JUDICIAL ATTITUDES AND DIFFERENTIAL TREATMENT: NATIVE WOMEN IN SEXUAL ASSAULT CASES*

*Margo L. Nightingale***

In this paper the author discusses the concepts of racism, judicial impartiality and bias. While impartiality is recognized as the judicial ideal, it is argued that impartiality is virtually impossible where a judge's personal predispositions (biases) are viewed as objective realities. A review of Canadian sexual assault jurisprudence involving Native people is undertaken with particular attention given to cases involving Native women as complainants/victims. These cases provide examples of various forms of judicial bias, and show how bias can affect the treatment of Native women appearing in courts as complainants/victims. Cases are also discussed in which judges have attempted to recognize a distinct Native "culture". These cases are reviewed to assess the impact upon Native people, but more specifically, the impact upon Native women.

Dans cet article, l'auteure discute du racisme, de l'impartialité des juges et des préjugés. Bien que l'impartialité des juges soit reconnue comme l'idéal, l'auteure maintient qu'il est presque impossible de l'atteindre lorsqu'on considère les prédispositions, ou les préjugés, d'un juge comme des réalités objectives. Elle examine la jurisprudence canadienne sur les agressions sexuelles concernant des autochtones en prêtant une attention particulière aux affaires qui touchent les femmes autochtones en tant que plaignantes et victimes. Ces affaires illustrent différentes façons dont se manifestent les préjugés des juges, et elles démontrent comment ces préjugés peuvent influencer le traitement des femmes autochtones qui comparaissent en cour à titre de plaignantes et de victimes. Elle discute aussi d'affaires lors desquelles des juges ont essayé de reconnaître une « culture » autochtone distincte. Ces affaires sont examinées afin d'évaluer leur impact sur les membres des autochtones, et plus particulièrement, sur les femmes autochtones.

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* A number of terms exist to define the Inuit, the Métis, the Status and the Non-Status Indian First Nations in Canada. The most appropriate identification would be to refer to each particular Nation, (*i.e.* Inuvialuit, Cree, Mohawk) but in this paper such clear identification cannot always be made. Although "Aboriginal" is the term used in the *Constitution Act, 1982*, I have chosen the term "Native" to describe Inuit, Métis, Status and Non-Status Peoples where the comments are believed to apply universally to "Native" Canadians. I have done this based on the belief that this is the term most commonly adopted by Native Canadians to define themselves. This belief has been formed from a review of various writings and the names chosen for various Native and women's organizations. Where material is directly related to a particular Nation or people, I have been as specific as possible.

** LL.B (University of Ottawa, 1990), articled at Stikeman, Elliott (Ottawa).
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> 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.
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> ....
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> 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.[1]

I. INTRODUCTION

With these words, Territorial Court Judge Michel Bourassa stated his belief that sexual assault in the Northwest Territories cannot always be judged in the same light as cases in southern Canada where "rape" is often more violent than in the Northwest Territories. Although his comments are shocking and inappropriate, they nonetheless reflect a certain reality. Sexual assault in the Northwest Territories *is* treated differently than in southern Canada. This difference is not, however, merely a feature of geography, but can be more directly linked to the victim's and the accused's race.

Although these comments were made by one judge and do not purport to represent the views of all members of the bench, these comments are indicative of several things. Firstly, there is a failure or inability to comprehend the nature of sexual assault and the many ways it can be committed. Secondly, the presence of race and gender bias among judges affects perceptions of wrongdoing and injury. Finally, judicial bias is ever present although invariably unacknowledged.[2]

Criticisms that bias exists within the Canadian justice system are not new. Public investigations into such events as the sexual assault and murder of Helen Betty Osborne, 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 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. Furthermore, recent studies on the disproportionate incar-

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[1] Comments of Territorial Court Judge Michel Bourassa as quoted in L. Sarkadi, "Sex Assaults in North Are Often Less Violent, Judge Says" *The Edmonton Journal* (20 December 1989) A1 [hereinafter Sarkadi].

[2] As a result of making these and other comments in the same newspaper article, a judicial inquiry was held to determine whether they constituted misbehavior. After a determination of Judge Bourassa's precise statements, Judge Carole Conrad found that Judge Bourassa's comments "were not well thought out" or were "somewhat crude". His comments, however, were "not sufficiently offensive as to render Judge Bourassa unfit to hold his judicial office, thereby making him guilty of misbehaviour." *See* Northwest Territories, *In the Matter of An Inquiry Pursuant to Section 13(2) of the Territorial Court Act, S.N.W.T. 1978(2), c. 16 and In the Matter of An Inquiry into the Conduct of Judge R.M. Bourassa* (28 September, 1990) (Commissioner: Hon. Madame Justice Carole Conrad) at 335-36 [hereinafter *Inquiry*].

ceration of Native Canadians in federal and provincial facilities[3] also support the conclusion that Natives are subject to differential treatment in Canadian courts.

Within the justice system, racial discrimination affects both the offender and the complainant. While a great deal has been written about the effect of racial prejudice upon accused persons,[4] literature discussing the effect of racism upon the victims of crime has been virtually absent.[5]

In Canada, and elsewhere, there has been a dramatic increase in the amount written on sexual assault in the last twenty years.[6] Yet, amidst this burgeoning literature, there has been no discussion of the effect of a victim's race or ethnicity on the criminal trial or sentencing process. Very little material exists on the differential impact or experience of sexual assault upon Native women and other women of colour.[7] This is surprising in light of the identification of sexual assault in Native communities as an increasing problem. For example, in its 1984 draft report on Native crime victims, the Canadian Council on Social Development stated:

> 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.[8]

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[3] M. Jackson, *Locking Up Natives in Canada* (1989) 23 U.B.C. L. REV. 215 [hereinafter Jackson].

[4] Some examples are B.P. Archibald, *Sentencing and Visible Minorities: Equality and Affirmative Action in the Criminal Justice System* (1989-90) 12 DALHOUSIE L.J. 377; S.L. Johnson, *Unconscious Racism and the Criminal Law* (1988) 73 CORNELL L. REV. 1016; K. Bumiller, *Rape as a Legal Symbol: An Essay on Sexual Violence and Racism* (1987) 42 U. MIAMI L. REV. 75.

[5] It was not until 1970 that the legal literature on rape actually began to discuss issues involving victims of rape. By that date, the focus of the literature began to shift from discussing issues relevant to protecting an accused, to consider the problems associated with protecting a rape victim from "particularly odious behavior" by persons within the criminal justice system. D. Chappell, G. Geis & F. Fogarty, *Forcible Rape: Bibliography* (1974) 65 J. CRIM. L. 248.

[6] Between 1970 and 1979, 131 articles were written internationally, as compared to a total of 84 articles in the preceding 50 years. Between 1980 and 1988, an average of 22 articles were published each year (as determined from a review of the *Legal Periodical Index*).

[7] For some discussion of the effect of sexual assault upon Black women, refer to A.Y. Davis, WOMEN, RACE & CLASS (New York: Random House, 1981) at 172-201; R. Tong, WOMEN, SEX AND THE LAW (Totowa, N.J.: Rowman & Allanheld, 1984) at 166-69; G. Lerner, ed., BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY (New York: Pantheon Books, 1972).

[8] Canadian Council on Social Development, NATIVE CRIME VICTIMS RESEARCH (draft manuscript: August 1984) at 5, as cited in 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.

The absence of literature discussing race as it affects all women's issues, including sexual assault, is partly the fault of White middle class feminists who have asserted their version of reality as representative of all women's realities.[9] The failure to address issues of race has proven problematic. However, the absence of material on sexual assault has also resulted from the silence of Native women. Rather than assume that this silence indicates an acceptance of the existing literature as representative, it should prompt questions about the reasons why Native women have not written on the subject.

In discussing Native women and the women's movement, Caroline Lachapelle has provided two possible explanations. Many Native women may see gender issues to be of lesser importance than race issues. For them, the rights of the entire Native population may take precedence.[10] Native women may also feel their participation in the women's movement could alienate Native men, weaken their families and thereby fragment their communities. Not wishing to cause disharmony, these women have remained outside the movement.[11]

Another reason for the silence of Native women regarding sexual assault may be the sheer volume of issues that they must confront. Ultimately, it is of considerable importance to note the following when discussing Native women and sexual assault:

> Native and [W]hite women have many of the same concerns such as health care and day care, but sometimes women's groups want Native women to identify with the issues [W]hite women have chosen.[12]

Is sexual assault one of these issues?

Although Native women have said little about their own experiences of sexual assault, they have begun to discuss publicly the occurrence of child sexual abuse and family violence in their communities. This public disclosure is a great step forward when:

> The historical experience of Native people makes them very reluctant to reveal sexual abuse problems to outsiders. Fear of bringing in alien, outside *white* others creates pressures to keep the family secret. The R.C.M.P., social workers, (who are often seen as "baby stealers"), and the legal justice system can all be seen as oppressors rather than helpers.

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[9] E. Thornhill, *Focus on Black Women!* (1985) 1 C.J.W.L. 153; M. Kline, *Race, Racism and Feminist Legal Theory* (1989) 12 HARVARD WOMEN'S L.J. 115 at 121. In attempting to overcome this, White women must be very careful when writing about women of colour, and be aware of the potential for conflict inherent in the task. Problems can arise such as the misrepresentation of issues, cultural appropriation and asserting knowledge of experience where the author has no basis for such knowledge. Being a White woman and writing about issues as they affect Native women, I have had to grapple with these and other related issues throughout the stages of writing this paper.

[10] C. Lachapelle, *Beyond Barriers: Native Women and the Women's Movement* in M. Fitzgerald, C. Guberman & M. Wolfe, eds, STILL AIN'T SATISFIED! CANADIAN FEMINISM TODAY (Toronto: The Women's Press, 1982) 257 at 261.

[11] *Ibid.* at 263.

[12] *Ibid.* at 261.

> The victim may be torn between her desire for the abuse to end, and feelings of loyalty towards her own people. This is slowly changing due to public education within the Native community with social workers and the R.C.M.P.[13]

According to a recent report on family violence by the Ontario Native Women's Association, 57% of respondents to their questionnaire suggested that sexual abuse was a feature of family violence in Aboriginal communities.[14] It is then possible that concentration on child sexual abuse and family violence may represent an effective strategy to reduce, or eliminate, some forms of sexual assault within a community. Such an approach may be preferable to many Native women because the focus is directed towards the interests of the family and the community. This may contrast with the strategy adopted by non-Native women which might be perceived as forwarding individual interests, and for that reason alone, be unacceptable.

The absence of Native literature on sexual assault results in an inability to comment upon or understand the extent of the differential *experience* of sexual assault among Native women. Therefore, this paper will focus upon judicial attitudes, and the differential *treatment* of Native women involved in cases of sexual assault. This will be done predominantly by an examination of judicial decisions in sexual assault cases involving Native people. As a discussion of this nature will identify issues of racism and judicial bias, these concepts will also be discussed and, where possible, defined.

II. RACISM

> Natives discuss issues related to culture and race from their immediate experience, not from abstract theories....Many are unable to give detailed explanations of racism; instead, they can only give direct examples supported by the phrase, "I just know." Indians and Métis have the feeling that everyone should know that racism is obvious and blatant – to ask them to document discrimination is an insult because racism surrounds them constantly.[15]

"Racism" as a concept and a practice is generally misunderstood by mainstream society.[16] What constitutes racism, and the ways in which it can be demonstrated are often perceived stereotypically. As a result,

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[13] T. Martens et al., THE SPIRIT WEEPS: CHARACTERISTICS AND DYNAMICS OF INCEST AND CHILD SEXUAL ABUSE WITH A NATIVE PERSPECTIVE (Edmonton: Nechi Institute, 1988) at 115.

[14] BREAKING FREE: A PROPOSAL FOR CHANGE TO ABORIGINAL FAMILY VIOLENCE (Thunder Bay: Ontario Native Women's Association, 1989) at 19 [hereinafter BREAKING FREE].

[15] H. Adams, PRISON OF GRASS: CANADA FROM THE NATIVE POINT OF VIEW (Saskatoon: Fifth House Publishers, 1989) at 149.

[16] The various definitions of racism discussed here are not intended to be all-encompassing. Many would make the scope of the definitions much wider. Defining racism at all is problematic, but the attempt is made in hopes of increasing awareness of the different forms that racism may assume. For further definitions and examples of racism *see* P. Essed, EVERYDAY RACISM: REPORTS FROM WOMEN OF TWO CULTURES, trans. C. Jaffé (Claremont: Hunter House, 1990).

the many forms racism may take remain largely unacknowledged and are easily perpetuated.

Defined as "a belief that some races are by nature superior to others",[17] racism can be characterized as a belief in the propriety of inequality due to the mental inferiority and moral corruption of other races. This racism is demonstrated through overt acts of hostility towards members of other races. It is perceived as "red-necked", and is now known as the "old-fashioned"[18] or "traditional, dominative"[19] form of racism.

While this form of racism remains within our society, racism has also adopted more subtle, more indirect and less overtly negative forms. John McConahay refers to this as "modern racism". While the theory specifically deals with prejudice towards Blacks in the United States, the analysis fits equally well when Native peoples — or most other "minority" groups — are substituted.

McConahay defines the principal tenets of modern racism as follows:

> 1) Discrimination is a thing of the past because Blacks now have the freedom to compete in the marketplace and to enjoy those things they can afford.
> 2) Blacks are pushing too hard, too fast and into places where they are not wanted.
> 3) These tactics and demands are unfair.
> 4) Therefore, recent gains are undeserved and the prestige-granting institutions of society are giving Blacks more attention and the concomitant status than they deserve.[20]

Some people will endorse each tenet, some none, while others would selectively believe in some and not others. McConahay goes on to say that these tenets are supplemented by modern racists' general belief that racism is bad and that their own beliefs do not constitute racism because they are perceived as empirical facts.[21]

Gaertner and Dovidio have termed this more subtle racism "aversive". 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."[22]

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[17] THE MERRIAM-WEBSTER DICTIONARY (New York: Gulf & Western Corp., 1974).

[18] J.B. McConahay, *Modern Racism, Ambivalence, and the Modern Racism Scale* [hereinafter McConahay] in J.F. Dovidio & S.L. Gaertner, eds, PREJUDICE, DISCRIMINATION AND RACISM (Orlando: Academic Press, 1986) [hereinafter PREJUDICE] 91 at 93.

[19] S.L. Gaertner & J.F. Dovidio, *The Aversive Form of Racism* [hereinafter Gaertner] in PREJUDICE, *ibid.*, 61 at 62.

[20] McConahay, *supra*, note 18 at 92-93.

[21] *Ibid.*

[22] Gaertner, *supra*, note 19 at 63.

As aversive racists generally believe that all people are equal, to notice *any* difference between peoples is, to them, inappropriate and potentially racist. The following comments are illustrative:

> 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.[23]

These comments, described as "inappropriate" in *The Vancouver Sun*, should be defined as racist in accordance with this new, subconscious racism. 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.

According to the above definitions, a modern or aversive racist would assume that true racism is manifested only in blatant, deliberate and ill-intentioned acts. Anything less is *not* racism. Further, as the term "racist" is pejorative, few will associate themselves with it.

In her essay *Theories of Race and Gender: The Erasure of Black Women*, Elizabeth Spelmann has said:

> White people may not think of themselves as racists, because they do not own slaves or hate blacks, but that does not mean that much of what props up white people's sense of self-esteem is not based on the racism which unfairly distributes benefits and burdens to whites and blacks.[24]

The continued misunderstanding of racism is often supported by the common defence, "I didn't mean to offend anyone."[25] Intention, however, is no longer an element required to prove discrimination,[26] and:

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[23] Comments of British Columbia Provincial Court Judge John Davies in J. MacDonald, "Racial comments 'inappropriate', appeal judge says" *The Vancouver Sun* (11 June 1988) C6.

[24] *Quest*, vol. V, No. 4, at 36-62, as cited in B. Hooks, *Feminist Theory: From Margin to Centre* (Boston: South End Press, 1984) at 53.

[25] This was the comment made by the lawyer representing two Hull, Quebec police officers at the inquiry into Minnie Sutherland's death. While entering the courtroom during the inquiry, the lawyer was heard to greet others by saying "How". Without admitting he made this remark, he said "I apologize to those who could be offended by such a remark, if it was said....But again I affirm categorically that I didn't mean to offend anyone and have never held any racist intentions towards anyone" in G. Kalogerakis, "Lawyer Apologizes for Remark Without Admitting He said it" *The [Ottawa] Citizen* (8 June 1990) B1.

[26] *Re Bhinder and C.N.R. Co.*, [1985] 2 S.C.R. 561, 23 D.L.R. (4th) 481. *See also C.N.R. Co.* v. *Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, 40 D.L.R. (4th) 193, and *Andrews* v. *The Law Society of British Columbia*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1.

> [I]ntent does not excuse somebody from racism. Racism is racism, and racism stings. All the good intentions in the world do not take away the sting and do not take away the pain.[27]

To discuss racism in Canadian society without some reference to the history of relations between Native and White societies is to consider racism out of context. Although thorough discussion of this history is impossible here, it is hoped that by introducing the historical connection, an understanding of the complexities of racism may be possible.

The relationship that currently exists between the Native and non-Native peoples of Canada has been shaped by Canada's history of colonialization and colonial rule. The effect of European contact on Native peoples differed significantly depending upon the nature of the Native social structure at the time of European contact, and the amount and type of contact sustained. Few non-Native people view the current situation with any thought of past relations between Native and European people and the history of oppressions experienced by Native peoples. Few Native peoples can view any situation without such considerations. The gulf in perspective that is subsequently created is problematic, largely because the existence of racist stereotypes and attitudes and the effects of these on Native peoples today are all products of the past.

III. JUDICIAL BIAS

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.[28]

The ideal of impartiality requires that all cases be decided without the influence of pre-conceived ideas on matters of law or policy and without personal prejudices or bias. To avoid bias, a judge:

> ....must purge his [or her] mind not only of partiality to persons, but of partiality to arguments, a much more subtle matter, for every legal mind is apt to have an innate susceptibility to particular classes of arguments.[29]

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[27] P.A. Monture, *Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Yah-Gah* (1986) 2 C.J.W.L. 159 at 166 [hereinafter Monture].

[28] *R.* v. *Sussex JJ*, [1924] 1 K.B. 256 at 259, [1923] ALL E.R. 233 at 234.

[29] Lord MacMillan quoted in B. Shientag, *The Virtue of Impartiality* in G. Winters, ed., HANDBOOK FOR JUDGES (Ville: The American Judicature Society, 1975) 57 at 62, as found in B. Wilson J., "Will Women Judges Really Make a Difference?" (The Fourth Annual Barbara Betcherman Memorial Lecture, 8 February 1990) at 3 [hereinafter Wilson].

Judge Rosalie Abella argues that every judge will consider an issue in accordance with his or her own values, assumptions and experiences.[30] Thus, the reality is such that the ideal of "impartiality" is virtually impossible. This is particularly evident when the bias consists of ingrained assumptions about race or gender which are viewed as so "natural and obvious" that most judges are unaware that their perceptions are, in fact, biased.[31] Doubting that complete impartiality was possible, Lord Justice Scrutton said:

> This is rather difficult to achieve in any system. I am not speaking of conscious impartiality; but the habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas of such a nature that, when you have to deal with other ideas, you do not give as sound and accurate judgments as you would wish....It is very difficult sometimes to be sure that you have put yourself into a thoroughly impartial position between two disputants, one of your own class and one not of your class.[32]

Bias may be apparent when a judge has a pecuniary interest in the outcome of a decision. Bias may also be found in feelings of favouritism or adversity to one of the parties before a judge, acquired through some personal interaction. A third type of bias involves the predetermination of an issue before the court, and includes "attitudinal bias". It is this third type of bias which is the most difficult to recognize or identify. It is this form of bias which will most affect Native offenders or victims.

The Supreme Court of Canada has established that the test of a "reasonable apprehension of bias" is as follows:

> ....the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude."[33]

As long as judges are predominantly White middle class men, the determination of what is "reasonable" is likely to be limited by their perspectives and attitudes. "Court judgments endow some perspectives, rather than others, with power. Judicial power is least accountable when judges leave unstated — and treat as a given — the perspective they select."[34]

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[30] R. Abella, *The Dynamic Nature of Equality* in S.L. Martin & K.E. Mahoney, eds, EQUALITY AND JUDICIAL NEUTRALITY (Toronto: Carswell, 1987) 3 at 8-9 [hereinafter EQUALITY].

[31] C. Boyle & S.W. Rowley, *Sexual Assault and Family Violence: Reflections on Bias* in EQUALITY, *ibid.*, 312 at 315.

[32] *The Work of the Commercial Courts* (1921) 1 CAMBRIDGE L.J. 6 at 8, as found in Wilson, *supra*, note 29 at 4.

[33] *Committee for Justice and Liberty* v. *National Energy Board*, [1978] 1 S.C.R. 369 at 394, 68 D.L.R. (3d) 716 at 735, cited with approval in *R.* v. *Valente*, [1985] 2 S.C.R. 673 at 684, 24 D.L.R. (4th) 161 at 169.

[34] M. Minow, *Foreword: Justice Engendered* (1987) 101 HARV. L. REV. 10 at 94.

IV. JUDICIAL DECISIONS[35]

As the basis for analysis, 69 cases involving Natives as offenders and/or victims were accumulated. The majority of the cases (47) arose in the Northwest Territories, and all but four cases involved sexual offenses. Of these four, two involved charges in some way related to a sexual offence,[36] with two cases involving charges of simple assault.[37]

Of the 67 cases involving or related to a sexual offence, 46 involved Native intra-racial sexual assault; two involved a Native offender and a non-Native complainant; five involved a non-Native offender and a Native complainant; and one involved non-Native intra-racial sexual assault. In nine cases the accused was a Native, but the race of the victim was unclear, and in four cases the race of both parties was unclear.

The cases found and reviewed are believed to be representative of cases reported and tried. However, it is not assumed that these cases represent all occurrences of sexual assault in Native communities, or all sexual assaults against Native women. 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.

The number of cases determined by police to be "unfounded" is significantly higher in the Northwest Territories than exists across Canada. In 1984 and 1985, the percentage of unfounded cases in Canada was 14.8% and 14%, respectively. During the same period, police in the Northwest Territories deemed almost twice that number to be unfounded.[38] When the complaints were deemed to be "actual offenses", a much higher percentage of charges were laid in the Northwest Territories. In 1985, 46.8% of "actual offenses" throughout Canada resulted in a charge being laid, while 73.4% resulted in a charge in the Northwest Territories.[39]

Of the 67 cases involving sexual offenses, 39 cases involved charges of sexual assault, three dealt with charges of sexual assault with

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[35] A comprehensive analysis of sentencing has not been undertaken in this paper. For further information on this, please refer to the Canadian Bar Association's *Report on Sexual Assault Sentencing in the Northwest Territories*, scheduled for release in Fall 1991.

[36] *R.* v. *Abel* (16 December 1986), Yellowknife 3743 (N.W.T.S.C.), de Weerdt J.; *R.* v. *Reimer* (16 April 1986), Vancouver 1433 (B.C.S.C.), MacKinnon J.

[37] *R.* v. *Nilaulak*, [1986] N.W.T.J. No. 65 (Terr. Ct), Bourassa J.; *R.* v. *Amagoalik*, [1987] N.W.T.J. No. 136 (Terr. Ct), Bourassa J.

[38] The comparable figures in the Northwest Territories were 23.9% and 28% for 1984 and 1985, respectively. Statistics are also available regarding complaints of sexual assault with a weapon and aggravated sexual assault. *See Canadian Crime Statistics, 1984* (Ottawa: Canadian Centre for Justice Statistics, 1985) at 2-1, 2-2, 2-97 and 2-98; *Canadian Crime Statistics, 1985* (Ottawa: Canadian Centre for Justice Statistics, 1986) at 2-1, 2-2, 2-97 and 2-98.

[39] *Ibid.*

a weapon, three cases dealt with sexual assault causing bodily harm, and one dealt with charges of aggravated sexual assault. One case involved a charge of sexual intercourse with a girl under age 14, and two cases involved charges of incest. The remaining 18 cases involved charges of sexual assault mixed with such charges as indecent assault, break and enter, sexual assault with threats to a third party and common assault.

The accused's plea could only be determined in 64 cases. Of these, pleas of guilty were entered in 40. Thirteen cases were heard by a judge sitting alone, and the remaining 11 actions were tried before a jury. Of the 24 cases that went to trial, three involved non-Native offenders.

In all of the cases that went to trial, the accused were convicted. It is impossible to know if this high conviction rate resulted from the Native complainant being believed more frequently, or whether the Native accused was believed to be more capable of the offence with which he was charged. Research suggests that this is one way in which race factors into a judge's or jury's decision. In particular, it has been found that many jurors *do not* believe any accused person to be innocent until proven guilty, and that an accused from a minority group is seen as even less likely to be innocent than others.[40]

Twenty-two of the cases reviewed were appeal decisions. Only five of these involved an appeal of the accused's conviction; none were successful. The remainder dealt with appeals of sentence, whether brought by the Crown or the accused.

A. *The Effect of Intoxication*

Sexual assault has been defined as a crime of general intent. As a result, intoxication cannot be used to negative the presence of *mens rea* and therefore cannot act as a "defence".[41] The presence of intoxication is, however, considered when determining sentence.

According to the Alberta Court of Appeal decision in *R.* v. *Sandercock*, drunkenness generally should not be considered as a mitigating factor, but:

> ....the fact that an assault is totally spontaneous can offer mitigation, and sometimes drunkenness is a factor in determining whether the attack is spontaneous or whether the likely consequences were fully appreciated.[42]

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[40] S. Nickerson *et al.*, *Racism in the Courtroom* in PREJUDICE, *supra*, note 18, 255 at 274.

[41] *R.* v. *Bernard*, [1988] 2 S.C.R. 833, 45 C.C.C. (3d) 1; *R.* v. *Quinn*, [1988] 2 S.C.R. 825, 44 C.C.C. (3d) 570.

[42] (1985), 62 A.R. 382 at 388, [1986] 1 W.W.R. 291 at 300, Kerans J.A. [hereinafter *Sandercock*]. This case is most often applied when determining sentence in sexual assault cases, especially in the Yukon and Northwest Territories. It established a three-year starting sentence for all major sexual assaults.

In 45 of the 69 cases reviewed, the judge considered alcohol to be a factor in the commission of the offence. The judicial analysis of some degree of intoxication in a Native accused illustrates one of the most obvious ways in which an accused is adversely affected by judicial bias.

When the facts of a case disclosed that a Native accused had been drinking prior to the offence, a lengthy discussion of the level of intoxication and the presence, or absence, of alcohol abuse will often follow. Although some studies have found that substance use prior to the commission of an offence is present among the majority of offenders,[43] regardless of race, its recognition as a factor is not similarly treated in all cases. 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. An example of this is provided in the case of *Pappajohn* v. *The Queen*.[44] Although the facts outlined that the parties had 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.[45]

Where Native offenders are sentenced, the judge will often blame alcohol as the "root cause" of the offence.[46] In his reasons for sentence of two men charged with a violent assault against a woman, Judge Bourassa said:

> [I]t's no good to say that they wouldn't have done this if they were sober; I recognize that they wouldn't have done it if they were sober.[47]

Comments by other judges include:

> It is felt that alcohol is the main contributing factor to the circumstances of this offence and also depression and a low frustration tolerance.[48]

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[43] Through analysis of American surveys conducted on inmates in 1978 and 1979 it was found that 60% of offenders reported alcohol and/or drug use prior to the offense: *see* B.A. Miller & J.W. Welte, *Comparisons of Incarcerated Offenders According to Use of Alcohol and/or Drugs Prior to Offense* (1986) 13 CRIM. JUSTICE AND BEHAVIOR 366 at 373. Several other American studies report a high association between violence and alcohol use, particularly between sexual violence and alcohol use: *see* H. Vera *et al.*, *Violence and Sexuality: Three Types of Defendants* (1980) 7 CRIM. JUSTICE AND BEHAVIOR 243 cited in P. Ladouceur & M. Temple, *Substance Use Among Rapists: A Comparison with Other Serious Felons* (1985) 31 CRIME AND DELINQUENCY 269 at 272. Ladouceur and Temple's study noted at 288 and 291 that there was very little difference between the alcohol use of offenders charged with violent and non-violent offenses.

[44] [1980] 2 S.C.R. 120, 14 C.R. (3d) 243.

[45] K.L. Campbell, *Intoxicated Mistakes* (1989) 32 CRIM. L.Q. 110 at 121.

[46] *R.* v. *Atlin*, [1986] 1 Y.R. 21 at 22 (C.A.), Macdonald J.A. [hereinafter *Atlin*].

[47] *R.* v. *Zoe*, [1987] N.W.T.J. No. 157 (Terr. Ct), Bourassa J.

[48] *R.* v. *Ekalun* (26 March 1986), Yellowknife 3577 & 686 (N.W.T.S.C.), de Weerdt J.

> I am satisfied that his alcohol problem and his level of intoxication on this occasion had a great deal to do with his committing this crime.[49]

Although on the facts it may be established that an accused drank some amount of alcohol prior to the offence, to presume that an offence would not have occurred otherwise is erroneous. Such a finding indicates a misunderstanding of the relationship between alcohol use and crime. If any connection can be established, alcohol use is more likely to be a *contributing* factor rather than a *causative* factor in criminal behaviour.

Several possible relationships between alcohol use and crime have been suggested, although none of these has been proven to exist. Alcohol use may predispose some individuals to criminal behaviour due to its impact on other factors which may be related to violent behaviour, such as hypoglycaemia. Physiological changes may also result from long-term alcohol abuse which might reduce an individual's ability to cope without engaging in criminal behaviour.[50] Drinking could also act to provide an offender with an excuse to behave in an anti-social manner. A final possibility suggests that rather than being a *cause* of crime, alcohol use and criminal behaviour are products of the same underlying factors, for example socio-economic conditions, low frustration tolerance, parental neglect, depression or dispossession.[51]

Regardless of what assumptions affect judges' and lawyers' understanding of alcohol and crime, their continued emphasis of the presence of intoxication in Native persons appearing before the court acts only to reinforce pre-existing stereotypes of the "drunken Indian". Courts, in fact, appear predisposed to finding and perpetuating this stereotype. Furthermore, judges often do not define drunkenness as a characteristic particular to an accused, but more generally and incorrectly, as constituting a cultural attribute of Native society.

B. *Treatment of Native Complainants*

An examination of the judicial decisions collected reveals that the sexual assault of Native women is, as always, affected by disturbing judicial perceptions of sexual assault. Judges often fail to recognize any injury or harm, or will minimize that harm which cannot be avoided. This is best expressed by the following examples:

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[49] *R.* v. *Abel* (25 November 1988), Yellowknife 00540 (N.W.T.S.C.), Richard J.

[50] K. Pernanen, *Theoretical Aspects of the Relationship Between Alcohol Use and Crime* in J.J. Collins, ed., DRINKING AND CRIME: PERSPECTIVES ON THE RELATIONSHIPS BETWEEN ALCOHOL CONSUMPTION AND CRIMINAL BEHAVIOR (New York: Guilford, 1981) as cited in R.R. Ross & L.O. Lightfoot, TREATMENT OF THE ALCOHOL-ABUSING OFFENDER (Springfield: Charles C. Thomas, 1985) at 13 [hereinafter Ross].

[51] Ross, *ibid.* at 13-14.

R. v. *Smarch*[52]

Facts: Victim exposed to great deal of violence while being assaulted in an abandoned home.

Comments: "[N]o lasting injuries.... except stress waiting for trial."

Sentence: 4 months, 2 years probation.

Record: Included 2 assaults.

R. v. *Ashoona*[53]

Facts: Ashoona broke into the home of the victim armed with a knife. There was resistance, force, three acts of intercourse and one of indecency.

Comment: "There is no evidence of injury, although in these cases it is assumed there will be some injury."

Sentence: 4.5 years.

Record: Included 1 indecent assault.

R. v. *Avadluk*[54]

Facts: Victim "passed out/drunk" in her bedroom. Avadluk entered her room and had intercourse with her. She has no recollection.

Comment: "She remembers nothing about this sexual assault. She did not suffer any injuries, physical or psychological."

Sentence: 12 months, 150 hours of community service, 2 years probation, possession of firearms prohibited for five years.

Record: None.

R. v. *McPherson*[55]

Facts: Victim was intoxicated. She was "unaware" the intercourse had occurred.

Comments: He assaulted her "not using any weapon or causing any physical injury to her or indeed, it may be said, disturbing her composure at any time."

Sentence: 21 months.

Record: Extensive, included 6 assaults.

In their discussion of the harm to women, judges appear to consider only that which is visible or physical, and which generally would constitute "short-term" harm. The 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.

Studies have indicated that female victims of crime suffer greater mental distress than non-victims, and victims of completed "rape" suffer the most, as demonstrated in the following chart:

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[52] (20 March 1989), Whitehorse 1333.87 (Y.T.S.C.), Maddison J. The accused grabbed the complainant's hair, banged her head, slapped her face, threw her on the floor and threatened to kill her.

[53] [1986] N.W.T.R. 238 at 243 (S.C.), Marshall J.

[54] [1989] N.W.T.R. 235 at 236 (S.C.), Richard J.

[55] [1984] N.W.T.R. 225 at 226 (S.C.), de Weerdt J. [hereinafter *McPherson*].

Effects of Crime on Women
Dean Kilpatrick, Research; Medical University, South Carolina
Study of 2,000+ Women, Ages 18-20

	Had Nervous Breakdown %	Thought Seriously of Suicide %	Attempted Suicide %
Non-victims	3.3	6.8	2.2
Victims of:			
Attempted Rape	8.9	29.1	8.9
Completed Rape	16.0	44.0	19.0
Attempted Sexual Molestation	5.4	32.4	8.1
Completed Sexual Molestation	1.8	21.8	3.6
Attempted Robbery	0.0	9.1	12.1
Completed Robbery	7.7	10.8	3.1
Aggravated Assault	2.1	14.9	4.3[56]

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. 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.

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.[57] The support of, and interconnection with one's family and community is of such importance in most Native societies that ostracism can be particularly painful. In assessing the impact of an assault on a Native victim, a judge should also consider the relative isolation of most Native communities, especially in Northern Canada, and the lack of access to support or counselling services.

From conversations with 39 federally sentenced Native women it appears that their exposure to acts of violence, including their experiences of sexual assault, have affected them very profoundly:

> Our stories tell of all those self-destructive ways through which women who are victims seek escape. Suicide attempts are common. Thirty-one

[56] P. Marshall, *Sexual Assault, The Charter and Sentencing Reform* (1988) 63 C.R. (3d) 216 at 227 [hereinafter Marshall]. For further information *see* European and North American Conference on Urban Safety and Crime Prevention, *The City for Women: No Safe Place* by L. MacLeod (Corporate Policy Branch, Secretary of State Canada, 1989) at 18-25.

[57] *R.* v. *M.(G.O.)* (1990), 54 C.C.C. (3d) 79 (N.W.T.S.C.), Boilard J.

> of 39 had abused alcohol, 10 coming from families with serious alcohol problems, and 10 considering their own abuse serious. Twenty-seven considered themselves severely addicted to narcotics, and many were addicted to prescription drugs. Twenty-three tell of addiction *in institutions* to prescription drugs provided by institutional psychiatrists or physicians. Ten of 39 describe slashing themselves: self-mutilations that are not suicide attempts, but the relief of tension and anger, physical pain self-inflicted as escape from what lies inside us.[58]

For some Native women, the exposure to violence is not limited to one experience of sexual assault, but has consisted of "long-term and systematic violence."[59] Some of the violence occurred in birth families, while other instances arose in foster homes, juvenile institutions, or on city streets. In the report on federally sentenced Native women, a relationship has been established between the women's convictions for violent offenses and their histories as victims:

> 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.[60]

Judges and Crown counsel could learn much from these comments.

Another indication that judges misunderstand the nature of sexual assault is by placing blame for the assault upon the victim. A number of cases reviewed provide examples of this. In one case, a nine-year-old girl walking home after dark was assaulted by a 30-year-old man. It was said that "her attempt to avoid him may have triggered his behaviour....(but) it is impossible to tell what brought about this apparently senseless attack."[61]

A more prevalent form of victim-blaming often results where the complainant was intoxicated at the time of the assault. In *R.* v. *Gargan* the accused, once intoxicated, had a propensity to assault women sexually while they slept. His actions were characterized in the following manner:

> [I]t is clearly not only unfair and obnoxious, as well as potentially dangerous [due to the possibility of contracting sexually transmitted diseases], but also morally wrong and against the law designed to protect people such as the victim in this case, *no matter how much such victims may regrettably and foolishly expose themselves to attack.*[62]

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[58] F. Sugar & L. Fox, *Nistum Peyako Séht'wawin Iskwewak: Breaking Chains* (1989) 3 C.J.W.L. 465 at 473 [hereinafter BREAKING CHAINS]. Similar experiences are noted in A.M. Shklinyk, A POISON STRONGER THAN LOVE: THE DESTRUCTION OF AN OJIBWA COMMUNITY (New Haven: Yale University, 1985) at 17, 32, 43-47.

[59] BREAKING CHAINS, *ibid.* at 470.

[60] *Ibid.* at 473.

[61] *R.* v. *L.(W.)* (16 May 1986), Yellowknife SC3638 (N.W.T.S.C.), de Weerdt J.

[62] (14 June 1988), Fort Smith CR 00383 (N.W.T.S.C.), de Weerdt J. (emphasis added).

In *R.* v. *Atlin*, the accused sexually assaulted his former common law spouse while she slept; both had been drinking. The accused had a criminal record, including one conviction for assaulting the complainant to an extent that was "near-fatal". Despite the extent and severity of the accused's record, the trial judge saw alcohol abuse as the root cause of the offence. In offering his reasons for sentence, the trial judge said:

> This sexual assault is less severe than is often heard in this court, not just because no beating accompanied it, but also because the complainant's excessive drinking and drinking herself into a stupor exposed her, unnecessarily, to what occurred here, that is, exposed her to a risk that was unnecessary. That relates, however, to the question not of guilt or innocence, but of the sentence to now impose.[63]

After considering these remarks, Appeal Court Justice Anderson said, "[i]n my view, the fact that the complainant may have exposed herself to risk is not a proper factor to take into account in imposing sentence."[64] Despite this finding, the accused's sentence of two years less a day was not increased. The comments of both the trial and appeal judges are disturbing as they fail to recognize that it is inappropriate to place responsibility on the complainant for her assault simply because she became intoxicated.

In the case of *R.* v. *Hardisty*, the complainant had invited the accused to stay the night in the trailer home she shared with her boyfriend. During the night, she woke to find the accused trying to engage in sexual intercourse with her. 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.[65]

Of the 69 sexual assault cases considered, 13 involved facts to the effect that the complainant was asleep or "passed out" when the sexual assault began. Of the 13, the facts disclosed that in three, the complainant had not consumed alcohol. The highest sentence ordered was two-and-a-half years,[66] while six of the cases resulted in a sentence of two years less a day. Sentences in the remaining cases ranged from one month[67] to 21 months.[68]

The cases involving "passed out" victims then only constitute approximately one-seventh of the sexual assault cases studied. These numbers clearly contradict the comments of Judge Bourassa that the

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[63] *Atlin*, *supra*, note 46 at 23, Anderson J.A., citing the trial judge.

[64] *Ibid*. *See also Abel*, *supra*, note 36.

[65] [1990] N.W.T.J. No. 998 (N.W.T.S.C.).

[66] *R.* v. *Kanayok* (22 September 1988), Cambridge Bay CR 00468 (N.W.T.S.C.), Richard J.

[67] *R.* v. *Qavavau*, [1986] N.W.T.J. No. 83 (Terr. Ct), Bourassa J.

[68] *McPherson*, *supra*, note 55.

"majority of rapes in the Northwest Territories occur when the woman is drunk and passed out."[69] Regardless of whether or not the numbers refute his assertion, it is unacceptable to suggest that because a woman is asleep, or passed out, the violation experienced is less serious, or non-existent.

In a recent decision in the Northwest Territories Supreme Court, it has been suggested that these cases be viewed as a separate category of sexual assault:

> [I]t is difficult to characterize these crimes as being within the category of major sexual assault defined in Sandercock[70] because of the absence [*sic*] of violence or threats of violence other than the violence against the person which is inherent in a non-consensual act of sexual intercourse with a woman. It is, however, perhaps a related category of sexual assault or a subcategory to the major sexual assault. It is regrettably sufficiently prevalent [*sic*] as to justify, perhaps, being labelled [*sic*] as a category of its own.[71]

It was suggested that the starting sentence in this category of sexual assaults should be "at least two years, and perhaps as much as three years."[72]

Establishing sentencing guidelines may be helpful to eliminate disparities in sentences. However, guidelines are only truly beneficial when judges are able to understand the nature of the offence to which they apply. For guidelines to be applied appropriately, it is also necessary that judges adopt the rationale without the influence of personal attitudes or biases. The judicial remarks present in the cases discussed above indicate that guidelines are being established without such a proper understanding and without judicial impartiality.

Courts have had no difficulty in finding that killing a person while they sleep is "particularly repugnant".[73] The fact that a similar abhorrence is not extended to the sexual assault of a sleeping victim is indicative of an inability to acknowledge that rape is serious, regardless of the presence or absence of debilitating physical injury. It also indicates that courts do not view a woman's lack of awareness as lack of consent. Further, courts do not seem to appreciate that it is the lack of consent which makes the sexual contact an offence. Comments by judges in the cases cited earlier clearly illustrate the belief that women who

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[69] Sarkadi, *supra*, note 1.

[70] The Alberta Court of Appeal decision in *Sandercock, supra*, note 42, is relied upon to determine the starting point for sentencing in "major" sexual assaults. The key aspects of a "major" sexual assault are the evident blameworthiness of the offender and the effect of the assault on the victim. Assuming a mature accused with previous good character, no criminal record and no pre-meditation, three years is to be the starting point for sentencing. This sentence can be altered in accordance with aggravating or mitigating circumstances.

[71] *R.* v. *Kendi* (9 January 1990), Inuvik CR 00841 (N.W.T.S.C.), Richard J.

[72] *Ibid.*

[73] *R.* v. *Roy* (1975), 18 CRIM. L.Q. 17 (Que. C.A.). On a charge of murder, the accused was convicted of manslaughter and sentenced to 15 years.

drink heavily are in some way asking to be sexually assaulted. This is not only disturbing, but illogical. The sexual assault of a sleeping woman is in many ways the ultimate violation. Consent is not an issue, and should not be brought into issue by inferring a complainant's complicity.

C. *Class as a Factor*

In research on sentencing and sexual assault, correlations between class and sentence have been noted as follows:

> In many cases, the judge's concern for the accused overshadows any expressions of outrage regarding the act. In cases of middle-class offenders, disproportionate weight can be given to mitigating factors such as employment, monetary loss, "marital problems"....These factors can be used to demonstrate that this assault was a single instance and "out of character".[74]

Two examples can be given that illustrate the impact of class upon a judge's sentence of a Native accused. The first involves a charge of sexual assault against a member of the Northwest Territories Legislative Assembly laid in July, 1989. The offence involved three occasions when the accused held his stepdaughter (a "pubescent" girl) next to him, putting his hands under her clothing and rubbing her breasts and vaginal area. These incidents were described as "inappropriate cuddling" in the pre-sentence report. The accused entered a guilty plea and was sentenced by Judge Michel Bourassa to five days in jail with nine months probation. In discussing this case with the media, 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.[75]

Despite public anger over the sentence Judge Bourassa imposed, a Crown appeal was dismissed by Supreme Court Justice de Weerdt. After listening to Crown arguments, he read a lengthy prepared decision outlining his reasons for dismissal. Among these, Justice de Weerdt stated that the sentence was a stiffer penalty than those of the guideline decisions for similar convictions. He also stated that the sentence, in combination with the accused's resignation from the Legislative Assembly, was adequate denunciation for this "relatively minor, or even minimal, sexual assault".[76] Having already prepared his decision prior to the hearing of this appeal, this case provides a clear example of judicial bias.

The case of *R.* v. *C.(B.I.)*,[77] provides another example of the strong effect of class bias in sentencing. The complainant, who had suffered brain damage as a child, was sexually assaulted by the accused, then

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[74] Marshall, *supra*, note 56 at 222.
[75] *Inquiry*, *supra*, note 2 at 192.
[76] Sarkadi, *supra*, note 1 at A2.
[77] (3 August 1989), Inuvik CR 00714 (N.W.T.S.C.), de Weerdt J.

President of the local Métis association. Intercourse occurred while a friend of the accused held the victim's feet apart.

Although the crime was considered "cowardly and cruel deserving of public condemnation", sentence was imposed at two years less a day, with 200 hours community service and two years probation. Judge de Weerdt stated that the accused had kept himself out of trouble since the offence and was attempting to fix his alcohol problem:

> He's a person who could....make a very good life for himself. He's obviously a capable person who's respected by his community. A long time has passed since the offence, relatively speaking, and I consider that in mitigation....[as] time appears to heal most wounds.[78]

Class bias is a factor that is likely to work against Native women far more often than the reverse. This is due to the general position of Native women within Canada. Review of the 1981 Census indicates that while Native women experience roughly twice the level of unemployment as non-Native women, they experience approximately the same level as Native men.[79] Yet, employed Native women generally have substantially lower incomes than both non-Native women and Native men.[80] While it should not be assumed that all Native peoples, or women, live in poverty, the bare statistics seem to indicate that in general, Native women are unlikely to be more economically or socially advantaged than most male offenders.

V. When Gender and Culture Clash

> [L]ocal judges seem to labour under the delusion that they are showing sensitivity to the local culture when they treat sexual assault differently than they would in the south.
>
> In a way, they seem to be saying that there is a cultural difference here, and we [Inuit/Natives] have no right to interfere.[81]

Amid Native requests for self-determination and for the recognition of Native justice systems, two judicial decisions attempting to give Inuit communities more control have been subject to a great deal of controversy. Judicial sensitivity to Native values, community interests and

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[78] *Ibid.*

[79] Secretary of State Canada, *Native Women: A Statistical Overview* by P.M. White (Ottawa: Social Trends Analysis Directorate and Native Citizens Directorate, 1986) at 15. The unemployment rate for Native women was 16.5%, for Native men, 15.4%, while non-Native women experienced 8.6% unemployment and non-Native men, 6.3%. Use of the term "Native" is used with no distinction made between status and non-status Indians, Inuit and Métis.

[80] *Ibid.* at 18. The average income for Native women was $6,073, non-Native women made $8,414, Native men made $10,661, and non-Native men made $16,918.

[81] Comments of Cate Sills, Vice-President of the Women's Resource Centre (Northwest Territories) in K. Makin, "Judge's Comments Spark Call for Inquiry" *The [Toronto] Globe and Mail* (22 December 1989) A13.

community treatment programs is essential and has a number of advantages. Such an approach affords greater respect to Native peoples and their values. Reference to community standards is also preferable to subordinating a community's views regarding a federally based sentencing policy, "particularly where the application of that policy will have the effect of undermining the Native community's cohesion and ability to resolve its own problems."[82] However, identifying a community's values, interests or relevant cultural differences is problematic. The two Northwest Territories cases of *R.* v. *Naqitarvik* and *R.* v. *Curley, Nagmalik and Issigaitok*,[83] outline some of the difficulties that arise.

In *R.* v. *Naqitarvik* at the trial level,[84] Judge Bourassa gave particular consideration to an existing community treatment program and its effect on the accused's sentence. The accused, a 21-year-old resident of Arctic Bay, pled guilty to a charge of sexually assaulting his 14-year-old cousin. Within Arctic Bay, a council of elders known as the Inumarit provided traditional treatment and counselling to members of their community, including the accused. Judge Bourassa arranged a special sentencing hearing to receive evidence regarding the role of the Inumarit, and its treatment program for offenders.

The evidence presented suggested that the accused had responded well to the counselling provided by them to date, and that sending him to prison would not only be destructive to the accused, but would cause resentment within the community. Members of the Inumarit believed that a prison sentence would not be within the best interests of the community, the accused, or the victim.

Judge Bourassa was impressed by the Inumarit, stating:

> The very things that the Inumarit are trying to do is what the court is trying to do: rehabilitating an offender, reconciling the offender, the victim and the community so that there is unity in the community and a programme of education. Can any of us really say that jails do that? For the person that responds, the Inumarit, the Social Services Committee and the whole community together can obviously heal; they can unite; they can reconcile; and they can reform.[85]

He then imposed a 90-day intermittent sentence, to be followed by two years probation and the completion of 100 hours of community service.

On appeal, an 18-month sentence was substituted, based on the belief that Judge Bourassa had erred in finding that this "counselling service" was adequate replacement for the longer sentence of imprisonment which would ordinarily be imposed.[86] The Court noted the exis-

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[82] Jackson, *supra*, note 3 at 272.

[83] *R.* v. *Naqitarvik* (1986), 69 A.R. 1, 26 C.C.C. (3d) 193 (N.W.T.C.A.) [hereinafter *Naqitarvik* cited to C.C.C.]; *R.* v. *Curley, Nagmalik and Issigaitok*, [1984] N.W.T.R. 263 (Terr. Ct) Bourassa J., *appeal allowed*, [1984] N.W.T.R. 281 (C.A.) McGillivray C.J.N.W.T. [hereinafter *Curley*].

[84] *Naqitarvik*, *ibid.*

[85] *Ibid.* at 205.

[86] *Ibid.* at 196.

tence of electricity and other modern amenities and past exposure to Canadian laws, suggesting that Arctic Bay was like other Canadian towns and cities. Further, the Inumarit was said to resemble "the usual community counselling service rather than the traditional governing and counselling body of earlier times. I am unable to see....that it is a remnant of ancient culture."[87]

Through application of this ethnocentric reasoning, the recognition of any Inuit culture, ancient or otherwise, is made virtually impossible. This reasoning provides a prime example of judicial bias that has often arisen in land claim cases where traditional values are similarly dismissed or denigrated. This type of analysis has been criticized as indicating:

> ....a judicial view that the aboriginal peoples of Canada have rights so long as they remain in a fossilized or primitive state but their rights are progressively diminished to the extent that they avail themselves of the benefits and the burdens of the 20th [C]entury.[88]

While the trial decision shows a greater awareness of cultural diversity, neither it nor the appeal decision is acceptable as both fail to address, or consider the effect of the assault on the victim. The sexual assault occurred in the complainant's home. Once she resisted the accused's advances, the accused used an electrical cord to tie her hands behind her back. Although this violence was used, there was no significant consideration of the injury done to the complainant. There was also no emphasis on the fact that the complainant called the police following the assault, and not members of the Inumarit. In fact, without any discussion of her, both the Court and the community presumed to know the best interests of the complainant.

The earlier case of *Curley*[89] also achieved notoriety for its reliance upon Inuit "values" in determining sentence. The three accused pled guilty to the offence of having intercourse with a female under the age of 14. The offences did not occur at the same time, and the Crown made no suggestion that these occurred without the girl's consent.

In considering appropriate sentence, Judge Bourassa stated that the "law and the morality it reflects [must] walk hand in hand with the people."[90] He noted that Canadian law, which deems intercourse with a girl under 14 an offence, was in conflict with alleged Inuit values that a young woman was ready to engage in sexual intercourse once she began to menstruate. These values were ascertained from the pre-sentence report, and from "this court's experience in the Eastern Arctic."[91] Although the existence of Inuit tradition contrary to Canadian values is

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[87] *Ibid.*

[88] N.D. Bankes, *Judicial Attitudes to Aboriginal Resource Rights and Title* (1985) 13 RESOURCES 3, cited in J. Ryan & B. Ominayak, *The Cultural Effects of Judicial Bias* in EQUALITY, *supra*, note 30 at 355.

[89] *Supra*, note 83.

[90] *Ibid.* at 265 (Terr. Ct).

[91] *Ibid.* at 266 (Terr. Ct).

not synonymous with an ignorance of the law, Judge Bourassa reduced the case to these terms.

The accused had spent three weeks in custody prior to their hearing. Believing this time to be equal to two or three months in jail, Bourassa imposed a further term of imprisonment of one week, followed by eight months probation. It was believed this sentence would be sufficient to "educate" the community. The sentence incensed Native women's groups.[92]

The case was appealed on the basis that the sentence was inadequate, and that the pre-sentence report's assertions of Inuit values were incorrect.[93] The Court of Appeal refused to entertain this latter submission on the basis that objection to the report should have been made at the initial sentence hearing. It then proceeded to consider the "cultural circumstances" raised by Judge Bourassa.

The Court assumed, as Judge Bourassa did, that different cultural values were behind the accused's ignorance of the law, suggesting that the mere presence of Canadian law is sufficient to show the inappropriate nature of Inuit values — regardless of what those values might actually be. On behalf of the Court, McGillivray C.J.N.W.T. said, "[the trial judge] recognized, and we recognize, that knowledge of the law is an evolving factor. This case will assist the community to better understand the law."[94] Such rigid enforcement of Canadian law does not negate Inuit values, it merely debases and suppresses them. The real impact of these judgments on Inuit or Native peoples is also questionable. In their 1989 Report, the Ontario Native Women's Association wrote that:

> ....Canadian Judges and police officers are not the respected and revered members of the community. It means very little to us to have a non-Aboriginal person come into reserve communities to enforce laws which we did not develop and do not recognise as 'our' laws. This might be a powerful message for non-Aboriginal Canadians who see the *Criminal Code* as their law and their protection from wrongdoing, but the Canadian criminal law has served Aboriginal Peoples very tragically. Indeed, this non-Aboriginal interference is often viewed as a problem and not a solution.[95]

After assessing the trial judge's reasons, the Court of Appeal increased the sentence to four months imprisonment. This was deemed an appropriate sentence in consideration of the fact that this incident constituted "a simple matter of sex."[96] No consideration was given to the fact that the 13-year-old complainant became pregnant as a result, nor was there an appreciation that she was particularly vulnerable to exploitation:

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[92] Sarkadi, *supra*, note 1.

[93] The Crown should have argued in the alternative that, presuming the report to be accurate, it was not correct to suggest that a young woman becomes available to all men once she has begun to menstruate.

[94] *Curley*, *supra*, note 83 at 283 (C.A.).

[95] BREAKING FREE, *supra*, note 14 at 50.

[96] *Curley*, *supra*, note 83 at 284 (C.A.).

> [T]he young girl here was described as "slow", which I interpret as meaning not highly intelligent. She did not object to the intercourse, but I must temper that with the fact that she may not have completely understood what was going on. *Her silence, which was seen by these men as consent, may have in fact represented something else.*[97]

With this in evidence, the Court of Appeal's assessment that this was "a simple matter of sex" is particularly disturbing. It appears from this statement that each of the three accused made no attempt to determine consent, and that, in fact, consent may have been absent. At the very least, it is easily argued that the girl may have been completely unable to consent.

Although it was the Crown's responsibility to recognize lack of consent as an issue, the trial and appeal decisions' failure to do this, and their refusal to consider what the true impact of Inuit values on sexual relations might be, are disappointing. They are also disappointing because the judges' ethnocentric bias is so highly visible and yet totally unacknowledged.

Both of these cases are indicative of several problems that Canadian courts experience when they attempt to recognize cultural difference in most cases. Often a consideration of cultural "differences" results in the perception or definition of these differences as inferiorities. As Mary Ellen Turpel has said:

> ....Aboriginal cultures have been and still are presumed to be primitive, premodern, or inferior in the sense of being at lesser states of development than the dominant European culture. They continue to be viewed as artifacts. This is disturbing because it effaces cultural differences by presuming that cultures are basically the same, but at various historic levels of civilization. The narrative of cultural progress is antithetical to the idea of cultural difference. The theory of progress, or stories about development to a higher state of knowledge and cultural experience, is a product of an ethnocentric predisposition. It presupposes that one culture (European or European-influenced) is the measure of all others.[98]

One example of this arose in *Curley* where the belief in values different than those espoused in the Canadian law was defined as an "ignorance of the law". Turpel also states that the perception of difference as inferiority has arguably been and remains the primary basis of denial of cultural difference:

> Instead of responding to departures from the culturally acceptable with cultural self-analysis, European based cultures have reacted to difference with plans of civilization, sameness, domination and control.[99]

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[97] *Curley, supra*, at 265 (Terr. Ct) (emphasis added).

[98] M.E. Turpel, *Aboriginal Peoples and The Canadian Charter: Interpretative Monopolies, Cultural Differences* (1989-90) 6 CAN. HUM. RTS Y.B. 3 at 34 [hereinafter Turpel].

[99] *Ibid.*

Problems also arise from use of "an(other) language and conceptual apparatus (the Canadian legal system) to further an understanding of a different system of belief."[100] Ultimately, Turpel contends that:

> [F]irst, cultural differences are also differences between ways of knowing, describing or understanding and that, second, cultural differences are differences among even the 'other' cultures. Consequently, a descriptive analysis of the differences between cultures, as contrasted with an analysis directed toward raising sensitivity or a sensibility of cultural differences, is an impossibility.[101]

Further, judicial reliance upon a system of law and order which may not be culturally relevant to Native or Inuit peoples is also problematic. Hence, the claims being made for the creation of a native justice system, or systems.

Another problem arises when the Inuit values or traditions outlined in the cases have been discussed from a predominantly male perspective, whether at trial or on appeal. As seen in *Naqitarvik* and *Curley*, this is particularly problematic where sexual assault is at issue. The problems resulting from the lack of a female perspective are only compounded by the Court of Appeal's patronizing neo-colonial judgments that discount all Inuit perspectives, male or female.

While judicial attempts to assess and apply Inuit or Native values is to be commended, the deficiencies in these assessments must be recognized. Proper guidelines must be created to ensure that community programs or community values are used where possible, but judges — and more appropriately legislators — must be aware that they must proceed with caution. When undertaking any analysis of cultural difference, a judge must be particularly aware of his or her own bias(es), whether in the form of race, class or gender bias. The judge must also try to be aware of bias in the information collected and presented. Is the information regarding the "community values or traditions" truly representative? Few values in society are unidimensional; therefore, the judge should also determine whether other perspectives were presented or canvassed. The cultural differences in evidence must also be evaluated to determine whether they are in fact relevant to the case before the court. While Native cultures are distinct from mainstream Canadian culture, it must be determined whether this affects what is particularly relevant in sexual assault cases: the definitions of acceptable and unacceptable sexual relations. A judge should consider all of the above factors any time special circumstances are felt to exist given the locus of the offence. These factors should also be considered by the lawyers involved in the prosecution of these cases, particularly Crown Attorneys.

The advantages which may be achieved by a sensitive and appropriate consideration of cultural differences make these arduous tasks

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[100] *Ibid.* at 17.
[101] *Ibid.* at 30.

worthwhile. However, such an approach is not without sacrifices – a fact which too often deters:

> The opening of a space for considering cultural differences in Canadian legal analysis involves the loss of a cultural monopoly over the generation of law and its interpretation, a loss of universality which, undoubtedly, sits uncomfortably with lawyers committed to the rule of law. If irreconcilable conceptions of law exist within the imagined confines of one 'state', what is to be done? One possibility is the denial of cultural difference which would continue oppression through the maintenance of cultural monopoly or hegemony. There is also the possibility for toleration of differences and the recognition of autonomous or incommensurable communities. This choice has profound implications for the style of legal analysis and judging now practiced. If nothing else, it forces us to question the cultural legitimacy and authority of the judiciary as an institution competent to choose between and among varying cultural images. For a judge, a situation of cultural difference should be and must be a situation of *not* knowing which direction to go, a situation involving choices about reasoning which may not be defensible or acceptable. It involves episodes of undecidability, self-judgment, and uncertainty. It would involve acknowledging the imperative of admitting mistakes and recognizing ignorance.[102]

VI. CONCLUSION

The basic premise of this paper has been that race, gender and class bias are prevalent within Canadian society, and that judges, as members of this society, are not immune to their influence. There will be exceptions to this general statement, it is not inflexible; however, to varying degrees, we are all products of our society. This statement is not made to assign blame, but to encourage acknowledgement of the potential for bias in the hope that it can then be addressed.

The late Judge Shientag of the New York Supreme Court, Appellate Division, believed that generally, the bias with which judges should be concerned is not overt. Yet, by failing to appreciate this, many judges can be lulled into a false sense of security. He said:

> ....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.[103]

While Judge Shientag did not make these comments with reference to any particular form of bias, these comments apply equally well to the attitudinal bias illustrated in the cases discussed. Examples of this bias were clearly evident in the cases attempting to import Inuit traditions and values into the sentencing process. Bias was also most apparent

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[102] *Ibid.* at 45.

[103] *See* Wilson, *supra*, note 29 at 6.

when the facts of a case involved the consumption of alcohol, whether by the accused or the complainant. 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".

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. Clear articulation of the distinctions may, however, be impossible, especially when one considers the subtle manifestations of each of these elements. 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 woman.[104]

Finally, it must be emphasized that any discussion surrounding Native and Inuit women in Canadian sexual assault cases is incomplete without the inclusion of their experiences. It is hoped that in the future, Native and Inuit women will write about their experiences and their theories regarding sexual assault. Only then will it be possible to see the full extent of the impact of judicial attitudes on Native and Inuit victims of sexual assault.

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[104] Monture, *supra*, note 27 at 167.