

The Ghettoisation of Difference in Canada: “Rape by Culture” and the Danger of a “Cultural Defence” in Criminal Law Trials

P A S C A L E F O U R N I E R *

The tale tells the teller, the myth tells the myth-maker.
Stuart Hall¹

I. INTRODUCTION

D RUCILLA CORNELL HAS WRITTEN THAT “[t]he stories we tell to justify one state of legal affairs over another are just that, stories.”² Stories, in the context of law, tell a great deal about how people are seen and cultures conceptualised. They also reveal the social location of judges when they claim simply to interpret what is put before them. My objective in this article is to advance the telling of a story, one that chronicles the ethnic and ethical values that shape, and are shaped by, Canadian society. I do so by exploring the race and gender dimensions of the judicially—defined “Other” as they intersect in the language of law.

Such an inquiry is important. Values that are translated into legal discourse derive from particular ideological choices, decisions that select and cabin the interests advanced in the Canadian legal system. In this article, I present cultural imperialism³ in the judicial process and explore the ways in which it asserts

* LL.B. (Laval), LL.M. (Toronto). Law Clerk to Madame Justice Claire L’Heureux-Dubé, Supreme Court of Canada. The author would like to thank Professor Brenda Cossman, who supervised the LL.M. thesis of which the subject of this article was a part, for her magnificent mentorship.

¹ S. Hall, “Old and New Identities, Old and New Ethnicities” in L. Back & J. Solomos, eds., *Theories of Race and Racism: A Reader* (New York: Routledge, 2000) 144 at 146.

² D. Cornell, *The Philosophy of the Limit* (New York: Routledge, 1992).

³ As I.M. Young has argued in *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990) at 60, cultural imperialism involves:

... the paradox of experiencing oneself as invisible at the same time as one is marked out as different. The invisibility comes about when dominant groups

its perspective to be universal and neutral. In so doing, I attempt to contribute to the ongoing debate over the universality and cultural relativity of human rights, by focusing on criminal law cases that have defined or failed to define what it means to be different in Canada's multicultural society. Thus, I challenge the universality of legal claims to truth, and demonstrate that the truth produced by law is contingent and speaks in the name of some voices while obscuring others. Through this truth production, law is complicit in the "Othering" of minority people and uses its power to disqualify their experiences through and in the guise of legal method. In many respects, discussion of the conceptualisation of race, ethnicity, and ethnic identity is always also a discussion of gender. I examine the consequences of cultural imperialism on women of colour and discuss the "race before gender" position adopted by Canadian courts in some sexual assault cases, that is the extent to which courts subjugate the sexes differently and in so doing produce a form of racism that is deeply gendered.

I refute, criticize and complicate notions such as "culture," "race," and "ethnic identity," by illustrating the unstated norms that nourish these concepts, as well as the problematic assumptions they embody. Using concrete examples based on implicit cultural defences to sexual assault charges, I draw attention to the colonial nature of characterisations such as "Haitian cultural norms," "Muslim people" and "Arab identity" in the judicial process. I emphasize the exclusion imposed upon minorities as a contradistinction to the construction of a "Canadian national identity." I argue that those marked as the "Other" find themselves defined from the outside, socially segregated, legally objectified, their bodies ascribed with inferiorised and inferiorising images. They are devalued and stereotyped as culturally deviant by the dominant group. In the words of Iris Marion Young: "When the dominant culture defines some groups as different, as the Other, the members of these groups are imprisoned in their bodies. Dominant discourse defines them in terms of bodily characteristics, and constructs those bodies as ugly, dirty, defiled, impure, contaminated, or sick."⁴

Since the 1960s, there has been a significant increase in the visible minority population in Canada: traditional European and North American immigrants

fail to recognize the perspective embodied in their cultural expressions as a perspective. These dominant cultural expressions often simply have little place for the experience of other groups, at most only mentioning or referring to them in stereotyped and marginalized ways. This, then, is the injustice of cultural imperialism: that the oppressed group's own experience and interpretation of social life finds little expression that touches the dominant culture, while that same culture imposes on the oppressed group its experience and interpretation of social life.

⁴ Young, *ibid.* at 123.

(mostly white) have been replaced by people from Asian, Caribbean, South American, and African countries.⁵ With the development of the notion of multiculturalism⁶ in Canadian society, the demand is that Canadian society recognise “the equal value of different cultures; that we not only let them survive, but acknowledge their *worth*.”⁷ In the context of multicultural accommodation,⁸ the state attempts to respect identity groups’ practices and norms. But the recognition of difference is not without its drawbacks. Recognising difference risks perpetuating the negative stereotypes and assumptions that help produce difference.⁹ In an attempt to respect differences, courts have at times unfortunately

⁵ See L. Jakubowski, “Managing’ Canadian Immigration: Racism, Ethnic Selectivity, and The Law”, in E. Comack, ed., *Locating the Law: Race, Class, Gender Connection* (Halifax: Fernwood, 1999) 98.

⁶ In 1971, then Prime Minister Pierre Elliott Trudeau introduced the official federal policy of multiculturalism, which led to the enactment in 1988 of the *Canadian Multiculturalism Act*, R.S.C., c. 24, (1985) (Can.). Section 3(1) of the Act provides:

It is hereby declared to be the policy of the Government of Canada to (a) recognize and promote the understanding that multiculturalism reflects the cultural and racial diversity of Canadian society and acknowledges the freedom of all members of Canadian society to preserve, enhance and share their cultural heritage.

Canada’s commitment to multiculturalism is found in several sections of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11. Section 27 provides:

This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

For an analysis of ethnicity and the rise of multiculturalism in Canada, see J.W. Berry & J.A. Laponce, eds., *Ethnicity and Culture in Canada: the Research Landscape* (Toronto: University of Toronto Press, 1994).

For a critique of multiculturalism policy, see N. Bissoondath, “A Question of Belonging: Multiculturalism and Citizenship” in W. Kaplan, ed., *Belonging: The Meaning and Future of Canadian Citizenship* (Montreal, Quebec: McGill-Queen’s University Press, 1993).

⁷ C. Taylor, “The Politics of Recognition” in A. Gutmann, ed., *Multiculturalism, Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994) 25 at 64.

⁸ Legal recognition of group identities is discussed by W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995); J. Spinner, *The Boundaries of Citizenship: Race, Ethnicity, and Nationality in the Liberal State* (Baltimore: Johns Hopkins University Press, 1994); Young, *supra* note 3; J. Baker, *Group Rights* (Toronto: University of Toronto Press, 1994).

⁹ See M. Minow’s methodology of deconstructing difference, which attempts to reveal the unstated norms against which difference has been constructed in law, in *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca: Cornell University Press, 1990).

portrayed Other cultures as inferior and less developed than idealized Canadian values and practices.

In what follows, I call attention to the current commitment in the legal arena to take into consideration “Other” cultures while refraining from moral criticisms of these cultures. I present cultural relativism in criminal law and expose how courts, by relying on culture as a mitigating factor in the context of sexual assault cases, have maintained and reinforced a position of superiority towards people of colour. In this process of racial stigmatisation, the male “Other” is painted as a coloured body which is culturally ill and sexually deviant while the woman of colour is rendered dramatically invisible. I explore the fascination and the lies provoked by difference—how people to be “Othered” are homogenized into a narrowly focused “them” which is presented as having no similarity with “us.” Pointing out the inaccurate and dangerous pictures of the “Haitian body” and the “Muslim/Arab body” produced by *R. v. Lucien* and *R. v. Ammar Nouasria*, I analyse the ways in which sexual violence against women of colour gets represented as instances of “rape by culture” and thus excused in a misguided attempt to be culturally sensitive. After describing two instances when culture has been misused by the legal system in this way, I will suggest, through an example of Quebec’s experience with *hijab* (the Muslim veil), a model for making cultural diversity a positive force in legal decision-making.

Because of the evidence that widespread racism has translated itself into systemic discrimination in the Canadian criminal justice system,¹⁰ judges are

¹⁰ See S.L. Johnson, “Black Innocence and the White Jury” (1985) 83 Mich. L. Rev. 1611; Nova Scotia, *Royal Commission on the Donald Marshall, Jr. Prosecution: Findings and Recommendations*, vol. 1 (Halifax: The Commission, 1989); J. Pfeiffer, “Reviewing the Empirical Evidence on Jury Racism: Findings of Discrimination or Discriminatory Findings?” (1990) 69 Neb. L. Rev. 230; K. Roach, “Challenges for Cause and Racial Discrimination” (1995) 37 Crim. L.Q. 410.

Recently, the Supreme Court of Canada brought into sharp relief the need for those engaged in the administration of justice to acknowledge and address race and racism, particularly regarding the selection of jurors.

In *R. v. Williams*, [1998] 1 S.C.R. 1128, the issue was whether the evidence of widespread bias against aboriginal people in the community raises a realistic potential of partiality. The Supreme Court of Canada’s view is that there was ample evidence that this widespread prejudice included elements that could have affected the impartiality of jurors. Racism against aboriginals includes stereotypes that relate to credibility, worthiness, and criminal propensity. The Court stated at para. 21:

To suggest that all persons who possess racial prejudices will erase those prejudices from the mind when serving as jurors is to underestimate the insidious nature of racial prejudice and the stereotyping that underlies it. As *Vidmar*, *supra*, points out, racial prejudice interfering with jurors’ impartiality is a form of discrimination. It involves making distinctions on the basis of class or category without regard to individual merit. It rests on preconceptions and unchallenged assumptions that unconsciously shape the daily behaviour of

expected to be increasingly culturally sensitive.¹¹ However, I argue that the current trend of fashioning a cultural defence in cases of sexual assault leads to racial essentialism¹² and permits the subordination of women of colour in the

individuals. Buried deep in the human psyche, these preconceptions cannot be easily and effectively identified and set aside, even if one wishes to do so. For this reason, it cannot be assumed that judicial directions to act impartially will always effectively counter racial prejudice.

In *R. v. Gladue*, [1999] 1 S.C.R. 688, the Supreme Court of Canada reaches the following conclusion with regard to the over-incarceration of Aboriginals, at para. 64:

These findings cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it. The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal population and the criminal justice system reveals a sad and pressing social problem. It is reasonable to assume that Parliament, in singling out aboriginal offenders for distinct sentencing treatment in s. 718.2(e), intended to attempt to redress this social problem to some degree. The provision may properly be seen as Parliament’s direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process.

¹¹ The need for more cross-cultural or race-relations training has been identified as a priority by policing experts, members of minority communities and governments. Prior to its abolition in 1992, the Minister’s reference asked the Law Reform Commission of Canada (“LRCC”) to study the *Criminal Code of Canada* and related statutes and examine the extent to which these laws ensure that persons who are members of cultural or religious minorities have equal access to justice and are treated equitably. In the report *Equal Access to Justice, Equitable Treatment and Respect*, Department of Justice Canada, the Commission, at 2–3, recognizes that equitable treatment involves that:

... cultural distinctiveness be recognized, respected and, where appropriate, incorporated into the criminal justice system. They require that differences between members of various groups be considered by police, Crown prosecutors, defence lawyers, judges, legislators, and all other participants in the criminal justice system, and indeed at times that the criminal justice system itself be adjusted to allow greater recognition of these differences.

See also Canada, Department of Justice, *Working Document, Review of Multiculturalism and Justice Issues: A Framework for Addressing Reform* by B. Etherington (Ottawa: Department of Justice, May 1994) [hereinafter Etherington]. Many reports acknowledge that approaches to law reform to address multiculturalism and justice issues must be “guided by an explicit anti-discrimination and more particularly, anti-racist outlook.” Canada, Department of Justice, *The Criminal Code of Canada: A Review Based on the Minister’s Reference* by A. Kaiser (Ottawa: Department of Justice) at 134,

¹² In using this sensitive terminology, I should make it clear that I am not referring to the constructionist view of race taken by writers of colour to reveal and resist negative racist constructions. Rather, the notion of racial essentialism as it is used in this section entails a belief in essential racial differences which constructs people to be racialised as inferior and deviant in particular historical circumstances and places. For a critique of race essentialist

name of ethnic differences. I will articulate more specifically how the judicial reading of sexual assault cases involving people of colour produces racialised ugly bodies, that is the extent to which both the accused and the complainant are measured against rape mythologies informed by racism and sexism.

II. THE “OTHER” AS UNCIVILIZED OR WHEN CULTURE RAPES WOMEN

The rules can be colour-blind, but people are not. The question remains, therefore, whether the law can truly exist apart from the colour-conscious society in which it exists, as a skeleton devoid of flesh; or whether law is the embodiment of society, the reflection of a particular citizenry's arranged complexity of relations.¹³

“SEXUAL ASSAULT IS NOT LIKE ANY OTHER CRIME.”¹⁴ More than any other offence, it is informed by mythologies as to who the ideal rape victim and the ideal rape assailant are.¹⁵ In sexual assault cases, when race and gender are constituted through a legal process of meaning attribution, rape mythologies also play a central role in determining what culture is, how it matters, and the extent to which it “excuses” criminal behaviour. Canadian criminal law does not allow a formal “cultural defence”¹⁶ as a means for an accused to present evidence on cultural beliefs or practices to diminish *mens rea* or to form an independent excuse for criminal charges.¹⁷ Even though several reports arguing for a

positions, see A.P. Harris, “Race and Essentialism in Legal Theory” (1990) 42 *Stan. L. R.* 581. For an analysis of strategic race essentialism, see R. Jhappan, “Post-Modern Race and Gender Essentialism Or a Post-Mortem of Scholarship” in T.B. Dawson, ed., *Women, Law and Social Change, Core Readings and Current Issues* (North York, Ontario: Captus Press, 1998) at 64.

¹³ P.J. Williams, *The Alchemy of Race and Rights: The Diary of a Law Professor* (Cambridge, Massachusetts: Harvard University Press, 1991) at 120.

¹⁴ *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at 649, per L'Heureux-Dubé J [hereinafter *Seaboyer*].

¹⁵ See the dissent of Madame Justice L'Heureux-Dubé in *Seaboyer*, *ibid.* in which she investigates rape myths and stereotypes in Canadian society.

¹⁶ In Etherington, *supra* note 11, a cultural defence is defined at 75 as “the manner in which evidence of cultural differences could be allowed to buttress the assertion of one of our traditionally accepted defences, excuses or justifications.”

¹⁷ Although the question of the treatment of First Nations culture within the criminal justice system is of great importance, my focus in this section is rather on non-aboriginal minority communities. For articles directly addressing the treatment of cultural evidence in cases involving the First Nations cultural context, see M.L. Nightingale, “Judicial Attitudes and Differential Treatment: Native Women in Sexual Assault Cases” (1991) 23 *Ottawa L. Rev.* 71; S. Razack, “What is to be Gained by Looking White People in the Eye? Race in Sexual Violence cases” in *Looking White People in the Eye, Gender, Race, and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998); T. Nahanee, “Sexual Assault of Inuit Female: A Comment on ‘Cultural Bias’” in J.V. Roberts & R.M. Mohr, eds., *Con-*

reform of the *Criminal Code*¹⁸ advocated the introduction of a cultural defence to the General Part, no formal recognition has yet been made.¹⁹ However, the willingness to consider cultural and religious differences in sentencing has been introduced on some occasions by judicial discretion. In *R. v. Lucien* and *R. v. Ammar Nouasria*, two sexual assault cases in which both the accused and the complainant were people of colour, the courts reduced the sentence of the assailant on the basis of "cultural differences." Through the colonial gaze²⁰ of the judges, the West has represented itself as a civilized, rational, scientific, culturally and morally superior entity in relation to the East, while the East has been depicted as uncivilized, irrational, unscientific, culturally inferior, and immoral.²¹ Notions of "Otherness and difference" are premised upon racist assumptions that ultimately serve to silence and permit the oppression of women of colour.

fronting Sexual Assault: A Decade of Legal and Social Change (Toronto: University of Toronto Press, 1994) 192. One has to note, however, that in the United States cultural evidence is used much more frequently. For discussions of the "cultural defence" in the U.S. context, see L. Volpp, "(Mis)Identifying Culture: Asian Women and the 'Cultural Defence'" (1994) 17 *Harv. Women's L.J.* 57; L. Volpp, "Talking 'Culture': Gender, Race, Nation and the Politics of Multiculturalism" (1996) 96 *Colum. L. Rev.* 1573. For cases that have specifically dealt with this issue, see *People v. Dong Lu Chen* (1988) No. 87-7774 (N.Y. Sup. Ct.); *People v. Kong Moua* (1985) No. 315972 (Fresno County Super. Ct.); *People v. Tou Moua* (1985) No. 328306 (Fresno County Super. Ct.); *People v. Fumiko Kimura* (1985) No. A-091133 (Santa Monica Super. Ct.).

¹⁸ R.S.C. 1985, c. C-46, ss. 4 to 45. See Canada, Department of Justice, *Proposals to Amend the Criminal Code (General Principles)* (Ottawa: Department of Justice, 1993); Parliamentary Sub-Committee on Recodification of the General Part of the Criminal Code, *First Principles: Recodifying the General Part of the Criminal Code of Canada* (Ottawa, 1993) (Chairperson: Blaine Thacker, M.P., Q.C.); Canadian Bar Association Criminal Recodification Task Force, *Principles of Criminal Liability, Proposals for a New General Part of the Criminal Code of Canada* (Ottawa: Canadian Bar Association, 1992); Canada, Department of Justice, *Reforming the General Part of the Criminal Code: A Consultation Paper* (Ottawa: Department of Justice Canada, 1994).

¹⁹ See C.M. Wong, "Good Intentions, Troublesome Applications: The Cultural Defence and Other Uses of Cultural Evidence in Canada" (1999) 42 *Crim. L.Q.* 367. Cultural evidence has been used as a defence in some Canadian cases. However, the courts have always dismissed the argument. See *R. v. Ly* (1987), 33 C.C.C. (3d) 31 (B.C.C.A.), in which the accused argued that his Vietnamese cultural background explained why he killed his wife who apparently had committed adultery. See also *R. v. Baptiste* (1980), 61 C.C.C. (2d) 438 (Ont. Prov. Ct.), in which parents accused of assault claimed that the severe corporal discipline they had used towards their teenaged daughter was part of their Trinidadian culture.

²⁰ This term is borrowed from B. Cossman, "Turning the Gaze Back on Itself: Comparative Law, Feminist Legal Studies, and the Postcolonial Project" (1997) *Utah L. Rev.* 525.

²¹ Razack, *supra* note 17 at 91.

A. R. v. Lucien: The Black Body as Culturally Ill and Sexually Deviant

Whites cannot think of themselves without the Negro.²²

Racial imagery is central to the application of the cultural defence. In the language of law, emphasis on race, on blackness, reveals what it means to be black, that is, what it means not to be white. In *R. v. Lucien*,²³ the ideology of “difference” defines who gets to be regarded as civilized and beautiful: through the colouring lens of the white judge, the black body is racialised and degraded. It is the story of a fixed image of racial identity, of the vulgar use of culture, and of a woman silenced. Subverting the liberal portrayal of culture as a monolithic and coherent whole, I consider blackness as well as whiteness and discuss the use of black images in a white courtroom, see its power and uncover its assumptions. In order to make visible what is rendered invisible, I reveal the unstated point of reference from which we tend to identify difference.

The accused, Patrick Lucien and Evens Shannon, respectively 23 and 22 years old at the time of the offence, were found guilty of sexual assault in which more than one party is involved pursuant to s. 272(1)(d) and s. 272(2)(b) of the *Criminal Code*. The offence was committed on the night of 11 July 1996. Both of the accused are originally from Haiti. They are black. They shared a one-bedroom apartment in Montreal. Evens Shannon arrived in Quebec in 1991, after having spent eleven years in the United States. On 11 July 1996, the accused went to Le Safari bar in Montreal and met M.O., a black 18-year-old girl on a visit from Quebec City. Lucien and Shannon did not drink, whereas M.O. had two beers. M.O. danced with Shannon for most of the night. At the bar’s closing time, Shannon asked her if she wanted to come to his place before he drove her home. She accepted. After having eaten a yogurt, she asked him to take her home. The accused refused. Each in turn sexually assaulted her, while the other one was holding her down. The complainant stated that they placed a pillow over her head to muffle her shouting.²⁴

After having found the two accused guilty of sexual assault on the person of M.O. pursuant to s. 272(1)(d) of the *Code*, judge Monique Dubreuil sentenced them to only 18 months to be served in the community, thereby using her discretion to make an order under s. 742.1 of the *Code*. This means that they could serve their time at home if they respected a curfew—being home from 22h30 to 6h00—and performed some community service—100 hours.

²² A. Farley, “The Black Body as Fetish Object” (1997) 76 *Oregon L. Rev.* 457 at 491.

²³ *R. v. Lucien* (1998), A.Q. no 8 (Cour du Québec) [hereinafter *Lucien*].

²⁴ The facts are described in greater details in the Court of Appeal judgment. See *R. v. Lucien* (2000), J.Q. No. 2 (Cour d’appel du Québec).

As a general principle, the objectives which a sentence should attempt to achieve are denunciation, general and specific deterrence, separation of offenders, rehabilitation, making reparations, and promotion of a sense of responsibility in the offender.²⁵ In dealing with the factor of deterrence, both specific and general deterrence must be considered, but courts have placed more emphasis on general deterrence in charges of sexual assault, since they are occurring with alarming frequency in Canada and have become a matter of deep concern for our society. They exhibit an attitude of violence against women.²⁶

Under ss. 272(1)(d) and 272(2)(b) of the *Criminal Code*, any person who, in committing a sexual assault, is a party to the offence with any other person, is guilty of an indictable offence and subject to maximum imprisonment of 14 years. This sentence is more severe than the maximum of 10 years for sexual assault under s. 272 of the *Criminal Code*. The courts regard as particularly reprehensible those circumstances in which men collaborate to perpetrate a sexual assault. Absent exceptional mitigating circumstances, a conviction for this offence will result in a significant penitentiary sentence, generally four years or more.²⁷

²⁵ The general principles of sentencing were laid down in *R. v. Grady* (1971), 5 N.S.R. (2d) 264 (S.C., A.D.). The approach outlined was reviewed in *R. v. Chisholm* (1985), 18 C.C.C. (3d) 518 (N.S.S.C., A.D.) where the court stated at 531:

The basic purpose of criminal law is to preserve the well-being and general order of society. The sentencing process is vital to such purpose. As a result this and other appellate courts have said that the paramount aim or purpose of sentencing is the protection of the public. This protection has both a subjective and an objective meaning—first, the protection of society from the particular offender and secondly, the protection of society from the commission of a particular type of offence. In the majority of cases it is this second meaning that is being referred to when the “protection of society” is alluded to. This court in *R. v. Grady* said that the protection of the public could be achieved either by (a) deterrence or (b) reformation and rehabilitation of the offender or both deterrence and rehabilitation ... [citations omitted]

²⁶ I refer particularly to *R. v. Bryson* (1987), 80 N.S.R. (2d) 334 (S.C., A.D.), *R. v. Hawkes* (1987), 81 N.S.R. (2d) 156 (S.C., A.D.), *R. v. Farrell* (1988), 89 N.S.R. (2d) 91 (S.C., A.D.), and *R. v. White* (1989), 88 N.S.R. (2d) 416 (S.C., A.D.) in which the courts have commented on the increasing number of sexual assaults and the need to protect the public by placing a major emphasis on the factor of general deterrence.

²⁷ In *R. v. White* (1974), 27 C.R.N.S. 66, 16 C.C.C. (2d) 162 (Ont. C.A.), three men involved in sexually assaulting a woman were each given five years imprisonment. In *R. v. Stoddart* (1987), 59 C.R. (3d) 134 (Ont. C.A.), again three men were each given five and one-half years. In *R. v. Bear* (1973), 13 C.C.C. (2d) 570 (Sask. C.A.), three men who were involved in sexually assaulting a woman were each sentenced to five years of imprisonment. In *R. v. Oliver* (1979), 34 N.S.R. (2d) 631; 59 A.P.R. 631 (S.C.A.D.), the court referred to a number of cases where offenders, both with and without criminal records, were sentenced to various terms of imprisonment of eight years and higher. The court increased the five year sentences of the four “gang-rape” assailants to eight years for two, and to nine and ten years

Under s. 742.1 of the *Criminal Code*, the court has discretion²⁸ whether or not to make an order for a conditional sentence served in the community, but only if the court is satisfied that the safety of the community would not be endangered. This discretion must, however, be exercised in accordance with recognised sentencing principles, including the objectives of specific and general deterrence.²⁹

In *R. v. Lucien*, the court accepted evidence that neither of the accused regretted the sexual assault.³⁰ Surprisingly, the judge came to the conclusion that, even considering this aggravating factor, serving the sentence in the community would not endanger its safety.³¹ Why does she notice a lack of remorse? And why did it not matter? Judge Dubreuil explained:

In this case, the absence of remorse of the two accused seems to me to arise more from a particular cultural context with regard to relations with women than to a real problem

for the others. In *R. v. Beaton* (1991), N.S.J. No. 633 (appeal dismissed by the Nova Scotia Supreme Court and the Supreme Court of Canada; see *R. v. Beaton* (1992), N.S.J. No. 366 (N.S.C.A.) and *R. v. Beaton* (1993), S.C.C.A. No. 63), the accused was convicted of participating in a gang rape with two other men and was sentenced to six years incarceration. The sentence was imposed based on the factor of deterrence and the outrageous nature of the assaults. The accused had no criminal records, nor any negative comments from any of the police forces contacted regarding his behaviour in the community. Justifying the seriousness of the sentence, the Court states at 12:

Mr. Beaton is convicted of an offence under s. 272(d) of the Criminal Code that he was a party to a sexual assault. Clearly the Parliament of Canada recognizes and affirms that where there is a use of extreme violence, where a weapon is used, or when more than one assailant is involved, the act is even more outrageous than the act of sexual assault without these elements, and is therefore deserving of a harsher penalty. As I have noted, this is also reflected in the case law. The cases I have referred to, including *Sandercock*, *supra*, indicate that sexual assaults of this nature must be dealt with more severely by the courts.

²⁸ *The Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer, 1995) rightly notes at 104–105:

The criminal justice system operates through a series of highly discretionary decision-making stages. Discretion is exercised in subtle, complex and interactive ways, which leave considerable scope for racialisation to influence practices and decisions, and for bias to be transmitted from one stage of the process to others.

²⁹ On 2 May 1997, Bill C-17 was proclaimed into force. It added the phrase “and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2” to section 742.1(b). The amendment was in response to a body of judicial interpretation of section 742.1(b) with which the legislature did not agree.

³⁰ *Lucien*, *supra* note 23 at para. 7 and 15.

³¹ See *ibid.* at para. 13 and 14.

of a sexual nature. ... [C]onsidering their age, their social integration, the fact that they have no previous criminal record, and *the special circumstances of the case*, I believe that by making an order for a conditional sentence served in the community, the safety of the community would not be endangered. The follow-up of a security agent will allow them to change their mentality towards women and thus gain a better sense of responsibility.[emphasis added]³²

Whether these statements were intended to convey a “cultural defence” or not, they give the strong impression that Judge Dubreuil drew conclusions based not on the evidence before her, but primarily on the fact that Evens Shannon and Patrick Lucien are black and, therefore, very aroused. The accused are black people from Haiti, the “particular cultural context.” This further evidence implies that, as members of a group whose social and cultural values differ from “ours,” they would find it difficult to regret the gang-rape. That is to say, there is a cultural explanation for what only appears to be sexual misbehaviour.

1. The visibility of the black male body

The Negro is the genital. Is this the whole story? Unfortunately not.
The Negro is something else.³³

Cultural explanations for racial subordination replaced biological assumptions by the early decades of the twentieth century.³⁴ This shift has been characterised by Frantz Fanon as the transition from vulgar to cultural racism.³⁵ As Leti Volpp has pointed out, cultural racism positions non-European immigrants as “living according to cultural dictates that are hopelessly backwards and differ-

³² *Ibid.* at para. 15.

³³ F. Fanon, *Black Skin, White Masks: The Experience of a Black Man in a White World* (New York: Grove Press, 1967) at 180.

³⁴ Volpp, *supra* note 17 at 1600. Of course, our era is not free from this type of racism. For an investigation of the white supremacist discourse in the United States, see J. Daniels, *White Lies, Race, Class, Gender, and Sexuality in White Supremacist Discourse* (New York & London: Routledge, 1997). Daniels argues that the ideology of these groups is much closer to core American values that most of us would like to believe. See also R.J. Herrnstein & C. Murray, *The Bell Curve: Intelligence and Class Structure in American Life* (New York: Free Press, 1994) (correlating IQ with racial and social stratification). In *Orientalism* (New York: Vintage Books, 1978), E.W. Said writes at 206:

Theses of Oriental backwardness, degeneracy, and inequality with the West most easily associated themselves early in the nineteenth century with ideas about the biological bases of racial inequality. ... Thus the whole question of imperialism, as it was debated in the nineteenth century by pro-imperialists and anti-imperialists alike, carried forward the binary typology of advanced and backward (or subject) races, cultures, and societies.

³⁵ F. Fanon, *Toward the African Revolution: Political Essays*, trans. H. Chevalier (New York: Grove Press, 1967) at 31.

ent.”³⁶ This section addresses the construction of race as a social and political category.³⁷ A key development in recent scholarship theorising race is the racial formation approach, in which “race is understood as an unstable and “decentred” complex of social meanings constantly being transformed by political struggle.”³⁸ Since the oppression of racial groups is rooted in the history and the economic development of Canadian society,³⁹ it is crucial to highlight the legal processes by which the “Other” is produced and reproduced. That is to say, in the particular case of black people, how does the West freeze and appropriate the black body as something that exists always above time, history, and Africa? In the analysis that follows, I will explore and demonstrate how the black body in *Lucien* became perceived as black through a colourful judicial lens.

Judge Dubreuil described the facts of the case, the circumstances under which the sexual assault occurred, the evidence that both of the accused knew the absence of consent of their victim, the reasons why they ignored it, and the ways in which they behaved and moved themselves, physically, sexually. She depicts the black male body as very sexual, out of control, in physical need, and primitive.

Evens Shannon, confident in his charm, did not take into account the hesitations and reticence of the young girl after she accepted to go to his place. The two accomplices then took her consent for granted. They behaved like *two young roosters craving for sexual pleasure without any regard for the young woman*. Despite their resentment for her, *despite the pride of young males* who cannot admit having committed a serious insult to the victim by not respecting her choice to leave at a certain moment, they nevertheless thought about the incident and gained a little more maturity since it became judicial.[emphasis added]⁴⁰

³⁶ Volpp, *supra* note 17 at 1601.

³⁷ Race as a social construct is maintained by differential power between a dominant group and a subordinate group. P. Li & B.S. Bolaria, “Chapter 1: Race and Racism” in *Racial Oppression in Canada* (Toronto: Garamond Press, 1988) at 24, define the racial project in this manner:

Racial oppression is concretized when social institutions are revamped to recognize a colour line as a means to recruit and to exclude people. ... The end result, however, is to subject the subordinate group to unequal treatment on the basis of a socially defined colour line.

³⁸ M. Omi & H. Winant, *Racial Formation in the United States from the 1960s to the 1980s* (New York: Routledge & Kegan Paul, 1986) at 68.

³⁹ See C. Backhouse, *Colour-Coded, A Legal History of Racism in Canada 1900–1950* (Toronto: University of Toronto Press, 1999); James W. St. & G. Walker, “Race” in *Rights and the Law in the Supreme Court of Canada: Historical Case Studies* (Waterloo, Ont.: Wilfred Laurier University Press, 1997); C.A. Aylward, *Canadian Critical Race Theory, Racism and the Law* (Halifax: Fernwood, 1999).

⁴⁰ *Lucien*, *supra* note 23 at para. 7.

The subtext of these comments seems to be this: Black men are inherently and unalterably sexually aggressive. They are embodied penises. They are biological dangers. They are animals, young roosters craving for pleasure: “But here the Negro is the master. He is the specialist of this matter: Whoever says *rape* says *Negro*.”⁴¹ The image of black men as beasts, concerned primarily with the body, has long been part of the Western imagination.⁴² It is the fear of the sexual potency of the Negro.⁴³ Frantz Fanon writes: “One is no longer aware of the Negro, but only of a penis: the Negro is eclipsed. He is turned into a penis. He is the penis.”⁴⁴ It is the fear of the Negro, viewed as a penis symbol, as an infinite virility, using his tremendous sexual powers on the woman’s body.

The discourse of race involved in *Lucien* is about inscribing the black body with images of violence and charm, cultural and not sexual misbehaviour, and sexist values. Racism is so deeply embedded in culture that even when, and

⁴¹ Fanon, *supra* note 33 at 166.

⁴² Daniels, *supra* note 34 at 93, gives the example, among others, of the American public’s fascination with the O.J. Simpson trial:

Simpson, although acquitted, continues to embody white supremacist archetypes of Black men as “beasts,” ontologically violent, dangerous, and criminal. ... O.J. was proof that there were no class barriers in America, that someone could—even if they were born Black and poor—become an economic success in America by dint of their own talent and hard work. And, O.J. reassured white Americans that Black men, even big, strong, athletic black men, were no threat, were not dangerous, were even likable, and yes, good-looking. ... And then, with his arrest for the murder of his ex-wife Nicole and her acquaintance Ron Goldman, this image transmogrified—at least for many white Americans—into the iconography of the brutal and dangerous Black man, driven to murder by his uncontrollable lust and jealousy for a white woman. The double-murder trial of O.J. Simpson is an important cultural marker for all that it says about Black masculinity.

⁴³ F. Fanon, *supra* note 33 at 163 draws the comparison between the Jew as the intellectual danger and the Negro as the biological danger:

No anti-Semite, for example, would ever conceive the idea of castrating the Jew. He is killed or sterilized. But the Negro is castrated. The penis, the symbol of manhood, is annihilated, which is to say that it is denied. The difference between the two attitudes is apparent. The Jew is attacked in his religious identity, in his history, in his race, in his relations with his ancestors and in his posterity; when one sterilizes a Jew, one cuts off the source; every time that a Jew is persecuted, it is the whole race that is persecuted in his person. But it is in his corporeality that the Negro is attacked. It is as a concrete personality that he is lynched. It is as an actual being that he is a threat. The Jewish menace is replaced by the fear of the sexual potency of the Negro.

⁴⁴ *Ibid.* at 170.

perhaps especially when, the court is attempting to be culturally sensitive,⁴⁵ stereotypes of good and bad, white and black, us and them, superior and inferior, linger as the background of the decision. Implicit in the discussion of the Haitian “cultural context” is the assumption that Haitian sexual norms and (mis)conduct are widely different from and inferior to white mainstream norms. This discourse of race textually produces racism in that “if the black body is the site and cite of all ills, then the white body is not.”⁴⁶ White is good. And white is white. Black is black. And black is really bad.⁴⁷ Taking Haitian culture into account, as it was by this white judge, ultimately means confirming the “Other” as barbaric, savage, and uncivilized. Anthony Farley writes:

Blackness is presented as a natural object, for it is only where the category of race is deemed natural, that is, independent of social choices, that the hierarchical ordering of things can be enjoyed. Put another way, the natural is the alibi to power.⁴⁸

Farley’s description of the racialisation of power compels us to explore how inequality is shaped and indeed reinforced by judicial decision-making. Thus, what

⁴⁵ For the purposes of the *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen’s Printer, 1995), judges were asked if they think that in general racial minorities are treated the same as white people. According to the report, it seems that racial minority individuals tend to receive better treatment than white individuals in Ontario’s courts. As a matter of fact, at 32, the judges confessed:

My general experience is that ... both judges and juries give members of racial minorities leniency as opposed to similarly placed accused from non-racial minority segments of the population. In effect they over-compensate for the perception that they may be prejudiced.

...

Most courts now are trying to be very careful not to be biased—possibly even leaning over the other way, which is equally unfair.

⁴⁶ Farley, *supra* note 22 at 475.

⁴⁷ Fanon, *supra* note 33 at 189 writes:

In Europe, that is to say, in every civilized and civilizing country, the Negro is the symbol of sin. The archetype of the lowest values is represented by the Negro. ... The torturer is the black man, Satan is black, one talks of shadows, when one is dirty one is black—whether one is thinking of physical dirtiness or of moral dirtiness. It would be astonishing, if the trouble were taken to bring them all together, to see the vast number of expressions that make the black man the equivalent of sin. ... Blackness, darkness, shadow, shades, night, the labyrinths of the earth, abysmal depths, blacken someone’s reputation; and, on the other side, the bright look of innocence, the white dove of peace, magical, heavenly light.

⁴⁸ Farley, *supra* note 22 at 474.

the white judge tries to tell us is this: rape naturally belongs to the black Haitian community; it is something inherent to *their* culture. That is, not to *ours*.⁴⁹ Again, if rape is bad, and rape is black, then black is really bad. In *Lucien*, the black ill body was saved by the white civilized body: a lighter sentence of 18 months in the community was thus justified. Accordingly, blackness and whiteness are creations of each other: there can be no Black without the White. And here the latter symbolizes purity, in relation and in contrast to the black presence.⁵⁰ It should not go unnoticed, however, that this bipolar dynamic is only possible insofar as the black female body is rendered invisible.

2. *The (in)visibility of the black female body*

All the Women are White, All the Blacks are Men, but
Some of Us are Brave.⁵¹

In *Lucien*, the production of knowledge concerning the black body is a process by which a white judge excuses the violence of men towards women. The expressions used by Judge Dubreuil to describe the accused's sexual assault, such as "two young roosters craving for sexual pleasure" and "despite the pride of young males," are plainly inappropriate since they minimize the importance of the accused's conduct and the reality of sexual aggression against women of

⁴⁹ Said, *supra* note 34 at 228:

Only an Occidental could speak of Orientals, for example, just as it was the White Man who could designate and name the coloureds, or nonwhites. Every statement made by Orientalists or White Men (who were usually interchangeable) conveyed a sense of the irreducible distance separating white from coloured, or Occidental from Oriental; moreover, behind each statement there resonated the tradition of experience, learning, and education that kept the Oriental-coloured to his position of object studied by the Occidental-white, instead of vice versa.

⁵⁰ Exploring the white-black dynamic, T. Morrison, *The Bluest Eye* (New York: Pocket Books, 1972) at 205 writes:

All of our waste which we dumped on her and which she absorbed. And all of our beauty, which was hers first and which she gave to us. All of us—all who knew her—felt so wholesome after we cleaned ourselves on her. We were so beautiful when we stood astride her ugliness. Her simplicity decorated us, her guilt sanctified us, her pain made us glow with health, her awkwardness made us think we had a sense of humor. Her inarticulateness made us believe we were eloquent. Her poverty kept us generous. Even her waking dreams we used to silence our nightmares. And she let us, and thereby deserved our contempt. We honed our egos on her, padded our characters with her frailty, and yawned in the fantasy of our strength.

⁵¹ This the title of a book edited by G.T. Hull, P. Bell Scott & B. Smith, (Old Westbury, New York: Feminist Press, 1982).

colour. More precisely, it is the “culturalisation of rape”⁵² which becomes a mitigating factor in the sentencing of the black men convicted of sexual assault. Here, violence is mediated as “a cultural attribute rather than a product of male domination that is inextricably bound up with racism.”⁵³ The judge’s perspective on culture is stereotypical and reflects a frozen sexist vision,⁵⁴ implying that *all* black male Haitian bodies move like “young roosters craving for pleasure,” vested with the “pride of young males.” The second assumption, a corollary to the first, is that the black female body is a natural vessel into which the black male body pours his poison. If rape is a crime of humiliation, to be thematised and naturalised as an inherent racial victim of rape is a greater form of humiliation. Her body, on which he imposed his violence, his rape, his betrayal, and then his lack of remorse, is made available for rape forever. For this female body is black. Forever black. Moreover, racial essentialism renders the experience of the black woman invisible: *her* vision of culture, *her* body as a black body, *her* oppression as a woman all disappear in the face of a racial identity which is not presented as gendered.

3. Intersectionality analysis

Not only are women of colour in fact overlooked, but their exclusion is reinforced when white women speak for and as women.⁵⁵

Scholarship on critical race feminism⁵⁶ has attempted to highlight the implicit assumption, in political as well as legal agendas, that *all* women are “white” and

⁵² I borrow this expression from Razack, *supra* note 17 at 62. In her book, Razack analyses sexual assault cases which took into account the race of the offenders, in the particular context of the Aboriginal male community. See also M. Nightingale, “Judicial Attitudes and Differential Treatment: Native Women in Sexual Assault Cases” (1991) 23:1 Ottawa L. Rev. 71.

⁵³ Razack, *ibid.* at 58.

⁵⁴ In the context of Inuit women, T.A. Nahanee, *Gorilla in Our Midst: Aboriginal Women and the Inhumanity of the Canadian Criminal Justice System* (LL.M. Thesis, Queen’s University 1995) at 40 writes:

The so-called “cultural defences” which have been used in these sexual crimes are a judicial fiction. ... Instead of using the “reasonable man” standard, the northern courts have invented a fictional Inuit man. The legal fiction is the “reasonable Inuit man” who is uneducated, underemployed or unemployed, perhaps intoxicated at the time of the offence and a follower of traditional Inuit sexual mores.

⁵⁵ K. Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” (1989) U. Chi. Legal F. 139 at 154.

⁵⁶ For analyses of how women of colour are marginalized within the discourse of gender essentialism, see *ibid.*; K. Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics

all blacks or other members of a racially defined category are “male.” This essentialism ends up silencing women of colour, who experience racism *not* from the privileged standpoint of maleness, and experience sexism *not* from the privileged standpoint of whiteness.⁵⁷ In other words, as Kimberlé Crenshaw has powerfully stated: “Contemporary feminist and antiracist discourses have failed to consider intersectional identities such as women of colour. ... Because of their intersectional identity as both women *and* of colour within discourses that are shaped to respond to one *or* the other, women of colour are marginalised within both.”⁵⁸

Women of colour are the outsiders whose experience and perspective is *elsewhere*. Bell Hooks puts it this way: “Living as we did—on the edge—we developed a particular way of seeing reality. We looked both from the outside in and from the inside out. We focused our attention on the centre as well as on the margin. We understood both.”⁵⁹ Precisely because they present themselves as intrinsically connected to one another as axes of oppression, the sexual and racial dynamics⁶⁰ of the individual cannot be separated into sharp categories. For any account of women’s experience hides the history of conflicts between

and Violence Against Women of Colour” (1991) 43 Stan. L. Rev. 1241; Harris, *supra* note 12; M. Kline, “Race, Racism and Feminist Legal Theory” (1989) 12 Harv. Women’s L.J. 115; P. Caldwell, “A Hair Piece: Perspective on the Intersection of Race and Gender” (1991) Duke L.J. 365.

⁵⁷ Feminists of colour have questioned attempts to universalise “women’s experience” and have argued that what is considered as shared world-wide is in fact a white, straight, socio-economically privileged, and western perspective of reality. Feminists who have focused on differences among women in international human rights scholarship include I.R. Gunning, “Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries” (1992) 23 Colum. Hum. L. Rev. 189; N. Kim, “Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism” (1993) 25 Colum. Hum. Rts. L. Rev. 49.

⁵⁸ Crenshaw, *supra* note 56 at 1242. See also D.C. Chiu, “The Cultural Defence: Beyond Exclusion, Assimilation, and Guilty Liberalism” (1995) 82 Cal. L. Rev. 1053 at 1121:

The ultimate trap for a woman of colour is the casting of gender power against racial solidarity, a deep conflict that underlies the cultural defence debate. Should she choose gender over race, she is spurning cultural and racial affinity for white feminism. Should she remain silent, she legitimates sexism in her community.

⁵⁹ B. Hooks, *Feminist Theory: From Margin to Centre* (Boston: South End Press, 1984) at 9.

⁶⁰ Even though intersectionality analysis has focussed primarily on gender and race as an encounter, the use of a single axis framework also fails to address the experiences of those at the intersection of interlocking forms of oppression—along lines of sexual orientation, disability, class, etc.

women.⁶¹ Audre Lorde, a black woman when speaking to her white “sisters,” writes: “Some problems we share as women, some we do not. You fear your children will grow up to join the patriarchy and testify against you, we fear our children will be dragged from a car and shot down in the street, and you will turn your backs upon the reasons they are dying.”⁶²

In sexual assault cases, when both the accused and the complainant are “raced” through the judicial process, race is presumed to be a natural category existing independently and apart from law. Critical race feminists have highlighted the ways in which the construction of racial identity in white courtrooms has failed to address the intersectionality of social domination and power for women of colour. They have therefore argued for the rejection of a cultural defence because it condones violence against women.⁶³ Daina Chiu powerfully notes that: “One of the most important consequences is that, through the workings of the cultural defence, the subordination of women is reconstructed and reinforced.”⁶⁴ Both Crenshaw and Chiu’s comments alert us to the need to introduce a more gendered vision in our efforts to situate and conceptualise racial groups.

4. Speak white: the appeal and the presence/absence of culture

It is sometimes advantageous to be unseen, although it is most often rather wearing on the nerves. Then, too, you’re constantly being bumped against those of poor vision. Or again, you often doubt if you really exist. You wonder whether you aren’t simply a phantom in other people’s minds.⁶⁵

⁶¹ A. Lorde, *Sister Outsider: Essays and Speeches* (Trumansburg, New York: Crossing Press, 1984) at 116: “There is a pretense to a homogeneity of experience covered by the word sisterhood that does not in fact exist.”

⁶² *Ibid.* at 119.

⁶³ See N. Rimonte, “A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defence” (1991) 43 *Stan. L. Rev.* 1311, in which she asserts at 1321:

While the cultural defence is based upon a laudable respect for the worth of all cultures, it results in a validation of Pacific-Asian patriarchal values which promote, or at least facilitate, crimes against women.

See also M. Spatz, “A “Lesser” Crime: A Comparative Study of Legal Defences for Men Who Kill Their Wives” (1991) 24 *Colum. J.L. & Soc. Probs.* 597, in which she suggests at 624:

An examination of the types of cases in which defendants have successfully employed the cultural defence suggests that it will increasingly be invoked by men who kill their wives.

⁶⁴ Chiu, *supra* note 58 at 1121.

⁶⁵ R. Ellison, *Invisible Man* (New York: Random House, 1952) at 3–4.

The question remains: what qualified Judge Dubreuil to draw conclusions regarding Haitian culture and, insofar as they are a form of cultural imperialism, how do judicial mechanisms respond to such discrimination? The description of Haitian men given by Judge Dubreuil reflects inaccurate notions of Haitian sexual mores. Yet even though the Quebec Court of Appeal overruled the decision,⁶⁶ the use of information about Haitian culture in sentencing by the trial court was not even mentioned in the appellate ruling. The black man is here an invisible man: “I am invisible, understand, simply because they refuse to see me.”⁶⁷ The Court of Appeal identified two errors in law. First, Judge Dubreuil did not correctly interpret s. 272(1)(d) of the *Criminal Code*, under which any person found guilty is subjected to maximum imprisonment of 14 years, as opposed to 10 years for sexual assault under s. 271 of the *Code*. Secondly, the judge did not take into account the perpetrators’ lack of remorse, which is an aggravating factor, not a mitigating one. Because the accused “forced their victim into doing odious and repugnant acts, incarceration constitutes the best measure for them to take to heart their responsibility.”⁶⁸ Yet the 18-month sentence was not changed. The formalistic approach of the Court of Appeal, in which culture is *absent*, *invisible*, and *omitted*, indicates that it was not the appropriate forum for raising issues of race. The Quebec Judicial Council was the last hope.

5. Humiliation and truth: the narrative and its myth

The investigation of humiliation, its presence and its absence from the judicial field of vision, is primarily a genealogy of the colourlined body.⁶⁹

The Haitian community was outraged that Judge Dubreuil made it sound like Haitian men consider it acceptable to mistreat women.⁷⁰ Eric Faustin, head of the Christian Community of Haitians in Montreal, reacted with anger to the decision: “I interpret what she says as it being normal for Haitian men to proceed with group rapes and then to have no remorse because it’s normal to do this. I find this outrageous.”⁷¹ Haitian groups and members of the legal community called the ruling “racist and sexist.”⁷² They asked for a public apology.⁷³

⁶⁶ R. v. *Lucien* (2000), J.Q. No. 2 (Cour d’appel du Québec).

⁶⁷ Ellison, *supra* note 65 at 3.

⁶⁸ *Lucien*, *supra* note 23 at para. 13.

⁶⁹ A. Farley, “The Whiteness of the Whale: Knowledge & Power in Two Eras of Hate Speech Jurisprudence” (Legal Theory Workshop, University of Toronto, 21 January 2000).

⁷⁰ E. Cherney & S. Richard, “Haitians Condemn Judge in Rape Case” *The [Montreal] Gazette* (28 January 1998) A1; J. Robinson, “Rape is a Heinous Crime in any Culture” *The [Montreal] Gazette* (29 January 1998) B2.

⁷¹ Montreal Bureau, “Monique Dubreuil: Judge let Rapists Serve Sentences at Home” *The Toronto Star* (28 January 1998) 1.

But even though the judge's comments on the "cultural context" had been denounced as a racial slur by women's groups,⁷⁴ editorialists,⁷⁵ immigrants' defence organizations,⁷⁶ the Canadian Bar Association,⁷⁷ the Haitian Embassy in Ottawa,⁷⁸ the Haitian Consul,⁷⁹ and the Montreal Haitian community,⁸⁰ Que-

⁷² CP Montreal, "Heat Still on Judge Over Rape Ruling" *The Ottawa Sun* (2 February 1998) 14. For a discussion of the concept of "visible minority," see A. Pratte, "Les effets pervers du concept des "minorités visibles" *La Presse* (5 February 1998) A11.

⁷³ E. Faustin, Director of the Haitian community organisation, said: "She may have recognized her error, but she has not apologized." See CP Montreal, *Ottawa Sun* (2 February 1998) 14.

⁷⁴ The Quebec Federation of Women stated that rape sentences should always be served in jail, whereas both the Quebec Council on the Status of Women and the Quebec Council for Intercultural Relations issued a joint statement deploring "confusion between respect for the law and respect of cultural diversity." See *Le contexte culturel n'a pas de place dans le contexte criminel* online: Quebec Council on the Status of Women <<http://www.csf.gouv.qc.ca/actu/com/com1998.htm>> (Montreal, 28 January 1998), in which both Ms. D. Lemieux, president of the Quebec Council on the Status of Women, and M. A. Vieira, president of the Quebec Council for Intercultural Relations, claimed that:

L'égalité des sexes est une composante fondamentale de la démocratie et une valeur non négociable, même au nom de la diversité culturelle. Les lois de notre société, notamment en matière d'agression sexuelle, s'appliquent de la même façon, à toutes et à tous, sans égard à "un contexte culturel."

See also R. McKenzie, "Minister Won't Rush to Condemn Judge" *The Toronto Star* (29 January 1998) A1. For an editorial by the Point de ralliement des femmes d'origine haïtienne de Montréal, see "Jugement consternant" *La Presse* (4 February 1998) B2. For an editorial by the Centre d'aide et de lutte contre les agressions sexuelles de l'Outaouais, see "Une sentence qui indigné" *Le Droit* (2 February 1998) 13.

⁷⁵ See J.J. Samson, "Une justice à la dérive" *Le Soleil* (29 January 1998) B6; L. Fitterman, "Justice Comes into Disrepute", *The [Montreal] Gazette* (28 January 1998) B2; J. Robinson, "(Editorial) Rape is a Heinous Crime in any Culture" *The [Montreal] Gazette* (29 January 1998) B2; N. Collard, "Le jugement Dubreuil, La pointe de l'iceberg?" *Voir* (5 February 1998) 9; A. Gruda, "Le facteur ethnique" *La Presse* (28 January 1998) B2; S. Cham, "Drôle de justice" *Le Droit* (2 February 1998) 12; M. Caouette, "Le jugement Dubreuil" *Le Soleil* (28 January 1998) A9; "A Wrist Slap for Rape" *The Toronto Star* (1 February 1998) 1. For public opinions, see P. Bittar, "Dix-huit mois de prison pour un viol collectif: La culture de l'ignorance et de la bêtise" *Le Devoir* (5 February 1998) A9.

⁷⁶ The Quebec Collective of Immigrant Women asked whether the sentence was that light because the young woman who was raped was not white: "Does this judgment mean that persons of black race can do whatever they like (criminal acts among others) as long as they do it within their community?" in McKenzie, *supra* note 74.

⁷⁷ The Canadian Bar Association claimed that judges don't know enough about the country's "ethnocultural diversity to avoid stereotypes, myths and (common) beliefs." in *ibid.*

⁷⁸ The Haitian Embassy in Ottawa called the judgment "a grave insult to the Haitian people" and insisted on the fact that rape is severely punished in Haiti. See *ibid.*

bec’s Justice Minister, Serge Ménard, was dismissive. On 29 June 1998, he gave his personal explanation of what the decision truly meant: “I think that the cultural context was rather the type of boys involved, popular, especially in discotheques, always being popular with girls, thinking that they all wanted to, that they all desired them so much. This type of person exists among young Montrealers of white race, speaking both languages, just as much as in the Haitian community or in any other community in Montreal.”⁸¹ Complaints were filed with the Quebec Judicial Council,⁸² asking for it to determine whether Dubreuil’s remarks represented a breach of the code of ethics.

On 23 June 1998, the judge was not reprimanded. For her comments, without doubt inappropriate, were not considered to be racist by the Council.⁸³ Rather, the Council argued that they could have been referring to an immature youth culture and not to the ethnic origins of the accused.⁸⁴ It stated:

The judge as well as the other people participating in the trial did not have racist considerations or remarks. However, all members agree that the remarks at stake are ambiguous and can give rise to different interpretations. Some can pretend that the cultural context to which the judge refers is aimed at the Haitian community, whereas others can believe that it is directed against the culture of certain groups of youth who do not share the same values as the rest of society. The Council can hardly give to these words a meaning that they do not bear.⁸⁵

When asked by the Council to justify her attitude, Judge Dubreuil admitted that her comments about the “cultural context” are ambiguous and said she regretted that they might have been interpreted as racist, for she was not referring to the Haitian community. Taking this into account, the Council rejected the

⁷⁹ See A. Noel, “Le commentaire de la juge Dubreuil choque le consul d’Haïti à Montréal” *La Presse* (28 January 1998) A4.

⁸⁰ “Affaire Dubreuil: des Haïtiens déposent une plainte” *La Presse* (31 January 1998) A6.

⁸¹ McKenzie, *supra* note 74. See also K. Gagnon, “Ménard vole au secours de la juge Monique Dubreuil” *La Presse* (29 January 1998) A1; PC Montreal, “Sursis à deux violeurs, La juge admet avoir erré” *Le Soleil* (29 January 1998) A1.

⁸² M. Abley, “Haitians Want Judge’s Apology” *The [Montreal] Gazette* (2 February 1998) A3. The Judges Council was established in accordance with the *Courts of Justice Act*. Its chief mandate is to ensure respect for the legal code of ethics and to set up proficiency programs intended for the judges appointed by the province of Quebec. For this purpose it receives, examines and, if necessary, investigates any complaint filed against a judge of the Court of Quebec, a municipal court judge or a justice of the peace appointed in accordance with article 186 of the *Courts of Justice Act*.

⁸³ See Y. Boisvert, “La juge Monique Dubreuil est blanchie par ses pairs” *La Presse* (23 June 1998) A5; Y. Boisvert, “Le sursis suscite la controverse” *La Presse* (3 January 1999) C5.

⁸⁴ PC Montreal, “No Sanctions Over Judge’s Rape Ruling” *Ottawa Sun* (23 June 1998) 22.

⁸⁵ This case can be found by contacting the Quebec Judicial Council, 300 Boul. Jean-Lesage, Quebec, Quebec, G1K 8K6.

complaints by holding that the remarks at issue did not constitute a breach of judicial ethics. This decision renders racial humiliation invisible. In making this choice, the Council attempted to maintain the innocence of law. Speaking of the colonial situation, Albert Memmi writes:

Having founded this new moral order where he is by definition master and innocent, the colonialist would at last have given himself absolution. It is still essential that this order not be questioned by others, and especially not by the colonised.⁸⁶

The Council's finding and its rendering racial prejudice invisible shocked public opinion.⁸⁷ For denial of humiliation is worse than humiliation itself.⁸⁸ After all, "ignorance is not innocent, it is political."⁸⁹ And here it is "the objectified pain of those labelled "black" which is denied as pain and experienced as power."⁹⁰ The Council used its power to say: what you imagine as racist is not, what you see as an insult to the black body does not exist. It is in your head. Just remember. Nothing to do with your body. Everything is in your head. And turn the page. It is white again.

B. *R. v. Ammar Nouasria*: Oriental Backwardness and The Muslim/Arab Body

"We" are this, "they" are that. Which Arab, which Islam, when, how, according to what test: these appear to be irrelevant distinctions. The crucial point is that everything one can know or learn about "Semites" and "Orientals" receives immediate corroboration, not merely in the archives, but directly on the ground.⁹¹

To contextualise this article's second case study of an implicit cultural defence in a sexual assault trial, explicating the meaning of Orientalism is crucial. It can be defined as knowledge about and knowledge of so-called Orientals.⁹² As a his-

⁸⁶ A. Memmi, *The Colonizer and the Colonized*, trans. H. Greenfeld (Boston: Beacon Press, 1967) at 76.

⁸⁷ See PC Montreal, "Propos sur les Haitiens, La juge Monique Dubreuil blanchie" *Le Soleil* (23 June 1998) A13; P. Gravel, "L'équivoque" *La Presse* (25 June 1998) B2.

⁸⁸ The psychological impact of denial is often examined in contexts of abuse of power such as in child sexual abuse cases. See E. Bass & L. Davis, quoted in Farley, *supra* note 22 at 469:

As time goes on he doesn't even bother to stroke or hold or touch me. I'm not even there. But each time before he leaves, he leans down, his nose brushing against my ear, and whispers, "Just remember, Honey, nothing happened." And being eager to please, I remember perfectly.

⁸⁹ Farley, *supra* note 69 at 6.

⁹⁰ Farley, *supra* note 22 at 471.

⁹¹ Said, *supra* note 34 at 237.

⁹² For a definition of "Orientalism" as discourse and system of knowledge and power, see Said, *ibid.* at 41:

torical phenomenon and a way of thought, this political vision of reality promoted the difference between the West and the Orient, the latter being conceptualised as an unchallenged coherent whole characterised by its "sensuality, tendency to despotism, aberrant mentality, habits of inaccuracy, backwardness."⁹³ If Orientals live in "their" world, then we live in "ours," a Western world characterised by a stronger culture, which is industrialized, modern, progressive, fair.⁹⁴ Indeed, this division expresses hostility and lack of similarity between the colonial binaries of us and them, here and there, west and non-west, coloniser and colonised.⁹⁵ When mainstream society speaks, writes, and reifies

Orientalism was a library or archive of information commonly, and in some of its aspects, unanimously held. What bound the archive together was a family of ideas and a unifying set of values proven in various ways to be effective. These ideas explained the behaviour of Orientals; they supplied Orientals with a mentality, a genealogy, an atmosphere; most important, they allowed Europeans to deal with and even to see Orientals as a phenomenon possessing regular characteristics. But like any set of durable ideas, Orientalist notions influenced the people who were called Orientals as well as those called Occidental, European or Western. ... If the essence of Orientalism is the ineradicable distinction between Western superiority and Oriental inferiority, then we must be prepared to note how in its development and subsequent history Orientalism deepened and even hardened the distinction.

⁹³ Said, *supra* note 34 at 205.

⁹⁴ Focusing on Western accounts of other cultures as contingent fictions, U. Narayan argues, in *Essence of Culture and a Sense of History: A Feminist of Cultural Essentialism* (Bloomington: Indiana University Press, 1998) at 4:

This frequently reiterated contrast between "Western" and "Non-western" cultures was a politically motivated colonial construction. The self-proclaimed "superiority" of "Western culture" functioned as the rationale and mandate for colonialism. The colonial self-portrait of "Western culture" had, however, only a faint resemblance to the moral, political, and cultural values that actually pervaded life in Western societies. Thus liberty and equality could be represented as paradigmatic "Western values," hallmarks of its civilizational superiority, at the very moment when Western nations were engaged in slavery, colonization, expropriation, and the denial of liberty and equality not only to the colonized but to large segments of Western subjects, including women. Profound similarities between Western culture and many of its Others, such as hierarchical social systems, huge economic disparities between members, and the mistreatment and inequality of women, were systematically ignored in this construction of "Western culture."

⁹⁵ Said, *supra* note 34 at 45:

When one uses categories like Oriental and Western as both the starting and the end points of analysis, research, public policy, the result is usually to polarize the distinction—the Oriental becomes more Oriental, the Westerner more Western—and limit the human encounter between different cultures,

Oriental cultural identity, the subject who is spoken of, the “Oriental” man or woman created from the position from which we speak and write, is often viewed and judged as the exotic “Other.”

In *R. v. Ammar Nouasria*,⁹⁶ Orientalist assumptions served to reduce the sentence of a Muslim man found guilty of four offences relating to sexual misbehaviour with his spouse’s daughter. In this decision, “Oriental/Muslim” culture becomes defined through legal discourse based on its differences from mainstream society. This is the production of identity within a stable, unchanging and continuous frame of reference and meaning—the (mis)representation of the Orient within the dominant regime of representation of the West. Further, “cultural bias,”⁹⁷ by emphasizing race over gender, is shown by this sexual assault case to work to the disadvantage of Muslim women and girls.

1. Sexual abuse, sodomy, and lack of remorse

In July 1989, the accused, a 37-year-old man, got married to Hemniene Mokharia, who had four children from a previous marriage; since then, the couple has had two children. The accused was found guilty of sexual touching of a person under the age of 14 pursuant to s. 151 of the *Criminal Code*, invitation to sexual touching of a person under the age of 14 pursuant to s. 152, engaging in anal intercourse pursuant to s. 159, and sexual assault pursuant to s. 265. All the sexual activity embraced by the four convictions took place between the accused and his spouse’s daughter, commencing in July 1989, that is, when the complainant was 9 years old, and terminating in January 1992, when she was 11 years old. Both the accused and the victim are Muslim. The sexual activity in-

traditions, and societies. In short, from its earliest modern history to the present, Orientalism as a form of thought for dealing with the foreign has typically shown the altogether regrettable tendency of any knowledge based on such hard-and-fast distinctions as “East” and “West”: to channel thought into a West or an East compartment. Because this tendency is right at the centre of Orientalist theory, practice, and values found in the West, the sense of Western power over the Orient is taken for granted as having the status of scientific truth.

Western thought has produced many of such mutually exclusive oppositions: subject/object, mind/body, nature/culture, good/bad, pure/impure. The first side of the dichotomy, considered as the unified and the self-identical, is elevated over the second, which designates the chaotic and the unformed. See Young, *supra* note 3 at 99.

⁹⁶ *R. v. Ammar Nouasria* (13 janvier 1994), 500-01-003139-927 (Cour du Québec) [hereinafter *Ammar Nouasria*].

⁹⁷ By “cultural bias,” I mean the utilisation by courts of an opinion regarding another culture “which is stereotypic and insensitive to the cultural attributes of the people involved.” See N.W.T., N.W.T. Status of Women Council, *Brief to the Judicial Inquiry into the Conduct of Territorial Court Judge R.M. Bourassa* (Yellowknife: N.W.T. Status of Women Council, 18 June 1990) 10.

cluded fellatio, anal intercourse, kisses, touching of the breasts, and touching of the vaginal area with his penis and fingers. The accused did not have complete vaginal intercourse with the victim. Over a period of two years on a monthly basis, twenty incidents occurred and, in most cases, anal intercourse was involved. The accused used psychological pressure and threats to coerce the complainant to participate in sexual activities. He would promise her special favours, presents and fieldtrips while at the same time threatening to punish her if she would not obey. On one occasion, when the complainant mentioned to her mother that the accused had sexually abused her, he slapped her in front of her mother and said she was lying. The victim finally decided to speak out when she complained about physical pain. The doctor confirmed that she had 5 cuts in the anal area. During the period of the sexual abuse, the victim suffered from insomnia and nightmares, was unable to concentrate and did not perform well at school. She was subsequently placed in a foster home.

The accused was unemployed for about two years at the time of sentencing. He did not testify at his trial and argued that the victim fabricated the evidence. He showed no sympathy or remorse for his crimes and refused treatment. The probation officer concluded that, under such circumstances, no rehabilitation could be envisaged, for the risks of recidivism with the other children of the household could not be eliminated.

2. Incest, Muslim culture, and the significance of virginity in sentencing

The culturally dominated undergo a paradoxical oppression, in that they are both marked out by stereotypes and at the same time rendered invisible. As remarkable, deviant beings, the culturally imperialised are stamped with an essence. The stereotypes confine them to a nature which is often attached in some way to their bodies, and which thus cannot easily be denied.⁹⁸

Most criminal law cases contain a mix of aggravating and mitigating factors. The sentencing process involves noting and weighing each and settling upon a sentence which reflects that balancing. Among the factors which permit the determination of the extent of an offender's criminal liability for the purposes of sentencing for sexual offences, the following are worthy of mention. For sexual offences against children, possible mitigating circumstances include the marginal intelligence of the accused,⁹⁹ evidence of progress in the course of psychotherapy,¹⁰⁰ the remorse of the accused (confessions, collaboration in the investigation, immediate involvement in a treatment programme, potential for rehabilitation, and compassion and empathy for the victims),¹⁰¹ no criminal record

⁹⁸ Young, *supra* note 3 at 59.

⁹⁹ See *R. v. Bear* (1983), 30 Sask. R. 116 (C.A.) and *R. v. P.* (8 July 1991), (Y.T.C.A.).

¹⁰⁰ See *R. v. Beaudin*, [1981] O.J. No. 36 (C.A.); *R. v. R.J.S.*, [1983] O.J. No. 168 (C.A.).

¹⁰¹ See e.g. *R. v. Bouchard*, J.E. 90-1136 (Que. C.A.).

for similar offences,¹⁰² and the ill-health of the accused.¹⁰³ However, where the accused is in a position of trust in relation to the child, the violation of this trust through sexual abuse will often be noted by the court as an aggravating factor.¹⁰⁴ With regard to offences in which the very person to whom the child looks for protection is the abuser, courts insist on the fact that society's revulsion must be clearly expressed through denunciatory sentences.¹⁰⁵ Also, courts may impose higher sentences where bodily interference¹⁰⁶ and the use of violence, psychological threats and manipulation¹⁰⁷ are involved. The frequency of the offences and the time period over which they were committed may also contribute to a longer sentence.¹⁰⁸

In *R. v. Ammar Nouasria*, the accused stepfather was found guilty of four charges. The maximum term of imprisonment for these sexual offences is 10 years. On 13 January 1994, Quebec court Judge Raymonde Verreault surprisingly imposed a concurrent sentence of 23 months' imprisonment and one year of probation for the sexual offences. Some mitigating factors formed the basis of this sentence. The fact that the accused did not have complete vaginal intercourse with the victim was considered as a mitigating factor for the count of anal intercourse. The trial judge took into consideration the fact that the accused preserved the virginity of the victim, something important to him and to the victim, both of whom are Muslim. The court noted:

¹⁰² See *R. v. Brown* (1984), 49 Nfld. & P.E.I.R. 14 (C.A.).

¹⁰³ See *R. v. Ross* (1984), 57 A.R. 79 (C.A.); *R. v. McDonnell* (26 August 1991), (Nfld. C.A.).

¹⁰⁴ See *R. v. Farmer* (1978), 30 N.S.R. (2d) 79 (C.A.) (three years imprisonment for intercourse with 13-year-old stepdaughter); *R. v. Herritt* (1984), 63 N.S.R. (2d) 51 (C.A.) (five years imprisonment for intercourse and forced fellatio with 11-year-old girl visiting the accused's home); *R. v. S.(L.H.)* (9 August 1999), Doc. Vancouver CA023066 (B.C.C.A.) (5 years 4 mos. imprisonment for sexual interference, invitation of sexual touching, sexual assault and assault causing bodily harm with the accused's 8-year-old step-daughter).

¹⁰⁵ See *R. v. Palmer* (1985), 7 O.A.C. 348 in which MacKinnon A.C.J.O. held at 350:

The sexual abuse of a child by one *in loco parentis* is a very serious crime. It is a gross abuse of trust and power which society does not tolerate. It warrants, absent quite exceptional circumstances, a denunciatory sentence which reflects society's revulsion at this type of conduct and at the same time has regard to the possibility of rehabilitation of the offender.

¹⁰⁶ See *R. v. Laurie* (1984), 46 Nfld. & P.E.I.R. 348 (Nfld. Dist. Ct.); *R. v. Matheson* (1984), 57 A.R. 396 (C.A.).

¹⁰⁷ See *R. v. Caldwell* (1974), 10 N.S.R. (2d) 187 (C.A.) (five years' imprisonment for violent rape of 10-year-old girl); *R. v. Young* (1980), 27 C.R. (3d) 85 (B.C.C.A.) (seven years' imprisonment for 'cruel homosexual rapes, of young boys'); *R. v. Hardy* (1984), 4 O.A.C. 39 (fourteen years' imprisonment for violent extended rape of 12 year-old girl).

¹⁰⁸ See *e.g. R. v. C. (P.)*, [1997] R.J.Q. 1263 (Que. C.A.).

The mitigating factors are ... the fact that the accused did not have normal and complete sexual relations with the victim, that is to say, vaginal sexual relations, to be more precise, so that he could preserve her virginity, which seems to be a very important value in their religion. We can say that, in a certain way, the accused spared his victim.¹⁰⁹

The court's underlying, unstated argument seems to be this: if the accused was nice enough to preserve the girl's virginity while sodomising her over more than two years, it was in order to respect and espouse the "so-called" Islamic prescriptions to which the judge refers as a cultural defence. Yet cultural (in)sensitivity rests on a highly Orientalist, unsophisticated view of culture.¹¹⁰ The judge does not tell us what difference it makes to a sodomy offence for the accused to be affiliated with the Islamic faith and how this element constitutes a mitigating factor. What we know, however, is that such a choice of words is used to mark Muslim people as the "Other," as deviant in relation to the dominant norm which is unmarked and invisible.

In *Ammar Nouasria*, the existence of a different value system for Muslim people living in Canada is constructed,¹¹¹ one based on the notion of cultural difference as inferiority. Further, the "Othering" performed by the court operates to define sharply the binaries of "them" and "us," the Arab and the non-Arab, the Muslim and the non-Muslim. According to this analysis, a man would deserve a lighter sentence for having non-consensual sex whenever the name of his God and the victim's God is Allah. From this legal discourse, is born and reborn the Orientalist and the Oriental, through a process of identity constitution which is grounded in a separation of Self and Other:

... since it is more or less assumed that no Oriental can know himself the way an Orientalist can, any vision of the Orient ultimately comes to rely for its coherence and force on the person, institution, or discourse whose property it is.¹¹²

Judge Verreault's *Ammar Nouasria* ruling uses culture to encompass a specific set of attitudes, values, and responses that characterise all members of a group. The Oriental Muslim individuals involved thus find themselves defined from the outside, positioned within a network of dominant meanings that they experience as arising from elsewhere, from those who do not identify with them but who will however speak in their names and in the name of Islam.

¹⁰⁹ *Ammar Nouasria*, *supra* note 96 at 4.

¹¹⁰ Montreal's Muslim community was not alone in its outrage at the use of such stereotypes. See A. Gruda, "Sodomie et interculturelisme" *La Presse* (18 January 1994) B2.

¹¹¹ The defence attorney confessed to *The Gazette* that the judge wrote a "very, very courageous" decision, for "she did recognize that there's a value structure.", in G. Baker, "Stepdad gets 2 years in Sex Assault" *The [Montreal] Gazette* (14 January 1994); See also I. Block, "Women Outraged by Judge's Remarks" *The [Montreal] Gazette* (15 January 1994).

¹¹² Said, *supra* note 34 at 239.

3. Sexual assault of Muslim girls: a lower sentence?

While cultural considerations may be intended to promote sensitivity, dominant groups too readily adopt the cultural differences approach, relieved not to have to confront the realities of racism and sexism.¹¹³

As I have argued in the section on *Lucien*, when race and gender are considered in the context of sexual assault, intersectionality can be used to highlight the ways in which racism and sexism operate to conceptualise the offence and to describe the unique marginalisation of women of colour caught between two systems of domination. Just as culture became a mitigating factor in the sentencing of minority men convicted of sexual assault in *Lucien*, the harm of rape suffered by women of colour is minimised by the judicial process in *Ammar Nouasria*. At the same time, the legal discourse of both cases reinforces the assumption that minority women experience sexual abuse differently from women belonging to mainstream society. As Sherene Razack has argued: “Racialised women ... are considered inherently less innocent and worthy than white women, and the classic rape in legal discourse is the rape of a white woman.”¹¹⁴

In *Ammar Nouasria*, the conceptualisation of sexual abuse is not only racist but also sexist. In effect, the court scrutinises the complainant’s life, attitudes and behaviour to determine whether she was an innocent victim. Implicit in the argumentation of Judge Verreault is the idea that the 11 year-old Muslim girl made herself sexually available, that she was somehow *participating actively* and even *making the sexual abuse happen*. After having constructed the reasons why she supposedly *encouraged* the sexual assault, the court takes these mitigating factors into account to determine which sentence is appropriate:

This Court also takes into consideration, even though it is not an excuse nor a defence for the accused, the fact that the victim, in her behaviour and attitudes, seemed to have experienced at a certain moment all kinds of attitudes towards the accused, which can lead to the conclusion that she acted out of hatred towards her mother, because she intended to keep the accused away from her mother or because she wanted to take her place.

As I mentioned earlier, this behaviour is certainly not a defence when a nine or ten year old child is involved. But all these mixed feelings for the accused which, according to me, ranged from on the one hand feelings of affection towards the accused and a desire that he perhaps replaces the real father and, on the other hand, hatred, revenge, and as I mentioned, a desire to put the mother aside, all of this constitutes factors that this Court has to take into account in sentencing.

In the colonial gaze of the court, the victim is rendered responsible for the sexual abuse. She must have done something to deserve being sodomised for so

¹¹³ S. Razack, *supra* note 17 at 85.

¹¹⁴ S. Razack, “What Is to Be Gained by Looking White People in the Eye? Culture, Race, and Gender in Sexual Violence” (1994) 19 *Signs* 894 at 899.

long. And she must have her reasons, says the court: either “*she* acted out of hatred towards her mother, because *she* intended to keep the accused away from her mother or because *she* wanted to take her place.” She, not He. She acted: He replied.

Women of colour, as Kimberlé Crenshaw has demonstrated, are cast into a sexual hierarchy which holds certain female bodies in higher regard than others. Writing of the situation in the United States, she states:

Statistics from prosecution of rape cases suggest that this hierarchy is at least one significant, albeit often-overlooked, factor in evaluating attitudes towards rape. A study of rape dispositions in Dallas, for example, showed that the average prison term for a man convicted of raping a black woman was two years, as compared to five years for the rape of a Latina and ten years for the rape of a white woman.¹¹⁵

One must recognise and expose Orientalism and map the ways in which it works to propagate lies about cultures, and portray ugly faces to represent them. Just as women who led sexually autonomous lives were in the past the least likely to be vindicated if they were raped,¹¹⁶ so too women of colour may suffer discrimination since in the good/bad woman dichotomy¹¹⁷ they are associated with the latter. Speaking of colonialism, Aimé Césaire reminds us:

¹¹⁵ Crenshaw, *supra* note 56 at 1252.

¹¹⁶ For an analysis of whether the prior sexual history of a complainant is relevant or/and admissible in a trial of sexual assault, see *Seaboyer*, *supra* note 14. On the issue of the application of myths and stereotypes to women in the realm of sexual assault trials, and in particular the relevance of the prior sexual history of a complainant in the trial of an accused charged with sexual assault, see E.A. Sheehy, “Canadian Judges and the Law of Rape: Should the Charter Insulate Bias?” (1989) 21 *Ottawa L. Rev.* 741; E.J. Shilton & A.S. Derrick, “Sex Equality and Sexual Assault: In the Aftermath of *Seaboyer*” (1991) 11 *Windsor Y.B. Access Just.* 107.

¹¹⁷ In *Seaboyer*, *ibid.*, Madame Justice L’Heureux-Dubé offers significant insights with regard to the prevalence and impact of discriminatory beliefs on trials of sexual offences. More specifically, she states at 654:

This list of stereotypical conceptions about women and sexual assault is by no means exhaustive. Like most stereotypes, they operate as a way, however flawed, of understanding the world and, like most such constructs, operate at a level of consciousness that makes it difficult to root them out and confront them directly. This mythology finds its way into the decisions of the police regarding their “founded/unfounded” categorization, operates in the mind of the Crown when deciding whether or not to prosecute, influences a judge’s or juror’s perception of guilt or innocence of the accused and the “goodness” or “badness” of the victim, and finally, has carved out a niche in both the evidentiary and substantive law governing the trial of the matter.

Brooks, Doob, and Kirshenbaum (1975) found that jurors were more likely to convict a defendant accused of raping a woman with a chaste reputation than an identical defendant charged with assaulting a prostitute. Information on

First we must study how colonisation works to *decivilise* the coloniser, to *brutalise* him in the true sense of the word, to degrade him, to awaken him to buried instincts, to covetousness, violence, race hatred and moral relativism; and we must show that each time a head is cut off or an eye put out in Vietnam and in France they accept the fact, each time a little girl is raped and in France they accept the fact, each time a Madagascan is tortured and in France they accept the fact, civilization acquires another dead weight, a universal regression takes place, a gangrene sets in, a centre of infection begins to spread.¹¹⁸

Each time a girl of colour is raped and in white courtrooms this crime is explained away, each time an accused of colour sexually assaults such a girl and in white courtrooms they call this “cultural,” and each time this process is understood to be universal and objective, an analogous centre of infection begins to spread in legal discourse and in legal method.

4. The Quebec judicial council: when all that matters is good faith

What is important in a work is what it does not say. This is not the same as the careless notation “what it refuses to say,” although that would in itself be interesting: a method might be built on it, with the task of *measuring silences*, whether acknowledged or unacknowledged. But rather this, what the work *cannot* say is important, because there the elaboration of the utterance is carried out, in a sort of journey of silence.¹¹⁹

As a consequence of the widely reported nature of her comments, Madame Justice Verreault was ordered to appear before the Quebec Judicial Council after nine complaints were lodged against her regarding the grounds upon which her judgment had been delivered. On 16 February 1994, the Quebec Judicial Council ordered the establishment of an inquiry; the inquiry report was deposited on 6 July 1994.¹²⁰ In characterising the legal issue in a highly narrow manner, the Council came to the conclusion that no disciplinary sanctions should be imposed.

The Council’s analysis involves s. 1 of the *Code de déontologie*, which provides: “The role of the judge is to deliver justice within the limits of the law.”¹²¹ In its decision, the Council defines the scope of s. 1 as including only those instances in which a judge who fails to deliver justice within the limits of the law does so deliberately, that is with knowledge that the grounds on which she or he

the “good” or “bad” character of the victim appears to affect the decisions of the jurors, and the definitions of good or bad are likely to be broadly defined.

¹¹⁸ A. Césaire, *Discourse on Colonialism* (New York: Monthly Review Press, 1972) at 10.

¹¹⁹ P. Macherey, *A Theory of Literary Production*, trans. G. Wall (London: Routledge, 1978) at 87.

¹²⁰ See *Conseil de la Magistrature*, S. Guillemette Le Barreau du Québec *et al.* (Plaignants) et Madame la juge Raymonde Verreault (Intimée) No. 8-93-40.

¹²¹ See *ibid.* at 3.

relies are contrary to what the law commands. The Council thus frames the scope of its judicial inquiry as narrowly as possible:

It seems obvious that the mere fact of delivering a bad judgment does not constitute a violation of section 1 of the *Code de déontologie*. If a judge, by omission, by mistake or even through ignorance does not apply a section of the law, or if she or he wrongly considers that a section of the law cannot be applied to the case, or again if she or he does not interpret it appropriately, the right instance to complain about the decision is the court of appeal. So is the case where a judge, exercising her/his judicial discretion in good faith, takes account of reasons which she or he should not have legally considered. In such cases, the judge does err in law, but she or he does so within the limits of his judicial discretion and his decision cannot be challenged before a disciplinary board.

Such is not the case, however, where a judge, deliberately, does not apply the law, or gives consideration to certain reasons that, as she or he knows, must be ignored under the law. In such cases, disciplinary sanctions become applicable, notwithstanding the reasons which drove the judge to so doing. [emphasis added]¹²²

In other words, even though a judge clearly delivers justice *outside* the limits of the law, if she or he does so in good faith, the Judicial Council is satisfied. But what does good faith entail? If a judge relies on racist or sexist reasons to deliver justice but does so due to ignorance, is this good faith? If a judgment is based on myths and stereotypes about a disadvantaged group in Canadian society, but this judgment was delivered precisely because such stereotypes have spread and become our conception of this particular group, is this good faith? As we know, racism and sexism are often produced without any intention to discriminate, that is, they are produced in good faith. Can the Judicial Council intervene in these circumstances? Disciplinary sanctions will be imposed by the Judicial Council only if a judge, *deliberately*, does not apply the law, or gives consideration to certain reasons that, *as she or he knows*, must be ignored under the law. What possible scenarios can we imagine under such narrow conditions? Would a judge seriously ignore the law only for the sake of it?

The result of the Council’s formalism, therefore, is to render invisible the inappropriate comments made about Muslim people which form, in *Ammar Nouasria*, the basis of the sentence. Examining whether Judge Verreault’s remarks on the significance of a Muslim girl’s virginity were made within the limits of the law, the Council states:

The respondent’s decision convinces us that she tried to guide herself as to legal principles and to take into account the factors that she deemed relevant to the decision she had to deliver. If she did err, she clearly did so in good faith, and it is the court of appeal’s role to determine so.

¹²² See *ibid.* at 6.

Therefore, the respondent did not contravene section 1 of the Code de déontologie.¹²³

On 6 July 1994, Judge Verreault was not reprimanded by her peers. But what matters in the Judicial Council's decision is not so much its content. Rather, it is what it does not say. And, above all, what it cannot say. The task of "measuring silences" gives a better understanding of how racism and sexism can become invisible. By merely stating that Judge Verreault delivered justice in good faith, the Judicial Council puts aside the "biases"¹²⁴ which are at the heart of the decision and thus participates in the construction of the Other as barbaric and deviant. The first step in gaining a conscious understanding of people of another culture is to realize that we constantly *interpret* their acts, and that we do so subconsciously but always in conformity with what our culture has taught us. Stereotypes and myths are part of Canadian society, and hence part of a judiciary composed of Canadians.¹²⁵ As Madam Justice Rosalie Abella puts it: "Every decision maker who walks into a courtroom to hear a case is armed not only with the relevant legal texts, but with a set of values, experiences and assumptions that are thoroughly embedded."¹²⁶

In Canada, as elsewhere in Western countries, Islam is denigrated and Muslims are marginalised through the use of stereotypical images.¹²⁷ The Judicial Council rendered its decision without condemning the (mis)use of stereotypical

¹²³ See *ibid.* at 7.

¹²⁴ The Hon. M. Omatsu, "The Fiction of Judicial Impartiality" (1997) 9 C.J.W.L. 1, defines the notion of "bias" in the following manner:

I take it that a judge is biased when he or she is disposed to make unjustified judgments either of fact or of law to the disadvantage or to the advantage of specific individuals or categories of individuals.

¹²⁵ See *ibid.*

¹²⁶ Quoted by Omatsu, *ibid.* at 8.

¹²⁷ The OCI (Organisation de la Conférence Islamique) has been worried about the negative image of Muslims in the Western world. On this topic, see AFP, Casablanca, "L'OCI se dit préoccupée par la mauvaise image de marque de l'Islam en Occident" *La Presse* (11 December 1994) A10. Also, see R. Hassan's observation, in "Rights of Women Within Islamic Countries" (1995) 15:2 & 3 CWS/CF 40 at 40:

Given the reservoir of negative images associated with Islam and Muslims in "the collective unconscious" of the West, it is hardly surprising that, since the demise of the Soviet Empire, "the World of Islam" is being seen as the new "enemy" which is perhaps even more incomprehensible and intractable than the last one. The routine portrayal of Islam as a religion spread by the sword and characterized by "Holy War", and of Muslims as barbarous and backward, frenzied and fanatic, volatile and violent, has led, in recent times, to an alarming increase in "Muslim-bashing"—verbal, physical, as well as psychological—in a number of western countries."

images about Muslim people in *Ammar Nouasria*, that is the use of the following equivalence: Islam equals the importance of virginity which equals a lower sentence. Instead of naming the oppression thereby created, the Council designates the Court of Appeal as the appropriate forum to resolve the issue; but would that Court be a better venue?

5. *The appeal: the silence and violence of myths*

In a world where language and naming are power, silence is oppression, is violence.¹²⁸

For an appeal to be heard, a judge must have erred in law, either because she or he gave a wrong interpretation of the law or because she or he wrongly considered that a section of the law could not be applied to the case at hand. Such is the case where a judge, exercising judicial discretion in good faith, takes account of reasons which she or he should not have legally considered. But *Ammar Nouasria* is not a case about the wrong application or interpretation of a section of the law: it is a case about myths and stereotypes. Above all, it is a case about racist and sexist assumptions regarding Muslim men and women living in Canada. To ignore the incidence of such biases in the judiciary is to perpetuate discriminatory beliefs about people who belong to minority groups. Silence is oppression, is violence. More and more, the Supreme Court of Canada is willing to shed light on the myths and stereotypes that influence judicial interpretation.¹²⁹ In *Ewanchuk*, Madame Justice L’Heureux-Dubé, writing of the rape myths that have improperly formed the background for sexual assault trials, asserted:

Rape myths include the false concepts that: women cannot be raped against their will; only “bad girls” are raped; anyone not clearly of “good character” is more likely to have consented. ... History demonstrates that it was discretion in trial judges that saturated the law in this area with stereotype. My earlier discussion shows that we are not, all of a sudden, a society rid of such beliefs, and hence, discretionary decision making in this realm is absolutely antithetical to the achievement of government’s pressing and substantial objective. ... Complainants should be able to rely on a system free from myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions.¹³⁰

¹²⁸ A. Rich, *On Lies, Secrets and Silence: Selected Prose 1966–1978* (New York: Norton, 1979) at 203.

¹²⁹ For a discussion of myths and stereotypes in judging sexual assault cases in Canada, see *R. v. W.(G.)* (1999), S.C.J. No. 37 at para. 29, per L’Heureux-Dubé J.; *R. v. Ewanchuk* (1999), 1 S.C.R. 330 at para. 82 and 87–97, per L’Heureux-Dubé J. [hereinafter *Ewanchuk*]; *R. v. Esau* (1997), 2 S.C.R. 777 at 814–15, per McLachlin J.; *R. v. Osolin* (1993), 4 S.C.R. 595 at 670, per Cory J.; *Seaboyer*, *supra* note 14 at 604 and 630, per McLachlin J., and at 651, per L’Heureux-Dubé J.

¹³⁰ *Ewanchuk*, *ibid.* at 375.

In order for our system to try to be free from myths and stereotypes, the judiciary should take the leading role in deploring biased assumptions. In *Ammar Nouasria*,¹³¹ the Court of Appeal did not take such an initiative. Even though imprisonment of 42 months was substituted on the count of anal intercourse and the probation order was quashed, the Court did not consider the prevalence and impact of Orientalist beliefs on the trial. Deterrence was the key factor, in light of the accused's denial of the offences and refusal to take treatment.¹³² The formalism of legal method again smothered a popular outcry about overt cultural prejudice. The Court of Appeal substituted the arid language of sentencing principles for judicial denunciation of the offensive posture of the trial judge.

III. THE *HIJAB* IN QUÉBEC: EXCLUSION, ASSIMILATION, OR INTEGRATION?

How did we come to believe that difference is intrinsic in the "different" person; that the norm used for comparison need not be stated; that an observer can see without a situated perspective; and that competing perspectives of those labeled different are irrelevant? How did we come to believe that the existing institutional arrangements, which treat some people as normal and others as different, are themselves natural, inevitable, and good?¹³³

ISLAMIC LAW AND THE PRACTICES IT GENERATES ARE often viewed in the West as patriarchal, oppressive to women, and thus incompatible with Western values such as democracy and human rights. As a result of the colonialist heritage, the typical Orientalist view of Muslim women pictures them as oppressed, passive, and confined to the private.¹³⁴ The recent debate in Québec over the wearing, in public schools, of the *hijab*—the scarf used to cover the head of Muslim women and girls—offers an interesting theoretical framework for reflection on the permissible use of cultural specificity in Canadian law.¹³⁵ In Septem-

¹³¹ *R. v. Nouasria*, (1994) 31 C.R. (4th) 296 (Cour d'Appel du Québec).

¹³² Y. Boisvert, "La sentence controversée du juge Verreault révisée à la hausse par la Cour d'appel" *La Presse* (8 July 1994) A1.

¹³³ Minow, *supra* note 9 at 97.

¹³⁴ See S. Khan, "The Veil as a Site of Struggle: The *Hijab* in Quebec" (1995) Vol. 15:2 & 3 Canadian Women Studies 146; L. Abu-Odeh, "Post-Colonial Feminism and the Veil: Considering the Differences" (1992) 26:4 New Eng. L. Rev. 1527; L. Abu-Odeh, "Comparatively Speaking: The 'Honor' of the 'East' and the 'Passion' of the 'West'" (1997) 2 Utah L. Rev. 287; R. Hassan, "Rights of Women Within Islamic Countries" (1995) 15:2 & 3 CWS/CF 40; A.Y. al-Hibri, "Deconstructing Patriarchal Jurisprudence in Islamic Law A Faithful Approach" (1997) 12 American University J. of Intl. L. and Policy 1.

¹³⁵ See M. McAndrew & M. Pagé, "Entre démagogie et démocratie: Le débat sur le hijab au Québec" (1995) [unpublished, archived at Université de Montréal]. For further discussion

ber 1994, Émilie Ouimet, a 13-year-old girl, was excluded from l'École secondaire Louis-Riel for wearing the *hijab* in contravention of the school's dress code,¹³⁶ which prohibited any clothes or accessories that would marginalise a student.

In February 1995, the Québec Commission des droits de la personne denounced the ban in an advisory opinion. The commission proposed an interpretation of the law which would go beyond myths and stereotypes. It stated: "It is ... important that we do not "ethnicize" conflicts of a religious nature, but we must also be aware that racism may sometimes lie at the root of religious intolerance."¹³⁷ Examining whether the values embedded in the veil may be contrary to the value of sexual equality, the Commission held:

For many people, the veil signifies and even serves as a vehicle for the oppression of women in the Muslim world. ... Many people have expressed concern about the right to equality of young Muslim women who, consciously or not, might not wear the veil entirely of their own will. Some clarification is needed here.

Beyond differences in Koran interpretation and out of respect for the people who choose to wear the veil, we must assume that this choice is a way of expressing their religious affiliation and convictions. *In our view, it would be insulting to the girls and women who wear the veil to suppose that their choice is not an enlightened one, or that they do so to protest against the right to equality.* It would also be offensive to classify the veil as something to be banished, like the swastika, or to rob it of its originality by comparing it to a simple hat.[emphasis added]

In general terms, therefore, the veil should be seen as licit, to be prohibited or regulated only if it can be proved that public order or the equality of the sexes is threatened.

This would be the case, for example, if students were forced to wear the veil against their will. While a school must, in the name of freedom of conscience, respect the freedom of students who wish to wear the veil, it must also, for the same reason, support those who do not wish to do so.¹³⁸

Through these comments, the Commission does not establish the limits of knowledge about the Other. For the Muslim woman is not so named. She is un-

of the limits of cultural accommodation within Quebec society, in particular regarding the *hijab* and female genital mutilation, see J. Webber, "Multiculturalism and the Limits to Toleration" in A. Lapierre *et al.*, eds., *Language, Culture and Values in Canada at the Dawn of the 21st Century* (Ottawa: International Council for Canadian Studies, 1996) 269.

¹³⁶ This is the first publicly known case involving the *hijab* in Quebec public schools. See F. Berger, "Élève expulsée de son école parce qu'elle portait le foulard islamique" *La Presse* (9 September 1994) A1.

¹³⁷ Québec, *Religious Pluralism in Quebec: a Social and Ethical Challenge* (Québec: Québec Human Rights commission, February 1995) at 9.

¹³⁸ *Ibid.* at 18 and 39.

certainty itself. She can be veiled and free, veiled and oppressed, veiled and unhappy to be, or veiled and proud to be. She is imagined as having several contradictory faces. What she is not, however, is a woman in need of being saved.¹³⁹ In not claiming to know what is best for her and whether she is truly free, law avoids the use of “the binary of the civilized and liberated Western woman and her oppressed Third World sister.”¹⁴⁰ Because the norm is explicitly stated and evaluated in the opinion (we, non-Muslim people, view the veil as a vehicle for the oppression of women), difference can be understood as a function of relationships rather than being conceived as intrinsic.¹⁴¹ Rather than reinforcing existing arrangements based on the unstated norm of the non-veiled girl, the Commission attempted to create a different norm from which the entire classroom might be constructed. Identity is acknowledged as composed of more than one discourse, as formed in ambivalence and impurity. The veil is no longer a static colonial image, a sealed totality.

In effect, the *hijab* case transcends the universality/cultural relativity dilemma in so far as the Muslim veiled girl is neither excluded from the classroom because she is *not* the same, nor tolerated because she is *so* different and inferior. Under the universalist approach, the veil would have been constructed as the inevitable symbol of oppression of women and thus banned on that basis. Through this colonial gaze, the Muslim girl would have become different, deviant and Other from the point of reference of the Western norm, which expresses the perspective of the majority. A notion of universality which disregards difference calls for assimilation to the unstated norm.

On the other hand, the cultural relativist approach would have asserted that Muslim people have distinct perspectives on social life and, although some of their beliefs are backward, Canadian society must recognise cultural diversity. As a consequence of this underlying assumption, the veil would not have been

¹³⁹ For a description of the media narrative of Western superiority over Islamic people, see E.W. Said, *Covering Islam: How the Media and the Experts Determine How We See the Rest of the World* (New York: Pantheon 1981).

¹⁴⁰ Razack, *supra* note 17 at 6.

¹⁴¹ Minow, *supra* note 9 at 79:

This ambivalence is itself sustained by a set of usually unstated assumptions. “Different” traits are regarded as intrinsic to the “different” person, and the norm used to identify difference is assumed to be obvious, needing neither statement nor exposure to challenge. Differences are presumed identified through an unsituated perspective that makes other perspectives irrelevant and sees prevailing social arrangements as natural, good, and uncoerced. The chief effect of these assumptions is to deposit the problem of difference on the person identified by others as different. Screened out by these assumptions are the possibilities that difference expresses patterns of relationships, social perceptions, and the design of institutions made by some without others in mind.

challenged under the sexual equality principle, for the oppression of women that it reflects is deemed part of *their* norms and practices. The recognition of difference also connotes deviance, and risks propagating the negative stereotypes which are at the heart of the Othering process. A notion of cultural relativity which sees difference as cultural inferiority perpetuates a subtle form of racism which lies hidden behind an attempt to be culturally sensitive.

Under both approaches, the “us” and “them” colonial binaries stand as excluding categories. Culture and religion are monolithic, unified, and ahistorical realities. Identity is fixed. The Muslim girl is defined from the outside: we already know who she is, what she stands for, and how terribly sad it must be to walk with sexual inferiority written on your forehead. To escape the colonial gaze, the issue has to be recast as one not of insiders and outsiders in Canadian society, but rather as one of relocating the centre from which one determines who is inside and who is not. The *hijab* story did so. For the notion of identity moves through the commission’s decision as an unstable and undefined expression which insists on heterogeneity, fluidity, and relational knowledge. This is the essence of plural consciousness, the willingness to negotiate and renegotiate our knowledge of what it means to be different, and how and why it matters.

IV. CONCLUSION

SHAHNAZ KHAN POINTS OUT THAT CANADIAN multiculturalism reinforces stereotypes of monolithic communities.¹⁴² Not only does encapsulating the totality of one’s culture result in essentialisation, but it also presents the culture as divorced from the realities and experiences of the people involved. One of the chief problems with this policy is that it fails to capture the constantly dynamic reality of racial communities and ignores the manner in which culture is relational and fluid—how cultural identity is “a matter of ‘becoming’ as well as ‘being.’”¹⁴³ The phenomenon of the colonial construction of subjects such as the “Arab,” the “Haitian male,” the “Muslim woman,” and so on expresses and ensures cohesion while obscuring differences within the culture.¹⁴⁴

¹⁴² As Khan, *supra* note 134 at 148 suggests:

In such a manner material issues confronting individuals are reduced to one or two symbols of oppression. The pre-determined and pre-established stereotypes of Muslims and of Muslim woman see Islam as the cause of all problems Muslim women in Canada face. Such a view denies racialisation of Muslims as well as the personal prejudice and systemic barriers which diverse Muslim women face both inside and outside their communities.

¹⁴³ S. Hall, “Cultural Identity and Diaspora” in *Colonial Discourse and Post-Colonial Theory: A Reader* (New York: Columbia University Press, 1994) at 394.

¹⁴⁴ Narayan, *supra* note 94 at 4:

Too often, culture is in the hands of the power elite—often comprised overwhelmingly of white men—and the disempowered are left out of its configuration.¹⁴⁵ Only the gaze of the Other can break down the silence, the boundaries, and the structure of identification wrongly constructed through a single, coherent discourse. Women of colour should be encouraged to attack and problematise mainstream understanding of their culture in the courts of law.

Judges often fail to acknowledge their own perspectives in the elaboration and assignment of cultural difference. I would like to emphasize the need for Canadian jurists to dislocate and displace themselves from the centre of their story and thus aim for the reconceptualisation of stories, that is the construction of the subject as multiply gathered.¹⁴⁶ In this regard, one has to view difference as relational rather than intrinsic, as humanly invented rather than discovered. As Martha Minow writes, “unstated points of reference may express the experience of a majority or may express the perspective of those who have had greater access to the power used in naming and assessing others.”¹⁴⁷

In *R. v. Nouasria*, Nouasria and the eleven-year old complainant were different in relation to the unstated Christian norm. In *R. v. Lucien*, the accused and the complainant were different in relation to the unstated white norm. Yet even though each of these differences is drawn from an implicit comparison, we treat the legal observer as without a perspective, as not judging from a particular

The colonial picture of the sharp contrasts between “Western culture” and its Others also resulted in seriously distorted representations of various “colonized cultures,” often as a result of the prejudiced and ideologically motivated stereotypes held by Western colonizers but also as a result of anti-colonial nationalist movements embracing and trying to revalue the imputed facets of their own “culture” embedded in these stereotypes.

¹⁴⁵ As pointed out by N. Kim in “Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism” (1993) 25 *Colum. Hum. Rts. L. Rev.* 49 at 89:

The communist government of the People’s Republic of China claims that China has its own standards of human rights and that human rights issues fall within China’s domestic jurisdiction. Many Chinese citizens, however, do not adhere to this position, as the events in the spring of 1989 demonstrated. The people whose culture the regime ostensibly was trying to protect rose up in overwhelming numbers to express their dissatisfaction with the “Chinese” attitude toward human rights.

¹⁴⁶ A.P. Harris argues for the conception of the subject as multiplicitous and contingent which can be developed by disrupting the unity and certainty of modern categories and paradigms. See “Foreword: the Jurisprudence of Reconstruction” (1994) 82 *Cal. L. Rev.* 741 at 744.

¹⁴⁷ Minow, *supra* note 9 at 51.

location-maintaining the pretence that a particular is universal.¹⁴⁸ This aspiration to universality and impartiality in legal discourse is a grotesque illusion and must be replaced by a genuine and explicit embrace of cultural difference like that displayed in the case of the *hijab*. All of us will benefit from exploding unstated norms, for legal decision-making will no longer be shielded by claims of universalism from all citizens’ rightful expectations of cultural sensitivity.

¹⁴⁸ J. Bruner writes: “There is no seeing without looking, no hearing without listening, and both looking and listening are shaped by expectancy, stance, and intention.” In *Actual Minds, Possible Worlds* (Cambridge, Massachusetts: Harvard University Press, 1986) at 110.

