge Accused of 'Stereotyping,'" *Toronto Star* (4 November 1997) A25. The digital version, with the same date &

as "a spirited written response to The Star," he called the criticism "**outrageous**" (emphasis in the *Star* article).[44] The outrage of the racialized people who sat in his courtroom and the members of the social justice organizations who complained was reframed as his outrage over their critique of him. Lamer CJ argued that his reference to former Chinese clients was past history, although he insisted it was also a depiction of reality:

> At the time I was practising law in the late '50s-early '60s, there were some Chinese men (Canada had unfair laws at the time as regards the immigration of Chinese women) who were very much into gambling. This is a fact. It is unfortunate that I used the expression "they are tremendous gamblers" as I was referring to the situation **at that time**. Today the profile of the Chinese community in Montreal is completely different. If I have offended the Chinese community by a slip of the tongue, by the use of "are" instead of "were," I offer my apologies.[45] (emphasis in the original.)

Taking refuge in "that was then, this is now" is another common position for those who respond to complaints of racism.[46] The Chief Justice insisted that his past assessment was "a fact" at the same time as he minimized the impact of the *Chinese Exclusion Act*, one of the most egregious racist statutes in Canadian history, which had barred Chinese women and men from immigrating to Canada between 1923 and 1947.[47] The word slippage between "were" and "are" makes clear how intertwined the past and the present remained. His remarks about Chinese gambling in the Montreal casino were all phrased in the present tense: "*there **is** a problem right now in Montreal," "the casino **is** constantly occupied by people of the Chinese community," and "Chinese people **have** a propensity for gambling."*[48] (emphasis added.)

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headline, omits Freed's byline, and contains three more paragraphs than in the print version. The additional digital material noted that Lamer CJ was one of three dissenting judges, that the Roma Advocacy Centre had a problem with his statements, and that the National Action Committee on the Status of Women wanted him to step down.

44. Nicolaas Van Rijn, "Chief Justice Denies Attack on Chinese", *Toronto Star* (5 November 1997) A8.

45. *Ibid.*

46. Paul Thomas offers one typical illustration: "I didn't own slaves, and slavery ended in the 1800s." "Confronting White Responses to Racism: De-centering Whiteness and White Fragility" (16 June 2020), online: *Medium* <medium.com/an-injustice/confronting-white-responses-to-racism-de-centering-whiteness-and-white-fragility-a9362195d8b4> [perma.cc/79WC-R58U]. DiAngelo, *supra* note 8 at 22 notes that "many whites see racism as a thing of the past."

47. Backhouse, *supra* note 11.

48. Appeal Transcript, *supra* note 2 at 20-21.

The Chief Justice's reference to "a slip of the tongue" minimized his comment, another common pattern of defensive argumentation, as did the apology that began, "If I have offended…" It was not a question of "if." In his letter to the *Star* Lamer CJ insisted that *"I did not mean any offence,"* later stressing that *"It was not in the least intended to offend any group."* Such statements are sometimes accepted as an honest and sincere response.[49] Yet the courts had long ago drawn a distinction between intent and harmful impact in anti-discrimination law.[50] The law had also made finely tuned distinctions between intent, honest mistake, wilful blindness, negligence, accident, and incapacity to form intent. Did the Chief Justice stop to think about which of the various classifications might apply to him before mounting his defence?

Lamer CJ was on somewhat stronger ground when he defended his remarks as "purely hypothetical examples of stereotypes, not factual assertions."[51] When the lawyer Yola Grant expressed concern that he based his assumption of a racialized gambling propensity upon his law practice experience, he was quick to reply "*It was a hypothetical."*[52] It was a point Lamer CJ made several times in the courtroom.[53] In his letter to the *Star*, he added, *"I put to (the lawyer) various hypothetical stereotypes for the sake of argument, to express my distaste for such stereotypes and to point out what I felt was a flaw in her reasoning."*[54] Jonas Ma, the executive director of the CCNC, responded that Lamer had missed the point: "Even giving hypothetical examples of stereotypes can reinforce racist images," he explained.[55]

The *Toronto Star* was alarmed by Chief Justice Lamer's anger. When a staff reporter phoned him that evening, Lamer CJ apparently tried to alleviate some concern. "Let's start by saying I don't intend to sue anybody," he quipped.[56] The *Star* not only accepted the Chief Justice's

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49. One generous example of this came from Chris Rock, well-known African-American actor and comedian, in answer to a question about his reaction to Jimmy Fallon's earlier appearance in blackface on Saturday Night Live. As quoted in Dave Itzkoff, "Chris Rock Tried to Warn Us," *New York Times* (20 September 2020) AR6, Rock said: "I'm friends with Jimmy. Jimmy's a great guy. And he didn't mean anything. A lot of people want to say intention doesn't matter, but it does."
50. "A central trend in the development of discrimination law, in every jurisdiction, has been the movement from a requirement of intention to ground a complaint to the recognition as actionable of indirect or adverse effect discrimination." Denise G. Réaume, "Harm and Fault in Discrimination Law: The Transition from Intentional to Adverse Effect Discrimination" (2001) 2:1 Theor Inq L 349.
51. Van Rijn, *supra* note 44.
52. Appeal Transcript, *supra* note 2.
53. *Ibid* at 24: *"I'm just pretending for—it's a hypothetical."*
54. Van Rijn, *supra* note 44.
55. *Ibid.*
56. Don Sellar, "How the Chief Justice's Side of the Story Got Mangled," *Toronto Star* (8 November 1997) E2. The staff reporter represented the *Star's* "Bureau of Accuracy."

excuse that he was "actually giving examples of how wrong stereotyping would be," but also it published an apology on 5 November 1997. The paper's white Ombudsperson, Don Sellar, wrote a column describing Lamer as "under attack by the Chinese Canadian National Council and 20 other ethnocultural groups." It was a replication of the *RDS* case itself, in which the white officer had turned the questionable arrest of a Black youth into a "racist" attack upon himself. It distracted from the harms of racism and served as an example of what some anti-racist educators refer to as "white-centering."[57] Sellar affirmed Chief Justice Lamer's words as spoken "hypothetically, the way judges often do when they test lawyers' arguments," and depicted the Chief Justice as "the victim of a journalistic mugging."[58] The column was an illustration of the backlash that so often greets complaints of racism.

The phrase "journalistic mugging" seems overblown. The original article had simply stated:

> Lamer is under attack for calling the Chinese "tremendous gamblers" during an appeal before the Supreme Court last March 10. Lamer said he was using hypothetical comments when he stated in court that over the years many of his clients were Chinese and were "very much into gambling." Later on in the hearing, according to excerpts from a transcript of the appeal, Lamer also took shots at another group: "What if I take judicial notice of the fact that 95 per cent of gypsies are pickpockets?"[59]

The rest of the article consisted of statements from the aggrieved groups that accurately represented their newsworthy concerns.[60] The reporter's phrase "took shots" was the one journalistic assessment, tempered with the qualification of "hypothetical comments."[61]

Undeterred by the media backlash, the CCNC pressed its complaint forward to the Canadian Judicial Council, which was composed of the Chief Justices and Associate Chief Justices of Canada's superior courts. The Canadian Judicial Council had the authority to investigate judicial misconduct and recommend penalties up to and including removal from

57. Both Lamer C.J. and Sellar were redirecting the focus toward the harm to the white judge. "Any white person responding to racism with an 'I' statement is requesting that they and their whiteness (and delicate sensibilities) remain *centered* when the focus should remain on racism and its consequences for Black citizens": Thomas, *supra* note 46.

58. Sellar, *supra* note 56.

59. Identical wording in both the digital and printed versions: Freed, *supra* note 43.

60. *Ibid.*

61. It is true that the reporter did not repeat the hypothetical words the Chief Justice had said with respect to his negative reference to the Roma. Did that qualify as "journalistic mugging?" The news item was reporting on the complaint. The point the complainants were making was that, whether hypothetical or not, such comments were harmful.

office.[62] When it was established in 1971, it was accepted that the principle of judicial independence meant that only judges could investigate the misconduct of other judges. The difficulties inherent in the premise were clear in this case. The chair of the Canadian Judicial Council was none other than the Chief Justice of the Supreme Court of Canada, Antonio Lamer. The judge responsible for investigating the complaint was Allan McEachern, the white Chief Justice of British Columbia.[63] Chief Justice McEachern took the precaution of seeking an independent review from a white Toronto lawyer.[64] However, it is likely this did little to assuage the fears of observers about the capacity of the Canadian Judicial Council to rule on a matter concerning the top chief justice in Canada.

The complaint was dismissed in January 1998 after Chief Justice McEachern concluded that the complaint was not serious enough to merit further consideration, and that Chief Justice Lamer's remarks "could not be characterized as misconduct." [65] He stated that Chief Justice Lamer's comments were "hypothetical in nature" and made in the "specific context of a case" that concerned "matters of race and racial stereotypes in assessing the credibility of witnesses." McEachern emphasized that exchanges between counsel and judges were "often wide-ranging, probing and exploratory in nature."[66] Lamer CJ's hypothetical defence won the day. The Montreal casino comments passed without further scrutiny. Although there is a distinction between comments delivered during oral submissions and a judicial decision, it was a light touch and a far cry from the critical eye that was trained on Judge Sparks' words. Given that Lamer CJ signed the dissenting decision that was most critical of the Youth Court judge, the gentle treatment here must have struck some observers as particularly unsettling.

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62. Canadian Judicial Council, "The work of the Council," online: *Canadian Judicial Council* <www.cjc-ccm.ca/en/what-we-do> [https://perma.cc/72CL-8YMZ].

63. Complaints were first heard by the chair or vice chair of the Judicial Conduct Committee. Due to his position as Vice-Chair of the CJC, McEachern CJ chaired its Judicial Conduct Committee. If he considered a complaint serious enough to merit further consideration, he could refer it to a panel of up to five committee members who could decide whether a public inquiry was needed. Correspondence from Jeannie Thomas, Executive Director of the CJC, to Dr. Alan Li, President of the CCNC (22 January 1998), CJC Archives File 97-120.

64. Toronto lawyer Eleanor Cronk conducted the independent review; Cronk was appointed to the Ontario Court of Appeal in 2001.

65. Canadian Judicial Council, *Annual Report 1997–1998,* online: Canadian Judicial Council <https://cjc-ccm.ca/cmslib/general/news_pub_annualreport_1997-1998_en.pdf> [https://perma.cc/4Z4G-QYWY] at 22.

66. Canadian Judicial Council news release (23 January 1998); Correspondence from Thomas to Li, *supra* note 63.

Chief Justice McEachern claimed to "understand the sensitivities that generated" the complaint, and regretted that the "CCNC feels aggrieved by the statements," but emphasized Lamer CJ's unintentional motivation. He noted that the "spirited argument between counsel and the Court can sometimes create misunderstanding or cause hurt that is no less painful for its being unintended. When this occurs, it is much to be regretted, but judges must be free to test lawyers' submissions with hypothetical questions" and "to engage in frank and wide-ranging discussion."[67]

McEachern CJ's insistence that all such questions were open season, necessary for full and frank judicial analysis, amounted to a blanket approval of hypothetical comments—racially based or otherwise. It failed to inquire why Chief Justice Lamer had selected these particular hypotheticals, and what those choices might signify about his beliefs. The Canadian Judicial Council should have delved more deeply into the stereotypes—that Chinese people gamble, that Roma people steal, that "ethnics" lie on the stand—asking other important questions: What is the source of the presumption? Who is applying it? Who is it harming? It failed to consider whether some hypothetical statements might be so offensive they should not be used for jousting practice. According to the Canadian Judicial Council, probing statements that contained racist stereotypes were acceptable. Jonas Ma's concerns that hypothetical racist stereotypes fostered racism were dismissed.

III. *The professional culture of whiteness*

As white lawyers and judges, many of us live our lives primarily within a "white bubble," raised in families, schools, neighbourhoods, workplaces, and social circles largely confined to white people. While insensitivity to racism is not an inevitable consequence, for most of us the experiential gap means that we are not well-equipped to assess racism claims. It is impossible to know from the available records whether the nine Supreme Court judges in the *RDS* case had any significant exposure to racialized communities, but we do know that these nine judges studied in mostly white educational institutions, they practised in predominantly white law firms and government offices, and they sat on all-white courts.[68]

67. *Ibid.*

68. A volume of essays on Chief Justice Lamer's life and career (b.1933, d.2007) describes personal and professional circles that were overwhelmingly white, although one can surmise that his early criminal defence practice in Montreal may have included some racialized clients. He studied law at the University of Montreal, practised with Philip Cutler and Jacques Bellemare, and served as a judge from 1969. Justice John (Jack) Major (b.1931) studied law at the University of Toronto and practised as a corporate-commercial litigator and senior partner at the elite Alberta law firm of Bennett, Jones, Verchere, where his clients included the Calgary Police and physicians at the Canadian Medical

Robin DiAngelo points out that segregation may make racial disparities "difficult for whites to see and easy to deny."[69] Although most Canadians look with disparagement upon our American neighbours for their historic and on-going racial segregation, many of us move within similar white spaces without much reflection on our own situation. The Supreme Court that heard the *RDS* case might itself be aptly characterized as a segregated white space.[70] Did any of the top court judges recognize that they sat on a segregated all-white bench? If they had, would they have recognized the implications? Describing what this means for all-white neighbourhoods, DiAngelo explains:

> Predominantly white neighbourhoods are not outside of race—they are **teeming** with race. Every moment we spend in those environments reinforces powerful aspects of the white racial frame, including a limited worldview, a reliance on deeply problematic depictions of people of color, comfort in segregation with no sense that there might be value

Protective Association. Justice Major had been a judge since 1991. Justice John Sopinka (b.1933, d.1997), the first Ukrainian-Canadian on the court, studied law at the University of Toronto, and practised with the elite Toronto firms of Faskin & Calvin and Stikeman Elliott for twenty-eight years before moving directly from practice to the all-white Supreme Court in 1988. Justice Peter deCarteret Cory (b.1925, d.2020) studied law at Osgoode Hall, and practised civil litigation with the Toronto firm of Holden Murdoch while active with a number of lawyers' professional associations. He had been a judge since 1974. Justice Frank Iacobucci (b.1937), the first Italian-Canadian judge on the top court, studied law at the University of British Columbia and Cambridge University, practised corporate law at an elite New York City firm, and then joined the University of Toronto where he taught business and tax law and rose to become Dean and Vice-President, before becoming Deputy Minister of Justice in Ottawa. He had been a judge since 1988. Justice Gérard Vincent La Forest (b.1926) studied law at the University of New Brunswick, Oxford, and Yale, taught law in New Brunswick, Alberta, and Ontario, and served as Assistant Deputy Attorney General of Canada. He had been a judge since 1981. Justice Charles Doherty Gonthier (b.1928, d.2009) studied law at McGill, and practised law in Montreal from 1952 to 1974, when he became a judge. Throughout his career, he remained active within lawyers' and judges' professional organizations. The biography of Justice Claire L'Heureux-Dubé describes a life and career largely devoid of non-white influences. Chief Justice Beverley McLachlin mentions in her memoir the presence of some Indigenous people in rural Alberta where she grew up, but few non-white influences thereafter. Biographies of all nine judges, Supreme Court of Canada, online: <www.scc-csc.ca> [https://perma.cc/5ZE5-GVXR]; Adam Dodek & Daniel Jutras, eds, *The Sacred Fire: The Legacy of Antonio Lamer (Chief Justice of Canada)* (Markham, ON: LexisNexis, 2009); Lionel D Smith, *Ruled by Law: Essays in Memory of Mr. Justice John Sopinka* (Toronto: Butterworths, 2000); Sean Fine, "Supreme Court Judge Peter Cory 'Was Legendary For His Kindness,'" *Toronto Globe & Mail* (1 May 2020), online: <www.theglobeandmail.com> [perma.cc/BZZ4-349Y]; Backhouse, *supra* note 32; Beverley McLachlin, *Truth Be Told: My Journey Through Life and the Law* (Toronto: Simon & Schuster, 2019).

69. DiAngelo, *supra* note 8 at 23.

70. Two of the nine judges had been publicly acknowledged for their ethnic heritage, John Sopinka J the first Ukrainian and Frank Iacobucci J the first Italian on the top court. Nineteenth-century Canadians of Ukrainian and Italian backgrounds, then categorized as "racially" distinct, faced considerable discrimination and exclusion from the classification of "white" in certain geographic areas. These once disparaged "foreign" ethnicities had been largely integrated into the white category by the time of Justices Sopinka and Iacobucci's appointments in the late twentieth-century. Backhouse, *supra* note 12.

> in knowing people of color, and internalized superiority. In turn, our capacity to engage constructively across racial lines becomes profoundly limited. [71] (emphasis in the original.)

The judges' individual interactions with police officers would also have been mediated by their professional status as lawyers and judges. For these judges, the risks of being street-checked, stopped and frisked, having their homes or vehicles searched, or being wrongly arrested were minimal. Due to his earlier stint as a criminal defence lawyer, Chief Justice Lamer may have had greater knowledge about police wrong-doing than his colleagues with their corporate law and civil litigation backgrounds, but his race, class, and professional stature insulated him personally. [72] Indeed, Lamer CJ was fond of boasting that he could speed as fast as he wished on the highway between Ottawa and Montreal. Police cruisers would see him driving well over the limit, come after him with their lights flashing, catch sight of his Chief Justice of Canada licence plates, and abandon the chase.[73]

In theory, ongoing judicial training that incorporated information about racism—conscious, unconscious, individual, institutional, and systemic—might have helped to rectify some tunnel-view perspectives. But common law judges have traditionally been averse to judicial education. The earliest courses, in the 1970s, were a patchwork of skills training and doctrinal updates run by volunteer judges for the few judges who volunteered to attend. In 1994, the Canadian Judicial Council's innovative recommendation for "social context" programming about gender and race stirred up storms of controversy. Many judges insisted that such courses could be a cover for attitudinal indoctrination by interest groups, a violation of judicial independence. Chief Justice Lamer led the early opposition, rejecting mandatory education, insisting that only judges could design and deliver the material, and expressing concern that the training must not be used "as a vehicle for indoctrination of any kind." [74]

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71. DiAngelo, *supra* note 8 at 37.

72. Michel Robert, the Chief Justice of Quebec, reflected upon Chief Justice Lamer's law practice in the late 1950s, stating that "with respect to police conduct towards the accused, we'll say, to be elegant, that it lacked monitoring." Although Robert CJ followed up by stating that Lamer was "deeply affected by the injustices of the system at that time," it was an extraordinary admission, couched in an attempt at humour, from the province's Chief Justice. The Hon. JJ Michel Robert, "Antonio Lamer: The Man, His Life and Times" in Dodek & Jutras, *supra* note 68 at 4.

73. Backhouse, *supra* note 32 at 339, 642.

74. Antonio Lamer, "The Rule of Law and Judicial Independence: Protecting Core Values in Times of Change" (1996) 45 UNB LJ at 15; Antonio Lamer, "Social Context Education" (1997) 10 National Judicial Institute Bulletin 1; Backhouse, *supra* note 32 at 505-507; Rosemary Cairns Way & T Brettel Dawson, "Taking a Stand on Equality" in Kim Brooks ed, *Judging Bertha Wilson: One Woman's Difference* (Toronto: UBC Press, 2009) at 278-289.

Effective social context judicial education might have gone some distance toward lessening the "white bubble" perspectives of Lamer CJ and the court over which he presided.

IV. *The dilemma of deference*

The judicial environment exacerbated the problems. The challenging task of assessing evidence and applying legal rules requires that judges develop a strong sense of independent self-confidence. Failure to do so can foster uncertainty, anxiety, and incapacitation. Yet the confidence essential for judging can also reduce recognition of personal limitations and inculcate a sense of superiority that results in rudeness, suspicion of outsiders, narcissism, and what some have termed "judge-itis."

When the nine black-robed, white-tabbed *RDS* justices filed in from their separate entrance to take their seats on high-backed red-leather chairs, the court clerk shouted "All rise!" Traditional protocols hammered home the hierarchical structures from the moment of entry. Everyone in the room remained standing until the judges were seated on a platform high above the rest. Lawyers bow to judges upon entering and exiting the courtroom; they never turn their backs because doing so is deemed disrespectful. Lawyers laugh at all the judges' jokes, even ones that might receive blank stares in other venues. That day Chief Justice Lamer offered bland comments, then stopped to grin, and the audience responded with laughter.[75]

Lawyers speak of "this Honourable Court." The traditional forms of judicial address that were in use in 1994—"My Lords and My Ladies" —are reminiscent of peasant-serfs addressing nobility.[76] When lawyers speak, they begin with "I submit" or "We submit," to reflect the superior status of the judge. Observers in the courtroom suffer other restrictions. Certain hats, clothes, and gum-chewing present expellable offences. In a race-based case involving the prosecution of Black activist Dudley Laws in Toronto in 1994, with a courtroom filled with Black observers, an African-Canadian was ordered out for refusing to remove his Muslim prayer cap.[77]

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75. Laughter ensued even after Rocky Jones merely requested that the court "grant" the articling clerks an opportunity to sit at the counsel table. Chief Justice Lamer said "Yes, granted," and smirked. Laughter then broke out. Video recording, *supra* note 31; Appeal Transcript, *supra* note 2 at 1.

76. When the court was established, Lord Dufferin recommended the title of "Lord Justice" to reinforce the status of the new tribunal; James C Snell & Frederick Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: Osgoode Society, 1985) at 23. The court website currently recommends the title of "Justice." online: SCC <https://www.scc-csc.ca/contact/faq/qa-qr-eng.aspx#f10> [https://perma.cc/7QLX-4A6F]. The *RDS* lawyers chose to use "My Lords and My Ladies."

77. Asserting his "duty to oversee the solemnity and dignity that must prevail," the trial judge ordered Michael Taylor, a spectator and supporter of Dudley Laws, to remove his prayer cap or

When the overflow Black crowd in the *RDS* courtroom spontaneously exclaimed "amen" when they agreed with statements made by counsel, they were met with brusque threats of ejection.[78]

The obsequiousness showered on judges in court is on a different plane from other office-holders. Rocky Jones replied to a comment by Justice Gérard La Forest, by saying "Thank you very much, you're so much better than I am." [79] Crown counsel Robert Lutes retorted "Why?" to a question from the Chief Justice, and then jumped to add, "I don't mean to be flip—you know, I'm sorry. It was the heat of the moment."[80] When the lawyers responded to the judges' queries, they did so gently. It was apparently unthinkable, a strategic error, to tell a judge outright that she or he was wrong. It could risk angering the judge and damaging a client's case. Delicate disagreement, politely phrased, was the only recourse. [81]

None of the lawyers affronted by Chief Justice Lamer's interjections felt they could call out the racial biases. No one pointed out that hypotheses about gambling Chinese were part of a dreadful Canadian history of racism —a "prevalent attitude of the day" to use Judge Sparks' words.[82] No one suggested that hateful ideas about the Roma had long kept them from employment, housing, and social mobility in Canada and other countries.[83] As lawyer April Burey told the court, her team had been unable to find any previous case where a judge's decision had been appealed for racial bias.

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leave the courtroom. The judge drew a distinction between Mr. Taylor's head covering and those of "adherents of a well established and recognizable race, culture, national or religious community." The Ontario Court of Appeal later ruled that the judge had erred "in suggesting that only certain communities are clearly within the purview of the Charter." A subsequent complaint to the Canadian Judicial Council resulted in an expression of disapproval over the trial judge's comments, but no further disciplinary action. *R v Laws* (*1998*), 41 OR (3d) 499, 165 DLR (4th) 301 (CA) [*Laws*]. See also Rosalind Raymond, "Anti-Cop Brutality Activist Dudley Laws Wins Victory Over Police Frame-Up," *The Militant* (16 November 1998), online: <www.themilitant.com/1998/6241/6241_18.html> [perma.cc/93FJ-TYUK]; Letter to the Editor, "Quebec Judge's Hijab Ruling Inflammatory," *Toronto Star* (7 March 2015), online: Toronto Star <https://www.thestar.com/opinion/letters_to_the_editors/2015/03/07/quebec-judges-hijab-ruling-inflammatory.html> [https://perma.cc/7UGM-NSJD].

78. Interview with Lynn Jones, *supra* note 29; Jones & Walker, *supra* note 26 at 203.

79. Appeal Transcript, *supra* note 2 at 16.

80. *Ibid* at 67.

81. Backhouse, *supra* note 32 at chapter 35, documents a race-based case, *Baker v Canada*, 1999 SCC 699, [*Baker*], where the only Black lawyer in the Supreme Court hearing chose not to raise relevant racism issues because he feared it would be harmful to his client.

82. Backhouse, *supra* note 11 at chapter 5.

83. Maureen Brosnahan, "Roma Refugees Victims of Systemic Discrimination in Canada, Report Finds," *CBC News* (2 April 2015), online: CBC News <www.cbc.ca/news/canada/roma-refugees-victims-of-systemic-discrimination-in-canada-new-report-finds-1.3018837> [perma.cc/J3MT-2RQK]; Sean Rehaag et al, "No Refuge: Hungarian Romani Refugee Claimants in Canada" (2015) 52:3 Osgoode Hall LJ; Cynthia Levine Rasky, "'They Didn't Treat Me as a Gypsy': Romani Refugees in Toronto" (2016) 32:3 Refuge: Canada's Journal on Refugees at 54 citing rampant discrimination and violence against the Roma.

"Perhaps," she speculated, "our difficulty arose because of the assumption or recognition that judges make difficult decisions in good faith." Then she added, more directly, "Also, lawyers are schooled in deference to judges and thus do not appeal on reasonable apprehension of bias."[84] The complaint to the Canadian Judicial Council came from social justice organizations. As hard-hitting as it was, even the complaint never used the word "racist."

Hierarchical practices of deference serve as an important recognition of the stature of judicial office and the courts, of respect for the law and the legal system. Yet for those who experience Canadian legal institutions as systematically unfair, these elaborate mannerisms must seem not only quaint, but also downright problematic. Moreover, the customary deference is not always extended to outsider members of the judiciary. Early white female judges faced insubordination from lawyers and court staff. [85] And prosecutor Miller interrupted Judge Sparks five times during Rodney Small's trial; the last intervention came in the middle of her decision, to remind her of an earlier statement he had made.[86]

The legal culture of deference on full display in the Supreme Court hearing meant that none of the lawyers confronted Chief Justice Lamer over his racist expressions. Nor is this case anomalous. The probability is that white Supreme Court judges have never been confronted with open accusations of racial bias from counsel inside their courtroom. It makes inquiries such as this one urgent, written after the fact by scholars who do not represent clients, freer to engage in direct critique.

V. *Facing the racial firing line*

The final portion of this paper will examine the additional interjections of the three judges who wrote the dissenting opinion most critical of Judge Sparks. Unlike the majority, which upheld Judge Sparks' acquittal (although not without words of critique), the dissenting judges would have sent the case back for a new trial. Justice Major wrote the dissent. Chief Justice Lamer and Justice Sopinka co-signed it. Collectively they found

84. Appeal Transcript, *supra* note 2 at 48.

85. Emily Murphy, Canada's first female police magistrate, appointed in Edmonton in 1916, was challenged by counsel who claimed she had no jurisdiction because women were not "persons" under the law: Byrne Hope Sanders, *Emily Murphy: Crusader* (Toronto: Macmillan, 1945) at 142-143. Justice Mabel Van Camp, the second woman appointed to the Supreme Court of Ontario in 1971, was refused parking in the judges' lot by the security guard: Obituary, William Illsey Atkinson "I Am The Damn Judge," *Globe & Mail* (9 August 2012) at R5.

86. Trial Transcript, *supra* note 13, interruptions twice at 30, and once at 31, 50, and 80. During her oral delivery of the decision, Judge Sparks had noted that the ride-along witness was not in court to corroborate Stienburg's evidence. Miller interrupted: "Your Honour, that's the person who I advised earlier was in the hospital and was in a coma." "I see, okay, thank you Mr. Miller," she replied.

that Judge Sparks' words raised a reasonable apprehension of racial bias sufficient to invalidate her decision.[87]

Justice John (Jack) Major was the first to interrupt Rocky Jones's submission. Jones had stated that the allegation of bias arose because "Judge Sparks, a Black woman, was adjudicating the trial of a Black accused and she explicitly recognized that the case had racial overtones." Justice Major interjected, "*Isn't that stereotyping that seems so out of favour these days?"*[88] His query exemplified a pattern that often occurs when white racism has been identified—a condemnation of *all* racial assumptions. In this case, it was a condemnation of the stereotype that a white officer had overreacted to a Black teenager. This common response claims that all racial stereotypes deserve condemnation as evil—that here, if it was wrong to assume that Black teenagers were dangerous then it would also be wrong to assume that white police overreact. DiAngelo has observed that whites often meet a challenge of racism by insisting that assumptions should never be drawn. "Now you are the transgressor" appears to be a reflexive reaction.[89] This constitutes an inversion that serves to destabilize the initial claim of racism. Ijeoma Oluo describes it as a defensive attempt "either to move the conversation to a place where the [white person] is more comfortable, or to end the conversation completely."[90]

For example, those who respond to slogans such as "Black Lives Matter" with banners reading "All Lives Matter," "White Lives Matter," and "Blue Lives Matter," offer an instructive parallel. There are dramatic imbalances in the number of Blacks injured and killed by police. The catch-phrase is simply a way to say Black Lives Matter too; it never inserts the word "Only" at the front. Of course, white lives matter, police lives matter, all lives matter. But the retort sideswipes the conversation, disrupting the focus on the immediate problem of anti-Black racism. It is also, asserts Ibram Kendi, an illustration of an insidious pattern where claims of racism against minority groups are met with claims of anti-white racism.[91]

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87. While Major J, Lamer CJ, and Sopinka J's decision did not carry the day, Justices Peter Cory and Frank Iacobucci wrote a separate opinion holding that Judge Sparks' remarks had been "worrisome and came very close to the line," but did not meet the high standard of reasonable apprehension of bias. Because four other Justices, Beverley McLachlin, Claire L'Heureux-Dubé, Gérard La Forest, and Charles Gonthier found that there was no reasonable apprehension of bias, Rodney Small's acquittal was restored. *RDS, supra* note 1.

88. Appeal Transcript, *supra* note 2 at 5.

89. DiAngelo, *supra* note 8 at 119-120, 128. Emphasis in the original.

90. Oluo, *supra* note 7 at 33.

91. Kendi, *supra* note 9 at 130-131: "In 2015, former New York City mayor Rudy Giuliani called the [Black Lives Matter] movement 'inherently racist.' …Ideas not centering white lives are [defined as] racist. …Embattled police officers who can't imagine losing their rights to racially profile and brutalize respond with 'Blue Lives Matter.'"

Chief Justice Lamer objected that stereotypes might cause the following:

> Say, well, all young Blacks are suspect of stealing cars, and why they steal cars is because they don't have money, why they don't have money is because they don't have jobs, and why they don't have jobs is because they're Black and they're being discriminated against. And then you conclude, well, it's more likely that a young non-white or Black person or Afro-Canadian or Afro-American is going to steal a car. If a police officer says he caught him stealing a car—I'm afraid it's going to start working both ways…[92]

There was no apparent recognition that this was exactly the situation that many Blacks experience within the criminal justice system—with policing, charging, prosecuting, and judging, as documented by a plethora of studies and commissions of inquiry.[93] To suggest that taking cognizance of anti-Black racism was harmful because it might lead to white judges exhibiting bias against Blacks was to erase the lived reality of Blacks.

Lamer CJ had set up the hypothetical under the assumption that white judges were operating free of racial bias. As DiAngelo writes, white defensiveness supports the "delusion that we are objective individuals," and protects our "deep investment in a system that benefits us and that we have been conditioned to see as fair."[94] The erasure of white privilege also ensures that we continue to perceive white judges as neutral and Black judges as less so. It was no accident that the first case of judicial racial bias to reach the Supreme Court was directed at a Black judge.

Anti-racist educators have documented patterns that distract and deflect discussions about racism.[95] Reni Eddo-Lodge notes that "the ubiquitous politics of race…operates on its inherent invisibility."[96] The choice of words is one signal. Ijeoma Oluo explains that we live in a society where talking about race is "not something you 'do' in polite society,"

92. Appeal Transcript, *supra* note 2 at 21-22.
93. AK Warner & KE Renner, "Research on the Halifax Criminal Courts: A Technical and Conceptual Report" (1978), cited in Philip Girard, Jim Phillips & Barry Cahill, eds, *The Supreme Court of Nova Scotia, 1754–2004* (Toronto: University of Toronto Press, 2004) at 187-188; *Royal Commission on the Donald Marshall, Jr. Prosecution* (Halifax: Province of Nova Scotia, 1989), vol 7, Consultative Conference Transcript of Proceedings (1989), vol 4: Discrimination against Blacks in Nova Scotia: The Criminal Justice System: A Research Study 1989; *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queens' Printer, 1995); *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: The Inquiry, 1991); *Report of the Task Force on the Criminal Justice System and Its Impact on Indian and Métis People of Alberta* (Edmonton: Government of Alberta, 1991).
94. DiAngelo, *supra* note 8 at 100.
95. Oluo, *supra* note 7 at 209.
96. Eddo-Lodge, *supra* note 10 at xiv.

and so we lack "practice in putting words to racial issues."[97] Most of us prefer phrases such as "race relations," "racial issues" "racial diversity," and "racial insensitivity" rather than the clearer term "racism." In some of his interjections, Chief Justice Lamer took the choice of evasive words to extremes, referring to "*an ethnic group who is disadvantaged*," and the peculiar "*racially inclined.*"[98] After his hypothetical about an ethnic group without respect for the oath, the Chief Justice then redirected the discussion away from racism entirely. With smiles and quiet chuckles—again to general laughter—he went into a long list of the groups known to mislead trial judges: witnesses, police officers, accused. He added jocularly "*I like to think that lawyers would mislead the court less often*," and further, "*it has been known that some judges have misled the courts, unfortunately*."[99] It was a side-tracking of the crucial debate about racism.

White fragility is marked by defensiveness over any attempt to talk openly about race.[100] The deleterious reprimand that the majority of the *RDS* judges delivered to Judge Sparks and any other Black judges who might follow her encompassed a warning that explicit reference to racist actions would lead to censure. This is in direct opposition to the advice of Ibram X Kendi, who insists that racism is not the worst word in the English language. Instead he states that racism "is descriptive, and the only way to undo racism is to consistently identify and describe it."[101]

Lamer CJ's further statement, "*I don't usually refer to people's colour, unless I intend to make something of it"* reflects the view held by many whites, that because racism is bad, we should insist that we do not notice race.[102] Such statements come in a variety of forms: "Race has no meaning to me. I don't care if you are green, purple, or polka-dot. I don't see colour." Or even, as DiAngelo mentions in her American book *White Fragility,* "I'm not racist, I'm from Canada." Yet, as she notes, because historical and current realities have placed us inside societies riven by racism, it is "impossible to completely escape problematic racial assumptions," and people who claim they are not prejudiced demonstrate a "profound lack of self-awareness." [103] Eduardo Bonilla-Silva explains that the myth

97. Oluo, *supra* note 7 at 14.
98. Appeal Transcript, *supra* note 2 at 11, 24.
99. *Ibid* at 6; Video Recording, *supra* note 31.
100. DiAngelo, *supra* note 8 at 42.
101. Kendi, *supra* note 9 at 9, adding at 46-47, "Only Racists Shy Away From the R-word—Racism is Steeped in Denial."
102. Appeal Transcript, *supra* note 2 at 11. Lamer did not explain what he meant by the phrase "unless I intend to make something of it," leaving it unclear when he thought it was correct to "make something of it."
103. DiAngelo, *supra* note 8 at 4, 19, 77.

of "colour-blindness" leads many of us to deny the unavoidable reality of racism, and underscores our lack of understanding about what racism is. As the first lesson of anti-racism education emphasizes, everyone has prejudice and everyone discriminates. A racism-free perspective is an illusion.[104] Eddo-Lodge notes that "insisting that we just don't *see* race… silence[s] people of colour attempting to articulate the racism we face."[105] Kendi adds that it is ridiculous to suggest that racism will miraculously go away if we stop identifying race. If we stop using racial categories, he adds, "then we will not be able to identify racist policies" and the result will be "a world of inequity none of us can see."[106]

Chief Justice Lamer conceded that, while he might not be personally implicated, it was "*an obvious proposition that there is racism.*" [107] Later, he would try to reassure Rodney Small's lawyers. "*We are talking about racism and I am very sympathetic to your argument. We are in a different world and we are becoming a very diverse society,*" he said with a smile.[108] There was no explicit recognition of the devastating legacy from the long history of Canadian racism, just a comment that late twentieth-century immigration had ushered in a new "diversity." In response to the Crown's admission that racism existed in Canada, Justice Major was less accommodating. "*Well,*" he answered, "*let's assume that it does—for the purpose of this discussion.*"[109]

Even supposing it did, Justice Major was not prepared to jump from racism in Canada to Judge Sparks' comments. He insisted that there was "*no evidence on which she could rely" that "race played a part," other than her own conclusions that "police officers overreact when dealing with non-white groups."*[110] Justice John Sopinka, considered Canada's greatest expert on the law of evidence, echoed his colleague's insistence that there was "*no evidence."*[111] Posing a slippery slope analysis, he queried whether other judges would have to adopt Sparks' approach: "*So that in every case a police officer, in similar circumstances, would*

104. Eduardo Bonilla-Silva, *Racism Without Racists: Color-Blind Racism and the Persistence of Racial Inequality in America* (Lanham, MD: Rowman & Littlefield, 2017) at 66; DiAngelo, *supra* note 8 at 19-20, 68.
105. Eddo-Lodge, *supra* note 10 at 81, 83. Emphasis in original.
106. Kendi, *supra* note 9 at 54.
107. Appeal Transcript, *supra* note 2 at 10-12.
108. *Ibid* at 23, Video Recording, *supra* note 31.
109. Appeal Transcript, *supra* note 2 at 60-61.
110. *Ibid* at 5.
111. *Ibid* at 8. He had co-authored Sidney N Lederman & John Sopinka, *The Law of Evidence in Civil Cases* (Toronto: Butterworths, 1974) and John Sopinka, Sidney N Lederman & Alan W Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992). The latter was described as "the leading text on the law of evidence": McLachlin*, supra* note 68 at 259.

start off with a presumption that he either overreacted or didn't behave properly?[112] Sopinka J was hypothesizing a new reality where trial judges would routinely frame their scrutiny of police testimony against a general recognition about the patterns of racism in police-Black interactions. It seems to have struck him as absurd. Yet Blacks might have retorted that for centuries white judges had started with an implicit assumption that police officers had no reason to lie on the stand, particularly when faced with conflicting evidence from Black witnesses. In fact, the white Crown prosecutor had made a similar submission at trial. Rick Miller had argued, "[T]here's absolutely no reason to attack the credibility of the officer. His explanation was straight forward. He was simply doing his lawful duty and carrying out the arrest." [113] It may have been one of the things that prompted Judge Sparks to issue the decision she did.[114]

After dismissing the wider vistas of systemic racism, Sopinka J, Lamer CJ, and Major J shifted downward to the realm of the individual officer. The discussion switched from whether anti-Black racism had played a role in Rodney Small's chokehold and arrest to questions about Officer Stienburg: a pattern that has been described as "white-centering."[115] It was also a cue that the three judges understood racism as discrete, isolated acts of prejudice committed by individuals, rather than as complex, interconnected patterns. "*The question here*," Justice Sopinka emphasized, *"is whether or not [the presumption] can be applied to the particular facts of the case?"*[116] Lamer CJ homed in on Officer Stienburg: *"We have to decide whether* ***this one*** *was racist. …But we don't know which ones are unless they do things to reveal it, and the smarter ones don't."*[117] Major J asked for evidence to "*show racism on the part of the police officer. Were there events where he acted in a racist way? What is there available by way of evidence other than things like studies which are general? What is the value of the studies of the population in general, looking at the conduct of a specific individual? How do you bring the results of [a] study down to a single individual policeman? You have to show evidence that something in his past, or somebody at the incident told it."*[118]

The dismissal of the value of studies into racism was particularly surprising. The *Marshall Report* on the wrongful conviction of Donald

112. Appeal Transcript, *supra* note 2 at 41.
113. Trial Transcript, *supra* note 13 at 76-78.
114. Justice Cory suggested this; *RDS, supra* note 1 at 547.
115. Thomas, *supra* note 46.
116. Appeal Transcript, *supra* note 2 at 62.
117. *Ibid* at 10. Emphasis from the video.
118. *Ibid* at 59-61.

Marshall, Jr. had been released only a few years earlier. In 1989, the Royal Commission headed by three chief justices had uncovered appalling racist treatment of an Indigenous man by the police, the lawyers, and the judges of Nova Scotia, and also found what Nova Scotia criminologist Donald Clairmont later described as "a long legacy of negative Police-Black relationships in Nova Scotia."[119] The surveys the Royal Commission conducted found Nova Scotian respondents overwhelmingly agreed that "discrimination against blacks was an observable fact." Both legally- and non-legally trained respondents "expressed concern with alleged police harassment" and reported that the police were "not very tolerant" when dealing with young Blacks. The *Report* concluded that "the hostility of many Blacks to the police, and apparently of many police toward Blacks" was "well documented."[120]

Chief Justice Lamer had even referred to the Marshall Inquiry in his hypothetical interjections. If shocking studies like this were irrelevant in assessing a Halifax police officer's apparent overreaction, the requisite standard of proof had been set impossibly high. The discussion had slipped a long way from assessing evidence of wrongful arrest. It was as though the police officer himself was under criminal charges for intentional racism.

Indeed, the focus had shifted far from whether the chokehold and handcuffs on a Black teenager was an overreaction to nosey-ness, and whether the discretionary obstruction charges were retaliation for talking back. Instead, the judges inquired whether the officer's intent and

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119. *Royal Commission on the Donald Marshall, Jr. Prosecution*, vol 1, Findings and Recommendations (December 1989) and vol 4, Discrimination against Blacks in Nova Scotia: The Criminal Justice System, A Research Study; Don Clairmont & Ethan Kim, "Getting Past the Gatekeepers: The Reception of Restorative Justice in the Nova Scotian Criminal Justice System" (2013) 36:2 Dal LJ at 370. An earlier 1978 study on summary conviction first-time offenders showed 23 per cent of whites discharged and 77 per cent sentenced; none of the Blacks was discharged and all were sentenced. Warner and Renner, *supra* note 93 at 187-188. Several decades later, University of Toronto criminologist Scot Wortley's research would document a startling over-representation of Blacks in Halifax police street checks. Dr Scot Wortley, *Halifax, Nova Scotia: Street Checks Report* (Halifax: Nova Scotia Human Rights Commission, 2019). Wortley concluded: "The police are much more likely to level criminal charges against Blacks for lower-level criminal events. Young people will defy or question an officer, and the officer will use force and say they were threatened. We call it 'contempt of cop' situations. Then [the young Blacks] face discretionary charges such as obstruct justice, assault police." Interview with Scot Wortley (28 November 2019) in Toronto. See also *Report on Systemic Racism in the Ontario Criminal Justice System* (Toronto: December 1995); *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: The Inquiry, 1991); *Report of the Task Force on the Criminal Justice System and Its Impact on Indian and Métis People of Alberta* (Edmonton: Government of Alberta, 1991); Clayton James Mosher, *Discrimination and Denial: Systemic Racism in Ontario's Legal and Criminal Justice Systems, 1892-1961* (Toronto: University of Toronto Press, 1998); David M Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin, 2006); Robyn Maynard, *Policing Black Lives* (Blackpoint, Nova Scotia: Fernwood, 2017).

120. *Royal Commission on the Donald Marshall, Jr. Prosecution*, *supra* note 119 at 17, 26, 49-50.

motivation were based on race.[121] They had failed to grasp that the issue was not whether the individual officer had racist motivations but whether he misperceived the dangers and risks connected with Rodney Small. Research has demonstrated that whites perceive danger simply because of the presence of Black people, and that "we cannot trust our perceptions when it comes to race and crime."[122] Had the cultural and social perceptions of the police magnified the threat of an unarmed fifteen-year-old on a bike into a potentially injurious assault on a SWAT team officer? Had the cultural and social perceptions of white judges done the same?

Justice Sopinka even suggested that Judge Sparks had a responsibility to canvas other valid reasons for police overreaction: "*[S]he doesn't try to find some legitimate explanation. ...[W]hy would this person [Officer Stienburg]—what would this person's motive be* ***to lie****?"*[123] The word "lie" had never appeared in Judge Sparks' decision. She said: "I'm not saying that the Constable has misled the Court," and "I believe that probably the situation in this particular case is the case of a young police officer who overreacted."[124] The job of a trial judge is to determine whether the Crown has proven the case beyond a reasonable doubt. Judge Sparks did not need to find the officer had lied, and she did not. Sopinka's jump to questioning the officer's motive to "lie" was an over-attribution, another reflection of white defensiveness.

Ultimately, Chief Justice Lamer's comment that "*bias is never fair"* may be a comforting thought, but it is premised upon the invisibility of pernicious biases that we all labour under, most of them tied to prevailing realities that position the races on unequal planes. [125] The lessons that can be drawn from scrutinizing the appellate judges' ideas here are ones that all of us need to incorporate if we aspire to disabuse ourselves of racist notions. The judges' interjections and questions in the *RDS* case reveal much about white judicial thinking. Their informal conversation offers an instructive comparison with Judge Sparks' carefully worded comments

121. Oluo, *supra* note 7 at 89: The focus on individual officers denies the existence of systemic racism. "[I]nstead of a system plagued by unchecked implicit bias, inadequate training, lack of accountability, racist quotas, cultural insensitivity, lack of diversity, and lack of transparency, we are told we have a collection of individuals doing their best to serve and protect outside of a few bad applies acting completely on their own, and there's nothing we can do about it other than address those bad apples once it's been thoroughly proven that the officer in question is indeed a bad apple." Chris Rock added that law enforcement was among the professions that "simply could not allow" bad apples: "American Airlines can't be like, 'You know, most of our pilots like to land; we just got a few bad apples that like to crash in the mountains.'" Itzkoff, supra note 49.

122. DiAngelo, *supra* note 8 at 45.

123. Appeal Transcript, *supra* note 2 at 8. Emphasis added.

124. Trial Transcript, *supra* note 13 at 92-93.

125. Appeal Transcript, *supra* note 2 at 70.

in her oral decision. Canada's first Black female judge found her words under harsh dissection and reprimand from a majority of Supreme Court judges whose own words received significantly different treatment.