PLAYING THE RACE CARD: RACIAL BIAS IN JUDICIAL DECISION-MAKING

by

Andrew John Arthur Luesley

JD, The University of British Columbia, 2015

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF LAWS

in

The Faculty of Graduate and Postdoctoral Studies

(Law)

THE UNIVERSITY OF BRITISH COLUMBIA

Vancouver

October 2017

© Andrew John Arthur Luesley, 2017
Abstract

Racial bias does not have to be explicit to be felt. In the context of the criminal justice system, even implicit bias can have huge impacts on complainants and accused. While judicial impartiality and neutrality are hallowed principles in our judicial system, there is clear evidence of racial bias in judicial decision-making. The prevalence of racial bias throughout the criminal justice system creates the need for explicit considerations of race for the system to produce substantive equality, and for the legal system to apply to and protect all people equally.

Sexual assault is an area of law where complainants likely face implicit racial bias. Further, it is possible that there is less perceived societal harm to the sexual assault of minorities. If racial complainants are less likely to be believed, or are less sympathetic complainants, then the criminal justice system will fail to adequately deter crimes against minorities.

This thesis asserts that counsel should be advancing the topic of race in the context of sexual assault due to its racialized nature and the pressing need to find a way to reduce its prevalence as the current approach has failed to do over the last ten years or more. If the topic of race is raised, it allows the judge to attempt to counteract any of his potential implicit biases, as well as factor race into his considerations regarding deterrence.

The current erasure of race in sentencing impacts both complainants and accused, and may limit the criminal justice systems ability to effectively deter crime. Ultimately, the thesis suggests judges record the race of the accused and complainant in their sentencing decisions for sexual assault. This data on the racial demographics of sexual assault convictions will allow researchers to measure judicial racial bias in sentencing, as to identify whether there is explicit, implicit and/or structure inequality in the criminal justice system such that sexual assaults involving minority complainants are less likely to result in convictions.
Lay Summary

Terms like “rape myths” and “justice gap” have been used to discuss the phenomenon of the under reporting of sexual assault, as well as the inability of the criminal justice system to effectively deal with the sexual assault epidemic in our society. In the context of judicial decision-making, the use of “rape myths” and the resulting “the justice gap” are seen as bias against sexual assault complainants. Rarely discussed, however, is the impact of racial bias, and how this may relate to “rape myths” and “the justice gap”. This thesis demonstrates why racial considerations are particularly important in the context of sexual assault, focusing on the impacts of racial bias on complainants. Acknowledging race in judicial decisions would reduce the justice gap for sexual assault by improving the deterrent effect of criminal sentencing and would ultimately improve public confidence in the judiciary’s ability to protect all women.
Preface

This dissertation is original, unpublished, independent work by the author, Andrew Luesley.
# Table of Contents

Abstract .......................................................................................................................... ii  
Lay Summary .................................................................................................................. iii  
Preface ............................................................................................................................. iv  
Table of Contents ........................................................................................................... v  
Acknowledgements ....................................................................................................... vii  
Dedication ....................................................................................................................... viii  

1. Introduction .................................................................................................................. 1  
   1.1.1. “Convicted York U Rapist Gets the Max” ......................................................... 3  
   1.1.2. Overturned: the ‘Incomprehensible’ Conviction of Mustafa Ururyar” ............. 4  
       1.1.2.1. Facts ........................................................................................................ 4  
       1.1.2.2. Zucker Decision, Appeal: ................................................................. 7  
       1.1.2.3. Implications, results ............................................................................. 8  
   1.1.3. Approach of the Thesis ............................................................................... 9  
       1.1.3.1. Thesis Statement ............................................................................... 9  
       1.1.3.2. Theoretical Approach ................................................................... 10  
       1.1.3.3. Methodologies: ............................................................................... 14  
       1.1.3.4. Chapter Summaries: ...................................................................... 15  
       1.1.3.4.1. Chapter 2: Racial Bias in the Criminal Justice System .................. 15  
       1.1.3.4.2. Chapter 3: Judicial Impartiality ...................................................... 15  
       1.1.3.4.3. Chapter 4 The Importance of Acknowledging Race: Sexual Assault .. 16  
       1.1.3.4.4. Chapter 5: Tackling Racial Bias ...................................................... 16  

2. Racial Bias in the Criminal Justice System ............................................................... 18  
   2.1. Race ................................................................................................................... 18  
       2.1.1.1. Defining Race .................................................................................. 19  
       2.1.1.2. Ascertainning Race ....................................................................... 22  
       2.1.1.3. Race and the Law ......................................................................... 25  
   2.1.2. Racial Bias in the Criminal Justice System ................................................. 26  
       2.1.2.1. Racial Bias and Racism ................................................................ 27  
       2.1.2.2. Discretion ....................................................................................... 29  
       2.1.2.3. Specific Instances ....................................................................... 31  
   2.1.3. Racial Bias in Judicial Decision-Making ................................................... 34  
       2.1.3.1. The Inferred Impact of Race ............................................................. 34  
       2.1.3.2. Specific Instances of Bias ............................................................... 36  
   2.1.4. Chapter Summary ...................................................................................... 38  

3. Judicial Impartiality .................................................................................................... 40  
   3.1. R.D.S. and The Reasonable Apprehension of Bias ......................................... 40  
       3.1.1.1. Nova Scotia Supreme Court ................................................................. 41  
       3.1.1.2. Nova Scotia Court of Appeal ............................................................. 42  
       3.1.1.3. Supreme Court of Canada Decision ................................................. 44  
   3.1.2. Judicial Impartiality and Neutrality .............................................................. 46  
       3.1.2.1. Two Approaches to the Reasonable Apprehension of Bias ............. 47  
       3.1.2.2. Law as Indeterminate .................................................................. 50  
       3.1.2.3. Formal versus Substantive Equality ............................................... 51  
   3.1.3. Censorship and Censoriousness: Erasure .................................................... 55
3.1.3.1. Censorship and Censoriousness .......................................................... 55
3.1.3.2. Erasure ............................................................................................... 58
3.1.3.3. Ururyar: Erasure and the Reasonable Apprehension of Bias ............... 61
3.1.4.  Chapter Summary .................................................................................. 65
4.  The Importance of Acknowledging Race: Sexual Assault .............................. 66
  4.1.1. The Special Nature of Sexual Assault .................................................... 66
    4.1.1.1. Unacknowledged Impact of Race ...................................................... 66
    4.1.1.1.1. Complainant’s Race .................................................................. 68
    4.1.1.1.2. Accused Race ......................................................................... 72
    4.1.1.2. Rape Myths ................................................................................ 74
    4.1.1.2.1. “Why Couldn’t You Just Keep Your Knees Together?” .............. 74
    4.1.1.3. Elements and Special Rules .......................................................... 78
    4.1.1.3.1. The Elements of Sexual Assault ................................................. 79
    4.1.1.3.2. Special Rules ........................................................................... 82
  4.1.2. Criminal Sentencing and Deterrence .................................................... 83
    4.1.2.1. Principles of Sentencing ............................................................... 83
    4.1.2.2. Sexual Assault Sentencing ............................................................ 87
    4.1.2.3. Race and Deterrence ................................................................... 90
  4.1.3. Public Confidence in the Criminal Justice System .................................. 91
    4.1.3.1. Justice Gap ................................................................................ 92
    4.1.3.2. Charter of Rights and Freedoms .................................................... 94
      4.1.3.2.1. Discretion and the Rule of Law ............................................... 95
      4.1.3.3. Promulgation of Law ................................................................. 97
  4.1.4.  Chapter Summary .................................................................................. 99
5.  Tackling Racial Bias ...................................................................................... 101
  5.1.1. Duty of Counsel .................................................................................. 103
    5.1.1.1. Defense Counsel ........................................................................... 104
    5.1.1.2. Crown Prosecutors ..................................................................... 108
      5.1.1.2.1. Laying Charges ..................................................................... 109
      5.1.1.2.2. Recommended Sentence ..................................................... 110
    5.1.2. Judicial Role .................................................................................. 111
      5.1.2.1. Identifying Race for the Record ............................................... 113
      5.1.2.2. Factoring Race in Sentencing .................................................... 114
      5.1.2.3. Impartiality and Implicit Bias ..................................................... 116
  5.1.3. Implications and Limitations .............................................................. 117
    5.1.3.1. The Need for Empirical Study ....................................................... 118
    5.1.3.2. Defining Race and Reverse Racism .............................................. 120
    5.1.3.3. Reverse Racism ......................................................................... 121
  5.1.4.  Chapter Summary ................................................................................ 122
6.  Conclusion .................................................................................................. 125
Bibliography .................................................................................................... 130
Acknowledgements

Thanks to Professor Bruce MacDougall, for your support, encouragement, wisdom and mentorship over the years. Your unceasing optimism inspires hope on even the darkest days. Words cannot express how instrumental you have been in helping me get to where I am, whether it be your valuable reflections and discussions, or your believing in me even when I did not.

My gratitude to the Peter A. Allard School of Law faculty and staff, as well as the University of British Columbia. This year of exciting growth and opportunity was not possible without your generous financial support. Studying here has truly been a dream come true.

I would also like to thank Professor Robert Paterson, whose timely assistance will always be appreciated.

Most of all thank you to my loving parents Ruth and Bruce Luesley, the two kindest people I know. To them I owe a debt I could never repay.
To those who believe in me,
inspiring me to dream,
and to each day be a better person.
我爱你.
1. Introduction

Removing the impact of racial bias in the criminal justice system is an important goal. Freedom from discrimination on the basis of race, sex, and gender by the judicial system is a Canadian Constitutional right. Judicial impartiality is a core tenet of Canadian law. “Equality before the law,” or that the law applies to and protects every individual, is at the essence of the Rule of Law. Due to the covert nature of implicit biases however, this is a difficult task. Starting a discussion about racial bias in the criminal justice system is the first step. The Canadian government and judiciary have come a long way in acknowledging their racial prejudices.

Unfortunately, our justice system still has room to improve on this, as judicial bias is apparent from time to time. The Supreme Court of Canada has laid out a test to determine whether a judge was sufficiently fair and impartial, or satisfies a threshold level of impartiality, and that is the

---

1 Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 s 15 [Charter]. Section 15 reads: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”


3 Oag v. Canada, 1985 CarswellNat 64 (Federal Court) at 12 [OAG].

4 British Columbia v. Imperial Tobacco Canada Ltd., 2005 SCC 49 at 57,58 [Imperial Tobacco].


6 See e.g. R. v. Gladue, [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688, at paras. 61, 64-65 (S.C.C.) [Gladue]. “There is widespread bias against Aboriginal people within Canada, and “[t]here is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system.” … The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. … The unbalanced ratio of imprisonment for Aboriginal offenders flows from a number of sources… [including] bias against Aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for Aboriginal offenders.” See also e.g. R. v. Parks, [1993] O.J. No. 2157, 84 C.C.C. (3d) 353, at 369 (Ont. C.A.), Doherty J.A [Parks]. “Racism, and in particular anti-Black racism, is a part of our community’s psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes. These elements combine to infect our society as a whole with the evil of racism. Blacks are among the primary victims of that evil.”
reasonable apprehension of bias as set out in the seminal case of \( R v S (R D) \), [1997] 3 SCR 484 [\( R.D.S. \)]. 7

Discussions regarding gender and racial bias often lead to disagreement and conflict. Perhaps it is because gender and racial bias are often expressed in the exercise of power or domination. Similar passion and vigour are evoked when talking about gender, sex and sexuality. I believe that in these instances, the same oppressor/oppressed dynamic permeates the discussion itself; the oppressor’s internal fight or flight signal triggered, as is that of the oppressed who has perhaps finally chosen to fight, much to the chagrin of the oppressor.

Recently the high profile sexual assault case of \( R v Ururyar, 2016 \) ONCJ 448 [\( Ururyar \)] was overturned.8 When I began writing this, the trial decision had just come down. Mustafa Ururyar, a brown-skinned Ph.D. candidate at York University, was accused of sexually assaulting the complainant Mandi Gray, a Caucasian Canadian female. The decision itself was seen by many as a win for sexual assault survivors.9 However, there was also a countervailing group, including some feminists, that felt the judge was extremely biased and heavy-handed.10 Ultimately, the conviction was quashed and a new trial ordered.11 As is to be expected, there was extremely passionate and outspoken people on either side of the topic. In some ways, the result is typical of

---

7 \( R. \ v. \ S. (R.D.) \) [1997] 3 S.C.R. 484 [\( R.D.S. \)]. In this case it was a female Black judge, discussing an alleged offence which occurred in the context of what she described as “anti-Black racism” in a Nova Scotia community.
8 Overturned by \( R. \ v. \ Ururyar, 2017 \) ONSC 4428 [\( Ururyar \) Appeal].
9 See e.g. Andrea Janus, “Judgment in Mandi Gray sexual assault case ‘glorious,’ but change to legal system will be slow: advocates” \( CBC \) News (July 23, 2016), online: <http://www.cbc.ca/news/canada/toronto/mandi-gray-verdict-impact-1.3692191>. Pamela Cross legal director of Luke’s Place a non-profit organization for women navigating the legal system: “[the decision is] moving, it’s empowering, it creates a little bit of hope in a situation where I think a lot of us had been feeling that there wasn’t any hope in terms of the criminal law being able to be helpful in a case of sexual assault.”
11 \( Ururyar \) Appeal, supra note 8.
conflicts regarding race and sex; an uneasy stalemate with both sides sticking to their guns and the matter being sent back to trial.

1.1.1. “Convicted York U Rapist Gets the Max”

On July 21, 2016, the Canadian media erupted over the 18-month sentence and $8,000 restitution order given to Mustafa Ururyar for allegedly sexually assaulting the complainant Mandi Gray. His 18-month sentence was the maximum term of imprisonment and his restitution order was unprecedented (at least in size). Justice Marvin Zucker of the Ontario Provincial Court used his written decision as a platform to launch an attack on rape myths, expose the prevalence of sexual assault in our society, and to voice his disgust for “rapists”. Many women’s rights groups exalted the decision as a ground-breaking victory against the patriarchy, rape culture, rape myths, and the justice gap for sexual assault. Others, including other women’s rights groups, lawyers’ groups and members of the media viewed the decision as outrageous and a step backward for the Canadian justice system. Upon conviction, Justice Zucker revoked Ururyar’s bail pending appeal, but this was overturned by Justice Quigley who believed Ururyar had “strong if not decisive grounds for appeal.”

This case raises questions about the inconsistency and indeterminacy in criminal sanctioning of sexual assault in Canada. In trying to correct rape myths the bias sexual assault complainants, what made Justice Zucker swing the pendulum so far in the other direction that his

---

12 Sam Pazzano, “Convicted York U Rapist Gets the Max” 24 Hours Toronto (September 14, 2016), online: <http://www.toronto24hours.ca/2016/09/14/convicted-york-u-phd-rapist-gets-the-max>.
13 There could also have been a victim surcharge, usually 50% of restitution order according to criminal code provision. See Criminal Code, RSC 1985, c C-46, s 737 [Criminal Code].
14 DiManno, supra note 10.
impartiality was questioned? While race is not discussed in the decision, Mustafa Ururyar is a Canadian born in Afghanistan and Mandi Gray is a Caucasian Canadian. While no explicit racial bias is present, is it possible implicit racial bias influenced the trial judge’s decision to throw the book at Ururyar, a racial minority, because like the complainant, he is White? Was race purposefully censored from the decision? Does the impact of race explain some of the justice gap for sexual assault, specifically are there rape myths regarding what constitutes a “real” rape victim (White, female) and rapist (coloured, male)?

1.1.2. Overturned: the ‘Incomprehensible’ Conviction of Mustafa Ururyar”

1.1.2.1. Facts

On the night of January 30-31, 2015, Mustafa Ururyar, a first year Ph.D. student at York University, was invited by Mandi Gray, also a first year York University Ph.D. student with whom at the time he had a casual sexual relationship, to come celebrate a successful CUPE strike vote at the Victory Café in Toronto. That evening she sent him the text: “[c]ome drink and then we can have hot sex.” Ururyar ultimately did attend the party at the Victory Café where Gray consumed at least 4 beers, and afterwards proceeded to a bar named Paupers with Gray and a few mutual friends. Gray testified that she was drinking quite a bit and that it was her idea to go back to Ururyar’s house: “cause I was drinking a lot, I asked Mr. Ururyar if I could spend the night over at his place.” At Paupers, Gray says she was “tipsy” and “silly drunk” but “not out of control or falling over,” and they stayed there until the lights came on around 2:00 or 2:30.

---

16 Ururyar Appeal, supra note 8 at 62 and 64.
17 Ibid at 37.
18 R. v. Ururyar, 2016 ONCJ 448 at para 7 [Ururyar decision].
19 Ibid at para 6. Facts as summarized by Trial Judge.
20 Ibid at para 7.
After leaving Paupers Ururyar, Gray and her friend Lacey were walking around thinking about getting some food. Ururyar invited Lacey over to have some drinks back at the place with him and Gray. Ururyar testifies that he had heard that Gray was interested in a threesome, and that the idea of a threesome was on his mind. Gray testifies that she was confused as to why Ururyar was adamantly inviting Lacey over for drinks, as she just wanted to go home and sleep, and because Ururyar had told her he wasn’t feeling well, to the extent that he hadn’t been drinking all night and didn’t want to have sex with her (Gray). Ultimately, Lacey decides to jump in a cab and go home leaving Gray and Ururyar alone to walk home. According to Gray, Ururyar’s tone changed once Lacey left, telling her that she “was unable to meet his sexual needs . . . was a drunk” to the effect of generally “tear[ing] away” her “self-esteem.”21 Despite Ururyar’s alleged verbal abuse, Gray nevertheless continued onwards with Ururyar towards his home where she planned to spend the night because “. . . I didn’t feel comfortable catching a cab by myself because I knew, I knew that I was vulnerable . . . I was intoxicated.”22 After arriving at the apartment, she says she sat on the edge of his bed at which point “he grabbed me by the back of the head and pushed his penis into my mouth.”23 She didn’t resist because she “stopped caring” and wanted to avoid “the risk of physical violence” and therefore decided “I’ll just comply because I don’t know what the repercussions of saying no will be.”24 Later, Ururyar pushed her onto the bed, initiated sexual intercourse, which Gray “went along with.” 25 Afterwards, she would lay in the fetal position and cry before passing out. When she awoke, she claims Ururyar was masturbating, and that upon seeing her awake, he pushed her head in an effort to initiate oral

---

21 Ibid at para 10.
22 Ibid at para 14.
23 Ibid at para 16.
24 Ibid.
25 Ibid.
sex. Here, she finally draws the line and says, “[n]o, like I’m not doing this”, got dressed, and left.26

Ururyar testified that throughout the night, Gray was being very flirtatious with him, and was rubbing his leg under the table, making him feel uncomfortable in public.27 He said this occurred on more than one occasion, continued to escalate, and that each time he told her to stop.28 He says that as they walked home they weren’t arguing, that they maintained a casual conversation, and that Gray was not intoxicated beyond control, or “beyond previous occasions” when they had been together, and that he was not intoxicated despite having a few beers that evening.29 He claims that when they got home in bed, he informed Gray that they shouldn’t continue seeing each other due to a relationship that he had with another woman, which Gray was already aware of. She took this news harshly, and as he comforted her, they eventually starting kissing, which led to oral sex, and finally intercourse. Ururyar claims that all the sexual contact was consensual, and that it never crossed his mind that there was a lack of consent and was therefore caught by surprise to learn that he was being charged with sexual assault.30

This case is a classic example of he-said-she-said, with conflicting testimony with little corroboration on the determining issue of whether their sex was consensual. Ultimately, it would be a test of credibility. It should be noted that Gray deleted the text messages inviting Ururyar over for “hot sex”, did not mention it to the police during interviews, and “initially testified that the appellant never told her that he was coming to the café, and just showed up, surprising her.”31

26 Ibid.
27 Ibid at para 26.
28 Ibid at para 27.
29 Ibid at para 31.
30 Ibid at para 36-46.
31 Ururyar Appeal, supra note 8 at 7.
1.1.2.2. Zucker Decision, Appeal:

Justice Zucker full-heartedly accepted Gray’s testimony while rejecting Ururyar’s in entirety, convicting Ururyar in a 179-page written decision. As discussed earlier, Justice Zucker sentenced Ururyar to 18-months imprisonment (the maximum for a summary sexual assault conviction), an unprecedented $8,000 restitution order to compensate Gray for her legal costs (likely invoking an additional $4,000 victim surcharge)\textsuperscript{32}, 3-years probation, and 240 hours of community service. The judge issued this sentence on September 14, 2016 “immediately” after sentencing submissions and “without reviewing the sentencing materials filed by the defence.” \textsuperscript{33} The sentence was seen as a victory to some, but the decision was seen as a miscarriage of justice by others. Ururyar appealed both the conviction and the sentence.\textsuperscript{34}

In quashing the conviction and ordering a new trial, Justice Dambrot of the Ontario Supreme Court decided that Justice Zucker’s decision was “unreasonable” and that his “reasoning process is irrational and, at times, impossible to follow”.\textsuperscript{35} Specifically, Justice Dambrot states that:

> “the reasons are in part conclusory and in part incomprehensible. . . frustrat[ing] meaningful appellate review. The trial judge failed to provide an explanation for how the conflicts in the evidence were reconciled and to sufficiently articulate how credibility concerns were resolved. I would allow the appeal on this ground alone.”\textsuperscript{36}

\textsuperscript{32} Criminal Code, supra 13 at s737.
\textsuperscript{33} Ururyar Appeal, supra note 8 at 7.
\textsuperscript{34} See Ibid at 6. There were six grounds to Ururyar's Appeal: 1. The trial judge displayed a reasonable apprehension of bias in favour of the complainant; 2. The trial judge improperly took judicial notice of and relied on untested academic commentary that was not put to the parties for submissions; 3. The trial judge applied different standards of scrutiny to the evidence; 4. The verdict is unreasonable because the trial judge’s reasoning process is irrational and, at times, impossible to follow; 5. The trial judge misapprehended the evidence related to text messages and public displays of affection; 6. The trial judge erred in his assessment of the issue of consent; and 7. The trial judge erred in imposing restitution for the complainant’s legal fees.
\textsuperscript{35} Ururyar Appeal, supra note 8 at 6 and 66.
\textsuperscript{36} Ibid at 64.
Although not necessary, Justice Dambrot goes on to say that other of Ururyar’s grounds of appeal had also been satisfied, including that: “[t]he trial judge applied different standards of scrutiny to the evidence; that the trial judge misapprehended evidence related to text messages (and public displays of affection); and that the trial judge erred in his assessment of the issue of consent.”37 Unfortunately, and most importantly for this project, Justice Dambrot chose not to address Ururyar’s first ground of appeal: “I will not address the first two grounds of appeal,” namely that “the trial just displayed a reasonable apprehension of bias in favour of the complainant.”38

1.1.2.3. Implications, results

Ultimately, it was ambiguity and incomprehensibility39 in Justice Zucker’s reasons that led to the conviction being overturned. This calls for more specificity in judicial decision-making, including dealing with questions of race. While Justice Dambrot does not point to bias on the part of Justice Zucker, he does illustrate that the since retired justice treated both parties differently, and that his reasoning was irrational. Perhaps this irrationality could be explained by an explicit but censored explicit bias, or an unconscious bias. Whether the bias was racial or not, there is a strong prima facie case that he was biased against Ururyar. This illustrates the negative impact bias can have, as it hurts the perception of fairness in our judiciary. As Justice Dambrot laments in overturning the decision: “I reach this conclusion with considerable regret. Requiring a new trial because of inadequacies and excesses in the reasons for judgment of the trial judge does no service to the complainant or the appellant.”40 If a second trial is ordered, convicting

---

37 Ibid at 66.
38 Ibid at 66 and 6.
39 See Ibid at 62. Justice Dambrot: “I conclude that his reasoning is incomprehensible.”
40 Ibid 68.
Ururyar would be impossible without the testimony of Mandi Gray who says that testifying again “i[s] not worth it.”¹ In the end, Justice Zucker may have allowed a guilty man to walk free because of his apparently biased decision.

### 1.1.3. Approach of the Thesis

These latest developments and the public reactions they garnered give rise to an analysis of the legal regime governing bias in judicial decision-making in the context of criminal trials for sexual assault. It also begs the questions of whether race plays an impact in sanctioning sexual assault and thus the so-called justice gap, what can be done to limit the impact of racial bias in judicial decision-making when racial considerations ought to be made, and what are the legal limits of racial considerations in judicial decision-making. The *Ururyar* case illustrates that the mere censoring of racial discussion does not necessarily lead to perceived racial impartiality. The topic of judicial impartiality and neutrality, and the censoring of race and discussions of racial equality will be discussed by examining the Supreme Court of Canada decision in *R.D.S.*. Later, I introduce the *R v Wagar*, 2015 ABCA 327[Wagar], which demonstrates the continued operation of rape myths and the very real justice gap in sexual assault.

#### 1.1.3.1. Thesis Statement

Race should be acknowledged in sentencing submissions by counsel and in sentencing decisions by judges in the context of sexual assault to improve the deterrent and incentive functions of the criminal justice system and thus reduce the justice gap, to prevent racial

---


9
discrimination thus strengthening judicial impartiality and the Rule of Law, and finally to provide data for future evaluation of racial discrimination in the criminal justice system.

1.1.3.2. Theoretical Approach

The study of implicit bias and how judges reach their decisions has been going on since at least the 1930s; however, experiment designs and limitations have made progress slow. Courtroom judicial decision-making cannot be accurately replicated in lab conditions. Lay people are not useful proxies for professional judges, who have legal training experience, and thus results generated from studies conducted on lay people cannot necessarily be imputed into judicial decision-making. Also, the fact that someone is participating in a study of bias will likely cause them to alter their behaviour to ensure that their biases are not apparent. A lot of recent work has been simply proving the existence of bias, improving experiment designs, and identifying shortfalls and limitations with previous experiments. As broader research into psychology discovers more about biases, we can theorize more specifically as to the possibility of judicial bias and design better experiments to test for it. One of the key insights in this field is the story model theory of fact-finding, which states that instead of weighing and assessing all pieces of evidence, judges tend to construct stories using: “the evidence presented at trial, knowledge about events similar to the one in dispute, and general notions of what constitutes a complete story.” This is line with my suspicion that the preconceived notions judges have with respect to race affect their decision-making, including witness credibility assessments and sentencing decisions, as “coherence requires that the story . . . conforms to factfinders’ beliefs

---

43 Ibid at 4.
about the physical world and people’s motivations and behavior.”44 When the judiciary is predominantly male and White, certain beliefs about people’s motivations and behaviour will be privileged over others, and is liable to be based on generalizations.

Currently, one of the major obstacles is the erasure45 of race in sentencing decisions, and therefore the ability to measure the impact of race on sentencing outcomes.46 My research will canvass some of the existing literature to help establish the presence of judicial bias and to identify steps that can be taken to evaluate implicit bias in judicial decision-making. The difficulties with finding data, as well as in replicating court room decisions, make experiments difficult; however, “behaviorally informed theories and policy recommendations, resting on imperfect experimental and empirical data, are generally preferable to theories and recommendations resting on no such data,”47 which is why I emphasize the importance of creating a data pool that can be used for empirical research into racial bias in judicial decision-making.

I will draw upon law and economic theory and critical legal theory to theorize about the impact of race in the sanctioning of sexual assault. I will use law and economic theory in so far as it explains the underlying rationale of our current criminal justice system. Its

44 Ibid at 5.
46 See Elizabeth Ann Welch, Succumbing To The Siren Song: Rape Myths In Sexual Offender Sentencing In B.C The University of British Columbia, 2014) [University of British Columbia]. See also Tamara Ashley Margaret Burnett, Subtle Expressions of Gender Inequality: Exploring the Application of Aggravating and Mitigating Factors in Sentencing Decisions for Sexual Offences The University of British Columbia, 2014) [University of British Columbia].
47 Teichman & Zamir, supra note 42 at 31.
explanation/rationale relies on the rationality of actors,\textsuperscript{48} deterrence,\textsuperscript{49} efficiency,\textsuperscript{50} and the socially optimal level of crime.\textsuperscript{51}

There is existing literature on the existence of racism in Canada’s psyche in the context of the criminal justice system,\textsuperscript{52} and the need for a shift towards a restorative justice approach.\textsuperscript{53} In the sexual context, UBC professor Isabel Grant found that issues of race are present in the criminalization of the non-disclosure of HIV in Canada.\textsuperscript{54} One of critical legal theory’s main tenets is that law is indeterminate, which is a precondition to believing that implicit bias affects judicial decision-making. As well, critical legal theory intuitively and through the lived-experience of minority people believes that racial discrimination is prevalent in the criminal

\textsuperscript{48} See Alon Harel & Uzi Segal, “Criminal Law and Behavioral Law and Economics: Observations on the Neglected Role of Uncertainty in Deterring Crime” (1999) 1 Am Law Econ Rev 276. Others have posited that certainty of severity but indeterminacy of probability is the maximal condition for creating deterrent effect, and that under these conditions people will operate under Mini-Max logic, and not risk the high severity consequence. Harel and Segal claim that Western criminal justice systems are designed this way, and that this type of system is desirable from an efficiency standpoint.

\textsuperscript{49} See Robert Cooter & Thomas Ulen, “An Introduction to Law and Economics” in \textit{Law Econ} (Pearson/Addison Wesley, 2008) 1. The principle of deterrence is that a person considering committing a crime will be deterred as long as the expected consequence outweighs the potential gain from committing the crime. The expected outcome is a function of the rate of detection as well as the consequences of conviction. This expected consequence can be labeled the deterrent effect.


\textsuperscript{51} See Polinsky & Shavell, \textit{supra} note 50. The impact of crime on societal welfare can be articulated as the gains criminals receive from committing their crimes, minus the costs to the victims of the crime, and the cost of law enforcement. The cost of law enforcement increases with increased detection and prosecution, as well as with using incarceration as a means of criminal sanction. Polinsky and Shavell argue that the social optimal level of crime is not zero, because at a certain point the cost of preventing additional crime outweighs the societal harm of the undetected crime. If expected consequences, or deterrents are calculated correctly with reference to Harm, then only crime for which the benefit is greater than the harm will be committed, and society will be spared the cost of detecting and punishing that crime, leading to a higher overall utility.


\textsuperscript{53} Williams, \textit{supra} note 45.

justice system, and perhaps more importantly, that this is a problem that needs to be resolved. Another of the dominant assertions made by critical race theorists is that racial hierarchies are reinforced using the criminal justice system. Young suggests that marginalization is the contemporary form of oppression.\(^\text{55}\) The criminal justice system plays a role in this. Criminal records marginalize people in the workplace, particularly if it is for a sexual offence. While it is the justice system that gives the convicted a criminal record, the justice system does not operate in isolation. The criminal record is a signal for society to participate in the marginalization of that person. In policing, racial bias tends to be more prevalent in lower level arrests.\(^\text{56}\) I extend this logic to suggest that racial bias also affects the initial determination of crime or no crime for the marginal case.

Studying critical legal theory, legal realism and my own experience have convinced me that law is indeterminate, and that bias affects every step in the Canadian judicial system. I believe certain people are more likely to be arrested, charged, and incarcerated than others. I think that there are explicit forces at work, including racism, sexism, and other judgments. Often, these disparities in outcomes can be attributed to implicit biases. Therefore, my research investigates how implicit biases affect the sanctioning of sexual assault, and what lawyers and judges should do to counteract its impact.

It is quite possible that minority accused receive custodial sentences more frequently and these sentences are longer in duration when compared to Whites. Further, I believe it is likely that an accused will receive a longer sentence where a complainant is White than when a complainant is Indigenous, for example. I also believe that as a result, racialized complainants or


complainants who have been assaulted by White men are less likely to go to the police about the incident because the expected justice in the form of criminal sanction will not be sufficient to warrant the cost of the second victimization a complainant undergoes when encountering skepticism, scrutiny and having to relive the incident throughout the process. White women who are assaulted by minority men who report their incident to police are more likely to be believed, which adds to the perceived sexual criminality of minority men which is propagated by the media. The increased perceived criminality will exacerbate existing racial bias. On the other hand, if they are less likely to report an incident, are less likely to be believed, or draw a significant penalty, this sends the signal that racialized women are legitimate subjects of sexual violence, and makes them a more vulnerable group.

1.1.3.3. Methodologies:

After creating a *prima facie* case for the existence of racial bias in judicial decision-making, my analysis will be primarily theoretical and doctrinal, elucidating what the impact of race may be and the legal justification for making it an explicit factor in the sentencing for sexual assault. Implicit bias will be difficult to find in decisions (though not impossible). Implicit bias can present itself in different ways, perhaps different language, different considerations/tones, emphasis on different aggravating and mitigating factors, etc. Another approach to a study of implicit bias in judicial decision-making would be to simply examine judicial decisions, and talk to various actors in the system such as judges and prosecutors. If I were to do this, there would be less chance of my own biases influencing my findings. Due to the nature of my subject area, however, these methods would be ineffective. Implicit bias is invisible to its owner; therefore, talking to the actors would not reveal their implicit bias. Secondly, while explicit bias is also a
real problem, it is easy to police oneself in situations where explicit bias would threaten one’s own situation, such as a judge writing a decision.

Combining law and theory, I illustrate the importance of considering race in sentencing for sexual assault, as well as the need to collect data and study the impact of racial bias on the justice gap. Law and economics studies identifying racial bias in the US illustrate the type of data that can be collected to assess the impact of racial bias on judicial decision-making in Canada.

1.1.3.4. Chapter Summaries:

1.1.3.4.1. Chapter 2: Racial Bias in the Criminal Justice System

In this chapter, I illustrate the importance of race and the existence of racial bias in the Canadian criminal justice system. I assert that racial bias in the criminal justice system is in violation of s.15 of the *Charter* and the Rule of Law. Finally, I identify clear evidence of racial bias in judicial decision-making, including in the judicial sanctioning of sexual assault.

1.1.3.4.2. Chapter 3: Judicial Impartiality

In Chapter 3, I articulate the legal limits on racial considerations in judicial decision-making, including the reasonable apprehension of bias test formulated in *R.D.S.*. I demonstrate that judicial considerations of race are consistent with the principle of judicial impartiality. I posit that the Rule of Law and the *Charter* demand these considerations be made. Finally, I use *R.D.S.* and the *Ururyar* case to illustrate a not insignificant amount of censorship or erasure of racial discussion within the legal community and judicial system.
1.1.3.4.3. **Chapter 4 The Importance of Acknowledging Race: Sexual Assault**

I illustrate the importance of acknowledging race and provide reasons for doing so, using the sentencing of sexual assault as an example. The importance of acknowledging race stems from the protections against racial discrimination in the *Charter*, the principle of deterrence in the *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*], and finally the public perception of the criminal justice system. The ripeness of sexual assault for demonstrating the importance stems from the vulnerability of minority women, negative assumptions about complainant credibility, rape myths, special statutory procedural and evidentiary rules, as well as a specific failure in deterrence as indicated by its prevalence in our society despite across the board reductions in crime. I assert that acknowledging race in judicial decisions would reduce the justice gap for sexual assault by improving the deterrent effect of criminal sentencing and would ultimately improve public confidence in the judiciary’s ability to protect *all* women.

1.1.3.4.4. **Chapter 5: Tackling Racial Bias**

In this chapter I suggest solutions, identify implications and address some limitations to my theory. First, I articulate practical steps lawyers and judges should take to confront racial discrimination and the justice gap in sexual assault. These suggestions are aimed at defence counsel representing minority accused, prosecutors handling sexual assault cases involving minority complainants or accused, and judges hearing sexual assault cases. Then I will discuss the long-term implications of adopting my suggestions, and what the next steps would be to further the goals of combating racial bias as well as in reducing the justice gap in sexual assault.
Finally, I address some of the limitations of my theory and how they may and ought to be overcome.
2. Racial Bias in the Criminal Justice System

In his article The Charter of Whiteness, Canadian law professor David Tanovich exposed the existence of racism in Canada’s psyche as well as in its criminal justice system. Racial injustice in the Canadian justice system is a pressing problem with “harmful and long lasting effects.” Racial injustice persists in spite of the Canadian Charter, which constitutionalizes equality under the law and prohibits discrimination on the basis of race. In this chapter, I illustrate the importance of race and the existence of racial bias in the Canadian criminal justice system. I assert that racial bias in the criminal justice system is in violation of s.15 of the Charter and the Rule of Law. Finally, I identify clear evidence of racial bias in judicial decision-making, including in the judicial sanctioning of sexual assault.

2.1.1. Race

The objective of my research is to illustrate the existence of racial bias in the criminal justice system while promoting an acknowledgement of race in sentencing decisions, so I begin by answering the question: what is race? Then, I suggest ways that an individual’s race can be ascertained in the context of the judicial system. Finally, I will discuss ways the law deals with race contemporarily and historically.

---

57 Tanovich, supra note 52 at 664. For example, the Criminal Lawyers’ Association of Ontario provided empirical evidence from the Ontario Systemic Racism Commission which found that in the context of bail hearings "some Black accused who were imprisoned before trial would not have been jailed if they had been White, and some White accused who were freed before trial would have been detained had they been Black."

58 See Ibid at 661. The effects include: “physical and severe psychological harm (in some cases death), isolation, alienation and mistrust, behavior changes, breakdown of or damage to family and social networks, and labour market exclusion.”

59 See Charter, supra note 1 section 15. “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".
2.1.1.1. Defining Race

The word *race* is a much easier term to use than to define. Race categorization is not scientific or objective, but rather quite subjective to both the self and other. Therefore, “what race are you (is he/she, etc.)?” is a much easier question to answer than “what is race?”, but could lead to differing answers depending on whether you ask the subject or the other, and even the “other” could turn up various answers depending on who you ask. Some answers include: White (or Caucasian), Black, Middle Eastern, Persian, East-Indian (sic) (Indo-Canadian), Latino/a, Polynesian, Eastern European, Indigenous, South American, Asian, or mixed race, and there are certainly others (I apologize if you identify with one that is not mentioned). This exercise categorizes the human population of over 7.5 billion people into no more than a few dozen races, in the process reducing people into very broad categories that do not tell us a whole lot about an individual. In general, racial categorization is based on physical appearance, as the only thing race really tells us is the colour of a person’s skin, their anticipated body height/shape, perhaps their hair colour, and allows us to access several stereotypes or generalizations we have already created about people with similar physical/ancestral characteristics. It may also give us an idea of the discrimination or biases they have/can expect to face. Unfortunately, in the context of the criminal justice system, it can also give us an idea of the outcomes they may face. In “politically correct” 2017 nobody wants to be labelled a racist, so race is censored out of everyday discussions, at least when there are minorities around. It is becoming less likely that somebody would come out and ask, “what race are you?” despite it being on a person’s mind. If you are mixed race (like myself), though, people do not know how to categorize you, and often will ask “where are you from?” or “what is your background?”. They are saying “you are

---

60 See e.g. Tanovich, *supra* note 52. See also *Gladue, supra* note 6 at 61, 64-65 and *Parks, supra* note 6 at 659.
different but I don’t know exactly how.” It is an example of a differentiation, an “us” and “them” view of the world. “Hard to categorize” people experience the importance placed on, or at least peoples’ curiosity with, race. Unless you belong to this group you probably do not realize quite how often, or how quickly upon meeting a person, it gets asked. Even an innocent inquiry establishes the reality of racial difference, and a demonstration of differential treatment based on racial difference.

On the other hand, one of my Caucasian friends told me “only Black people can wear those hats” 6 months after meeting me. It turns out, up until that time he had wrongly assumed that I was Indo-Canadian. He hadn’t asked, because race does not matter or he didn’t see colour (at this point I forget which way he put it). This avoiding of the topic is also an example of the importance people place on race. As the largest organ of the human body, my skin and its colour is one of the first things people see, and impacts my day to day life. Something this close to me was never inquired upon, instead a guess was made, due to the sensitivity of talking about race. He wanted me to feel like I wasn’t an “other”, by asking, though categorizing me as racially other (Indo-Canadian) in his mind.

When I am asked what my race is, I usually answer that I am “half Black”, or “half Black and half White.” Really, all that says is that one of my parents had “Black” skin and one had “White” skin, though of course nobody is actually “Black” or “White”. There are Black people all over the world living disparate lifestyles, practicing different religions, and having an infinite array of individual characteristics. Except for the colour of their skin, a Black person in Toronto and one in Haiti may have almost no similarities. The colour of their skin, however, will impact each of their lives in a different way based on their environment, including how other people
view their skin colour. Therefore, for my purposes I will focus on the Canadian environment and
the racial categories I have grown accustomed to hearing and using in Canada.

Race categorization in the way discussed in this thesis evolved as Europeans started
exploring the world using it to legally justify colonizing foreign lands and people on the basis
that they were less than people, or savages. Later, race continued to exist as a tool of
discrimination, such as Jim Crow or race laws in the United States, and apartheid in South
Africa. While the concept of race emanates from western (White) society as a way of
classifying other people based on skin colour and physical appearance, skin colour and physical
appearance also have social impacts in other societies. In Asia, for example, the lightness of
one’s skin is associated with social standing and beauty, with some basis being in the fact that
the lower-class people must work in the sun and therefore become darker.

On a recent trip to Taiwan I noticed that many women used umbrellas to block out the
sun, the locals were not shy on complimenting my White friends on the lightness of their skin,
and there were few if any tanning salons. On the other hand, in Canada tanning is quite popular,
with tanning salons in every major city and the beaches full of people happily sunbathing.
Meanwhile, minorities (non-White) all over the world are spending millions/billions of dollars

Review 3, no. 3 (2003): 257–337. Sylvia Wynter conceptualizes the concept of race, and situates it within
the philosophical context from which it emerges. Her thesis is that the “colour line” was used to
distinguish humans from sub human to justify the expropriation of Native American lands and the
enslavement of millions of African Americans. She asserts that this distinction is a social construct, a
“truth-for” that furthered the economic agenda of Europe, and its white European people and that it is so
engrained in our culture and our media that in whites today it is taken as self-evident or natural truth. This
creation of the racial “other” also creates whiteness, a whiteness that grants a person certain rights, both
social and economic.

62 Reiland Rabaka, “The Souls of White Folk: W.E.B. Du Bois’s Critique of White Supremacy and

63 Trina Jones, “The Significance of Skin Color in Asian and Asian-American Communities: Initial
Reflections” (2013) 3:4 UC Irvine Law Rev 1105, online:
on skin lightening cream, sometimes with tragic effects. This is almost to say that primarily only people within the dominant in-group of society, Caucasians, view darkening their skin as a good thing. Somehow, though, even a tanned Caucasian is unlikely to be mistaken for a racial minority. This is probably the only reason they can maintain these preferences. Unless they perhaps are trying to make themselves look more exotic, fetishizing dark skin and Blackness, in a way that darker skin is somehow more attached to sexuality, while White skin is more associated with purity or innocence. Meanwhile, in many ways there is pressure on racial minorities to try to fit in with the dominant group, a pressure resulting from media portrayals of beauty and racial discrimination, and therefore we see the explosion of skin lightening creams, as well as hair straightening creams, for example. These people have experienced life as an “other”, and know first-hand the reactions racial markers in their appearance can be like. Regardless of the exact explanation, one thing is clear, all over the world, skin tone means something, is somehow related to beauty or self-worth. In India, the biggest Bollywood stars tend to have the fairest skin, Asian cultures privilege porcelain colour skin, and in some areas of the world mulattos are more privileged than Blacks, so race is more of a sliding scale.

2.1.1.2. Ascertaining Race

It is important to note that issues of race and ethnicity are already considered by the court in the context of sentencing Aboriginal offenders, so difficulty in defining or ascertaining race should not be considered an absolute barrier to incorporating it as a factor when sentencing for sexual offences. I believe the simplest way would be allowing people to self-identify their race.

---

An analogous example is where religion is at play, and a party is self-identifying their religion.65 What is the minimum requirement for being a member of a certain religion? How devout is this person? Do they ever breach the requirements of the religion? All these questions are legitimate, but ultimately, mere self-identification is taken as a prima facie evidentiary basis.

Race is generally then conceptualized in terms of a person’s appearance. Therefore, in using race as a factor in the criminal justice system, the appearance of racial difference could trigger inquiries by either counsel or the judge. For example, if the judge sees the party is a racial minority based on their skin colour or other racial markers, they can simply ask the same question that I have been asked so many times: “what is your ethnicity?” or “what is your background?” Or, defence counsel/prosecutor, seeing that their client/complainant may have some sort of racial background can ask him or her “what is your background/ethnicity?” Whether it is the judge asking, or a lawyer, the end-result is allowing the client/complainant to self-identify. Of course, this self-identification is not fool proof, as occasionally people are known to self-identify in ways nobody else would identify them, and the important part here is how others identify them, and whether they have potentially been discriminated against by the police, prosecutor or judge who are particularly outraged at his or her behavior towards a White person, for example. As will be discussed more in depth later, whether others categorize the accused as of the same racial group or other will influence the deterrent impact the disposition of the accused's case will have on him or her. Involved lawyers, being aware of these possibilities, can choose to ask the race question where it may be a factor, thus triggering the self-identification opportunity. This would be good advocacy in advancing a client’s best interests due to the possibility of implicit bias.

65 See e.g. Syndicate Northcrest v. Amselem, 2004 SCC 47 at para 3-4.
Ethnicity can also be used as a proxy for race, though race is a much more expansive topic. Ethnic cleansing in Rwanda is an example of this. Within one country, the Hutus and Tutsis viewed themselves as fundamentally different ethnic groups. In the West, we use racial categories such as “Black”, which includes most of the entire continent of Africa, most of the Caribbean, large populations in South America, America, Europe, etc.

When it is difficult to ascertain if somebody is racialized, their name can give a clue. For example, a light skinned person of Middle Eastern or Persian descent can often still be identified as such by the spelling of their name. A study done in the US showed that people with seemingly African American names were less likely to get interviews based on the same resume.\(^6^6\) So, in some ways, when I am talking about race, I am really talking about *otherness*. Other culture, other appearance, other ethnicity/background. Where it is difficult to determine if a person is a racial minority or an *other*, it is also probably less of an important factor in the sentencing decision, and implicit racial bias is probably less likely. Therefore, if an accused can pass for White, he probably experiences less racism than somebody whose skin is the darkest tone of Black. Similarly, a Black person named Greg will be more likely to get an interview than one named Jamal.\(^6^7\)

\(^6^6\) See Marianne Bertrand & Sendhil Mullainathan, "Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination" (2004) 94:4 Am Econ Rev 991. Studies in the United States have shown resumes with apparently African American names were less likely to receive interviews than similar applicants with “White” names.

\(^6^7\) *Ibid.*
2.1.1.3. Race and the Law

In Canada, race is often discussed in the context of family law and child custody cases where one of the parents is non-White. While not a determinative factor, it is judicially considered as a sort of collateral factor of whether the child will grow up learning about their culture, or will share a similar experience of racism. This is an example of where a court has at least paid lip service to race, or acknowledged it instead of “erasing it”, just as a court may mention the homosexuality of a parent, but would not mention his or her heterosexuality. Race is the other (than White) that is identified and defined with reference to the self.

In the United States, anti-miscegenation laws criminalized marriage and sometimes sex between members of different races. Canada has a history of racist policies, including the Chinese “head tax” and denial of voting and citizenship rights. In these situations, being racial meant you had less rights, though with respect to miscegenation laws, consenting White people were also robbed of their rights. Some consider the infringement on the rights of White males to choose their partners as one of the main reasons that anti-miscegenation laws were not adopted in Canada. I argue that anti-miscegenation laws were probably applied in a discriminatory fashion

---

69 Ibid at 328.
70 Bruce MacDougall, Queer Judgments: Homosexuality, Expression and the Courts in Canada (Toronto, 2000).
71 See Emily Field Van Tassel, “Only the Law Would Rule between Us: Antimiscegenation, the Moral Economy of Dependency, and the Debate over Rights after the Civil War” in Delgado & Stefancic, ed, Critical White Studies (Philadelphia: Temple University Press, 1997) 152. The author discusses the roots and rationale of anti-miscegenation, as well as discusses how race was defined for legal purposes, including the “one-drop” rule. Understanding what is at the root of stigma and public disgust with interracial sex during earlier time periods is crucial for identifying whether these sentiments still exist today, and more importantly, if they manifest themselves in judicial decisions.
72 Chinese Immigration Act, RSC 1885, c 71.
73 See Philip Girard & Jim Phillips, "Rethinking ‘the Nation’ in National Legal History: A Canadian Perspective" (2011) 29:2 Law Hist Rev 607, online: <http://www.jstor.org/stable/23063874> at 618-619. While there were forces that wished miscegenation laws to be adopted in Canada, like in the United
as well. Where it was used to outlaw interracial sex, one can imagine that White men were not being arrested, prosecuted and jailed for consensual (or even non-consensual) sex with Black or Indigenous women, whereas Black men engaged in consensual sex with White women were surely targeted under this law.\textsuperscript{74} The main targets, then, under this law, were Black men, and White women. I say White women because if a man was engaged in non-consensual sex with a White woman that would-be rape, which is already criminally prohibited. Anti-miscegenation laws only target consensual sex. Therefore, they operate to prevent White women from choosing sexual (or marital) partners of other races. This demonstrates the patriarchal nature of the law, as well as its racism. I submit therefore that race and sex are in some way linked. And by examining race in the context of sexual assault a clear picture of the White heterosexual patriarchy will emerge.

\textbf{2.1.2. Racial Bias in the Criminal Justice System}

Having determined what race is, I move into my discussion on racial bias in the criminal justice system. First, I describe and define racial bias and racism and then demonstrate that the exercise of discretion by officials in the criminal justice system is prone to implicit racial bias. Next, I provide empirical evidence of specific instances of racial bias in the criminal justice system, asserting that racial bias is inconsistent with the \textit{Charter} and the Rule of Law.

\textsuperscript{74} Loving \textit{v. Virginia} 388 U.S 1.
2.1.2.1. Racial Bias and Racism

There are three common types of bias: implicit, explicit, and structural.\textsuperscript{75} All three types of biases play a role in the judicial system, each manifesting itself in a different way. This research focuses on implicit and explicit biases in judicial decision-making; however, structural biases are constantly operating in the background and affect which cases will come before the courts, for example the resources required to properly defend oneself against an accusation, the stratification of society, and the racial makeup of our parliament and judiciary. The most well-known form of bias and easiest to identify is explicit bias. In our age of political correctness, however, people (particularly lawmakers and judges) have incentives to self-censor their explicit biases and so, while persisting, explicit bias (or racism) is less apparent. On the other hand, implicit bias is not conscious or intentional and is therefore harder to detect. It is also impossible to hide, though “erasure” or censoring racial acknowledgment can obscure evidence of its operation (while potentially evidence of its existence). By their nature, implicit biases are unconscious and therefore require effort to uncover and neutralize.\textsuperscript{76} For this reason, they are still prevalent and have impacts on the determination of cases. Even unintentional bias should be identified and remedied.\textsuperscript{77} The law ought to accept people’s perceptions of bias against them, and these perceptions should be the point of departure for our inquiry, rather than the presence of explicit discrimination. As a result, implicit bias in judicial decision-making is the main form of bias discussed in this paper. The mere provision of information acknowledging the existence implicit bias can have a significant limiting effect on its operation in a person’s decision-making.\textsuperscript{78}

\textsuperscript{76} Ibid at 1128.
\textsuperscript{77} Young, supra note 55.
\textsuperscript{78} Kang, supra note 75 at 1173-1174.
My research focuses primarily on racial bias. While overrepresented in the criminal justice system, visible minorities are underrepresented in the Canadian legal profession, so as a visible minority I feel I have a duty to raise this issue. Canadian law schools have reached virtual gender parity in admissions and faculty; however, in my experience, their cohorts are still overwhelmingly White. While Canada has had several female justices on the Supreme Court of Canada, including the current and longstanding Chief Justice, the Supreme Court of Canada has never had a visible minority justice. Across all levels, the Canadian judiciary continues to close the gender gap, yet the racial gap remains.79

Racism is by no means experienced only by Blacks. All those judged “non-White” are liable to experience bias, including Aboriginals and contemporarily, Muslims. As Justice McLachlin (as she then was) points out in R v Williams, [1998] 1 SCR 1128 [Williams], “[r]acism against Aboriginals includes stereotypes that relate to credibility, worthiness and criminal propensity.”80

Margo L. Nightingale’s “Judicial Attitudes and Differential Treatment: Native Women in Sexual Assault Cases” deals specifically with racial bias against Canadian Indigenous people in

79 See Andrew Griffith, “Diversity among federal and provincial judges - Policy Options”, Policy Options Politique (May 2016), online: <http://policyoptions.irpp.org/2016/05/04/diversity-among-federal-provincial-judges/>. The report found just 1 per cent of Canada’s 2,160 judges in the provincial superior and lower courts are aboriginal, while 3 per cent are racial minorities.
80 At para 58 she refers to a number of sources: “As the Canadian Bar Association stated in Locking up Natives in Canada: A Report of the Committee of the Canadian Bar Association on Imprisonment and Release (1988), at p. 5: “Put at its baldest, there is an equation of being drunk, Indian and in prison. Like many stereotypes, this one has a dark underside. It reflects a view of native people as uncivilized and without a coherent social or moral order. The stereotype prevents us from seeing native people as equals. There is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system; see Royal Commission on Aboriginal Peoples, Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada, at p. 33; Royal Commission on the Donald Marshall, Jr., Prosecution: Findings and Recommendations, vol. 1 (1989), at p. 162; Report on the Cariboo-Chilcotin Justice Inquiry (1993), at 11. Finally, as Esson C.J. noted, tensions between Aboriginals and non-Aboriginals have increased in recent years as a result of developments in such areas as land claims and fishing rights. These tensions increase the potential of racist jurors siding with the Crown as the perceived representative of the majority’s interests.”
the context of sexual assault. She describes modern racism as “aversive” or covert in contrast to traditional or overt racism:

Aversive racists sympathize with victims of past injustices, believe in egalitarianism and promote liberal policies designed ideally to promote racial equality. They therefore believe themselves to be non-prejudiced and non-discriminatory. However, aversive racists do possess negative feelings and beliefs about other races that remain largely unacknowledged within the subconscious. While this negativity is not expressed as hostility or hate, it does involve discomfort, uneasiness, disgust, and sometimes fear, which tend to motivate avoidance rather than intentionally destructive behaviours. As aversive racists generally believe that all people are equal, to notice any difference between peoples is, to them, inappropriate and potentially racist.

Implicit racial bias is best understood by this concept of aversive racism. Those who practice aversive racism view themselves as being objective, not racist. The false belief that racism must be due to hatred, violent or overt is a feature of modern racism itself, which contributes to the power of aversive racism.

2.1.2.2. Discretion

Exposing the existence of racial bias in the criminal justice system touches on a wide range of legal actors and institutions. Broadly speaking the focus here is on criminal law, it deals specifically however, with discretionary decisions by legal officials. Discretion arises with the “indeterminacy of legal rules.” On the subject of discretion, Green cites Kelsen saying: “Law application and law creation are continuous activities for . . . every legal decision is partly determined by law and partly underdetermined . . . the higher norm cannot bind in every

---

82 Ibid at 70.
direction by which it is applied.” Implicit (or explicit) racial bias has its most significant impact on outcomes with respect to these discretionary decisions.

In the criminal justice system, discretionary decisions include Crown Counsel’s decision of whether to prosecute an individual, or a judge’s decision of whether a sentence of imprisonment, a sentence served in the community, or a conditional discharge is appropriate for an offender. Discretion is an example of how law is indeterminate, meaning that a combination of facts and law can have more than one legal outcome, an outcome which is influenced by the human application of the law to the facts. Unchecked, bias is bound to impact this application of the law to the facts. This suggests the requirement of evaluating discretionary decisions against legal standards.

Prosecutors have perhaps the most discretionary decision-making power, as their decision determines whether an individual will face charges or not. In the context of sexual assault, the charge itself is enough to have devastating impacts. Prosecutors also have discretion with respect to which charges to lay, or whether to proceed summarily or by indictment, both of which are significant in terms of applicable minimum and maximum sentences, and therefore ultimately limits the judge’s discretion in sentencing. On the other hand, the prosecutor may decide it is not in the public interest to lay charges, in which case the alleged assailter escapes criminal stigma or sanction, and the complainant, having undergone interviewing and investigation, is ultimately worse off than before he or she went to the police. What gives prosecutors the most latitude in discretion, however, is the fact that the Crown’s charging decisions are generally not public record or subject to independent or judicial review. Judicial decisions, on the other hand, are

---

subject to review, and can be appealed. When sentencing, judges must provide reasons for his or her decision, which can then be scrutinized by lawyers and legal scholars. Because judges are accountable and can be overturned, they have ultimately less discretion than prosecutors, however because judges must leave reasons for their sentences and prosecutors operate in secret, this study on racial bias will focus on judicial decisions. Perhaps future revelations on the impact of race on judicial decision-making will lead to inquiry into the Crown’s charge approval process and more rigorous scrutiny on prosecutorial discretion.

2.1.2.3. Specific Instances

There are specific instances of racial bias in the criminal justice system. The case of *R v Parks* (1993), 84 CCC (3d) 353 (Ont CA) [*Parks*], dealing with the potential anti-Black bias of jurors, led to the court acknowledging, and to allow other courts to judicial note the following “propositions” regarding racial bias in Canada:

. . . racism, and in particular anti-Black racism, is a part of our community’s psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes.\(^{86}\)

While the *Charter* has been a powerful tool in advancing the rights of women, gays and lesbians, discrimination against visible minorities remains a problem in Canada’s criminal justice system:

. . . it is fair to say that some groups such as women and gays and lesbians can point to a number of significant victories ranging from the right of reproductive choice to the right to same-sex marriage. Can the same be said of racial injustice in the criminal justice system? The manifestations of this

---

\(^{86}\) *Parks*, *supra* note 6 at 369.
injustice include over- and under-policing, discriminatory bail, trial and sentencing outcomes, and mass incarceration.87

The focus of my research is on the injustice of “over- and under-policing, discriminatory bail . . . sentencing outcomes, and mass incarceration.”88 With respect to over- and under-policing, Chapter 4 will discuss how minority women are particularly vulnerable to sexual assault, and that sexual assaults against minority women are being under policed, while I suggest anecdotal evidence that the opposite can be said about sexual assault complaints by White women against minority men. Examples of under policing include the lack of police investigation into missing and murdered Aboriginal women on the “Highway of Tears”89 and the murder of 19-year-old Helen Betty Osbourne, an Aboriginal woman.90

While racial bias is harmful in all areas of society, racial bias in the criminal justice system causes among the most “harmful and long-lasting effects” to racialized communities. These effects are “enormous and now well documented”, including the “collateral effects of over-incarceration and constant surveillance (e.g. racial profiling)” such as “physical and severe psychological harm (in some cases death), isolation, alienation and mistrust, behaviour changes, breakdown of or damage to family and social networks, and labour market exclusion.”91 Research has shown that bias plays a role in jury decision-making, for example jurors do not presume accused people as innocent until proven guilty, and “an accused from a minority group is seen as even less likely to be innocent than others.”92 In Parks, this implicit bias that jurors

87 Tanovich, supra note 52 at 656.
88 Ibid at 656.
90 Tanovich, supra 52 at 669. “On November 13, 1971, Osbourne was stabbed with a screwdriver more than 50 times and her face smashed beyond recognition. It took 15 years before the RCMP finally charged three of the four men, even though the men were identified as the killers by the police in 1972” Both of the accused, James Houghton and Dwayne Johnston were White.
91 Tanovich, supra 52 at 661.
92 Nightingale, supra note 81 at 82 her cite 40.
might have is articulated by Doherty J.A., who says “[f]or some people, anti-Black biases rest on unstated and unchallenged assumptions learned over a lifetime. Those assumptions shape the daily behaviour of individuals, often without any conscious reference to them.”\footnote{R. v. Williams, [1998] 1 S.C.R. 1128 at para 21 [Williams].}

Behavioural evidence of the perception of racial bias in juries was demonstrated in the trial of Dwayne Johnston, who was charged with the murder of Helen Betty Osbourne, a 19-year-old Aboriginal woman. In that case, Johnston’s lawyer “exclude[d] all of the Aboriginal jurors” that had been selected, using his peremptory challenges.\footnote{Tanovich, supra 52 at 669. Emphasis added. Meaning “as a result, there were no Aboriginals on the jury.”} The Manitoba Aboriginal Justice Inquiry later said: “[t]he systemic removal of potential Aboriginal jurors from the jury panel was motivated by their being Aboriginal persons. The jury selection process permitted racism to be applied.”\footnote{Ibid 665.} Peremptory challenges by their very nature can be exercised without justification or explanation, however this shows that the “senior member of the criminal bar in Manitoba” representing Johnston believed that race matters, at least when it comes to juries. Of course, at the time (and perhaps even now), he would not have had to worry about receiving an Aboriginal judge. If he had had an Aboriginal judge on the case, he likely would have felt as though he would not receive the fair trial his client deserved. That is the situation many minority accused face today when confronted with a predominantly White judiciary.

In addition to the sexual assault and murder of Helen Betty Osborne, other concrete examples of bias in the criminal justice system include: “the false imprisonment of Donald Marshall, the police shooting death of Manitoba Native leader J.J. Harper, [and] the death of Minnie Sutherland following a car accident” which “have brought to the public’s attention that
these individuals were subject to differential treatment by the police and courts primarily on the basis of their race.”

2.1.3. Racial Bias in Judicial Decision-Making

The main thrust of this chapter has been that racial bias is prevalent within Canadian society, and has been clearly demonstrated to impact jurors. Here I go on to assert that “as members of this society”, there is no reason to suppose that judges are “immune to [its] influence.” Judge Rosalie Abella points out that judges cannot help but look at issues from the perspective of their own “values, assumptions and experiences.”

2.1.3.1. The Inferred Impact of Race

Some forms of judicial bias are the result of the judge having “pecuniary interests” in a case or “feelings of favouritism or adversity to one of the parties” stemming from some “personal interaction.” Racial bias, however, is most likely to take the form of “attitudinal bias”, which is described as “the predetermination of an issue before the court.” This racial bias can impact either the offender or the complainant. In addition to being the type of bias most likely to impact racial minorities, it is also “the most difficult to recognize or identify.” This attitudinal bias flourishes in the court because judges are “predominantly White middle-class men” whose perspective, for example as to what is “reasonable [is] endowed . . . with power”; often terms

---

96 Nightingale, supra note 81 at 73.
97 Ibid at 97.
99 Nightingale, supra note 81 at 80.
100 Ibid.
101 Ibid.
such as *reasonable person* dress a decision makers subjective perspective in objective language, while “judicial power is least accountable when judges leave unstated - and treat as a given - the perspective they select.”\(^{102}\)

Having previously noted that the modern representation of racism is aversive, or the idea that “to notice any difference between peoples is . . . inappropriate and potentially racist”, it can be difficult to identify.\(^{103}\) Nightingale finds an example of this in the comments of Provincial Court Judge Davies, who said:

I don't really see why people who were born here, whose ancestors, into antiquity, were also born here, should be treated any differently than a person who was born here, whose parents were born elsewhere. I consider myself a native. I was born here .... [I am] psychologically opposed to treating people who happen to be Aboriginal natives, as if they're some sort of subspecies that need extra help.\(^{104}\)

In describing this, Nightingale says:

By refusing to acknowledge any difference between himself and the Native female sentenced before him, Provincial Court Judge Davies ignored such things as the socio-economic differences that are a reality and are, therefore, relevant. By denying their existence, or importance, factors of oppression remain unaltered. In this way, these factors are either ignored, or treated as the empirical facts used to justify differential treatment.”\(^{105}\)

The existence of this kind of racial bias is represented by the *erosure* or absence of racial discussion from a case, and therefore many instances of racial bias will go unnoticed in the context of a very busy criminal justice system. In fact, only the lawyers trying the case may ever know that a racial minority accused or complainant was involved and can raise the issue both/either during the case (preferably), or after the fact (on appeal).

\(^{102}\) *Ibid.*

\(^{103}\) *Ibid* at 78.


\(^{105}\) Nightingale, *supra* note 81 at 78.
2.1.3.2. Specific Instances of Bias

In the context of sexual assault sentencing, after comparing the treatment of sexual assault cases in the Northwest Territories and Ontario, Nightingale noted that the courts “appear predisposed to finding and perpetuating” the stereotype of “the drunken Indian”. Perhaps more concerning was the courts' tendency to link drunkenness not “as a characteristic particular to an accused” but rather “as constituting a cultural attribute of Native society.” Her research finds that “a finding that a native offender was intoxicated will always be noted and discussed, while non-Native offenders who have consumed a degree of alcohol may not have any intoxication noted.” She also found that in mentioning the intoxication of the accused, “the judge will often blame alcohol as the “root cause” of the offence.”

One exposition of judicial racial bias is referred to by Tanovich as “hostile adjudication”, in which “the disdain of the trial judge can be implied from the manner in which he or she controls the proceedings.” To demonstrate this, he uses the example of *R v Watson*, [2004] OJ No 4921, 191 CCC (3d) 144, at 148 (Ont CA), where the Court of Appeal admonishes the trial judge and overturns his decision: “We are satisfied, on a review of the transcripts as a whole, that the combined effect of the frequency and nature of the trial judge’s interjections during the conduct of the trial created the appearance of an unfair trial.” Another example is *R v Brown*, [2003] OJ No 1251, 173 CCC (3d) 23, at 53 (Ont CA), when a trial judge’s decision was

---

106 *Ibid* at 84.
107 *Ibid*.
108 See *Ibid* at 83. "An example of this is provided in the case of Pappajohn v. The Queen. Although the facts outlined that the parties consumed a "considerable" or "substantial" amount of alcohol prior to the offence, the judgments neither referred to the parties as "drunk" nor did the judgments place any reliance upon that fact in the resolution of the case."
109 *Ibid* at 84.
110 Tanovich, *supra* note 52 at 671.
111 *Ibid*. 

36
overturned by the Ontario Court of Appeal because in his reasons for sentence he “suggest[ed] that Brown apologize to the officer for raising racial profiling” as a potential issue during his trial, raising the reasonable apprehension of bias.112

Following Parks, which allowed jurors to be screened for racial bias and established the judicial existence of racial bias, the “challenge-for-cause cases that were brought . . . in areas outside of Metropolitan Toronto . . . were dismissed on the grounds that defence counsel had failed to establish that racism extended beyond the borders of Toronto”113 demonstrated the reluctance of judges to address racial bias, going against the spirit of the Charter, as there is no reason to believe that rural Ontario is any less prone to racial bias than Toronto.114 Nightingale’s article speaks of judicial bias on the basis gender, race and class as “ever present although invariably unacknowledged.”115 As Nightingale states, this is not meant to indict the judiciary, “but to encourage acknowledgement of the potential for bias in the hope that it can be addressed.”116 Empirical evidence of racial bias in judicial decisions and the inference of its even more prevalent covert operation leads Tanovich to say “[t]here is no question that increasing the

---

112 See Ibid at 672. Trial judge said: “I should say as well that I do not know whether my tone this afternoon might have displayed my distaste for the matters that were raised during the course of the trial, but that really is not relevant to determining the sentence. I do not disagree with the officer’s initial assessment of you. You dealt with him apparently in a polite and courteous way, and I had the impression when you were giving your evidence that you are that sort of person. So there is nothing inherently reprehensible about your conduct that I think should be treated as an aggravating factor when it comes to imposing sentence, which is not to say that it would not be nice if perhaps you might extend an apology to the officer because, I am satisfied, the allegations were completely unwarranted. But that is only my assessment. You are not required to share it and I will leave it to you to do what you think is right in that regard.”

113 Ibid at 671.

114 See R. v. Wilson[1996] O.J. No. 1689, 107 C.C.C. (3d) 86, at para. 14 (Ont. C.A.). “It is unrealistic and illogical to assume that anti-Black attitudes stop at the borders of Metropolitan Toronto. ... The possibility therefore of anti-Black racism taking root in communities outside of Metropolitan Toronto ... should be a matter of concern for the criminal justice system.”

115 Nightingale, supra note 81 at 73.

116 Ibid at 97.
diversity of the bench is one of the most pressing issues facing the justice system and that it will have a big impact on increasing the cultural competence of the judiciary.\textsuperscript{117}

2.1.4. Chapter Summary

The objective of my research is to illustrate the existence of racial bias in the criminal justice system while promoting an acknowledgement of race in sentencing decisions, so I begin by answering the question: “what is race?” I suggest ways that an individual’s race can be ascertained in the context of the judicial system and provide examples of the legislative treatment of the concept of race.

Having determined what race is, I move into my discussion on racial bias in the criminal justice system. First, I describe and define racial bias and racism and then demonstrate that the exercise of discretion by officials in the criminal justice system is prone to implicit racial bias. Next, I provide empirical evidence of specific instances of racial bias in the criminal justice system, asserting that racial bias is inconsistent with the Charter and the Rule of Law.

After establishing the existence of racial bias in the criminal justice system, I narrow my focus in on racial bias in judicial decision-making. In doing so, I identify specific instances of racial bias, as well as theorize as to the unacknowledged impact of race on judicial decision-making, identifying a lack of data as a significant impediment to ameliorating or even drawing attention to this issue. I refer to this as the “erasure” or censorship of race. Race does not play an explicit factor in sentencing; however, determining whether it has an implicit effect requires data, the collection of which is impeded by the “erasure”. In my next chapter Judicial Impartiality, I

\textsuperscript{117} Tanovich, supra note 52 at 672.
explore theories and evidence relating to the “erasure”, or censorship of race in the courts and in judicial decision-making.
3. Judicial Impartiality

One of the biggest obstacles to addressing racial inequality and racial bias in the criminal justice system is the formal, or colour blind approach to equality. This approach has traditionally been supported by the principle of judicial neutrality. I draw upon the Supreme Court of Canada’s decision, *R.D.S.*, to articulate the limits to racial considerations in judicial decision-making. This case also demonstrates that judicial considerations of race are consistent with the principle of judicial impartiality and posit that the *Charter* equality protections and the Rule of Law demand these considerations be made. Finally, I illustrate how *R.D.S.* and *Uruyvar* expose a not insignificant amount of censorship, censoriousness and erasure of racial discussion within the Canadian legal community.

3.1.1. *R.D.S.* and The Reasonable Apprehension of Bias

*R.D.S.* involved a 15-year-old African Canadian boy who was charged with resisting arrest. He had come across his cousin being arrested by a White police officer in a Black neighbourhood of Halifax, asked what was going on, was told to shut up, and ultimately put in a choke hold, arrested, and charged with resisting arrest and assaulting a police officer. The police officer did not deny that he told the boy to shut up, or that he put him in a choke hold, a chokehold so tight that the appellant said he was unable to speak and had trouble breathing. However, the officer claimed that the boy had struck him in the leg with his bike. Ultimately, there was conflicting evidence, and that while not completely accepting the appellant’s testimony over the officers, it had raised a reasonable doubt as to his guilt. After giving her oral reasons
explaining that there were still questions about “what actually transpired”\textsuperscript{118} and therefore the Crown had failed to discharge its burden of proof, Justice Sparks went on to comment:

The Crown says, well, why would the officer say that events occurred the way in which he has relayed them to the Court this morning. I'm not saying that the constable has misled the Court, although police officers have been known to do that in the past. And I'm not saying that the officer overreacted, but certainly police officers do overreact, particularly when they're dealing with non-White groups. That, to me, indicates a state of mind right there that is questionable. I believe that probably the situation in this case is the case of a young police officer who overreacted. And I do accept the evidence of Mr. 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. At any rate, based upon my comments and based upon all of the evidence before the Court I have no other choice but to acquit.\textsuperscript{119}

Justice Sparks’ comments alluding to racial bias resulted in the decision being appealed all the way to the Supreme Court of Canada on the basis that her statement created a reasonable apprehension of bias. Sparks J.’s decision was overturned by both the Nova Scotia Supreme Court and Nova Scotia Court of Appeal on the basis that her comments created a reasonable apprehension of bias.

3.1.1. Nova Scotia Supreme Court

In the Nova Scotia Supreme Court on appeal from the Crown, Glube C.J.S.C ordered a new trial, applying an objective reasonable apprehension of bias test: “whether a reasonable right-minded person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned”\textsuperscript{120} and finding that her comments in \textit{obiter} created a reasonable apprehension of bias. The court found no evidence to support her comments about the Nova

\begin{itemize}
\item \textsuperscript{118} \textit{R.D.S}, supra note 7 at para 73.
\item \textsuperscript{119} \textit{Ibid} at para 74.
\item \textsuperscript{120} \textit{Ibid} at para 79.
\end{itemize}
Scotia police’s tendency to overact when dealing with non-White groups or “prevailing attitudes of the day”, and thus that these were merely her opinions.\footnote{Nova Scotia Supreme Court (Trial Division), [1995] N.S.J. No. 184 (QL) at 24 [R.D.S. Nova Scotia Supreme Court].} She went on to say that “judges must be extremely careful to avoid expressing views which do not form part of the evidence.”\footnote{Ibid at para 25.} This view would be challenged in the Supreme Court of Canada, where the justices debated whether contextual factors and generalizations were permissible in certain circumstances.

### 3.1.1.2. Nova Scotia Court of Appeal

At the Nova Scotia Court of Appeal, the majority (two justices to one) concurred with Glube C.J.S.C in overturning Sparks J.’s decision on the basis of a reasonable apprehension of bias. Both majority and minority justices agreed that the test was an objective one, “requir[ing] a consideration of what the reasonable, right-minded person, with knowledge of all the facts, would think with regard to the apprehension of bias” and that “the apprehension must be reasonable . . . suspicion or conjecture is not enough.”\footnote{R.D.S, supra note 7 at para 81.} Another key aspect to the test is that there is no need for the appellant to prove that bias actually influenced the result.

The majority justices asserted that the issue was whether or not Justice Sparks relied on “factors not in evidence” to make “critical findings of credibility”, regardless of the truth of her generalizations.\footnote{Ibid at para 82.} Therefore, because there was no evidence before the court with respect to “the prevalent attitude of the day” and the issue of overreaction had not been put to the officer on cross examination, these were inappropriate considerations to make. As a result, in rejecting the appeal Pugsley J.A wrote:

---

\footnote{Nova Scotia Supreme Court (Trial Division), [1995] N.S.J. No. 184 (QL) at 24 [R.D.S. Nova Scotia Supreme Court].}
The unfortunate use of these generalizations, by the Youth Court Judge, would, in my opinion, lead a reasonable person, fully informed of the facts, to reasonably conclude that the Youth Court Judge would consider the important issue of credibility in this case, at least in part, on the basis of matters not in evidence; and, hence, unfairly.125

Freeman J.A. was the lone judge in dissent. He indicated that the only comment that could possibly give rise to the reasonable apprehension of bias was Justice Sparks’ finding that the police officer overreacted. He took judicial notice of the fact “that police officers have on occasion misled the court or overreacted when dealing with non-White groups” but that “[j]udge Sparks did not state that the officer did either of these things.”126 Instead, that this background knowledge helped her reconcile two conflicting testimonies leading her to believe R.D.S’s statement that the officer had threatened to arrest him if he did not “shut up”. This created a reasonable doubt as to whether the charges were stemming from a physical act, or the appellant’s mere verbal interference. He concluded that the officer having overreacted was a finding of fact supported by evidence that the Youth Court judge was entitled to make. 127

Freeman J.A was of the view that “it was perfectly proper . . . in weighing the evidence. . . to consider the racial perspective.”128 Further, he suggests Sparks J. may have even had a duty to consider race when he says:

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.129

---

126 R.D.S, supra note 7 at para 87 paraphrasing
128 Ibid at para 292.
129 Devlin & Pothier, supra note 125 at 6.
In getting right to the root of the issue, he displays insight into the censorship and censoriousness of racial conversations, seemingly advocating for trial judges to address racial inequality and directing appeal courts to allow trial judges this latitude:

Questions with racial overtones make the difficulties more intense, yet these questions must be addressed freely and frankly and to the best of the judge's ability. Because of their explosive nature they are more likely than any others to subject the judge to controversy and allegations of bias, but they cannot be ignored if justice is to be done. For this reason appeal courts must adopt a cautious approach when examining the trial judgment to determine whether it gives rise to an apprehension of bias.130

Ultimately, however, Freeman J.A was the only judge to take this approach on the Court of Appeal, and Sparks J.'s decision was overturned. The appellant then sought and was granted leave to appeal to the Supreme Court of Canada.

3.1.1.3. Supreme Court of Canada Decision

The majority of Supreme Court of Canada Justices (six to three) found that Justice Sparks’ comments did not create a reasonable apprehension of bias, restoring the acquittal. The main issues of the case were how to approach the reasonable apprehension of bias test and how the test applied to the facts of the case. There was consensus on the formulation of the test, however, there were disagreements within the court with respect to the “relationship between impartiality and neutrality” as well as “the relevance, and appropriate treatment, of social context.”131 It was this last issue, the treatment of social context, that seemed to be the fundamental difference between the outcomes the majority and minority justices reached after applying the test to the facts of the case.132

130 Ibid at 7.
131 Ibid.
132 Ibid.
The Supreme Court justices largely agreed with the formulation of the test by the Nova Scotia Court of Appeal, and ultimately added that the threshold for finding bias was a high one, that of a “probability or a real danger” as opposed to a “possibility or suspicion test.” While agreeing that the threshold for the test is quite high, Justices L’Heureux-Dube and McLachlin asserted that the proper way “to approach the case is to adopt a contextualist method, to directly consider what is the nature of the judicial function in a modern multicultural society.”

After applying the test to the facts, four judges (L’Heureux-Dubé, McLachlin, Gonthier, and La Forest) decided that Justice Sparks’ comments were “an entirely appropriate recognition of the facts in evidence in this case and of the context within which this case arose” and are nowhere close to generating a reasonable apprehension of bias. Rounding out the majority are Justices Cory and Iacobucci, who ultimately dispose of the issue in favour of the appellant, believing that while Justice Sparks' comments were “very close to the line,” they do not meet the high threshold for the reasonable apprehension of bias, particularly when read “in the context of the whole proceeding, with an awareness of all the circumstances.” The minority justices (Major, Lamer, and Sopinka) believe that Sparks J.’s comments create a reasonable apprehension of bias and an “irreparable defect.”

One of the disagreements between the majority and dissent at the Supreme Court of Canada was whether in assessing the credibility of a witness “the existence of racism in Canadian society . . . can be factored into the analysis.” The majority agreed that a judge can

---

133 Ibid.
134 Ibid at 8.
135 R.D.S, supra note 7 at para 30.
136 Ibid at para 152.
137 Ibid at para 22.
138 Devlin & Pothier, supra note 125 at 9.
consider “social context” in their analysis, which “may be relevant even in the absence of specific evidence about particular witnesses.”

Clearly opening the door to racial considerations by judges they go on to say:

It should be noted that if Judge Sparks had chosen to attribute the behaviour of Constable Steinberg to the racial dynamics of the situation, she would not necessarily have erred. As member of the community, it was open to her to take into account the well known presence of racism in that community and to evaluate the evidence as to what occurred against that background. That Judge Sparks recognized that police officers sometimes overreact when dealing with non White groups simply demonstrates that in making her determination in this case, she was alive to the well-known racial dynamics that may exist in interactions between police officers and visible minorities.

Interestingly, the now Chief Justice McLachlin and Justice L’Heureux-Dubé refer to the “well-known presence of racism” in Halifax. I will return to the existence of racism in Halifax later in my chapter on censorship and censoriousness, however, looking at the Nova Scotia Supreme Court and Nova Scotia Court of Appeal decisions in the context of racism in Halifax gives rise to a reasonable apprehension of bias on the part of the majority of Nova Scotian judges, three of four of whom found that Justice Sparks' comments were biased, particularly in light of the additional context that a clear majority of the Supreme Court of Canada justices decided the other way.

3.1.2. Judicial Impartiality and Neutrality

The majority of Supreme Court of Canada justices (six to three) found that Justice Sparks’ comments did not create a reasonable apprehension of bias, restoring the acquittal. However, the outcome is nearly split (seven to six) as to whether the comments create the

---

139 Ibid.
140 R.D.S, supra note 7 at para 56.
141 Ibid at para 56.
reasonable apprehension of bias if you include the justices at the Nova Scotia Supreme Court and Court of Appeal who heard the appeal, notwithstanding virtual consensus on the formulation of the test. The indeterminacy of law is demonstrated where the same test applied to the same facts creates two defensible outcomes, meaning factors unique to the judge, including their explicit and implicit biases, have a real impact in deciding the case. In a way then, taking a page from legal realist scholars, the law is just a tool for a decision maker to `justify` getting to their preferred outcome. In a case regarding bias, whether the judge in question’s bias matches that of the deciding judge could go a long way to determining whether he or she will believe there is a reasonable apprehension of bias. Where a class of people dominate the judiciary, their biases are then untouchable and become the `neutral` or unbiased standard.

3.1.2.1. Two Approaches to the Reasonable Apprehension of Bias

While it was tacitly rejected by the Supreme Court of Canada majority, Devlin suggests that there are two different approaches to the reasonable apprehension of bias test backed by authority. One approach he characterizes as the “possibility test” with a “relatively low threshold” for finding a reasonable apprehension of bias. To illustrate this approach, he draws upon Lord Hewart’s maxim: “. . . justice should not only be done, but should manifestly and undoubtedly be seen to be done.” This approach emphasizes judicial neutrality, and “the key rationale underlying this test” is the importance of “public confidence in the administration of justice.” On the other hand, the “probability test” sets a “relatively high threshold” for finding

---

142 See Devlin & Pothier, supra note 125 at 29, both Devlin and Pothier were involved in the case having made extensive contributions to the appellants (RDS) factum at the Supreme Court and in the case of Pothier, having made oral arguments.
143 Ibid at 26.
144 Ibid at 26 still, his quote number 95.
145 Ibid.
a reasonable apprehension of bias, “emphasizing the judicial traditions of integrity and impartiality, and oaths of office.” 146 While arguing for the appellant in R.D.S. at the Supreme Court of Canada, Devlin submitted that there was a precedent of using the higher threshold probability test in past situations involving accusation of gender or racialized bias, including the Bourassa and Marshall147 inquiries, in which the higher probability threshold resulted in no findings of a reasonable apprehension of bias, and that in the case before them, Sparks J. was being held to the lower possibility standard.148 While arguing that obviously the same standard should apply to Justice Sparks, it still begs the question as to what is the better standard, in terms of addressing the pressing issue of racial discrimination in the criminal justice system.

There are pros and cons to both tests. The probability test makes it more difficult for parties to prove a reasonable apprehension of bias against racially biased judges. Fleshing out the implications of the test, Devlin points to the majority decision where Cory J. asserts the “presumption of judicial integrity” dictates that there must be “cogent evidence” to create a reasonable apprehension of bias, a “high” bar to reach. 149 McLachlin J. (as she then was) and L’Heureux-Dubé articulate it differently, but agree that “convincing evidence” or “clear evidence of prejudgment” is required to rebut the “strong” presumption of impartiality.150 What is concerning about this standard is that it “insulate[s] judges from effective criticism and review” leaving “. . .few mechanisms available to ensure judicial accountability.” This is particularly

146 Ibid.
148 See Devlin & Pothier, supra note 125 at 26. Devlin: “I argued that in precedent situations where gender or racialized bias had been suggested, for example the Bourassa and Marshall Inquiries, judges were measured by the higher threshold with the consequence that there were no findings of a reasonable apprehension of bias. I further argued that to apply a lower threshold to Sparks J. would be the application of a double standard.”
149 R.D.S., supra note 7 at para 542.
150 Ibid at para 33 and 58.
concerning where judges rely on their common sense, instincts and experience in assessing credibility or in discretionary decisions such as whether to imprison an individual, all in the context of “a significant history of systemic bias on the bench.” Devlin presents a compelling argument that the ultimate result of this higher standard is that “those who are marginalized” will face more obstacles in “challeng[ing] oppressive or exclusionary judicial practices.”

These difficulties minorities may face is not dispositive of the issue, because a lower threshold would actually hamper attempts by judges such as Sparks J. to address substantive inequality, as there is evidence that in both Canada and the United States “challenges for bias on the basis of race or gender . . . have been frequently targeted (sometimes successfully) against women and/or minority culture judges and arbitrators.” On this topic, Pothier questions whether it is “sheer coincidence that the first time a Canadian judge is challenged for bias based on race, that judge is Black and is concerned about racism against Blacks?” A lower threshold for finding a reasonable apprehension of bias may also open the floodgates to “frivolous claims from losing parties.”

Ultimately Devlin finds a middle ground, advocating for the lower threshold possibility test while advocating that appellate courts be “particularly alert” in cases where the reasonable apprehension of bias is being asserted “against women and/or minority judges.” While this sounds aspirational, it is in line with Justices McLachlin and L'Heureux-Dubé who advocate for a “contextual approach” to applying the reasonable apprehension of bias test, as well as the

---

151 Devlin & Pothier, supra note 125 at 26.
152 Ibid.
153 Ibid at 27.
154 Ibid at 31.
155 Ibid at 31.
156 Ibid at 27.
Supreme Court’s interpretation that section 15 of the *Charter* permits “differential treatment to ensure equality.” This modified approach to the lower threshold possibility test is also more in line with Cory J.’s assertion that “. . . the courts should be held to the highest standards of impartiality” than Cory J.’s own high threshold approach requiring “cogent evidence.”

3.1.2.2. Law as Indeterminate

While Devlin discussed different tests and how *R.D.S.* would ultimately hinge on what test was applied (although the majority of the Supreme Court of Canada disagreed), Pothier adopted a different approach, suggesting that the law is indeterminate:

It is worth asking whether any test is actually determinative, or even very influential, in determining the outcome, or is it more of an ex post facto rationalization of the result. My assessment is that the latter is closer to the truth, that most bias cases are decided on a gut reaction that then gets dressed up in an articulation of the test for reasonable apprehension of bias.

Ultimately her perspective that “the fact that the style of legal discourse is to apply legal tests to facts does not mean the tests are actually decisive” is in line with a key tenet of critical race theory, that law is indeterminate. Because law is indeterminate, judges have “hard discretion,” and this discretion means we must be wary of judicial bias.

*R.D.S.* gives a great example of the indeterminacy of law. Among the 13 judges involved in the appeal of *R.D.S.* at various levels, there was “general consensus on the articulation of the test”. Nevertheless, their opinions were almost evenly split, with seven judges ruling there was no reasonable apprehension of bias, and six finding that there was. Further, only two judges

---

157 Ibid at 36.
158 Ibid at 27.
159 Ibid at 28.
160 Ibid.
161 Shapiro, supra note 85 at 265-280.
162 Devlin & Pothier, supra note 125 at 29.
thought the case was even close to the line.\textsuperscript{163} Pothier paints the picture that the choice of test was irrelevant and that it was gut reaction that determined the outcomes for most of the judges:

All six of the judges who found a reasonable apprehension of bias were obviously very offended by Judge Sparks' comments, tainting a police officer as racist without specific proof. They would have found a reasonable apprehension of bias no matter what the test. On the other hand, Justice Freeman in the Court of Appeal and the quartet of Justices L'Heureux-Dube, McLachlin, Gonthier and La Forest in the Supreme Court of Canada were not at all offended by Judge Sparks' comments. Viewing the circumstances as racially charged, thereby giving a context for Judge Sparks' comments, they would, I surmise, have concluded there was no reasonable apprehension of bias no matter what the test.\textsuperscript{164}

Though redeeming Devlin and justifying my discussion of the choice of test above, Pothier goes on to point out that:

\ldots admitted still leaves Justices Cory and Iacobucci in the Supreme Court of Canada, whose decision tipped the balance, and who did think that the case was very close to the line. It might be concluded that their reliance on a strict test produced a different result than they would have reached on a lower threshold test, making the choice of test crucial to the ultimate result.\textsuperscript{165}

\subsection*{3.1.2.3. Formal versus Substantive Equality}

Justices McLachlin and L’Heureux-Dubé, in the majority, assert that judicial impartiality is not necessarily inconsistent with de-emphasizing neutrality and objectivity.\textsuperscript{166} In advancing this perspective, they draw upon the Canadian Judicial Council’s \textit{Commentaries on Judicial Conduct} which says: “there is no human being who is not the product of every social

\footnotesize
\textsuperscript{163} Supreme Court Justices Cory and Iacobucci in the majority, see \textit{Ibid.}
\textsuperscript{164} \textit{Ibid.}
\textsuperscript{165} \textit{Ibid.}
\textsuperscript{166} \textit{Ibid} at 16.
experience, every process of education, and every human contact.”

Benjamin Cardozo, who in *The Nature of The Judicial Process* writes:

> We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own. . . . [d]eep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the [person], whether he [or she] be litigant or judge.

This perspective is justified by drawing upon the description of impartiality from the Canadian Judicial Council’s *Commentaries on Judicial Conduct*:

> 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.

This is contrasted with the minority justices, including Justices Major and Sopinka, and Lamer C.J. (as he then was), who maintain “a purely formal equality analysis” and that “[a]ny factoring of race” in the absence of “specific proof” of racial bias would be “the antithesis of equality and impartiality.” This position emphasizes the importance of individual, as opposed to group equality. This position is outdated, and ignores the fact that individuals face discrimination and inequality based on their group characteristics. As Devlin explains: “[t]he point of a substantive equality analysis, in contrast to a formal equality analysis, is that one cannot presume equality of starting points, and that group characteristics are highly relevant to inequality of starting points.”

---


In dissent, Major J. claims that a specific finding of racism on the part of the constable was required for Sparks J. to allow race to influence her analysis of his credibility and that “[i]t [is] open to the appellant to introduce evidence that this police officer was racist and that racism motivated his actions or that he lied.”

Pothier and Devlin point out that “in a society where racism is said to be pervasive, indirect and systemic rather than just overt and direct, how is a fifteen year old youth going to prove that a police officer is racist and that racism motivated his actions?” They call his approach “wilful blindness” on the existence of racism in Canada, an example of “a classical vision of judging” in which judges are “passive” and “all witnesses are . . . treated equally . . . by denying any reference to social context . . . endors[ing] an ideology of colour blindness.”

The minority justices adopt the view that witnesses should be assessed on their individuality without importing group characteristics, however the majority accepts a more “contextual approach.” Pothier and Devlin provide the example that to adopt the first approach is to say “that there is no reason to assume that this case would have unfolded any differently if R.D.S. had been a 60 year old White woman riding her bike . . . in an affluent, predominantly White neighbourhood” and that the more contextual approach adopted by the majority “would assume that there is every reason to think that such a variation in the identity of an accused and a change of environment would have made an enormous difference in how events unfolded.”

On the other hand, Justices McLachlin and L’Heureux-Dubé oppose the “classical model’s preoccupation with . . . the ‘fallacy’ of objectivity and neutrality”, embracing instead the

---

173 R.D.S, supra note 7 at para 496. See also at 498.
174 Devlin & Pothier, supra note 125 at 16.
175 Ibid.
176 R.D.S, supra note 7 at para 48
177 Devlin & Pothier, supra note 125 at 14.
approach of “perspectivism.”" They contend that judges must grapple with the “complicated reality of each case before them” and that “those who come before the law are “influenced by the innumerable forces which impact on them in a particular context.”

The discussion about neutrality and impartiality is inextricably tied to discussions of equality. Substantive equality, the type I believe section 15 of the Charter demands, requires acknowledging race in decision-making. Formal equality sees this approach as the “antithesis of equality.” The effect of this conflict is that the end result of a low threshold test would likely “invite a simplistic application of a formal equality approach” negating judicial attempts at “more complex substantive equality approaches.” Further compounding this issue and the issue of minority judges being targeted is the fact that “even ultimately unsuccessful challenges arguing a reasonable apprehension of bias can place a judge under a cloud.” Pothier agrees that adopting the low threshold test could potentially “undermine diversity in the judiciary and hamper the development of equality jurisprudence beyond formal equality.”

What makes R.D.S. such an important case is that it challenges what Devlin refers to as “two shibboleths” of the Canadian criminal justice system: “neutrality and impartiality.” The case demonstrates that there is fundamental disagreement within the Court on how to deal with these issues “both methodologically and substantively” in cases such as this. As a result, the issue was not settled, however the majority’s judgment reflects an acceptance of the principle of

---

178 Ibid at 17.
179 R.D.S. supra note 7 at para 40.
180 Ibid at para 41.
181 Devlin & Pothier, supra note 125 at 31.
182 Charter, supra note 1.
183 Devlin & Pothier, supra note 125 at 31.
184 Ibid.
185 Ibid.
186 Ibid.
187 Ibid at 36.
substantive equality in so far as they “acknowledged that colour blindness is not necessarily synonymous with impartiality.” Ultimately, the upholding of Justice Sparks’ decision by the Supreme Court of Canada is a “strong indication from a majority of Supreme Court justices that it is appropriate to confront issues of racial discrimination in the criminal justice system.”

3.1.3. Censorship and Censoriousness: Erasure

I explore theories and evidence relating to the censorship and erasure of race in judicial decision-making and other difficulties associated with identifying and addressing judicial bias. I demonstrate how the Crown’s arguments on appeal in R.D.S. illustrate the significant amount of censorship of racial discussion within the legal community and judicial system, identifying a possible chilling effect this case may have had on judicial considerations of substantive racial inequality. To conclude, I bring back the Ururyar decision and discuss connections between erasure and the reasonable apprehension of bias.

3.1.3.1. Censorship and Censoriousness

Research into bias in Canadian judicial decision-making has focused on the censorship and censoriousness of homosexuality in judicial decisions. Censorship and censoriousness are both ways of rendering something invisible, either by omission or by disparaging or trivialization. Censorship can be of one’s own language to prevent the incurrence of negative penalties, such as for having explicit biases. The need to censor oneself stems from an overall

---

188 Ibid.
189 Ibid at 9.
190 MacDougall, supra note 70 at 54.
191 Ibid.
192 Ibid.
environment of censoriousness, the notion that “some things are better left unsaid.”

Censoriousness means classifying as certain expression as bad without preventing it. Censoriousness is often at play when certain activities done by certain people are acceptable, while similar or same actions done by other types of people are not acceptable, or where the treatments of the two types of individuals for the same actions is different. I argue that similar to the case of homosexuality, there is censoring of race and or censoriousness against interracial sex, indicative of an implicit bias or taboo. Another way that censorship operates is when litigants refrain from mentioning race or sex in their arguments, because specific mention of race and sexuality are censored. Mentioning the impact of race draws the ire and the label of playing the race card, an attempt to silence, and an example of censoriousness.

One of the responses to the case were accusations that Sparks J. was labelling the police as racist. The tendency towards this labelling and the significant stigma associated with it derails substantive discussions on the topic of racial inequality because:

as happened in this case, when race is put on the table by a Black person, it gets interpreted as a branding of “racist” or “racial motivation” which prompts an angry denial and a lashing out from a feeling of being maligned . . . [i]n this process, as constructed by the Crown’s argument in R.D.S. and perpetuated by Professor Delisle, racial minorities are characterized as the oppressors rather than as the victims of racism, and any opportunity to confront the racism experienced by racial minorities is lost.

For example, in dissent at the Supreme Court of Canada in R.D.S., Major J. constructs a straw man argument and “mischaracterizes what Sparks J. said . . . exaggerating what Judge Sparks

---

193 Ibid at 55.
194 Ibid at 73-77.
195 Devlin & Pothier, supra note 125 at 13.
196 Ibid at 12, 13.
did”, making her “an easier target” with both Pothier and Devlin suggesting “this is symptomatic of how Canadian society avoids confronting issues of race.”

Instead of viewing them as labelling the police officer racist, Devlin and Pothier have another interpretation on Sparks J.’s comments. They suggest that the mere circumstances of “a White police officer, after a chase, arresting a Black youth in a largely Black neighbourhood” and then a “second Black youth” approaching could fairly be characterized as a “tense situation” particularly due to a “history of difficulties between White police officers and the Black community in Halifax.” This “tense situation” may have made the police officer (Constable Steinberg) “apprehensive (his “questionable state of mind”), therefore fearing and expecting the worst, and reacted on that basis instead of responding to what R.D.S. actually did.” In alluding to the possibility that Constable Steinberg overreacted. It is wrong to equate overreaction with racial motivation or racism. If Constable Steinberg did overreact “… his actions would require and acquittal” whether motivated by “a deliberate vendetta against Blacks” or simply a “miscalculation.”

The treatment of Justice Sparks at the hands of the Nova Scotia Supreme Court and Court of Appeal is a perfect example of censoriousness and censorship in the legal community. In his decision, Justice Cory was compelled to say: “… it must be emphasized that it is obviously

---

197 Ibid at 11.
198 Ibid at 13.
199 Ibid.
200 Ibid.
201 See The Nova Scotia Barristers’ Society v. Lyle Howe (2017), Nova Scotia Barristers’ Society at para 55 [Howe]. Similarly, a black lawyer’s experience in Nova Scotia as articulated by a hearing panel of the Nova Scotia Barristers’ Society: “To conclude this portion of our inquiry, we accept that the evidence gives us reason to believe that Mr. Howe’s professional in-court behaviour has been subjected to closer scrutiny than that of his peers. … Ms. James felt encouraged in her enhanced scrutiny of Mr. Howe by Ms. Rees, acting on behalf of the Bar Society. Ms. James’ difficult relationship with Mr. Howe cannot be understood by us on any objective basis.”
not appropriate to allege bias against Judge Sparks simply because she is Black and raised the prospect of racial discrimination”\textsuperscript{202} which is “[f]rom the perspective of counsel for the Appellant . . . what the Crown’s case seemed to be, though it was obviously never articulated in this way.”\textsuperscript{203} Justice Cory’s emphasis seems to be a subtle indictment of the Crown’s position, however three out of four of the Nova Scotia Judges who heard the appeal bought it. Perhaps the censorship of Black voices by the Nova Scotian judiciary should come as no surprise, as there is extensive evidence of anti-Black racism in Nova Scotia\textsuperscript{204}, which Justice Sparks had been alluding to. Further, the evidence shows that the Nova Scotian judiciary and legal system are complicit in the discrimination of Blacks.\textsuperscript{205}

\subsection*{3.1.3.2. Erasure}

When race is the object of censoring or censoriousness, it has been colloquially referred to as erasure.\textsuperscript{206} The erasure of race is specifically rampant in the context of sentencing for sexual assault, as two LL.M. students at UBC discovered while researching rape myths, the justice gap, and sentencing for sexual assault.\textsuperscript{207} They acknowledged that race plays a factor in sexual assault and in sentencing, but were unable to include these factors in their analysis as for

\begin{itemize}
\item \textsuperscript{202} R.D.S, supra note 7 at para 142.
\item \textsuperscript{203} Devlin & Pothier, supra note 125 at 30.
\item \textsuperscript{204} See Howe, supra note 201 at 6. “The Panel accepts the existence of systemic racism in our province. This results in a system that may cause discriminatory treatment of persons from a minority group, . . . We must also remember that such evidence is not always plain or obvious. People do not usually admit such biases. Sometimes people do not recognize their biases. Thus, we must be prepared to allow a broad examination of the question, which means comprehensive inquiries and possibly additional witnesses.” See also Royal Commission on the Donald Marshall Jr. Prosecution, supra note 147.
\item \textsuperscript{205} Marshal Royal Commission was a seminal royal commission looking into why a young native man named Donald Marshall, Jr., spent 11 years in prison for a murder he didn’t commit concluded that Nova Scotia had a deeply entrenched two-tiered justice system: one for the privileged, and another for Blacks and natives. See Royal Commission on the Donald Marshall Jr. Prosecution, supra note 147.
\item \textsuperscript{206} Tanovich, supra note 52 at 674.
\item \textsuperscript{207} Welch, supra note 46. See also Burnett, supra note 46.
\end{itemize}
the most part it was impossible to ascertain the racial demographics of complainants and accused in the cases they were analyzing.\textsuperscript{208}

One of the reasons for the absence of racial discussion is the failure of lawyers to raise the issue of race. Some lawyers may feel “uncomfortable engaging in race talk before our courts” or “may shy away from raising race because they believe they have a strong argument using traditional constitutional principles.” Others are simply “not seeing the issue”, probably because generally “Whites do not see themselves as a race or everyday conduct as the product of White privilege.”\textsuperscript{209}

Perhaps judges avoid discussing race because they assume it is not an important factor in a case, they are censoring their own explicit bias, or they believe that racial equality means colourblindness. This last belief stems from the belief (or ideal) that a post-racial society is possible or ideal. This formal equality for all races does not lead to equity as I will seek to demonstrate. What is needed is an acknowledgement of race to counteract the effects of implicit bias and discrimination in our society, in our criminal justice system, in our police forces and in sexual assault cases.

Another reason why race is not often discussed by judges is to maintain the illusion of impartiality. The judge may fear that by wandering into discussions of race they will be labeled a racist, from either side. As \textit{R.D.S.} demonstrates, not only can a judge be accused of being racist against Black people, they are also vulnerable to being accused of being biased against White people. When Justice Sparks brought up race when explaining how a young Black boy’s interaction with police may have been influenced by a particularly form of anti-Black racism in Nova Scotia, her decision was appealed all the way to the Supreme Court of Canada claiming

\textsuperscript{208} Welch, \textit{supra} note 46.
\textsuperscript{209} Tanovich, \textit{supra} note 52 at 674-675.
that she was racially biased. Too often, and against the spirit of our Constitution, tenet protections of minorities from discrimination are in fact used by the dominant class to protect their privilege and prevent affirmative action and progress.\footnote{Devlin & Pothier, supra note 125 at 31.} In addition to racial minorities, this is likely true with respect to the advancement of women’s rights and rights for sexual or gender minorities.

It is encouraging that in our society the label of \textit{racist} carries the utmost stigma, perhaps only surpassed by criminal labels such as rapist or sex offender. Nobody wants to be perceived as a racist, and that is half the problem. On the topic of race, I often hear people say, “I don’t see colour.” First, Black is not a colour — it is a shade. Second, unless they are truly colourblind they are lying. These people are either oblivious to their implicit racial biases, or are obfuscating their explicit racial biases. “Colour blindness”, or the ability to avoid seeing the world in terms of race, is as an aspect of White privilege.\footnote{See Barbara Flagg, “The Transparency Phenomenon, Race-Neutral Decisionmaking and Discriminatory Intent,” in Delgado & Stefancic, ed. \textit{Critical White Studies} (Philadelphia: Temple University Press, 1997), 220–27. The author situates white privilege as that of “white transparency”, and questions whether decision makers can actually make race neutral decisions without creating objective criteria, and then analyzing those criteria for inherent racial biases. She points to the social science literature as indicating that race almost always influences decision-making, and that the transparency of these biases is such that the researchers may not even identify all instances, or the researchers’ own transparent biases might even get in the way of identifying them, to the affect that there is likely even more racial bias in white decision-making than even the literature suggests. This leads her to characterize the “faith in the commonality of race-neutral decision-making is a component of white race consciousness.”} This is consistent with the transparency theory of Whiteness as being non-racial, race being defined as the opposite of Whiteness, and race neutrality means White centric.\footnote{Ibid.} The race-neutral decision maker who makes their race-neutral decision by ignoring race is in fact deciding from the perspective of Whiteness. A race-neutral decision is only achieved by explicitly examining what the effects of race are, assessing one’s
own racial bias, and critically evaluating the racial neutrality of the decision’s objective criteria which may in fact be reproducing systemic bias.\textsuperscript{213}

To say that a person does not see colour is disingenuous and diminishing of the experience of racial minorities. Perhaps one does not discriminate against minorities, however one does have the ability to see colour, and there are those who can and \textit{do}. Some of these people sexualize this difference between races, as evidence by the interracial pornography niche. When a judge makes his decision, they have often had the benefit of seeing the accused and/or the complainant, thus seeing their race, ethnicity or colour. By failing to record these racial facts in their decision, they are leaving out a large part of the picture. I think what is being left out could provide some explanation for the justice gap and the indeterminacy in sentencing for sexual assault.

3.1.3.3. \textbf{Ururyar: Erasure and the Reasonable Apprehension of Bias}

I return to the \textit{Ururyar} appeal and the now overturned trial decision. In his \textit{Ururyar} decision, the trial judge, Justice Zucker, does not mention race. He does display animus towards and bias against Ururyar, in disbelieving and mocking his testimony,\textsuperscript{214} as well as by throwing the book at him at sentencing before even considering his submissions.\textsuperscript{215} The decision being overturned in its entirety, meaning that the sentence imposed was not itself analyzed. By connecting the dots, perhaps we can read between the lines to make sense of the decision, exposing some type of implicit or explicit bias as a plausible explanation for Justice Zucker’s “incomprehensible” decision.\textsuperscript{216}

\footnotesize
\textsuperscript{213} \textit{Ibid.}
\textsuperscript{214} \textit{Ururyar Appeal}, supra note 8 at para 48.
\textsuperscript{215} \textit{Ibid} at para 5.
\textsuperscript{216} \textit{Ibid} at para 62.
In finding Ururyar guilty, Justice Zucker seemed to use the context of rape myths to discredit Ururyar’s testimony, speaking generally that those accused of sexual assault know that they can create their own narrative if their victim is drunk and will not remember what happened, and that even “nice guys” can commit sexual assault.\(^{217}\) This is one of the results of judges being able draw upon their experiences in the absence of specific evidence to use generalizations and a contextual approach. Justices L'Heureux-Dubé and McLachlin limit the use of experiences and generalizations to “the standard of the reasonable person” and that these “experiences must be “relevant . . . not based on inappropriate stereotypes and do not prevent a fair and just determination . . . based on the facts in evidence.”\(^{218}\) While agreeing with the outcome Justices McLachlin and L’Heureux-Dubé get to, Devlin feels as though they depart too far from objectivity, and that the Justices’ “unconditional, uncritical and unguarded embrace of contextualism might be read as a licence for other judges to shoot from the hip.”\(^{219}\) I believe that this fear is realized in Justice Zucker’s decision, as he asserts that his credibility analysis need not be scientific, and that he can rely on his gut instincts and his intuitions, and in the end produces a rambling and incoherent decision consisting largely of a scattered review of feminist literature on sexual assault.\(^{220}\) His bias against those accused of sexual assaults generally, or “rapists”\(^{221}\) as he calls them, is explicit, and therefore perhaps too obvious an explanation for his “incomprehensible decision”, for if his explicit bias against “rapists” was sufficiently explanatory, the decision would not be incomprehensible. Perhaps instead his implicit biases or censored explicit biases racial biases are the key to understanding his decision.

---

\( ^{217} \) Ururyar Decision, supra note 18 at para 523.
\( ^{218} \) R.D.S, supra note 2 at para 501.
\( ^{219} \) Devlin & Pothier, supra note 125 at 23.
\( ^{220} \) Ururyar Appeal, supra note at para 62.
\( ^{221} \) DiManno, supra note 10.
In his apparently biased Ururyar decision Justice Zucker says:

To listen to Mr. Ururyar paint Ms. Gray as the seductive party animal is nothing short of incomprehensible. He went or tried to go to any length to discredit Ms. Gray if not invalidate her. Such twisted logic. It never happened this way. None of it.222

According to the transcripts, however, Ururyar offered a narrative as credible as that of Ms. Gray.223 Unfortunately, Justice Zucker does not clearly state why he wholly accepts her version and rejects his version absolutely and disgustedly. Zucker refers to Ururyar as “[t]his man … this rapist”,224 even though he is not accused of rape (it is not a Criminal Code offence), and considering that Ururyar was charged summarily, meaning his was on the lower end of the spectrum of sexual assaults. Zucker also speaks as if Ururyar represented all men and all “rapists”. Also referring to a text message Gray sent to Ururyar saying: “[c]ome drink and we can have hot sex”, Justice Zucker says: “we don’t even know what the phrase ‘hot sex’ means.”225 After sentencing him to the summary conviction maximum of 18 months imprisonment and ordering an unprecedented $8,000 fine, Justice Zucker revoked Ururyar’s bail pending appeal, saying there was no reason the rapist should not be in jail now.

I believe Justice Zucker’s decision does create the reasonable apprehension of bias. First, after sending Ururyar to jail pending appeal, it is important to note that Justice Quigley overturned Justice Zucker’s bail revocation and said:

a reasonable person could and likely would conclude that this case was significantly stained by the judge’s views of the perceived inequities that face sexual assault complainants in the criminal justice system, as opposed to

222 Ururyar Decision, supra note 18 at 488.
223 DiManno, supra note 10.
224 Ibid.
225 Ururyar Decision, supra note 18 at para 460.
having dispassionately reviewed the evidence and the credibility and reliability of that evidence.\textsuperscript{226}

Here, Justice Quigley addresses the reasonable apprehension of bias, something that the appeal judge never did. What is missing from Justice Zucker’s analysis of the perceived inequalities of sexual assault is the tendency to paint Black men as sexual aggressors and White women as victims. Could this type of generalization have impacted the decision? Sure, especially where the judge is so passionate. Further, in \textit{R.D.S.}, Supreme Court Justices McLachlin and L’Heureux-Dubé assert that the reasonable apprehension of bias requires evidence of prejudgement.\textsuperscript{227} A judge making their decision before listening to submissions by counsel is evidence of prejudgement sufficient to create the reasonable apprehension of bias.\textsuperscript{228} Similarly, in \textit{Ururyar}, the judge had prepared a written sentencing decision before hearing sentencing submissions of the accused being sentenced.\textsuperscript{229} This prejudgement of the case is itself sufficient to create a reasonable apprehension of bias, regardless of the source of the bias.

Ultimately, the \textit{Ururyar} decision was overturned due to logical inconsistencies. Perhaps in a move to maintain respect for the court, which is a motive for a lot of things in the legal world, the judge leaves the issue of the reasonable apprehension of bias aside. By overturning the decision on other grounds, there is no need to grapple with the issue of race. Interestingly, or perhaps tellingly, he discusses several grounds for appeal and speaks to the fact that he will not be discussing the grounds of appeal relating to restitution because it would be \textit{obiter}, but does not mention Ururyar’s first ground of appeal, the reasonable apprehension of bias, other than to

\textsuperscript{226} Sam Pazzano, “Judge Cites Reasons for Releasing Rapist on Bail”, \textit{Toronto Sun} (August 9, 2016), online: http://www.torontosun.com/2016/08/09/judge-cites-reasons-for-releasing-rapist-on-bail.
\textsuperscript{227} \textit{R.D.S.} supra note 2 at para 58.
\textsuperscript{228} Nightingale, supra note 81 at 80.
\textsuperscript{229} \textit{Ururyar Appeal}, supra note at para 5.
say he would not be addressing the first two grounds of appeal. It was if Ururyar’s very first ground of appeal did not exist. On appeal, the issue of bias was itself erased.

3.1.4. Chapter Summary

*R.D.S.* is such an important case for challenging what Devlin refers to as “two shibboleths” of the Canadian criminal justice system: “neutrality and impartiality.”230 The case demonstrates that there is fundamental disagreement within the Court on how to deal with these issues “both methodologically and substantively” in cases such as this. As a result, the issue was not settled, however the majority’s judgment reflects an acceptance of the principle of substantive equality in so far as they “acknowledged that colour blindness is not necessarily synonymous with impartiality.”231

The Nova Scotia Supreme Court and Court of Appeal demonstrated censorship and censoriousness of racial inequality, which is consistent with the province’s long and ongoing history of racial injustice. Ultimately, the upholding of Justice Sparks’ decision by the Supreme Court of Canada, however, is a “strong indication from a majority of Supreme Court justices that it is appropriate to confront issues of racial discrimination in the criminal justice system.”232

---

230 Devlin & Pothier, *supra* note 125 at 36.
4. The Importance of Acknowledging Race: Sexual Assault

While literature on sexual assault and literature on the impact of racism have proliferated in recent times, there has been very little written about the impact of race in the context of sexual assault, particularly as it relates to the complainant.\textsuperscript{233} I demonstrate why racial considerations are particularly important in the context of sexual assault, with a focus on the impact of racial bias on complainants. I assert that the \textit{Charter} creates an obligation on courts to ensure all groups in society are equally protected by the law and that racial considerations are required to achieve that end in the context of sexual assault. To support this, I apply law and economic theory to the sentencing principles found in Canada’s \textit{Criminal Code}. Finally, I illustrate how the acknowledgement of race in sentencing decisions would boost the public’s slipping confidence in the judicial system’s ability to curb instances of sexual assault.

4.1.1. The Special Nature of Sexual Assault

In this section, I illustrate the importance of acknowledging race in sentencing decisions drawing again upon \textit{Ururyar} and introducing \textit{Wagar}. Sexual assault is particularly ripe to use as an example due to the vulnerability of minority women, documented biases against the credibility of sexual assault complainants, historic and recurring rape myths, special statutory procedural and evidentiary rules, as well as a demonstrated failure in deterrence.

4.1.1.1. Unacknowledged Impact of Race

Elizabeth Ann Welch adopts a feminist approach, understanding sexual assault as an:

expression of systemic gender inequality. . . not grounded in biology but based on the social construction of gender within a particular cultural and historical

\textsuperscript{233} Nightingale, \textit{supra} note 81 at 74.
context. . . enabled by the “erotization of subordination and dominance” of women based on cultural norms of femininity and masculinity and by institutions that oppress women and ignore violence against them.\textsuperscript{234} I believe it is appropriate to adopt a corollary understanding that views the sanctioning of sexual assault as an expression of racial inequality, not grounded in biology but based on the social construction of race within a particular cultural and historical context, enabled by the erotization of subordination and dominance \textit{and of race}. In adopting a feminist approach to sexual assault, Tamara Burnett asserts that “the history of law has been shaped primarily for and by men” and that “this structure has caused systemic harm to women.”\textsuperscript{235} In her work, she engages in critical discourse analysis, recognizing that the law “is a tool of the powerful that can be used to silence the marginalized in order to confirm the social standing of the most privileged.”\textsuperscript{236} In agreeing, I also suggest that the history of the law has been shaped almost exclusively by Whites, and that it has caused systemic harm to minorities.

Race has an unacknowledged impact on people’s decisions, on the outcomes of people’s lives and the way we judge other people. Race also plays an under-acknowledged role in sexual relations. I submit that just as sexual assault is gendered,\textsuperscript{237} it is also racial with minority women being the most vulnerable. Canada’s unforgiveable history of residential school sexual abuse by White men against Indigenous children is just one example of White domination and sexual


assault of subordinate racial groups.238 There is also evidence in the fact there are unique categories of pornography dedicated to interracial sex. Interracial sex makes up its own category of sexual relations, meaning there is something inherently sexual, to at least some people, of sexual contact between members of different races. That difference creates some sexual tension or there is some underlying sexuality to it. Many feminist writers have written about sex assault being about power or domination, some going as far as to say that all sex is violence. There are some intrinsic similarities between the power and domination between racial groups as between two-people engaging in sexual activities. In some way, these two have some overlap or relation to one another. Despite this fact, race is rarely discussed by judges in the context of sentencing for sexual offences. Studying sexual assault and rape myths in decisions, both Welch and Burnett acknowledge the impact of race on the perpetrating of sexual assault, as well as in the justice system generally, but discovered that determining the race of either accuser or complainant was nearly impossible in all the judgments that they looked at.239

4.1.1.1. Complainant’s Race

Aboriginal women240 are among the most vulnerable to sexual assaults. In 2014, for example, the overall rate of sexual assault was higher for Aboriginal women, at 113 per 1,000

---

238 Andrea Smith, Conquest: Sexual Violence and American Indian Genocide (Boston: South End Press, 2008). Andrea Smith exposes endemic historical sexual violence and discrimination against Native American and other minority women. Her account begins with first contact by Columbus and extends to present day. She describes the powerlessness that these women face vis-à-vis their abusers, as well as when it comes to reporting their victimization to the police. She posits that a narrative of rapist Indigenous men and men of colour is used as a covert tactic to justify misogyny towards white women, created by the white male abuser, in which he is the protector/hero. She says this in light of the fact that evidence shows that it was in fact the white man who was raping the black and Indian women. See also Wynter, supra note 61 for example at 20-25.

239 See Welch, supra note 46. See also Burnett, supra note 46.

women, compared to the overall rate for women of 37 per 1,000.\textsuperscript{241} Among Aboriginal women aged 15-24, 22\% or 1/5 reported being sexually assaulted.\textsuperscript{242} This racialized nature of sexual assault victimization underlies an important reason for considering race when dealing with sexual assaults.

The impact of complainants’ race has been largely ignored in sexual assault literature, even though the problem of sexual assault is particularly acute within Aboriginal communities.\textsuperscript{243} This is probably partly because of middle class White feminists defining the feminist agenda, and ignoring the impact of race, instead painting their picture or perspective as the picture of all women.\textsuperscript{244} Or, as Pothier and Devlin articulate it:

\begin{quote}
[t]he academic world, like the legal world, has been dominated by a relatively small and homogeneous elite. This domination can be both substantive and methodological. Thus it may be that vitally important issues that are of interest to those who are marginalized are considered “non questions.”\textsuperscript{245}
\end{quote}

Due to this gap in the literature, Nightingale focuses her study on the judicial treatment of Indigenous sexual assault survivors, as the understudy of indigenous sexual assault survivors leaves their actual experience largely a mystery. Her analysis of judicial treatment “reveals . . . disturbing judicial perceptions of [the] sexual assault” of Aboriginal women, as “[j]udges often fail to recognize any injury or harm, or will minimize that harm which cannot be avoided.”\textsuperscript{246}

\begin{flushright}
\textsuperscript{241} Ibid. See also Conroy, Cotter and Canadian Centre for Justice Statistics, supra note 237.
\textsuperscript{242} Ibid.
\textsuperscript{243} Canada, Native Victims in Canada: Issues in Providing Effective Assistance (No. 1986-50) by G.S. Clark (Ottawa: Ministry of the Solicitor General, 1986) at 45, as cited in Nightingale, supra note 81 at 74: “There is considerable concern regarding [the] apparent level of sexual assault and incest in many Native communities. It is also evident that there is sexual abuse within the community, e.g., gang rape. Concern was raised over the belief that young girls were being initiated at tender ages by groups of boys and men. Also, girls and women were being sexually abused when under the influence of alcohol and were therefore perhaps more vulnerable to such attacks.”
\textsuperscript{244} Ibid at 75.
\textsuperscript{245} Devlin & Pothier, supra note 125 at 18.
\textsuperscript{246} Nightingale, supra note 81 at 84.
\end{flushright}
The only type of harm that “judges appear to consider”, based upon her analysis, is “visible or physical” or "short-term" harm, while “[t]he true extent of the injury suffered by a woman who has been sexually assaulted is rarely addressed, or understood, particularly that injury which is psychological.”

It is not uncommon for judges to “make no comment upon the impact of the assault on the complainant.” In particular, the “unique forms of injury” Aboriginal women suffer as a result of sexual assault have not been recognized by the court, including their ostracism from family or community after being sexually assaulted, or after reporting their assault and being “blamed for what transpires.”

The circumstances in which the sexual assault of Aboriginal women often occurs creates additional reasons to pay attention to them as a class of victims. These sexual assaults often occur in “foster homes, juvenile institutions, or on city streets”, which one could argue creates a moral duty to protect them, but also because for many native women the exposure to violence is not limited to one experience of sexual assault, but has consisted of "long-term and systematic violence.”

Another important reason for looking specifically at the sexual assault of native women is the relationship between being sexual assaulted and future violent offending amongst Aboriginal women:

As victims we carry the burden of memories: of pain inflicted on us, of violence done before our eyes to those we loved, of rape, of sexual assaults, of beatings, of death. For us violence has begotten violence: our contained hatred and rage has been concentrated in an explosion that has left us with yet more memories to scar and mark us.

---

247 Ibid at 85.
248 Ibid at 86.
249 Nightingale, supra note 81 at 87.
250 Ibid at 87.
In this respect, one could even take a pragmatic public safety interest in addressing the problem of the sexual assault of Aboriginal women on the basis that this will also prevent their criminalization.

Welch points out that “Aboriginality, race, [and] class . . . are circumstances that make women more vulnerable to and shape their experiences of sexual violence” and “also affect their experiences of the criminal justice system in the discrimination they face from myths designating them as less credible or the harms against them less opprobrious.”251 Despite these factors potentially playing an important role, in her study of cases she found that “judges typically did not record offenders’ race or ethnicity” and “[i]nformation about survivors’ race or ethnicity was almost entirely absent from cases.”252 Her explanation for this erasure this was that judges were likely trying to appear “non-discriminatory”, finding this problematic. Drawing from McIntyre, she asserts that “[t]he blinders of a formal equality approach do not guarantee that discrimination and systemic inequality are eliminated from the criminal justice system, rather they obscure their presence.”253 This underscores the importance of acknowledging race in the context of the Charter, which I discuss later in the chapter.

Native women are particularly likely to experience differential treatment when they are perceived as being less advantaged (sympathetic) than the man who assaults them. Whether elements of race, gender or class are the cause of this difference will likely depend on the facts before the court . . . As Patricia Monture has said: “I do not know, when something like this happens to me, when it is happening to me because I am a woman, when it is happening to me because I am an Indian, or when it is happening to me because I am an Indian.”254

251 Welch, supra note 46. See also “Race, Gender, and Sexual Harassment” (1991) 65 S Cal L Rev 1467 at 1468.
252 Welch, supra note 46.
254 Nightingale, supra note 81 at 98.
This suggests the need for more data to help identify the source of biases against sexual assault complainants, as racial data is currently largely unavailable. It is also possible that some of the bias against Aboriginal complainants is in fact attributable to class based bias, as research has linked class and sentence in the context of sexual assault.”255

4.1.1.2. Accused Race

The race of an accused also plays a role in the sanctioning of sexual assault. In Williams, the Supreme Court of Canada admits that “the link between prejudice and verdict is clearest where there is an “interracial element” to the crime or a perceived link between those of the accused’s race and the particular crime.”256 This speaks to my theory that there is censoriousness with respect to interracial sex. Historical portrayals of the sexual aggressiveness of Black men, for example, also mean that there is this “perceived link between those of the accused’s race and the particular crime” which creates a clear “link between prejudice and verdict”,257 and therefore sexual assault is a particular context in which racial bias likely affects outcomes of cases.258

These comments were aimed at the decision-making of juries, but I do not think there is a reason

255 Ibid at 90.
256 Williams, supra note 93 at para 28.
257 Ibid.
258 Howe, supra note 201 at para 31. A hearing panel of the Law Society of Nova Scotia took notice of the historical painting of Black man as sexually aggressive, and say this stereotype was fed into as Lyle Howe was charged with sexual assault, leading to increasing bias against him: “We are prepared to take notice that Black men have suffered an historic disadvantage by being publicly associated by White society with a propensity for sexual impropriety and violence. That stereotype has too often represented part of the continuing baggage of the North American slave experience. The issue of “perceived criminality” is also justified based on the evidence that we heard about a Dartmouth Crown office policy (or advisory) in relation to the treatment of Mr. Howe in the Crown’s offices as a defence lawyer while concurrently going through the criminal justice system as a sexual offence accused. Clearly, all of the issues and concerns as to the stereotype of the Black man accused of criminal sexual misconduct are very much part of the fact situation presented in this case. We recognize how the nature of the criminal allegations faced by Mr. Howe could potentially feed directly into stereotypes historically associated with his racial and cultural background.”
to believe that judges are not susceptible to the same tendency, as if this was clearly the case, those cases that served to prove the link between prejudice and verdict would have been better tried as judge only trials. And if that is the case, why would defence lawyers be ignorant of this fact and subject their clients to prejudice at the hands of juries often enough to create sufficient evidence to make this statement? Just as “racist stereotypes may affect how jurors assess the credibility of the accused” with “bias . . . shap[ing] the information received during the . . . trial to conform with the bias,” 259 I believe there is no logical reason to believe the same cannot be true of judges. 260 In fact, one could argue that judges are more susceptible to this type of bias, as this next quote will demonstrate:

“The criminal trial milieu may also accentuate the role of racial bias in the decision-making process. Anti-Black attitudes may connect Blacks with crime and acts of violence. A juror with such attitudes who hears evidence describing a Black accused as a drug dealer involved in an act of violence may regard his attitudes as having been validated by the evidence. That juror may then readily give effect to his or her preconceived negative attitudes towards Blacks without regard to the evidence and legal principles ...” 261

If our attitudes create bias in the way we approach or “validate” evidence, including for example an “anti-Black attitude . . . connect[ing] Blacks with crime and acts of violence”, one could argue that judges are more likely to possess these attitudinal biases due to the overrepresentation of black or indigenous accused in the criminal cases they are exposed to. This overrepresentation can be as a result of racial profiling or over-policing by police, implicit anti-Black bias of Crown, a minority accused’s inability to mount a strong pre-trial defence to have charges dropped due to a lack of resources, as well as the fact that in the context of sexual assault, it is plausible that

259 Williams, supra note 93 at para 28.
260 Ibid.
261 Nightingale, supra note 81 at 76.
complainants less likely to file a complaint where the accused White.\textsuperscript{262} All this is alluded to by Nightingale who says:

It is also not assumed that sexual assault is generally perpetrated by Native men as the cases would tend to suggest. This element of the cases may result only from greater policing in Native communities, or from the fact that Native women are less likely to report a sexual assault committed by a White man if they fear their complaint would not be believed.\textsuperscript{263}

4.1.1.2. Rape Myths: “Why Couldn’t You Just Keep Your Knees Together?” \textsuperscript{264}

Another important topic relating to sexual assault is the impact of rape myths in criminal sanctioning of sexual assault. When a sexual assault does not fit into the “real rape” narrative, it is less likely to be believed by both police and judges.

Disgraced former provincial court Justice Robin Camp proved the continued existence of rape myths in sexual assault trials while presiding over Alexander Wagar’s 2014 sexual assault trial. He erroneously referred to the complainant as “the accused” several times,\textsuperscript{265} and utilized “sexual stereotypes and stereotypical myths, which have long since [been] discredited” while presiding over the trial and in his judgment.\textsuperscript{266} During her direct examination, he asks the petite 19-year-old Aboriginal complainant why she did not do more, such as keeping her knees together or “sinking her bottom into the sink” to prevent her alleged sexual assault by White.

\textsuperscript{262} See e.g. \textit{Ibid} at 81. Nightingale says: “Native women are less likely to report a sexual assault committed by a White man [compared to a Native man] if they fear their complain would not be believed.” See also Conroy, Cotter and Canadian Centre for Justice Statistics, \textit{supra} note 237; and see Jillian Boyce & Canadian Centre for Justice Statistics, \textit{supra} note 240.
\textsuperscript{263} Nightingale, \textit{supra} note 81 at 81.
\textsuperscript{265} \textit{Ibid}.
\textsuperscript{266} \textit{R. v. Wagar}, 2015 ABCA 327 at 4 [\textit{Wagar}].
Alexander Waga — the over 6-foot-tall and recently released from jail accused. Before acquitting Wagar, Justice Camp advises him that for his own protection he ought “to be far more gentle with women” and be “really sure that she is saying yes.”

This was said despite the fact that the complainant was intoxicated, self-identifies as a homosexual and testified that she explicitly said no to him several times, and in spite of the fact the judge accepted her evidence that she told him he was hurting her. To this last claim, Justice Camp suggests that sometimes sex is associated with pain, which is “not necessarily a bad thing.” Ultimately, the case was sent back to trial, where the accused was again acquitted. Justice Camp resigned after the judicial council recommended his removal.

My hypothesis here is that the “real rape” narrative is of a minority man and a White woman, whereas if a racialized woman were to be raped by a white man, the dynamic would not fit into the narrative, because she is always willing. Just as if a man is raped by another man, it does not fit into the narrative, and so homosexual sexual assaults are probably vastly underreported and under prosecuted as well. Victim blaming is also discussed in the literature. Studies have shown that even subjects who scored high in sympathy for rape victims and who tended to reject rape myths possessed biases against minority victims, attaching to them more blameworthiness for their victimization when compared to White victims. Another myth is that “real rape” is forcible rape. If a sexual assault complainant is not claiming physical injury,


268 Ibid.


270 See e.g. Smith, supra note 238 at 20-25.

the police will often label the assault as “non-crime.” In other cases, such as in Ururyar, rape does not need to be forcible, while a prior sexual history and acquiescence in the sexual act itself do not preclude a finding of sexual assault. This at least demonstrates the indeterminacy in the criminal sanctioning of sexual offences. The indeterminacy of the law indicates the ripeness for personal biases to determine the outcomes of cases, as the law itself does not determine the outcome. In his genuine concern for the White accused, embrace of rape myths, and repeated referencing of the Aboriginal complainant as the accused, was the disgraced former judge and White South African immigrant to Canada influenced by racial bias? In trying to correct the kind of rape myths, what made Justice Zucker swing the pendulum so far in the other direction by throwing the book at Ururyar, to the extent that his impartiality was questioned? While race is not discussed in the decision, Mustafa Ururyar is a racial minority and Mandi Gray is Caucasian. While no explicit racial bias is present, is it possible implicit racial bias influenced the trial judge’s decision to throw the book at Ururyar, a racial minority, because like the complainant, he is White? Was race purposefully censored? Does the impact of race explain some of the justice gap for sexual assault? Specifically, are there rape myths regarding what constitutes a “real” rape victim (White, female) and rapist (coloured, male)? Given the impact of rape myths in judicial decisions, what can be done to minimize the underlying or associated biases, to minimize the indeterminacy in the prosecution and sentencing of sexual offences?

Elizabeth Ann Welch, in “The Siren Song”, explains that the criminal sanctioning of sexual assault is impacted by and perpetuates gender inequality, and that judges have a particular role including in their “interpretations of consent” such as “the requirements of forceful

resistance grounded in the presumed low credibility of survivors” but also, similar to what Justice Camp demonstrated, “judges construct narratives of sexual violence that, for example, normalize or conceal coercion and violence.”273 A perfect example of this is where disgraced Justice Camp tells the Aboriginal complainant that “sometimes sex and pain go together” and that it is “not necessarily a bad thing.”274 Another example of a rape myth at play is in R v Hardisty, [1990] NWTJ No 998 (NWTSC), dealing with an Aboriginal complainant, in his decision judge de Weerdt said:

This is ... not the sort of case one sometimes hears of where one or more men and women together in a room drink themselves unconscious following which one of the men takes advantage of the comatose state of one of the women who might be thought to have exposed herself to this risk. In this case, the victim was in her own bed with her own man and had, in no way, invited the offender's attention.275

This is an example of blaming the victim for her sexual assault. To be fair, the case is from 1990, but as we see from the Robin Camp affair, there is no reason to believe that some judges still take outdated approaches to sexual assault. In fact, the impact of alcohol and rape myths is even more outrageously exemplified in Justice Bourassa’s comments:

The majority of rapes in the Northwest Territories occur when the woman is drunk and passed out. A man comes along and sees a pair of hips and helps himself. ...That contrasts sharply to the cases I dealt with before (in southern Canada) of the dainty co-ed who gets jumped from behind. My experience with rape down south [Ontario] is different from the reality of rape up here [Northwest Territories]. In most cases down south there is violence apart from the rape that's involved. Up here you find many cases of sexual assault where the woman is drunk and the man's drunk.276

273 Welch, supra note 46 at 93.
274 Hopper, supra note 267.
275 Nightingale, supra note 81 at 88.
These comments demonstrate both rape myths and implicit racial bias. Although race is not mentioned, the racial demographics of the localities he mentions, and the centrality of alcohol suggest there is a reason to believe there is a racial factor. While Justice Bourrassa casually remarks that the “majority of rapes in the Northwest Territories occur when the woman is drunk and passed out”, Nightingale’s analysis suggests a different statistical reality, and these comments serve to demonstrate the racial bias and stereotypes that decision makers have and bring to adjudicating these cases.277

4.1.1.3. Elements and Special Rules

Assault has long been a common law offence. The Criminal Code of Canada creates a criminal prohibition on assault278 and has specific provisions criminalizing sexual assault.279 There is some overlap, as Canada’s Criminal Code provision against assault includes sexual assault. The provisions relating to sexual assault, though, are more specific and have special evidentiary and procedural rules. This speaks to the special nature of sex, as well as Parliament’s efforts to combat the rape myths and the justice gap in sexual assault.

277 Ibid at 89.
278 Criminal Code, supra note 13 at 265(1 and 2). The provision reads: “A person commits an assault when (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly; (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs. This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.”
279 Ibid at s271.
4.1.1.3.1. The Elements of Sexual Assault

The leading case on sexual assault is *R v Ewanchuk*, [1999] 1 SCR 330. Sexual assault has three main elements: touching, a sexual nature of the contact, and the absence of consent. The first two are objective. The *mens rea* of the offence is the intention to touch the complainant, and knowledge, recklessness or wilful blindness to the complainant’s lack of consent. Consent is subjective and based on the complainant’s subjective internal state of mind towards the touching when it occurred. Sexual assault requires the actual or perception of imminent unwanted physical contact. Where physical contact is not applied or reasonably foreseeable, sexual assault has not occurred. Distinguishing sexual assault from assault is the sexual nature of the touching. An assault will be considered sexual if it is committed in what a reasonable person would consider “circumstances of a sexual nature, such that the sexual integrity of the victim is violated.”

One of the most debated element of sexual assault of is consent. Consent cannot be obtained simply because a complainant submits or does not resist if they are doing so out of fear, fraud, or the exercise of authority. Consent must be informed meaning a party must be aware of the essential nature of the sexual act they are consenting to, and consent is vitiated where obtained by fraud. Consent can be revoked at any time. Sexual contact after this revocation would constitute sexual assault. There are statutory limits to who can or cannot consent.

---

281 *Ibid*. See also *Criminal Code, supra* note 3 at s265(3).
282 *Ibid*.
284 *Criminal Code, supra* note 13 at s273.1(1).
285 *Ibid* at s265(3)(a-c).
288 *Criminal Code, supra* note 13 at s273.1(2)(e).
including those lacking capacity, such as people with disabilities, or people in power or dependency relationships, such as certain family members.  

The presence or absence of consent is quite discretionary on the part of the decision maker. For example, how intoxicated must a person be before they are unable to consent? This question is explored in *R v Haraldson*, 2012 ABCA 147 at para 7:

Capacity to consent to sexual activity requires something more than the capacity to execute baseline physical functions. The question is the degree to which intoxication negates comprehension or volition. A drunk complainant may retain the capacity to consent: *R. v. R.* (J) (2006), [2006 CanLII 22658 (ON SC)], 40 C.R. (6th) 97 (Ont. S.C.J.) at paras. 1719, 43. Mere drunkenness is not the equivalent of incapacity: *R. v. Jensen* (1996), [1996 CanLII 1237 (ON CA)], 106 C.C.C. (3d) 430 (Ont. C.A.). Nor is alcohol-induced imprudent decision making, memory loss, loss of inhibition or self control: *R. v. Merritt*, [2004] O.J. No. 1295 (Ont. S.C.J.). A drunken consent is still a valid consent. Where the line is crossed into incapacity may be difficult to determine at times. Expert evidence may assist and even be necessary, in some cases.

At what degree does intoxication negate comprehension or volition and could complainant and accused race play a factor in this?

Another question judges have to think about is: in what situations is acquiescence sufficient to create a reasonable doubt as to the absence of consent? While formally, acquiescence does not equate to consent, this likely plays a role in whether police determine whether sexual touching is a “non-crime”, or when prosecutors decide whether a conviction is

---

289 *Criminal Code*, supra note 13 at s273.1(2).

290 Recently there has also been a severe media backlash against Judge Gregory Lenehan for saying that “clearly a drunk can consent” See e.g. David Burke “Complaints about N.S. judge who said ‘a drunk can consent' will be investigated”, *CBC News* (September 7, 2017), online: <http://www.cbc.ca/news/canada/nova-scotia/judge-gregory-lenehan-drunk-sexual-assault-al-rawi-consent-1.4278905>.

291 See “Complaints mount against judge in cab sex assault case who said ‘a drunk can consent’”, *CBC News* (March 3, 2017), online: <http://www.cbc.ca/news/canada/nova-scotia/bassam-al-rawi-taxi-cab-sexual-assault-halifax-1.2875142>. Quoting Elizabeth Sheehy, a member of the University of Ottawa’s faculty of law who teaches sexual assault law: “there’s no clearly defined legal or medical line for when “intoxication or incapacitation crosses into incapacity to consent.” It makes such cases particularly difficult.”
“substantially likely” and therefore to press charges. In determining whether the accused had a belief in consent or that there is a reasonable doubt that the touching was non-consensual, acquiescence likely plays a role (and in my mind justifiably so). This is evident with respect to rape myths including questioning why the complainant did not fight back or resist. However, as we saw in *Ururyar*, sometimes a woman who has indicated an interest in sexual relations, previously participated in sexual relations, acquiesces in the sexual acts making up the allegations of sexual assault and finally even stayed the night, can be determined not to have consented. In Justice Camp’s decision, he determines there is reasonable doubt as to whether the complainant consented despite the fact the complainant testified that she expressly said no, expressly claims that it was painful for her, physically tried to resist and self-identifies as homosexual.

One can adopt the view that a complainant’s drinking is an intentional lowering of inhibitions, that they intended any sexual contact they later willingly engaged in, or believed that the complainant did not know the nature of what she was doing, what she was consenting to, and therefore the accused was in fact taking advantage of her or in other words sexually assaulting her. How one views a complainant’s intoxication depends in part on how one views the complainant and accused. I am asserting that how one views a complainant or accused is influenced at least in part by their race, as well the number other factors not necessarily relevant, objective, or legitimate. Nightingale’s research supports this view, as her analysis of the case law involving the judicial treatment of Aboriginal sexual assault discovered that bias against Aboriginal complainants and accused was particularly visible in cases involving alcohol consumption:

Native men suffer from the characterization as being criminal alcoholics, whereas intoxicated Native women were perceived as somehow "looser" and
less worthy of protection than other women. The judicial perception is clearly that women who drink, like women who hitchhike, should "know better."  

4.1.1.3.2. Special Rules

The issue of negative biases regarding sexual assault complainant credibility has led to specific procedural and evidentiary protections for sexual assault complainants giving evidence. These specific rules include the prohibition on using evidence of a complainant’s sexual activity or reputation, and no corroborating evidence is required. These special provisions relax evidentiary rules, evidentiary rules that were developed to protect the rights of an accused. Therefore, the creation of these rules creates a corresponding need to protect minority accused who have faced a similar history of bias against their credibility. These special rules are an example of where we must be vigilant against the “paradoxical way in which some people’s fight for their rights can easily lead to another person’s oppression” as well as the need to “be vigilant that in protecting the freedom of some we are not, often unintentionally, constraining the freedom of others.” We must ensure that while removing the barriers to justice for sexual assault complainants we are not trampling the rights of racialized accused to fair trials and the presumption of innocence, or allowing implicit or explicit bias to have undue influence on an

---

292 Nightingale, supra note 81 at 98.
293 Criminal Code, supra note 13 at s276(1). This provision states that: “... evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant(a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or; (b) is less worthy of belief.” See also Criminal Code, supra note 13 at s276(2).
294 Criminal Code, supra note 13 at s277. “...evidence of sexual reputation, whether general or specific, is not admissible for the purpose of challenging or supporting the credibility of the complainant.”
295 Ibid at s274. “If an accused is charged with an offence under section ... [inter alia] 271, 272, 273 no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.”
accused's credibility assessment which may be the ultimate issue in a case where testimony is uncorroborated, for example.

There is a history of rape myths and disbelief of sexual assault complainants, which continues to this day. I think there is similar tendency to disbelieve minorities, complainants of discrimination for example. The context of sexual assault leads to biased thinking against complainants, but I argue this context triggers racial bias as well. This speaks to considerations of race in making credibility assessments, and is outside the scope of my paper. However, if data were to show that there is evidence of racial bias in the disposition of cases, I believe it would be appropriate to make such considerations.

4.1.2. Criminal Sentencing and Deterrence

Here I examine the judicial sanctioning of sexual assault. In addition to specific sexual assault sentencing provisions, I discuss the Canadian Criminal Code's statutory principles of sentencing. Then, I consult law and economics literature to explain how deterrence and efficiency operate in the criminal justice system. Next, I demonstrate how implicit and racial bias in our criminal justice system limits the actual deterrence of sexual assault, identifying race as significant, yet presently unacknowledged factor in effective deterrence.

4.1.2.1. Principles of Sentencing

Parliament has expressed that the fundamental purpose of sentencing is “to protect society and to contribute, along with prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions.”

297 Criminal Code, supra 13 at s718.
sentences should adhere (follow, contain) “one or more” of the enumerated objectives,\(^{298}\) which are: denunciating unlawful conduct and its harms to victims and society,\(^{299}\) general and specific deterrence,\(^{300}\) removing offenders from society (where necessary),\(^{301}\) rehabilitating offenders,\(^{302}\) reparations to victims and communities,\(^{303}\) and “promot[ing] a sense of responsibility in offenders, and acknowledgement of the harm done to victims and the community.”\(^{304}\)

The *Criminal Code* also states that the fundamental principle of sentencing is proportionality with respect to both the “gravity of the offence and the degree of responsibility of the offender.”\(^{305}\) Parliament has also listed several other statutory sentencing principles that must be taken into consideration when sentencing offenders. These include: similar offences, circumstances and offenders should receive similar sentences;\(^{306}\) before imposing imprisonment (or the deprivation of an offender’s liberty) all other available sanctions should be considered;\(^{307}\) and imprisonment is only appropriate where “in the circumstances”, less restrictive sanctions are not.\(^{308}\) When considering whether less restrictive sanctions are appropriate, “particular attention” should be paid “to the circumstances of Aboriginal offenders.”\(^{309}\)

Parliament has also indicated a number of factors/circumstances that either increase or decrease the culpability of the offender or the harm to society/complainant.\(^{310}\) A sentence should

\(^{298}\) *Ibid.*

\(^{299}\) *Ibid* at s718 a.

\(^{300}\) *Ibid* at s718 b.

\(^{301}\) *Ibid* at s718 c.

\(^{302}\) *Ibid* at s718 d.

\(^{303}\) *Ibid* at s718 e.

\(^{304}\) *Ibid* at s718 f.

\(^{305}\) *Ibid* at s718.1.

\(^{306}\) *Ibid* at s718.2 c.

\(^{307}\) *Ibid* at s718.2 e.

\(^{308}\) *Ibid* at s718.2 d.

\(^{309}\) *Ibid* at s718.2 e.

\(^{310}\) *Ibid* at s718.2.
be increased or reduced where these aggravating and/or mitigating factors/circumstances of an offender or an offence are present. 311 These include: “[e]vidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor”, “evidence that the offender, in committing the offence, abused the offender’s spouse or common law partner”, “evidence that the offender, in committing the offence, abused a person under the age of eighteen years, evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim, [and] evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation.”312 Further, where the court is sentencing an offender for an offence involving the abuse of a person under the age of 18, “primary consideration” should be given to “denunciation” and “deterrence”313

I believe that a complainant’s race is relevant in applying these principles, including that the use of power or domination to commit an unlawful act is an aggravating factor. Women who are racial minorities face intersectional discrimination and are in some ways subjugated in society or lower on the racial hierarchy; therefore, and like sexual assaults in general, their sexual assault is an act of domination. Here, the vulnerability of the complainant gives power to the accused, rather than his own station. I liken this to the fact that abuse of a person under the age of 18 is graver because they are more vulnerable.

311 Ibid at s718.2 a.
312 Ibid.
313 Ibid at s718.01.
The Criminal Code allows for victim\textsuperscript{314} and community\textsuperscript{315} impact statements to be made, and requires prosecutors to inquire as to whether a victim (notice language, not complainant, statement called victim impact) would like to make such a statement. These statements provide the complainant to “describe[e] the physical or emotional harm, property damage or economic loss suffered by the victim as the result of the commission of the offence and the impact of the offence on the victim”, and in the case of community statements “describe[e] the harm or loss suffered by the community as the result of the commission of the offence and the impact of the offence on the community.” These statements shall be considered by the court in deciding whether a discharge shall be made under s. 730.

Furthermore, the Criminal Code also creates an obligation for courts to “consider any relevant information placed before it, including any representations or submissions made by or on behalf of the prosecutor or the offender.”\textsuperscript{316} This is an opportunity to raise issues of race and the impact of sexual assault on minority groups in Canada. Submissions can also be made under this provision relating to the deterrence effect.

Finally, the Criminal Code creates an obligation for a court imposing a sentence to enter its terms as well as “the reasons for it” into the record of proceeding.\textsuperscript{317} Written reasons are not required for acquittals. This is one way many sexual assault survivors and alleged perpetrators slip away and do not become part of the record, creating a gap. There have been recent calls to mandate written reasons for a finding of not guilty in sexual assault cases after a judge acquitted

\begin{footnotesize}
\textsuperscript{314} Ibid at s722(1).
\textsuperscript{315} Ibid at s722.2(1).
\textsuperscript{316} Ibid at s726.1.
\textsuperscript{317} Ibid at s726.2.
\end{footnotesize}
a taxi driver accused of sexually assaulting a passed out passenger.\footnote{Elizabeth Sheehy “Capacity for consent and the Halifax ruling: Did the judge err?”, \textit{The Globe and Mail} (March 5, 2017), online: <https://beta.theglobeandmail.com/opinion/capacity-for-consent-and-the-halifax-ruling-did-the-judge-err/article34206332/?ref=http://www.theglobeandmail.com>. Sheehy makes the suggestion that “it is time to amend the Criminal Code to require written reasons from judges in all sexual assault decisions. Judge Lenehan’s decision is only available to us because a journalist happened to be in the courtroom and caught the decision. We all know that fewer and fewer journalists will be able to do this important work of court observation in the future as newsrooms contract.”} There is some legitimacy to this. It would help if there were reasons, and racial demographics were recorded in these as well. Perhaps where there is evidence that sexual contact did occur, but reasonable doubt or conflicting testimony led to an acquittal, this would be appropriate, whereas if ultimately the court is not even sure sexual contact did occur this would not be necessary. Where the court has evidence that the sexual contact did occur, however, and the only determination is whether there was consent, a lot of discretion is given to the judge and thus should be available for analysis and scrutiny for bias to determine if certain types of complainants are less likely to be believed for example.

\subsection*{4.1.2.2. Sexual Assault Sentencing}

Sexual assault\footnote{Criminal Code, \textit{supra} 13 at s271.} is a hybrid offence, meaning it can be prosecuted summarily or by indictment. The most serious offences, prosecuted by indictment, carry a minimum of one-year and a maximum of 10-years imprisonment.\footnote{\textit{Ibid} at s271(a).} If a sexual assault is on the lower end of the spectrum and proceeded summarily, it carries no minimum sentence and a maximum of 18-months imprisonment.\footnote{\textit{Ibid} at s271(b).} The penalties for both summary and indictable offences are increased where the complainant is under the age of 16-years-old, from 10- to 14-years for indictable offences, and from 18-months to 2-years less a day for summary offences. Summary sexual
assault where the complainant is under the age of 16 also carries a minimum sentence of 6 months. ³²² A fine can also be levied against a person convicted of sexual assault.³²³ He or she can also be forced to pay a victim surcharge of 30% of any fine imposed or any other amount the court deems an offender can afford to pay and is appropriate in the circumstances.³²⁴ Sexual assault involving a weapon, threat to a third party or causing bodily harm is an indictable offence with more significant minimum penalties, ranging from 4-years if a firearm is used, and 5-years if a restricted weapon is used. If the complainant is under the age of 16, the minimum is 5-years with a maximum of 15-years imprisonment.³²⁵

A sexual assault where the accused wounds, maims, disfigures or endangers the life of the complainant is aggravated sexual assault,³²⁶ an indictable offence with a minimum punishment of 4- or 5-years imprisonment (depending on the circumstances) and a maximum of life imprisonment.³²⁷

In 2015/2016, there were 1,273 convictions for sexual assault.³²⁸ Of the 1,273 convictions for sexual assault, 729 resulted in custodial sentences, 116 in conditional sentences, and 428 (or roughly 1 in 3) sexual assault convictions resulting in either absolute and conditional discharges, suspended sentences, prohibition orders, fines, or restitution. We can see that there is a wide variety of sentencing outcomes when it comes to sexual assault, and significant latitude for the judicial decision-maker to exercise his discretion. Could demographic features such as race or class potentially explain the disparate sentencing outcomes?

³²² Ibid at s271 a and b.
³²³ Ibid at s734(1) Power of court to impose fine.
³²⁴ Ibid at s737.
³²⁵ Ibid at s272(1).
³²⁶ Ibid at s273(1).
³²⁷ Ibid at s273(2).
Class based bias has been proven to have an effect in the sentencing for sexual assault, and this is demonstrated when a “judge's concern for the accused overshadows any expressions of outrage regarding the act.” This usually occurs in the context of “middle-class offenders”, and manifests itself when judges give “disproportionate weight . . . to mitigating factors such as employment, monetary loss, [or] marital problems” and then uses “these factors . . . to demonstrate that this assault was a single instance and "out of character." An example of this is a 1989 case in the Northwest Territories, heard by Judge Michel Bourassa, the same judge who claimed that in the Northwest Territories sexual assault usually involved drunk or passed out women. In his decision, Judge Bourassa said:

He was stressed out; he wasn't liked by his peers; he was having trouble with his relationship with his wife and trouble with drink, and rightly or wrongly, he fondled his . . . stepdaughter.330

On three different occasions the accused, a member of the Northwest Territories Legislative Assembly, had put his hands under the clothing of his “pubescent” stepdaughter, “rubbing her breasts and vaginal area.”331 Bourassa sentenced him to five days in jail and nine months probation.332 The public was outraged at the sentence, and the Crown appealed the decision. Justice de Weerdt dismissed the appeal immediately after hearing Crown’s arguments, reading from an already prepared decision. In his reasons he referred to the denunciation as “adequate” given that the sexual offender had resigned from the Legislative Assembly, and the sexual assault was “relatively minor, or even minimal.”333 Perhaps what is most troubling is the fact that

329 Nightingale, supra note 81 at 90.
330 Ibid at 90 citing: Northwest Territories, In the Matter of An Inquiry Pursuant to Section 13(2) of the Territorial Court Act, S.V.W.T. 1978(2), c. 16 and In the Matter of An Inquiry into the Conduct of Judge R.M. Bourassa (28 September, 1990) at 192 [Inquiry].
331 Ibid at 90.
332 Ibid.
333 Ibid at 90 citing Sarkadi, supra note 276 at A2.
Justice Bourassa said: “rightly or wrongly he fondled his . . . stepdaughter.” Further, this case demonstrates a “clear example of judicial bias”: Judge de Weerdt had “already prepared his decision prior to the hearing of th[e] appeal.” Canada’s socio-economic reality means that “[c]lass bias is a factor that is likely to work against Native women far more often than the reverse” as “Native women are unlikely to be more economically or socially advantaged than most male offenders.”

4.1.2.3. Race and Deterrence

The principle of deterrence underlying much of our criminal justice system is studied extensively in the field of law and economics. One of the findings is that it is the sentencing probability rather than sentencing severity which creates the strongest deterrent effect. Further, studies have shown that group characteristics play a significant role in the deterrent effect. For example, a study by the government of Canada shows that individuals respond to the sentencing probability of members of their social groups. It makes intuitive sense that an Aboriginal offender being sentenced for sexually assaulting a White woman would have less deterrent effect on a White man who is considering sexually assaulting an Aboriginal sex worker, for example. In the same light, the Ururyar decision is less likely to deter the same White man than it will

---

334 Inquiry, supra note 331 at 192.
335 Nightingale, supra note 81 at 90.
336 Ibid at 91.
337 Thomas Gabor & Nicole Crutcher, MANDATORY MINIMUM PENALTIES: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures (2002) at 8. Evidence suggests that generally, those who believe they are likely to be caught and punished will be less likely to commit a criminal act, while there is less evidence that stiff sentences decrease crime. Other studies have shown that increases in the probability of arrest and sanction decrease crime rates.
338 Ibid. “The link between the certainty of punishment and crime rates may also vary according to criminal history or race . . . each ethnic/racial group tends to respond to the arrest probability of members of that group, rather than to society-wide arrest probabilities.”
339 Ibid.
deter any Middle Eastern man considering sexual contact with an apparently consenting, though potentially intoxicated, White woman. I herein suggest that the same principles apply to the race of the complainant. If the only prosecuted, or at least published incidents of sexual assault are against White women, there will be little to no general deterrence of sexual assault against minority women. Protecting our most vulnerable populations, those identified as racial minorities or other disadvantaged socio-economic groups, requires that their abusers are prosecuted, convicted, sentenced and these sentences published. The fact that the complainant belonged to minority group should also be published to deter these types of crimes.

4.1.3. Public Confidence in the Criminal Justice System

The Rule of Law and the *Charter* both guarantee equal protection under the law. The Rule of Law demands that “the law should be the same for everyone, so that no one is above the law, and everyone has access to the law’s protection” and “legal institutions and their procedures should be available to ordinary people to . . . protect them against abuses of public and private power.”\(^{340}\) However, Aboriginal women are not equally protected by the law and are among the most vulnerable group to sexual assault. Further, the Rule of Law dictates that we should ensure that racialized accused are not the victims of “abuses of . . . power”\(^{341}\) by judges or juries. Acknowledging race is important in terms of identifying if the criminal justice system is failing to prosecute crimes against minority or Aboriginal women, as well as whether race plays a role in the justice gap and the discretionary decisions that must be made for a sexual assault complaint to result in a conviction. Further, this data will help calibrate sentencing decisions,

---


\(^{341}\) Ibid.
which then need to be promulgated to create stronger deterrence effects to protect vulnerable
groups in the future. By promulgating the law and thus deterring the sexual assault of vulnerable
minority members of society, acknowledging race in sentencing decisions will help increase
public confidence in the criminal justice system.

4.1.3.1. Justice Gap

Women who are visible minorities (particularly Aboriginal women) or are otherwise
marginalized are the most vulnerable to sexual assaults, which go unreported much of the
time. In fact, sexual assault is one of the most under reported crimes. In 2014, there were
more than 635,000 reported incidents of sexual assault in Canada. Only 5% of sexual assault
incidents (unwanted sexual touching, sexual attacks, unable to consent) were reported to police.
This rate has remained consistent since 2004. Reasons for not reporting incidents of sexual
assault included: “hassle of dealing with the police” (45%), “thought the police would not have
considered the incident important enough” (43%), and “believed the offender would not have
been adequately punished” (40%). Other, primary reasons included: “minor and not worth
taking the time to report” (71%), “incident was a private or personal matter and handled
informally” (67%), and “no one was harmed during the incident” (63%). As we can see, most
incidents are minor, and result in little to no harm. However, in those other situations, we can see
that there are likely many serious sexual assaults going unreported. This includes barriers to

<http://www.statcan.gc.ca/pub/85-002-x/2016001/article/14631-eng.pdf>. Urging that caution be used,
Statistics Canada self-reported household survey found that the sexual assault rate for Aboriginal people
(58 incidents per 1,000 people) was almost three times that of non-Aboriginal people (20 per 1,000). See
also Smith, supra note 238.
343 Temkin & Krahe, supra note 271.
344 Conroy, Cotter and Canadian Centre for Justice Statistics, supra note 237.
345 Ibid.
justice (hassle), the fear of having their incident labelled “no-crime” or “un-founded”, and finally the belief that there would not be adequate punishment to justify the cost. In the case of Aboriginal women, often they view themselves as protecting their families by not reporting to RCMP or social workers (colloquially referred to as baby stealers), and would rather keep family secrets than report to outsiders (White people).  

Even when reported, sexual assaults rarely lead to charges and less often to convictions. When convictions do occur, the sentences vary widely. With such a low probability of conviction and lenient sentencing, some women feel it is hardly worth the double victimization that occurs when their dignity and credibility are attacked during police interviews and undergoing cross-examination. The gap between the number of offences recorded by the police and resulting convictions is referred to as the “justice gap”, and the process by which this occurs is labeled “attrition.” A complainant faces an uphill battle with many obstacles, including avoiding her incident being labelled “no-crime” or “unfounded” by the police after making a report; being interviewed and potentially even persuaded by police not to pursue the issue; or having a police investigation hampered by a lack of corroborating evidence, conflicting versions of events, or the involvement of alcohol consumption. The next hurdle is having the Crown deciding that their case has a substantial likelihood of conviction (their standard for laying charges), particularly where there is conflicting testimony, no corroborating evidence, or a high priced criminal defence lawyer. Finally, the case does go to trial, the last obstacle is a judge’s reasonable doubt, particularly in light of biases against sexual assault complainant’s credibility and in light of these evidentiary and other difficulties. Even where a judge does find guilt, the absence of a minimum

346 Nightingale, supra note 81 at 75,76.  
347 Temkin & Krahe, supra note 271.  
sentence means that all sentencing options are available for the judge, and an accused could “get away” with only a conditional sentence, probation, or even an absolute or conditional discharge. My study is situated in the context of the underreporting of sexual violence, particularly amongst racialized survivors. In doing so it creates a suspicion to suspect that there are discrepancies in the outcomes of sexual violence committed against White or racialized complainants, as well as perpetrated by White or racialized men. I identify ways to generate evidence that can be used to address the minimization of sexual violence against racialized women and the scapegoating of racialized men, which limit the effectiveness of the criminal justice system’s deterrence of sexual offending.

4.1.3.2. Charter of Rights and Freedoms

A society espousing equality must acknowledge inequality. The Charter constitutionalizes equality before the law for racial and sexual minorities.\(^{349}\) It is important for our constitutionally entrenched rights to be respected and enforced. Without data, it is impossible to determine whether these rights are being recognized. Science tells us that people do have inherent racial biases. Therefore, identifying and discussing race plays a role in both giving life to or abiding by equality rights and evaluating the system’s performance in respecting these rights. The status quo is not sufficient to guarantee that racial equality rights are being respected — some affirmative action is required. It also means that racial data should be recorded and later analyzed, to determine if our criminal justice system is upholding its racial equality duties. Protection by the law, and against the law. Making sure accused’s sentences are fair, as well as that there are no groups left exposed or under-protected by the law.

\(^{349}\) Charter, supra note 1 at s1.
It is the accused's rights that are mostly affected here. This means that lawyers and judges need to determine whether racial discrimination is impacting the decision to convict an individual, or their perception as to the amount of “harm”350 a sexual assault caused a complainant, and therefore its appropriate sentence. In a broader sense, it is also the rights of a complainant or potential complainant that are impacted by this. Every Canadian should be protected by the law. If the law is protecting certain racial groups more than others, the Charter is being infringed. A minority complainant should not be believed any more-or-less than a White one, nor should a minority accused be presumed guilty. Anecdotal evidence suggests that this might be the case, and more concrete data needs to be collected and analyzed to prove or disprove this notion. If race is playing an impact, this must be remedied to uphold the Charter, and the remedy involves acknowledging race in these decisions.

4.1.3.2.1. Discretion and the Rule of Law

In the context of sexual assault, a judge’s discretion is exercised when he determines which witness is more credible, particularly where a complainant’s testimony is uncorroborated.351 In situations where discretion is exercised, “judges may be empowered to make certain decisions and yet under a legal duty to make them in a particular way . . . in conformity with the spirit of pre-existing law or with certain moral principles” or for example, with the Charter.352 This is a core tenet of the Rule of Law:

The most important demand of the Rule of Law is that people in positions of authority should exercise their power within a constraining framework of well-

---

350 See Polinsky & Shavell, supra note 50 where they discuss the concept of harm, and how it relates to social utility and optimal level of crime prevention and deterrence.

351 Criminal Code, supra note 13 at 274.

352 Waldron, supra note 340.
established public norms rather than in an arbitrary, ad hoc, or purely discretionary manner on the basis of their own preferences or ideology.\footnote{Ibid.} Sexual assault charges prosecuted summarily have no minimum sentence. A judge has the discretion to choose any sentencing option, from absolute or conditional discharge, to 18 months, or 2-years less a day in a jail.\footnote{Criminal Code, supra note 13 at 271.} In Ururyar, Justice Zucker exercised his discretion with respect to credibility in favour of the White complainant against the minority accused with respect to findings of credibility. Further, with respect to sentencing, he used his discretion to order what can be considered the maximum penalty to Ururyar. Ultimately, as we have seen, his decision was thrown out. The Ururyar case is an example of how the Canadian legal system has checks and balances against the arbitrary use of discretion to remain consistent with the Rule of Law. I argue that this must go further, and judicial discretionary decisions should be analyzed for racial bias to remain consistent with the Charter. To do this, racial information must be recorded by judges in their decisions.

There also needs to be an evaluation of discretionary decisions of Crown prosecutors and police in pressing and approving criminal charges. Recently, police have been releasing data on unfounded rates.\footnote{Doolittle, supra note 273.} If racial data was able to be obtained from the police and then compared to racial data obtained from sentencing decisions, we may be able to triangulate the Crown prosecutor’s impact on the justice gap, i.e. if he is laying charges where the complainant is a minority or the accused is White, or whether those files are dying at the Crown’s office.

\footnote{Ibid.}
4.1.3.3. **Promulgation of Law**

With stories such as Brock Turner only serving 3 months in jail, and Jian Ghomeshi being acquitted receiving a disproportionate amount of attention in the news and on social media, there seems to be a common narrative on social and conventional media that the criminal justice system is excessively lenient when it comes to convicting and sentencing for sexual offences. Justice Zucker even alludes to the Brock Turner case when he waxes on about Mandi Gray not having a sweatshirt, a “reminder” of the nightmare she had gone through like the story shared by Brock Turner’s survivor in her victim impact statement. What happens south of the border can provide context for law in Canada. On the other hand, there are some heavy-handed punishments, including Mustafa Ururyar’s recently overturned 18-month sentence. These stiffer sentences are often justified on the principle of deterrence or sending a message. The dissemination or promulgation of sentences is critical to producing deterrent effects.

Among others, “[t]he formal principles” of the Rule of Law include “generality”, “clarity” and “publicity . . . of the norms that govern a society.” This is because the Rule of Law also has a “requirement of access” meaning law:

---


358 Ururyar Decision, supra note 18 at para 486.


360 Ururyar Decision, supra note 18 at para 523. Zucker wanted to make sure that a new signal was sent about rape. Not just good guys rape. Not to take advantage of intoxicated girls. Was trying to change the narrative and create precedence with respect to drunk girls being disbelieved in favour of their sober attackers.

should be a body of norms promulgated as public knowledge so that people can study it, internalize it, figure out what it requires of them, and use it as a framework for their plans and expectations and for settling their disputes with others.\textsuperscript{362}

Currently, however, the media is a primary source of the racial demographics of crime. The media likes to sensationalize crime, and has a well-known bias towards playing to people’s fears and taboos, titillating stories to sell papers. A large contributor to racial stereotyping and biases or profiling is the perceived criminality of racialized people.\textsuperscript{363} The perception of criminality is fed by the media, as well as by racial profiling by police, which each feed into each other exacerbating the effects of both perceived criminality and subsequent racial profiling. The same effect occurs when the only complainants of sexual assault we see are White, or most of the accused are minorities.\textsuperscript{364} This could be the result of media bias or a lack of prosecutions. For this reason, we need a source of racial demographic information outside of the media. That way we do not have to rely on their biases and can discover the true demographics of crime and victimization. Then, we can determine whether there is a discrepancy between the demographics

\textsuperscript{362} Ibid.

\textsuperscript{363} Amy Farmer & Dek Terrell, “Crime Versus Justice: Is There a Trade-Off?” (2001) 44 JL Econ 345. Farmer and Terrell acknowledge that race and gender play a role in wrongful convictions due to perceived criminality, though they attribute this increased perceived criminality to actual differences in criminality. What is unique herein is that they assert that eliminating this inequality in wrongful arrests would lead to social costs in the form of increased crime, and in the case of murder, more deaths. They suggest that this bias in the form of perceived criminality is also present within one’s own racial and gender groups. When full information isn’t available, individuals often resort to considering one’s group membership in filling in details, such as whether a person “did it” or not, or the person’s likelihood of re-offending. Both race and gender are known to judges, so with respect to my research I think that unless judges consciously (more importantly explicitly) account for any racial biases they may have, racial bias will be present in their judicial decisions.

\textsuperscript{364} Aleksandar Tomic & Jahn K Hakes, “Case dismissed: Police discretion and racial differences in dismissals of felony charges” (2008) 10:1 Am Law Econ Rev 110. Tomic and Hakes find that in the United States, the dismissal rates for charges which require less physical evidence and allow for more police discretion are higher amongst blacks than whites. The dismissal rates for categories of charges that require physical evidence were similar. By considering dismissed charges as a proxy for false arrests, we see that when relying on their discretion, police officers are more likely to falsely arrest a black man than a white. In other words, the marginal black is arrested on less evidence than the marginal white. The bias towards blacks can possibly be explained by perceived criminality. Even if the rate of criminality is equal between blacks and whites, the over policing of blacks will lead to them being overrepresented in the criminal justice system. This over representation would perpetuate the perceived criminality of blacks therefore increasing the over policing of blacks and ultimately, more false arrests of blacks.
of reported, investigated, prosecuted and sentenced sexual assaults, giving us a colour picture of the justice gap in sexual assault and perhaps a clue towards reducing it.

We want to target and identify the gap between perception and reality of sexual assault perpetrators and survivors. Sentencing decisions have the potential to be a good source of data. While not painting a clear picture of the reality of sexual assault, it is a more accurate source than the media, which currently disproportionately shapes perception. Personal experience also shapes perception, and many women have experienced sexual assault. They do not need the courts or the media to shape their perception of sexual assault. However, if courts make a serious effort at dealing with sexual assault, then the promulgation of this will shape the sexual assault survivor’s perception of the criminal justice system and its ability to help them, perhaps motivating them to take the step from sexual assault survivor to complainant. And for the would-be attacker, a clear signal in the form of stiff public sentences that the open season on minority women is no more will deter offending behaviour.

4.1.4. Chapter Summary

Like racism, sexual assault is about dominance, power and control. Just as rape myths are found in the sentencing of sexual offences, leading some to suggest that the criminal justice system and judiciary perpetuate “rapist culture”365 and “the patriarchy”,366 I argue that implicit (and/or explicit) racial bias can be found in the criminal justice system, also perpetuating rape

---

365 Welch, supra note 46. See also Burnett, supra note 46.
366 Welch, supra note 46. See also Burnett, supra note 46.
myths, and the “White heterosexual patriarchy”. Sexual assault is racialized, with minority women being the most vulnerable and with minority accused as the stereotype.\textsuperscript{367} 
I discussed the statutory principles of sentencing as they relate to sexual assault, consulted law and economics literature to explain how deterrence and efficiency operate in the criminal justice system, and demonstrated how implicit and racial bias in our criminal justice system limits the actual deterrence of sexual assault, identifying race as a significant yet presently unacknowledged factor in effective deterrence.

Lastly, public perception and confidence in the judicial system is important because it impacts crime deterrence, a sexual assault survivor’s willingness to report crime, and Parliament’s legislative responses to crime, all of which have significant effects on society. Currently, the media shapes both the public perception of our criminal justice system and the racial composition of victimization. Effective deterrence relies on the media dissemination of criminal sanctions.

Acknowledging race in sentencing decisions for sexual assault will send clearer deterrent signals, protect the racial equality rights of both complainants and accused, and help us collect valuable data about racial discrimination in society and in our criminal justice system, and as well help us determine which are societies most vulnerable groups, which groups of abusers are not being deterred, and as a result, how to efficiently use sentences to deter sexual assault.

\textsuperscript{367} See e.g. Conroy, Cotter and Canadian Centre for Justice Statistics, supra note 237. See also see Jillian Boyce & Canadian Centre for Justice Statistics, supra note 240. See also Howe, supra note 201 at 55.
5. Tackling Racial Bias

In exposing the prevalence of racial bias in Canada’s criminal justice system, David Tanovich points to a “significant failure of trial and appellate lawyers” in raising the issue of race in their pleadings as well as a “failure of the judiciary to adopt appropriate critical race standards when invited to do so.” Even where courts have established critical race standards, “there has been a large-scale failure of trial lawyers to raise race.” This is problematic, as lawyers and judges may be the only ones able to address this issue:

The idea that the democratic or the legislative process will bring anti-racist change to the criminal justice system is sheer folly. There is no evidence over the last decade that it will ever occur given the increased politicization of crime and unconscious nature of systemic racism. As Professor Stuart has noted, “[p]oliticians of all stripes have been unable to resist the political expediency of pandering to the perceived need to toughen penal responses. There are no votes in being soft on crime.”

Tanovich views Charter litigation as a particularly useful tool for lawyers to address “racial injustice in the criminal justice system” citing “inexorable ties between the rights and freedoms guaranteed under the Charter and the criminal justice system.” In the context of gun and drug offences, Charter arguments based on race are infrequently raise which “has too easily allowed courts to rely on good faith and the seriousness of gun and drug offences in not excluding evidence obtained in violation of the Charter . . . working disproportionately to the disadvantage of racialized groups.” Defence counsel who fail to advance arguments of race or racial bias, instead relying on the faith and impartiality of the courts, are acting negligently and not in the
best interest of their clients. The context of drug and gun offences again illustrates this, and I assert that analogies to the context of sexual assault are free to be drawn:

While the effects of gun violence are indeed tragic, so too are the consequences of racial profiling. That too was a backdrop of the case, one that was not raised and so not considered by the Court. It is interesting that the Court was prepared to take account of the effects of gun violence, even though there was no evidence before it, but not of racial profiling in Toronto because “no such allegations have been made.”

In this example, the courts demonstrate the censorship or censoriousness of racial discussion in the criminal justice system, like the judges who argued that there was no evidence that racism extended beyond Toronto, or when Justice Sparks was admonished by the Nova Scotia Court of Appeal for mentioning the impact of race in her decision. A further example of this judicial attitude and an analogous situation to that described in the passage is the case of *Ururyar*. Justice Zucker was keen to discuss the negative impact of bias against sexual assault complainants, something that in fact has a lot of built in protections, but did not for a second consider the impact of racial bias on the accused. Further, on appeal, in overturning the case the court declined to address this issue.

For *Charter* litigation to work, however, we need data or evidence proving racial discrimination. Tanovich maintains hope for racial justice in the future and suggests that some of the firsts steps to achieving this goal would be “the collection of data . . . reveal[ing] the extent and scope of racial injustice” in the system, “anti-racist training” of judges and increasing the diversity of the judiciary. In this chapter, I advance those objectives by suggesting that where

---

373 Tanovich, supra note 52 at 685.
374 *Ibid* at 659.
375 See *Ibid* at 662: “While I place considerable reliance on Charter litigation to address racial injustice, there is no question that other legal and extra-legal strategies are necessary in order to ensure implementation of the changes and to fill in the gaps when litigation fails. Anti-racist training for all criminal justice actors, the creation of monitoring systems, the creation of more anti-racist actors such as Gladue
it is relevant, there is a duty for lawyers to make submissions on race, and that race should be contemplated or at least recorded by judges in their decisions. In addition to combatting implicit bias and increasing the deterrent effectiveness of criminal sentencing, this would facilitate the collection of racial data for empirical studies.

In this chapter, I suggest solutions, identify implications and address some limitations to my theory. First, I articulate practical steps lawyers and judges should take to confront racial discrimination and the justice gap in sexual assault. Then I discuss the long-term implications of adopting my suggestions, and what the next steps would be to further the goals of combating racial bias as well as in reducing the justice gap in sexual assault. Finally, I address some of the limitations of my theory and how they may and ought to be overcome.

5.1.1. Duty of Counsel

David Tanovich reveals that there is racial discrimination at every stage of the criminal justice system including racial profiling in arrests, and discriminatory arraignment decisions.376 There are also studies in the United States showing that there is racial discrimination in sentencing.377 This creates a duty for counsel to consider race throughout a criminal process in light of the Charter and the importance equality for the Rule of Law.378 The Crown also has a duty to protect the public interest, which is in upholding the Rule of Law and acting consistent

---

376 Ibid.
378 Charter, supra note 1; see also OAG, supra note 3 at para 12; and Imperial Tobacco, supra note 4 at para 57,58.
with the Charter, but also protecting society’s most vulnerable populations.\footnote{Public Prosecution Service of Canada, \textit{Public Prosecution Service of Canada Deskbook} (2014) at section 2.1 and 2.2.} Defence counsel’s duty is to their client and to the client’s vigorous defence, also begging for racial arguments to be made where applicable.\footnote{The Law Society of British Columbia, \textit{Professional Conduct Handbook} (The Law Society of British Columbia, 1993) at 2. The Law Society of BC Website points to this as governing document concerning a Lawyer's professional responsibility. From the Canons of Legal Ethics 2.1: "(5) A lawyer should endeavour by all fair and honourable means to obtain for a client the benefit of any and every remedy and defence which is authorized by law." See also Allan C. Hutchinson, “Putting up a Defence” in Adam Dodek & Alice Wooley, eds, \textit{In Search of the Ethical Lawyer} (Vancouver: University of British Columbia Press, 2016) at 45.} My focus here is on sentencing, so I direct my analysis towards consideration of race in sentencing submissions as well as in decisions to appeal on the basis of a reasonable apprehension of bias.

The \textit{Criminal Code} creates an obligation for courts to “consider any relevant information placed before it, including any representations or submissions made by or on behalf of the prosecutor or the offender.”\footnote{\textit{Criminal Code, supra} note 13 at s726.1.} This is an opportunity to raise issues of race, racial bias and/or the impact of sexual assault on minority groups in Canada. Submissions can also be made under this provision relating to the deterrence effect. Defence lawyers and prosecutors should both be using this ability to alert the judge to his or her own potential implicit racial biases, forcing the judge to confront the possibility of his or her own unconscious or implicit bias. Without examining their own implicit biases, they are bound to be influenced by them.

\textbf{5.1.1.1. Defense Counsel}

Often a racial accused will be represented by a non-racial lawyer. It is understandable that under these (and perhaps all) circumstances, discussing race may be uncomfortable for the lawyer, who among other things, does not want to appear racist. Further, he or she may not
perceive discrimination against a minority. Tanovich asserts that lawyers often do not see the issue because “for the most part, Whites do not see themselves as a race or everyday conduct as the product of White privilege.”\(^{382}\) Therefore, it is important for defence counsel to inquire as to the whether the accused believes race may be playing a factor in his or her case. Further, defence counsel may feel, and perhaps rightly, that bringing up race or “playing the race card” may in fact prejudice their client in the eyes of the judge and the media. Further, he may feel as though it will prejudice him *personally*, within a predominantly White law society and judiciary.\(^{383}\) While inquiring about race may be uncomfortable, it is important for a client’s defence. Critical race scholars discuss how the experience of racism is an almost ubiquitous experience, and one can just as easily assume as not that racial bias has played a role at one stage or another of a criminal process.\(^{384}\) Further, due to social stigma on explicit racism and its contemporary covert nature, a non-racial person may not have witnessed racism or correctly identified it. Racial bias is something that can be felt, or experienced by a marginalized person in circumstances where others do not see or hear it. A person may not be explicitly racist in public, for example, but may exhibit some implicit or explicit racial bias in a one on one private encounter with a racialized person. Therefore, it is the minority person that has a much better sense of racial discrimination. Another explanation for the “erasure of race in *Charter* cases” is the fact that lawyers feel they have strong cases on other, “traditional” grounds.\(^{385}\) However, when an accused’s equality rights are violated on the basis of racial discrimination, this discrimination makes up one of the client’s

\(^{382}\) Tanovich, *supra* note 52 at 674-675. This is also consistent with what other authors have suggested.

\(^{383}\) Griffith, *supra* note 79.

\(^{384}\) Richard Delgado, Jean Stefancic, *Critical Race Theory: An Introduction*, 2nd ed., (New York: New York University Press, 2012) at 1–2. Delgado and Stefancic talk about microagression for example, “the sudden, stunning, or dispiriting transactions that mar the days of oppressed individuals. These include small acts of racism consciously or unconsciously perpetrated.”

\(^{385}\) Tanovich, *supra* note 52 at 674-675.
strongest defences, as freedom from this type of discrimination is a Constitutional right. If upon questioning a client indicates they feel they have been discriminated against, a lawyer should pursue this avenue of defence. The perception of racial bias is the launching point of the inquiry, rather than the explicit proof. Implicit bias or covert racism will not always be easily proven, however, its evidence is found in the perception of the receiver. It is not the intent of the action that matters, but the effect. So, a rather innocent seeming interaction or action may involve implicit bias and like sexual harassment, is actionably regardless of its intent.

A defence lawyer may believe that bringing up race in a sentencing submission will prejudice her client in front of the judge, or prejudice herself within the criminal bar and judiciary. With respect to the second point, a defence lawyer has a duty to his client, and if he puts these personal considerations ahead of his client’s there is a serious ethical breach. A concern that mentioning race may prejudice the judge against a client is a justifiable concern, however I do not believe that this should be determinative. Equal treatment before the law is a fundamental right at the core of both the Rule of Law and Canada’s Constitution, and therefore any defence that speaks to this is of the highest order. If it is apparent that submissions regarding race prejudiced the judge, then there are grounds for an appeal on the reasonable apprehension of bias. Therefore, the concern over causing prejudice is not the terminal consideration. One of the biggest reasons that racial rights have not moved at the same pace as gender or sexual

386 Charter, supra note 1 at s15.
387 Young, supra note 55. She says: “unconscious bias is still immoral and therefore should be addressed. If unconscious reactions, bias, perceptions, habits, reproduce oppression then they should be judged unjust and should therefore be changed.”
389 The Law Society of British Columbia, supra note 279 at 2: “(4) . . .the lawyer should represent the client’s interests resolutely and without fear of judicial disfavour or public unpopularity.”
390 R.D.S, supra note 7.
orientation is the absence of its discussion in legal discourse. Often on appeal counsel will try to strike down racial arguments (e.g. racial profiling) on the basis that they were not raised at the court of first instance, relying on the “waiver” exception. This is where an opposing party argues that any potential bias ought to be considered to have been accepted and a right to claim bias waived where an appealing party raises the issue of bias for the first time on appeal.

Therefore, lawyers should create a foundation for an appeal based on a reasonable apprehension of bias by advancing arguments with respect to race and bias, particularly at sentencing. I say this while questioning the merit of the doctrine of waiver and if it is truly in the public interest for the Crown to raise it where racial bias in being asserted.

A defence lawyer who is upholding his duty to the administration of justice and his duty to vigorously defend his client and advance all available defences will inquire with his client to determine if he or she has any reason to believe that the prosecution is racially motivated, and even in this absence, should be making submissions warning the judge to be wary of implicit racial bias, particularly where there is an interracial element to the case. A discussion of race in sentencing submissions should trigger a discussion of race in the judge’s decision, and can create the foundation for a later appeal on the grounds of a reasonable apprehension of bias or an infringement of the accused’s freedom from racial discrimination by the law. Perhaps because of these submissions (or not), the decision will be fair, or is unfair but without basis for appealing. In either case, forcing the judge to deal with race in his decision will provide a trail of crumbs for

---


392 Tanovich, supra note 52 at 678. Tanovich questions this doctrine “it is not clear why an appellate court should not be entitled to draw an inference of profiling where there is a strong circumstantial case. Since most profiling is unconscious, is there really any point in putting the suggestion to the officer? What can he or she reasonably be expected to say in response to the question? Moreover, why would a situation like this be any different from when an appellate court impugns the conduct of a trial Crown or judge or witness without first giving them an opportunity to respond?”
future scholars to find as they sift through cases, seeking to answer the question of the impact of race in sentencing. If these submissions are not enough to merit at least an acknowledgment in a judge’s decision, I argue this alone creates the suspicion of pre-judgement, censoriousness, and an actionable reasonable apprehension of bias.

5.1.1.2. Crown Prosecutors

The public interest is in promoting the Rule of Law, creating a just and fair society, and advancing equality for women and minorities. The justice gap is a violation of the Rule of Law. A society where women are routinely subject to sexual assault is not a just and fair society, nor is a society just and fair where minorities are more likely to be prosecuted and convicted of crimes, while minority victims of crime are less likely to receive justice. Advancing equality for women and minorities means reducing the justice gap for sexual assault and beginning to understand how racial discrimination works in our judicial system generally, and in the context of sexual assault. This requires the discussion of race by Crown prosecutors. Crown prosecutors can either advance equality in a just and fair society, or perpetuate the racial discrimination, inequality and injustice endemic to the criminal justice system:

“[o]ne need only recall the conduct of one of the lawyers from the Nova Scotia Department of Public Prosecutions who, in the mid-1990s, accused a Black judge in Halifax of racial bias for pointing out, in response to a Crown question suggesting that the police never lie, that systemic racism in policing is a problem in Halifax.”393

393 Ibid at 675.
5.1.1.2.1. Laying Charges

One of the prosecutor’s main roles is deterring crime. Therefore, deterrence should be one of their foremost concerns when determining when to lay charges. Is there a chance that a White man may be found not guilty of his alleged sexual assault against an Aboriginal woman? Could this chance be at least in part due to the perception that as an Aboriginal she may be seen as less credible? If the facts were the same, but the complainant was White and the accused was Black, would your belief as to the likelihood of conviction be the same? In other words, is it reasonable to believe that a White male judge is less likely to convict a White man who assaults an Aboriginal woman? In British Columbia, for example, the prosecutor’s threshold for prosecuting cases rests on the probability of conviction, or the “substantial likelihood of conviction.”

In circumstances where the probability of conviction is influenced by potential patriarchal and racial bias, that should be thrown out the window. In fact, in considering deterrence, merely the prosecution of the White male sends a deterrent signal regardless of whether a conviction is reached, as the mere accusation of sexual assault is devastating. Therefore, a prosecution may have a chilling effect on sexual violence against Aboriginal women for example and have value, even if it does not lead to a conviction, if other would-be predators catch wind and have second thoughts. Further, it will bring attention to the fact that there is reported violence against Aboriginal women. One can be reasonably convinced the man committed the crime while he is not found guilty at law. There is no problem with advancing the prosecution on that basis.

---

394 BC Ministry of Justice Criminal Justice Branch, supra note 348.
5.1.1.2.2. **Recommended Sentence**

When it comes to sentencing, prosecutors should be aware of the higher frequency of sexual assault perpetrated against minority women and therefore seek stiffer sentences where crime is committed against these vulnerable groups, particularly if they find less minority women coming forward with complaints. This suggests that there are larger hurdles, including rape myths, racial domination and power dominance from the police. That being the case, minority complainants should attract stiffer sentences. This should be reflected in Crown’s recommended sentence, but also in their explicit submission to judges.

The race of an accused should be a factor in applying the principle of general deterrence in sentencing due to its documented impact on one’s perceived sentencing probability.\(^{395}\) Whether dealing with a White accused or a minority accused, prosecutors should be considering how often these racial groups find themselves being prosecuted in determining what type of sentence is required to send a deterrent effect, and whether general deterrence is even an appropriate consideration, or if instead individual circumstances should be the primary determinants of a sentencing decision.

The more we learn about race and the more we can collect data from these decisions, we may find that minorities who commit sexual assaults have a higher chance of being prosecuted and sentenced for sexual assault. If so, then there is an argument to be made that the principle of deterrence may work as a mitigating factor, showing that deterrence is already being accomplished by the higher rate of detection and prosecution, particularly with the knowledge that the probability of sentencing is a stronger deterrent then severity of punishment.\(^{396}\) In these

---

\(^{395}\) See Thomas Gabor & Nicole Crutcher, *supra* note 337. Race impacts an individual’s perceived probability. The probability of sentencing being the more significant factor in deterrence as compared to severity of sentence.

\(^{396}\) *Ibid.*
situations, it is the individual accused and his or her actions that should make up the sentencing decision, not general deterrence. In that situation, a prosecutor who truly believes there is a need for more deterrence due to the prevalence of sexual assault should instead work at laying more charges and seeking more convictions from a more diverse group of accused and complainants.

5.1.2. Judicial Role

The impartiality of the judiciary is a core tenant of our society and our common law legal system, and impartiality’s implications affect both reality and perception. As Nightingale surmises:

“Impartiality is one of the most basic and fundamental qualities that a judge is, by tradition, required to possess. This is required to maintain public trust in the judiciary and the justice system, and to protect individual litigants who appear before a court. The requirement for impartiality also acts to protect the perception that justice is not only done, but is seen to be done.”\(^{397}\)

Currently “justice” is not being “seen to be done” as there are significant voices in the community who do not think that justice is being done to racialized accused. Tanovich articulates this, expressing his opinion that something more must be done:

“There are significant perceptions in a large part of the Canadian community that not all judges are willing to approach racially oppressed persons equitably. In my opinion, to attempt to offset these perceptions by reference to judicial oaths is insufficient to generate public confidence in the integrity of the system.”\(^{398}\)

Similarly, recent calls for mandatory written decisions in sexual assault acquittals indicate a lack of trust in the judiciary’s ability to deal with sexual assault after a judge acquitted a taxi driver

\(^{398}\) Devlin & Pothier, *supra* note 125 at 27.
accused of sexually assaulting a passed-out passenger after being found holding her urine-soaked pants and panties. Reasons are required for sentencing decisions, however currently they are not required for acquittals. I view these calls for written reasons analogous to my calls for judges to record race.

The only way to achieve true impartiality is to confront our biases by analyzing them and inoculating ourselves against their effects. If judges were to do this, it would increase the faith in the impartiality of our judiciary. Judges should ensure that the judicial system is in tune with social realities. Identifying race for the record and to create a data pool goes a long way towards understanding, evaluating and improving the deterrent effectiveness of the judicial system. The judiciary is responsible for upholding the Rule of Law, which dictates that the law should be supreme and apply to everyone. The law should be used as a corrective and preventative tool against abusers of all races as well as a shield for all types of victims. With respect to sexual assault, this is currently not the case. Judges have a duty to address this. This requires judges to consider the race of the accused and complainant as well as prevailing racial demographics of crime and crime victimization, to calibrate the deterrent effect and determining what the correct sentence is. In R.D.S., the Supreme Court of Canada left open the possibility of considering contextual factors such as race when analyzing the credibility of witnesses. In the context of sexual assault, with its sui generis evidentiary and procedural rules, this may be particularly important in protecting against implicit bias.

---

399 Sheehy, supra note 318.
400 Jerry Kang, et al, supra note 75. See also Flagg, supra note 211 ; Young, supra note 55.
401 Waldron, supra note 340.
402 Minorities are more vulnerable to sexual assault. See e.g. Conroy, Cotter and Canadian Centre for Justice Statistics, supra note 237. See also see Jillian Boyce & Canadian Centre for Justice Statistics, supra note 240.
5.1.2.1. **Identifying Race for the Record**

Judges ought to be indicating the races (or perceived races) of the complainant and of the accused when issuing decisions in order to *prima facie* confront the possibility of his or her own implicit or unconscious biases, to create a permanent record that can later be used to evaluate judicial impartiality and discrimination in the justice system, as well as to compare the racial demographics of cases resulting in conviction and sentencing with the racial demographics of sexual offending and victimization. Both minority and White race numbers must be recorded for statistical comparison. This will help to identify whether certain types of sexual assault survivors are less likely to become complainants, as well as to have their complaint be taken seriously by the police and considered by Crown prosecutor to be in the public interest to prosecute and substantially likely to lead to a conviction. This is particularly important because of prosecutorial privilege, which makes charging decisions private. As a result, the only data that can be collected is that which is created by the police or judges. Data on the racial demographics of accused and complainants at sentencing will allow for comparative statistical study between the racial demographics of sexual assault leading to conviction and the prevalence of sexual assault within racial populations. This will shed light on the potential impact of a complainant’s or a perpetrator’s race in the justice gap, and inform judges’ sentencing decisions, generating targeted and effective deterrence, thus protecting more women from sexual assault.

Making progress on this front requires that judges identify and note the racial demographics of the sexual assaults cases they encounter. Even without complex arguments or discussion on the topic of race, the judge can contribute to reducing the justice gap for sexual assault by taking this first step in collecting data to be analyzed by legal, sociological and economic scholars. These studies will contribute to data driven social policies to protect society’s
most vulnerable populations. More importantly, it can contribute to data-driven sentencing decisions based on deterrence. By analyzing victimization survey data and comparing it to sentencing data, we can calculate the sentencing probability for different racial groups of accused and complainants. When combined with research into recidivism rates, we may find that our entire sentencing approach to sexual offences is wrong. If there are low recidivism rates but also low sentencing probabilities in sexual assault incidents involving some racial or vulnerable groups, instead of longer sentences for those convicted of sexual assault, we need to be detecting, prosecuting and convicting more perpetrators, and punishing each less, reducing the prevalence of sexual assault in the most efficient manner.

5.1.2.2. Factoring Race in Sentencing

Judges should also be considering race in the application of the deterrent effect and determining what the correct sentence is. Deterrence does not necessarily mean longer sentence — it requires calculation and analysis. This calculation and analysis is a complex one involving the race of the accused and complainant, as well as prevailing levels of crime in communities.

Recent Parliaments have emphasized the need to protect society’s most vulnerable, referring to children, however, the Criminal Code also mandates that we should be protecting society’s other vulnerable groups, particularly minority and Indigenous women. Society should denounce sexual violence against vulnerable groups with disdain. Abuse against vulnerable or marginalized groups contains an increased level of power and dominance and should be

---

403 See e.g. Thomas Gabor & Nicole Crutcher, supra note 337.
404 Ibid.
405 Criminal Code, supra note 13 at 718.01. When the victim of a crime is under the age of 18 the primary consideration when sentencing is deterrence and denunciation.
considered an aggravating factor. A stronger deterrent effect would be sent if more of these cases were prosecuted and brought in front of the court, but a judge cannot control that. However, by judges giving stiffer sentences, perhaps more survivors would come forward leading to, *ceterus paribus*, more prosecutions and cases before the courts. In the marginal case of sexual assault, the case of an apparently consenting but perhaps intoxicated complainant who upon sober second thought is experiencing “buyer’s remorse”, the action was so close to the line of true immorality and natural law that the detection, prosecution, and conviction and granting of criminal record *itself* probably serves as sufficient deterrence, without the need for a stiff sentence of imprisonment. If in this case the accused is a minority, we must be wary of implicit bias, but also his or her race should be a mitigating factor with respect to the higher probability that a marginal case such as this would be brought against a minority accused.

Much of my last chapter was devoted to addressing the indifference the criminal justice system seems to have towards the sexual assault of minority and specifically Aboriginal women, and judges have played a role in this:

“Rather than recognize the many forms of injury that a victim of sexual assault may experience, judges often make no comment upon the impact of the assault on the complainant. . .Courts have also failed to recognize that Native women may suffer unique forms of injury. One example might be their ostracism from family or community after being sexually assaulted, or after reporting their assault. This may result if the victim is blamed for what transpires.”

Judges must ensure that when they are trivializing a sexual assault, they are not doing so because of racial bias towards a complainant. Before deciding on an appropriate sentence for a sexual assault committed against an Aboriginal woman, they should be asking themselves if they would still consider the sentence appropriate had the complainant been White and the accused Black,

---

406 Nightingale, *supra* note 81 at 86. Nightingale goes on to say: “It is unclear, however, whether this results solely from a judge’s inability to comprehend the injury, or if it is affected by Crown counsel’s failure to identify, understand, and articulate the complainant’s injury to the court.”
for example. It may only take asking this question one time for a judge to realize the impact implicit racial bias has on his or her decision-making.

5.1.2.3. Impartiality and Implicit Bias

This thesis has set out to illustrate the existence of racial bias in the Canadian criminal justice system, judicial decision-making, and the criminal sanctioning of sexual assault. It also suggests that implicit and explicit racial bias is endemic in Canadian society, and judges are not “immune to [its] influence.” The point is not to lay blame, or to attack the judiciary, but merely to further the discussion of implicit racial bias and bias in judicial decision-making, with the belief that, as Nightingale eloquently puts it:

. . . the judge who realizes, before listening to a case, that all men [and women] have a natural bias of mind and that thought is apt to be colored by predilection, is more likely to make a conscientious effort at impartiality and dispassionateness than one who believes that his [or her] elevation to the bench makes him [or her] at once the dehumanized instrument of infallible logical truth.

One thing I’d like to make clear, however, is that by advocating for judges to note or even consider race in their decisions, I do not think that race is determinative of any issues, but instead is a consideration one has to make, or as Devlin and Pothier put it: “[t]he experience of disadvantage and oppression should carry some presumptive weight, but to simply assume that social position confers an absolutely prioritizing truth is to give up on judgment: it is to run the risk of abdicating responsibility.” Therefore, my suggestions are much more data driven. I advocate for the collection and study of data, which can then be used as empirical evidence in decision-making. I am not asking judges to make decisions based on racial generalizations.

407 Ibid at 97.
408 Ibid.
409 Devlin & Pothier, supra note 125 at 20.
There may be situations where generalizations about race are appropriate, and Devlin and Pothier assert:

“to the extent that the Supreme Court has interpreted section 15 to allow for differential treatment to ensure equality, it might be suggested that on occasion a judge may have a constitutional responsibility to treat witnesses differently in order to achieve a fuller understanding of the totality of the evidence.”

By acknowledging race and addressing how it does or does not factor into their decisions, judges will be protecting themselves from the reasonable apprehension of bias. They can contribute to creating a stronger deterrent effect against the victimization of women in general by increasing the sentencing they seek against those who choose to victimize society’s most vulnerable, and therefore create a safer society for women. They can also contribute towards racial equality in the criminal justice system by counteracting the effects of racial profiling and bias in prosecutions. They can also create a more accurate picture of crime in our society by enabling the study of the racial demographics of sexual assault.

5.1.3. Implications and Limitations

In this section I acknowledge that many of my assertions beg for empirical justification or proof, however, the absence of data makes this impossible. In this way, however, the weakest link of my argument makes my argument stronger, for in its most diluted form, my only assertion is the need for more racial data. The lack of data to prove or disprove my stronger assertions validates this statement. I will also discuss other practical impediments to achieving the type of racial recognition that is required, such as difficulties in defining and categorizing race, as well

410 Ibid at 36.
as the likelihood that reverse racism would be alleged against a judge who makes racial considerations to address substantive injustice.

5.1.3.1. The Need for Empirical Study

Data and subsequent analysis is required to substantiate my theories, such as data on whether minorities are more likely to be sexually assaulted for example, as well as whether certain racial groups are more likely to commit sexual assault or have a higher probability of being sentenced, prosecuted, and convicted. Further study should also include whether the racial identity of the assaulter or complainant impacts the perceived harm of a sexual assault, and thus the sentence. I think belief in the word of minorities who experience discrimination should be the starting point. Just as any woman could tell you that sexual harassment is real and widespread without the need for empirical data and regardless of those skeptics who do not personally experience it, minority people will tell you that racism, discrimination and implicit racial bias is real, regardless of whether those who do not experience it, believe or want to believe it. Intersectional theory suggests that a person who is both a woman and a minority would thus experience sexual harassment and racial bias and discrimination more frequently than a minority man or a White woman. If we factor in the fact that sexual assault necessarily involves interpersonal contact or interaction, and that both individuals have racial and gendered identities, we can see the subject is ripe for harassment and bias. Therefore, I am asserting that there is a pressing need for more racial data, to reduce the prevalence of sexual assault and assess the impact of racial bias in the criminal justice system.

I am not sure that so much deference must even be given to this objection. Speaking in the context of R.D.S., Devlin and Pothier point to the existence of systemic racism in Canada and
racial discrimination in the Canadian criminal justice system to conceive of a “realistic possibility” of a certain type of bias being present, “[g]iven the history and nature of systemic racism in Canadian society” and the existence of “several recent reports which document widespread discrimination against minorities in [the] Canadian criminal justice system, then there is a “realistic possibility” that police officers might either mislead the court or overreact when dealing with a “non-White youth”.” I believe there is a corresponding “realistic possibility” that police, prosecutors, judges and perhaps even complainants over or under react to certain sexual assaults because of racial bias. I draw an analogy to their argument, but I believe I can also strengthen their assertion by pointing out that the history of racism includes negative stereotypes regarding the sexual aggressiveness of racialized men, the perceive innocence of White women, the sexual promiscuity of racialized women, and the recent reports that suggest that Aboriginal women are most vulnerable to sexual assaults. They go on to argue that this “realistic possibility” justifies a judge in paying particularly careful attention to the evidence involving such police officers so as to ensure that the pattern of discrimination (whether intentional or not) is not being repeated.” I argue that I have presented at least a “realistic possibility” of racial bias in the sentencing of sexual assault, and therefore this justifies a judge paying particular attention to his or her credibility assessments of a racialized accused and a sexual assault complainant with uncorroborated evidence, the potential for racial bias on the part of the Crown in his or her sentencing recommendations, the impact of race in deterrence and the

---

411 Devlin & Pothier, supra note 125 at 22.
412 See e.g. Howe, supra note 201 at 55; and Smith, supra note 238.
413 Smith, supra note 238.
414 Ibid. See also Wynter, supra note 61.
415 See e.g. Conroy, Cotter and Canadian Centre for Justice Statistics, supra note 237. See also Jillian Boyce & Canadian Centre for Justice Statistics, supra note 240.
416 Devlin & Pothier, supra note 125 at 36.
potential of over-policing and prosecution of minority accused, and finally his or her own potential for implicit racial bias in quantifying how harmful\textsuperscript{417} a particular sexual assault was in crafting an appropriate sentence for the accused. That does not mean that race should be a main factor in the decision or that one should lean towards accepting the testimony of a racialized person against a White complainant as “it is a basic principle of evidence that each witness is to be entitled an equal presumption of credibility” and of course two of the principles of or criminal regime are “the presumption of innocence of an accused and the obligation of the Crown to prove the case beyond a reasonable doubt.”\textsuperscript{418}

5.1.3.2. Defining Race and Reverse Racism

The practicalities of defining and recording race pose difficulties to this project. I do not think this difficulty should frustrate its actual or attempted implementation. The accused or complainant can self-identify themselves, with judges and lawyers having input too. I think where appearance or language betray racial indicators they should be recorded. If they are clear to those in the courtroom, they should be made available to those who later seek to analyze and understand the case. Freedom from discrimination is built into the Charter and inherent to the Rule of Law, so just as one’s religion is self-identified and protected, their racial identify should be too. Some will argue that it is unrealistic to deal with race in every case where there is a racialized complainant or accused. In \textit{R.D.S.}, Binnie J. casts shade on the notion of considering racial bias by saying: “[t]he eventual logic of the defence argument, it seems, is that courts should take judicial notice of a “realistic possibility” of racial partiality in every case where the

\textsuperscript{417} See Polinsky & Shavell, \textit{supra} note 50.
\textsuperscript{418} Devlin & Pothier, \textit{supra} note 125 at 22.
jurors, accused, complainant and witnesses are not all of the same race.” 419 Of course, where the accused is clearly innocent, there is no reason to mention race. However, the marginal case, involving credibility assessments as well as the sentencing decision, which allows broad room for discretion, are not of that sort. These cases require defence counsel to satisfy his duty to his client by being cognizant and aware of the possibility of racial bias and to alert the court to its potential impact, and require Crown Counsel to consider the public interest in prosecuting those who target minorities for sexual assault. As for the judiciary, many cases may require no more than making note and acknowledging the race of the complainant and accused and the potential that he or she was aware of the potential for implicit racial bias, and that racial bias did not play a part in his decision.

5.1.3.3. Reverse Racism

It is likely that just as Justice Sparks learned, any attempts to advance minority rights or interests are met with push back from the dominant groups in society due to the unfortunate paradox that an increase in one group’s rights often come at the expense of another's. We must not underestimate the number of covert racists that exist in our society and the level of censorship and censoriousness in the legal community. For example, while the majority of the Supreme Court of Canada and many judges in Nova Scotia (including Justice Sparks) accepted that racism exists in Nova Scotia, and more “that racism is a problem in Nova Scotia”, 420 “the police union, the Crown and several other Nova Scotian judges did not think that it was relevant to th[e] case.” Further, Pothier questions: “Is it sheer coincidence that the first time a Canadian

419 Tanovich, supra note 52 at 666.
420 Devlin & Pothier, supra note 125 at 20 [Emphasis added].
judge is challenged for bias based on race, that judge is Black and is concerned about racism against Blacks?"421

I believe this affirmative type of action that I suggest is protected under the Charter, in so far as the Supreme Court of Canada has interpreted s. 15 to allow discriminatory practices aimed at substantive equality, and in fact imperative in light of the Charter and Rule of Law guarantees of equal protection by the law.422 While perhaps the explicit use of race as an aggravating or mitigating factor may be prone to, although not necessarily defeated by, these types of challenges, the mere collection of data by judges should not be.

5.1.4. Chapter Summary

Tackling racial bias in the criminal justice system requires efforts by lawyers, judges and social scientists, as “in a society where racialization can often become racism there is an obligation upon all of us (including police officers) to self-regulate, to guard against (perhaps unintentional but still real) patterns of prejudice”.423 Lawyers have the duty to raise the issue of race where applicable, as a potential aggravating or mitigating factor at sentencing, as well as to bring the issue of implicit racial bias to the surface in the context of credibility analyses and other discretionary decisions. Judges play a role in the collection of data by recording racial information, just as they record other information such as the age of an accused or complainant, etc. Effectively combating racial bias in judicial decision-making requires that social scientists apply empirical methods to racial data collected from sentencing decisions to prove or disprove the existence of racial bias in sentencing.

421 Ibid at 31. Pothier also says: “it is significant that at first instance the claim was actual bias on the part of Judge Sparks, not just a reasonable apprehension of bias” citing RDS SCR at 518.
422 R.D.S, supra note 7 at 46.
423 Devlin & Pothier, supra note 125 at 22.
Considering evidence to suggest racial discrimination in the judicial system, I formulate a duty for defence counsel to make submissions cautioning against implicit racial bias in assessing the credibility of an accused, particularly where the case rests on a complainant’s uncorroborated testimony. Defence counsel also has a duty to make sentencing submissions with respect to race, cautioning against perceived criminality and negative racial stereotypes. These sentencing submissions should also speak to the principle of deterrence and how the increased probability of a minority accused being reported, charged, prosecuted and convicted compared to White accused in itself creates a significant deterring effect, diminishing the importance of this principle in crafting a sentence.

I argue that prosecutors should seek stiffer sentences when a sexual assault complainant is a minority, particularly where an accused is White, considering the relative vulnerability of minority women to sexual assault, the justice gap and the impact of race on the deterrent effects of sentencing. This will create a stronger deterrent effect and protect vulnerable communities, but will also encourage minority complainants to report offenders, a decision that is often based on whether the expected outcome or sentence is worth the second (third, fourth) victimization of being interviewed by police, and testifying/being cross-examined at trial.

While there are some limitations to my theory, including the need for data, and the possibility of claims of racial discrimination against White’s being made, I do not think they defeat my argument. The need for data to support my theory can only be generated by implementing it. One of the main goals of my recommendations is the generation of data for further study and analysis into the use the potential impact of racial bias in discretionary decisions made by prosecutors and judges, as well as the impact of race on the justice gap for

---

424 See e.g. Conroy, Cotter and Canadian Centre for Justice Statistics, supra note 237; and Jillian Boyce & Canadian Centre for Justice Statistics, supra note 240.
complainants of sexual assault. Perhaps the furthest boundaries of my argument regarding the consideration of accused or complainant race as an aggravating or mitigating effect may be vulnerable to claims of racial discrimination by Whites, I believe the Charter permits these types of arguments at least being made by lawyers and are worthy of consideration. At minimum, my calls for judges to record racial information regarding parties to an incident of sexual assault is immune to these attacks.
6. Conclusion

Racial bias is pervasive in society and in the criminal justice system. Racial bias does not have to be explicit to be felt. In the context of the criminal justice system, even implicit bias can have huge impacts on complainants and accused. While judicial impartiality and neutrality are hallowed principles in our judicial system, there is clear evidence of racial bias in judicial decision-making. The prevalence of racial bias throughout the criminal justice system creates the need for explicit considerations of race for the system to produce substantive equality, and for the legal system to apply to and protect all people equally. Sexual assault is an important example of an area of law where complainants likely face implicit racial bias, just as historically there has been bias against sexual assault complainants generally. Further, it is possible that there is less perceived societal harm to the sexual assault of minorities. If racial complainants are less likely to be believed, or are less sympathetic complainants, then the criminal justice system will fail to adequately deter crimes against minorities. Ultimately, I suggest that counsel should be advancing the topic of race in the context of sexual assault due to its racialized nature and the pressing need to find a way to reduce its prevalence, something the current approach has failed to do over the last ten years or more. If the topic of race is raised, it allows the judge to attempt to counteract any of his potential implicit biases, as well as factor race into his considerations regarding deterrence. Finally, by creating data on the racial demographics of sexual assault convictions, we can evaluate judicial racial bias in sentencing whereby minority accused receive longer sentences for example, as well as trying to determine whether there is explicit, implicit and/or structure inequality in the criminal justice system such that sexual assaults where the complainant is a minority are less likely to lead to a conviction.
Whenever racial equality is raised, there are those that seek to silence it. This has been demonstrated time and time again, including the attacks against Justice Sparks of the Nova Scotia Youth Court, a Black female who raised the prospect of a White police officer overreacting to a Black youth in an all-Black neighbourhood after the officer put the youth in a choke hold yet asserted that he had been assaulted. A less explicit example of censorship is how Justice Dambrot avoids the issue of the reasonable apprehension of bias in overturning then Justice Zucker’s Ururyar decision.

Essentially, we are talking about social organization of society on racial hierarchies and the subordination of women by men in our patriarchal society. Both involve long history of power and control; however, both have shown a demonstrable progress in reducing discrimination and promoting equality between people in recent years. The Charter has certainly advanced the rights of women, homosexuals, and transgendered individuals. In the criminal law however, racial minority rights have not made much progress. Perhaps this relates to the fact that women and sexual minorities continued to gain status and power in governments, while Aboriginal and minority representation in government and the judiciary still lags behind Caucasians.425 A common criticism of feminist and queer studies are their focus on White issues, and that the most productive feminists advancing female rights are White and have the perspective of White females. As we can see in the context that of the justice gap, not much has been done to advance the specific vulnerabilities of minority women complainants and victims. That is to say that protections are not aimed at protecting minorities, those who need it the most. Further, their vulnerability to sexual assault means that those needs are even more urgent.

425 See e.g. Griffith, supra note 79.
I began conceptualizing this project after hearing about the impact of implicit racial bias on people’s decision-making. I started noticing that many cases seem to go away when the accused was White, or would be spoken about in a more neutral tone, and that whenever a minority had committed a crime it was characterized in the most negative way. Having a background in economics and understanding the law and economic theories of deterrence and efficiency in our criminal justice system, I had an intuitive belief that the impact of race was missing. If we detect, prosecute and sanction the few in order to deter the whole, surely minorities and other less powerful groups of society will be targeted. Further, sanctioning those groups will not have a deterrent effect on White and powerful members of society. As I went through the literature, I discovered that my intuition was correct: an offender’s race has an impact on the deterrent effect of sanctioning, namely that one is deterred by sanctions against an offender of one’s own social or racial group. I began to wonder if the same was true of complainants. In this thesis I argue that it is, and that further study needs to be done. Nonetheless, logically speaking, if one is to evoke the word deterrence and accept its validity, one must accept the premise that race should be considered. If sexual assault is racialized, as minorities are more vulnerable to it, there is a greater need to deter this type of behaviour, and thus a conviction for sexual assault against a minority ought to have a stiffer sentence in the name of deterrence. Further, if after collecting racial data we find that there is a lesser probability of detection, prosecution and conviction of an offender who sexually assaults a minority, then those disproportionate few who are convicted must be given a stiffer sanction to offset the lower probability of sentencing and generate even the same level of deterrence, let alone an increased one because of to protect those most vulnerable.
Ultimately, the idea of incorporating race into sentencing submissions and decisions is not meant to be a definitive factor in a case, or even necessarily a determinative one. The purpose of counsel making submissions based on race is to be aware that implicit bias may be a factor to maintain the impartiality of the judiciary and ensure that the Charter’s protections against racial discrimination are being fulfilled. The purpose of judges acknowledging race in sentencing decisions is to determine the demographics of prosecuted or convicted sexual assault cases, to better tailor our legislation, policing, prosecutions and sentencing to the purpose of protecting society’s most vulnerable populations, and to close the justice gap in sexual assault. I hope that there will be those out there who take some of these considerations to heart and consider bringing up racial arguments in their submissions for sexual assault and beyond. If lawyers bring up the topic of race, then race is more likely to find its way into the decision, giving scholars a foundation to work with, even if judges do not adopt the changes I suggest.

In summary, I suggest that despite racial equality provisions in the Charter, racial discrimination continues to exist in the sanctioning of sexual assault in Canada’s judicial system. I argue that a purposive approach to the interpretation and application of the remedial Charter mandates “substantive equality”, and not just “formal equality”. Erasure of race in sentencing is a prima facie representation of “formal” equality, but given the existence of implicit bias and racial discrimination in our justice system, achieving substantive equality requires the explicit acknowledgement and consideration of race. As suggested by David Tanovich, I emphasize that justice demands more study on the prevalence and scope of racial discrimination in the Canadian justice system. Collecting racial demographics of complainants and accused is the first step to undertaking such work. This data is also crucial to evaluating the effectiveness of the criminal
justice system in deterring sexual offences, which are violent, gendered, an obstacle to gender equality, and persisting in Canadian society.

Lastly, public perception and confidence in the judicial system is important because it impacts crime deterrence, a victims’ willingness to report crime, and Parliament’s legislative responses to crime, all of which have significant effects on society. Currently, the media shapes both the public perception of our criminal justice system and the racial composition of victimization. Effective deterrence relies on the media's dissemination of criminal sanctions. The media’s lack of legal training often leads them to distort a judge’s reasoning in a case, and their desire to attract readers provides them an incentive to play to people’s explicit and implicit biases, particularly with respect to sex and race (both titillating, taboo topics). This is manifested in which cases are reported on, whether a picture is included, what language or tone is used in reporting it, etc. Currently, the most accessible information with respect to race is through the media, having either published a picture for example, or chosen to engage with the topic of race to generate a reaction. This is important, as deterrence is intimately related to race. The explicit mentioning of race in judicial decisions would allow researchers to access reliable information to combat the media distortion or skewing of complainant and accused racial data.
Bibliography

**LEGISLATION**


*Chinese Immigration Act*, RSC 1885, c 71.

*Criminal Code*, RSC 1985, c C-46.

**JURISPRUDENCE**

*British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49.


*Oag v. Canada*, 1985 CarswellNat 64 (Federal Court).


**SECONDARY MATERIALS: BOOKS**


MacDougall, Bruce. Queer Judgments: Homosexuality, Expression and the Courts in Canada (Toronto, 2000).


SECONDDARY SOURCES: JOURNAL ARTICLES


SECONDARY SOURCES: NEWSPAPER ARTICLES


SECONDARY SOURCES: OTHER


Welch, Elizabeth Ann. Succumbing To The Siren Song: Rape Myths In Sexual Offender Sentencing In B.C The University of British Columbia, 2014).