

## Reckoning with Racism: Police, Judges and the RDS Case

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RECKONING WITH RACISM:  
POLICE, JUDGES AND THE RDS CASE

—————MCGILL LAW JOURNAL ANNUAL LECTURE—————

*Constance Backhouse\**

I am sometimes asked why I chose to write a book about the RDS case.<sup>1</sup> The idea stemmed from a first-year criminal law class that I was team-teaching at the University of Ottawa Faculty of Law in 2008. As many law professors will agree, we never have enough time to teach cases properly, and in this course, RDS was bundled together with a few other cases in one lecture. My colleague Professor Rosemary Cairns Way and I then asked the students what they understood was the principle that came out of the Supreme Court ruling. With great confidence, they responded, “It’s a good decision. All judges should be impartial.”

And I was repeatedly dumbfounded when the same exchange occurred year after year, because that is *so not* the message that I took out of RDS. The actual message, at least to me, was the peril of assuming that judging is—or can be—impartial. To try to unpack the seeming simplicity and beguiling obfuscation of the concept of “impartial judging,” I thought, would take *more*. It could take up an entire course.

In fact, it led me and my colleagues to speculate that we could reconfigure the teaching of criminal law entirely around a rich single case like this. “Let’s just teach RDS! Nothing but the RDS case,” we ventured. “We’ll start from the encounter between the police and the accused. We’ll look at the history of the Black population in Halifax, the history of policing. We’ll examine the arrest in detail. We’ll look at bail, the history and regulation of legal aid, access to defence lawyers, the structure of the prosecutorial bar. What do careers in criminal lawyering look like – his-

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<sup>1</sup> This transcript is from the delivery of the McGill Law Journal Annual Lecture, Montreal, 23 March 2023. Constance Backhouse, *Reckoning with Racism: Police, Judges, and the RDS Case* (Vancouver: UBC Press, 2022); *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484.

torically and today? We'll take it through the preparation of evidence, the preliminary inquiry, the infrastructure of the courts, the appointments processes for the judges who hear these cases. We'll look at how the media covered the trial, and the role of public information in the criminal process. We'll follow the case through the various appellate processes, examining which cases get appealed and why, and how one prepares differently for appellate litigation than for trial work. We'll take this all the way up to the Supreme Court ruling. We'll run a mock trial with "guest" witnesses. We'll conduct mock appellate hearings with students acting out the various roles. We'll get them to prepare appellate factums and explore the role of interveners. We'll have the students write their own versions of the judgments as they think fair. And every step of the way we will be examining how this case impacted all the people involved. We'll look at every single stage of *RDS* and we'll teach the students about one case in depth."

It would have been a radically different way to teach first-year criminal law, but we marvelled at how exciting it would be to try. And we asked ourselves whether our students would come out knowing less, or more, about the nature of criminal law. Would we do a disservice to the objective of setting a foundational framework in first-year law, or would our students come out more knowledgeable, more prepared? Well, we never got there. Why is it that law professors, including me, cleave so rigidly to 19<sup>th</sup>-century Langdellian pedagogical practices?

Yet the idea of an intensive focus on *RDS* stayed with me. And when I heard about a new series at UBC Press where authors could propose to write a short book on a "landmark Canadian case," I volunteered to do *RDS*. I interviewed over one hundred people who had some connection with or interest in *RDS*. The more I learned about the case, the more I became convinced that the story should not just rest with the bare facts and the law. It required a wider context to situate the case properly within its place and time. Most importantly, I decided that I would write this book about the people who got caught up in *RDS* as principal actors or observers.

As a historian, I find that I spend half my time searching for pictures to illustrate the cases I write about. I know in our contemporary era, people take pictures of everything from daily events to food and holidays, simply everything. But if you go back, historically, finding photographs can take you forever, as much time as you spend in the archives. After several years of searching, I compiled a number of photos relating to *RDS*, too many of which got left on the cutting floor because of understandable strictures regarding manuscript length. Today, I am going to overuse PowerPoint images in my presentation, to profile photographs of the people and the place.

I am going to start with the event that began in October 1993, at a Halifax intersection. Unfortunately, no one took photos on the day of the arrest, but at least we can look at the specific intersection involved. Here was where an interaction took place between a police officer and a teen-aged boy that resulted in charges that ended up in the Supreme Court of Canada.

The judicial proceeding commenced in December 1994, when Rodney Small was tried in the Nova Scotia Youth Court in Halifax.<sup>1</sup> I am using his real name here: Rodney Darren Small. He was defined in law as a “youth,” and youths who are charged with crimes are typically identified by their initials to preserve their privacy.<sup>2</sup> So that youthful mishaps do not haunt them for the rest of their lives. That is how Rodney became RDS. Some years later, Rodney decided to publicly identify himself as the famous RDS. He has given us permission to use his real name, Rodney Small, and I am going to call him “Rodney” in my presentation today. I usually prefer to use surnames out of respect, but I think it is important to recognize how young he was when this case originated, and sometimes using the more familiar first name helps me remember that.

Rodney, a Black teenager, was just 15 years old when he was charged with assaulting a police officer, assaulting a police officer with intent to prevent the lawful arrest of another person, and obstruction of a police officer.<sup>3</sup> The first photograph I have of him does not date back to when he was 15 years old. He was age 39 when I took this photo in front of the house that he was living in at the time of his arrest. He still looks really young, even though he is 39. I imagine he is a little bit taller here, but I suspect that he looks just about the same as when he was a teenager.

There were two witnesses at the trial that unfolded in the Devonshire Youth Courtroom: Rodney himself and Donald Stienburg, a white police officer.<sup>4</sup> The two had conflicting stories about what happened at that Halifax intersection one year earlier. The officer testified that he was in the process of arresting a different Black teenager, while a group of younger Black children stood by, watching.<sup>5</sup> The officer said Rodney rode his bicycle into the fray.<sup>6</sup> The officer testified he warned Rodney to stay clear,

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<sup>1</sup> See Nova Scotia Youth Court, *RDS* trial (December 1994).

<sup>2</sup> See Youth Criminal Justice Act, SC 2002, c 1, s 110(1).

<sup>3</sup> See Constance Backhouse, *Reckoning with Racism: Police, Judges, and the RDS Case* (Vancouver: UBC Press, 2022) at 9.

<sup>4</sup> *Ibid* at 12.

<sup>5</sup> *Ibid* at 13.

<sup>6</sup> See Trial transcript, Nova Scotia Youth Court, 2 December 1994, in *Rodney Darren Small [R.D.S.] v. Her Majesty the Queen* (N.S.) (Criminal) (By Leave), Supreme Court

that Rodney did not move away, but rode his bike into the officer's leg and shoved the officer with his hands and shoulder. So, the officer arrested him.

In the courtroom that morning, Rodney, who had no previous criminal record, told a different story. He testified that he never personally touched the officer.<sup>7</sup> He said he was trying to speak to his cousin, who was the boy being arrested.<sup>8</sup> He shouted out to his cousin by name, "Shall I call your mother?" His cousin was already in handcuffs, so there was no risk that the alleged culprit was going to escape the officer.<sup>9</sup> But Rodney told the court that the officer then retorted, "Shut up kid, or you'll be arrested too."<sup>10</sup> Now Rodney was a bit of a show-off, which he would have admitted then and now, and age 15, dealing with a white police officer, he called out to his cousin by name again and repeated, "Do you want me to call your mother?" That provoked the officer to put the two boys into a chokehold, one under each arm.<sup>11</sup> Then he handcuffed Rodney too and loaded both boys into the police van.<sup>12</sup>

So that is the testimony, diametrically opposed versions of what happened in that intersection. In an oral decision, delivered on the spot, Family Court Judge Corrine Sparks found that the Crown had not proven its case beyond a reasonable doubt, and she acquitted Rodney.<sup>13</sup> Why did she acquit Rodney? She emphasized that Rodney had been open on cross-examination and seemed to be a "rather honest young boy"<sup>14</sup>. She could not understand why the officer was so threatened by a young boy who was merely trying to assist his friend. And she asked rhetorically, "If this young boy was handcuffed, what was the big ordeal? It's a teenager, a young person."<sup>15</sup> And then she added...and I am going to quote her words because these words catapulted this case all the way up to the nation's top court. She said, and remember this is orally delivered, she did not have time to sit down and write it, to do research and reflect over the exact words to use. She was just giving it off-the-cuff, and she said,

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of Canada, Library and Archives Canada (LAC), RG 125, vol. 5231, fle 25063A at 18-24 [RDS Transcript]. See also Backhouse, *supra* note 4 at 13.

<sup>7</sup> See RDS Transcript, *supra* note 7 at 66–68.

<sup>8</sup> *Ibid.*

<sup>9</sup> See Backhouse, *supra* note 4 at 16; RDS Transcript, *supra* note 7 at 58–59.

<sup>10</sup> See RDS Transcript, *supra* note 7 at 58–59.

<sup>11</sup> See Backhouse, *supra* note 4 at 10.

<sup>12</sup> *Ibid.*

<sup>13</sup> See RDS Transcript, *supra* note 7 at 89–93.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid* at 80–81A.

I'm not saying that the constable has misled the court, although police officers have been known to do that in the past. I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are dealing with non-white groups. That to me indicates a state of mind right there that is questionable. I believe that probably the situation in this particular case is the case of a young police officer who overreacted. I do accept the evidence of RDS that he was told to shut up or he would be under arrest. That seems to be in keeping with the prevalent attitude of the day.<sup>16</sup>

The white officer was deeply offended that morning in the courtroom. So was his police union and the white crown attorney. They all claimed that Judge Sparks was racially biased against white police. They lodged a complaint to the Chief Justice of the Provincial Court, who was the supervisor of Judge Sparks, and they also appealed her ruling.<sup>17</sup> Someone tipped off the local press, whose white reporter turned the case from one of police misconduct directed at Blacks, to judicial bias based on racism against whites.<sup>18</sup> It set off a concerted attack against an isolated Black judge.

I asked the Halifax journalist if he would let me interview him about his coverage of *RDS*. I was able to meet with him years later when he was passing through the Ottawa airport, and I asked him, "How come you didn't write this up as an issue of police misconduct or overreaction against Blacks? Why does this turn into media coverage about the alleged racism of a Black judge?" And I am paraphrasing our very interesting conversation. He said, "You know, as a reporter we look for 'news.' The allegation that the only Black judge in the province is racially biased against white officers is big news. So as a reporter, I knew this was newsworthy." But years after the coverage, the journalist was also prepared to reflect on his own perspectives at the time. He said, "I was young. I grew up in a segregated white neighbourhood. I had no people in my neighbourhood, or in my school, who were anything but white. I didn't know anything about racism. And I just didn't know enough to think otherwise." It was a very significant admission, illustrating a person's ability to rethink over time, to understand more about racism with the passage of time. I think the journalist deserves significant recognition for that, even though I think he started the media coverage of the case badly.

Let us turn now to the key people in this case. One of the things that I think is wrong with legal education, including much of my own teaching, is that our study of cases often takes place in a vacuum. The people in-

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<sup>16</sup> *Ibid* at 89–93; Backhouse *supra* note 4 at 22.

<sup>17</sup> See Backhouse *supra* note 4 at 67–68.

<sup>18</sup> *Ibid* at 70–71.

volved are invisible. There is no context. I am going to try to put the people back into this case. Let us start with the two white men. Donald Stienburg, the police officer who was the first trial witness, was a 29-year-old white man who came from a family of police officers.<sup>19</sup> His father and his younger brother both served with the Halifax police.<sup>20</sup> Stienburg very generously agreed to let me interview him. He told me he was a hockey player, a sports coach, a valedictorian of his high school.<sup>21</sup> He was over 6 feet tall, very athletic, and an eight-year veteran of the force. He felt he had been unfairly tarred as a racist and he felt embarrassed among his friends, his family, and his peers. He said friends would come up to him on the street and ask him, “What happened here? We don’t think of you as racist. What was going on?” Stienburg told me he never knew quite how to explain what had happened, but he said it was horrible.

The crown prosecutor, Rick Miller, 33 years old at the time of the trial, also generously let me interview him.<sup>22</sup> He grew up in the working class, north end of Halifax, one of only two of his classmates to go to university.<sup>23</sup> He left home at nineteen, and he worked 30 hours a week bussing tables at a nearby restaurant while he studied law at Dalhousie University.<sup>24</sup> He was called to the Bar in 1987.<sup>25</sup> Unable to land a permanent job right after graduation, he struggled to make ends meet with short-term law jobs. He eventually obtained a full-time, non-permanent contract position with the Crown, which was his situation at the time of the trial.<sup>26</sup> The police had a positive relationship with him and thought highly of him as a prosecutor. The defense lawyers called him a “bit of a hawk.”<sup>27</sup> Miller told me he was shocked by Judge Sparks’s words about the police overreacting and he insisted that the *RDS* case had “absolutely nothing to do with race.” His was a typical Canadian reaction which – and there is a long history of this – still exists in Canada.<sup>28</sup> Most Canadians assume that events are “raceless.” Scholars studying the legal history of race in Cana-

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<sup>19</sup> *Ibid* at 23.

<sup>20</sup> *Ibid*.

<sup>21</sup> *Ibid*.

<sup>22</sup> *Ibid* at 24.

<sup>23</sup> *Ibid*.

<sup>24</sup> *Ibid* at 25.

<sup>25</sup> *Ibid*.

<sup>26</sup> *Ibid*.

<sup>27</sup> *Ibid* at 26.

<sup>28</sup> For historical evidence, see generally Constance Backhouse *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press, 1999).



da search through legal records mostly in vain. Ninety percent of the time there will be no reference to anybody's race. The assumption always is that race has nothing to do with the cases. And there is nothing in the archival records. It is astonishing. We apparently are a multi-cultural nation, but we have no race and no racism.

So far, we have considered the two white people in the courtroom that morning: the white officer Donald Stienburg and the white prosecutor Rick Miller. There were five others in that Halifax courtroom. The other five people were all Black. It was the first time a Halifax criminal justice courtroom had witnessed a Black teenager, Black defense counsel, Black deputy sheriff, Black court reporter and Black judge, all together in one court.<sup>29</sup> Judge Sparks told me she had never seen that before. I have interviewed a series of other Black judges, and they too told me they had never seen a courtroom like that. This was unusual. Some people speculated later that it put the white police officer and crown attorney off kilter and set in motion the unusual dynamics that underlay the testimony, the result, and the reaction to the decision.

Now let us have a closer look at Rodney Small. As I mentioned earlier, at the time of the arrest, he was a 15-year-old African Nova Scotian. He described himself in 1994 as "a hundred pounds soaking wet." He told me his father was a "lifer in prison."<sup>30</sup> His mother was 16 years old when she gave birth to Rodney and although he still lived with her, they did "not get on."<sup>31</sup> Rodney's family traced its heritage to Black Loyalists who arrived in Nova Scotia after the American Revolution.<sup>32</sup> Theirs was a long and embedded history in Nova Scotia. Rodney grew up in a stigmatized Black neighbourhood in the north end of Halifax, a neighbourhood with problems rooted in impoverished educational opportunities, unemployment, and segregated housing. Over-policing, which was imposed by white authorities, did nothing to solve problems that were rooted in racism. Rodney told me that he and his friends deplored the police presence in their neighbourhood. "We were taught not to engage with the police," he said, "that it was dangerous." He explained that Officer Stienburg's chokehold "nearly asphyxiated him" and that he thought the officer was trying to kill him. He was nervous to give his testimony in court and surprised by the acquittal. He told me he "never expected leniency from a Black judge, just the opposite," and he did his best to ignore the whole legal process. "I was a confused young kid," he said.

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<sup>29</sup> See Backhouse *supra* note 4 at 12.

<sup>30</sup> *Ibid* at 27.

<sup>31</sup> *Ibid* 26–27.

<sup>32</sup> *Ibid* at 26.



His defense lawyer was Rocky Jones. Rocky Jones was a 53-year-old African Nova Scotian whose family had been living in Nova Scotia since the Black Refugees arrived after the War of 1812.<sup>33</sup> He grew up in a segregated Black rural neighbourhood near Truro and he had become a leader among Nova Scotia's anti-racist activists.<sup>34</sup> People described him as an athletic, physically imposing man. He was bright and charismatic, a man who could converse with anyone, someone who could command a room with ease. He dropped out of school very young, but subsequently returned as a mature student who helped to set up a program to assist racialized people to return to university.<sup>35</sup> Despite not having graduated high school, he obtained his undergrad education and then a law degree at Dalhousie in 1992.<sup>36</sup> It was at Dalhousie where he convocated with the first class from the innovative IB&M program that recruited Indigenous Black and Mi'kmaq students into the law school.<sup>37</sup> He helped set up that program, and although he was reluctant to attend, he was challenged to enrol after he'd set it up. He became one of its first graduates. Here is a photograph of him graduating. His wife, Joan Jones, also pictured in the photograph, is another powerful figure in the anti-racism history of Nova Scotia, whose life and career were every bit as important as Rocky's. The two of them together spearheaded much that happened in Nova Scotia's anti-racist movement.

By the time of this trial, Rocky Jones had become the most visible face of anti-racism activism in Canada. He was often called "Canada's version of the Black Panthers." This photograph of him as a public speaker will give you the sense of why a people might have dubbed him a Black Panther. Rocky Jones was well-connected to the American anti-racist movement. After Stokely Carmichael visited him in Halifax, the intrusive RCMP surveillance that had long dogged Rocky Jones's work intensified even further.<sup>38</sup> After his graduation, no law firm would hire Jones. He had just landed a job at the Dalhousie Law Clinic when Rodney came looking for legal representation.<sup>39</sup> He was a novice at the bar, but he was a lawyer with immense experience in the dynamics of race discrimination. This additional photograph captures the media interest in him. He was an

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<sup>33</sup> *Ibid* at 28.

<sup>34</sup> *Ibid* at 29.

<sup>35</sup> *Ibid* at 29–32.

<sup>36</sup> *Ibid* at 32.

<sup>37</sup> *Ibid*.

<sup>38</sup> *Ibid* at 30.

<sup>39</sup> *Ibid* at 32.

electrifying speaker, with a remarkable record in courageously tackling racism.

Family Court Judge Corrine Sparks was 41 years old at the time of the trial. She was also an African Nova Scotian who grew up in the segregated Black rural community of Lake Loon, in Preston Township on the outskirts of Halifax.<sup>40</sup> She was the eldest of nine children, in a family descended from the Black Refugees and Black Loyalists.<sup>41</sup> Her mother cleaned houses as a domestic day worker; her father was employed as a custodian.<sup>42</sup> Corrine Sparks became an exemplary student in the segregated Black primary school she attended, surrounded by all Black classmates. She developed a reputation as a responsible, reserved, quiet, and introverted young woman, someone who was deeply connected to her community's Black Baptist church. She graduated from Dalhousie Law School in 1979, in a class with just two other Black students, where she was the only Black woman.<sup>43</sup> In her Dalhousie law class graduation photograph, she is situated in the second row from the bottom, far right. The rest of the students are white with one exception, just one other Black student.

Then as well as later, when Rocky Jones could find no (white) private law firms willing to hire Black grads, Corrine Sparks got no Nova Scotia law firm offers. Against all odds, she opened her own law practice in Dartmouth, Nova Scotia.<sup>44</sup> And there is a long story about this, but to shorten things up, let me tell you that in 1987, she was appointed the first Black judge in Nova Scotia.<sup>45</sup> It made her the first Black female judge in Canada.<sup>46</sup> When this trial began, and she was accused of racism, she was the only Black female judge in Canada. That finishes describing the five people who were all present in the Youth Courtroom that morning in December 1994. These are the people.

Now there is a context. I could give you a long exposition on the history of Black people in Nova Scotia and the level of racism that they experienced, and the resistance that they mounted against the racism, but it would take considerably more time than we have allotted for this lecture, so I will just touch a few highlights. There were Black settlements all

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<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid* at 33.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid* at 35.

<sup>44</sup> *Ibid* at 36.

<sup>45</sup> *Ibid* at 37.

<sup>46</sup> *Ibid.*

through Nova Scotia for hundreds of years.<sup>47</sup> There was also slavery, which flourished under legal protection for more than 200 years.<sup>48</sup> Some of Nova Scotia's most prominent families were enslavers of Black men, women, and children.<sup>49</sup>

But free Blacks were also some of the first settlers of Nova Scotia.<sup>50</sup> By the late 18th century, the province could count itself as home to the world's largest free African population outside of Africa.<sup>51</sup> Some of the people I interviewed said they always wondered why Nova Scotians celebrate Scottish heritage so fervently. Why didn't they call the new colony Nova Africa instead? People sometimes ask me if Nova Scotia was more racist than the other Canadian provinces. I grew up in Manitoba and I have got to tell you I am sure we can compete for that infamy, and I expect that all of our provinces have centuries of race discrimination in their histories as well. But people will also emphasize that centuries of anti-Black discrimination in Nova Scotian education, employment, housing, social, cultural, economic, and political life created an appalling backdrop to the *RDS* case.

Some of you will have heard of Africville. This was a neighborhood that was a segregated Black community, razed in the name of municipal progress.<sup>52</sup> It has become a symbol of the damage done to Black communities and the resistance of Black communities against that repression.

Policing was not immune to racism either. Nova Scotia's history presents a long litany of Black reports of racial profiling, discriminatory arrests, over-charging, and police violence. I have used just one newspaper clipping of this, when a more enlightened reporter covered the story of a young man who was beaten by the police.<sup>53</sup> The only reason the story came to light was because his relative was a famous Black boxer. When the celebrated boxer learned about the beating that his young family member had suffered, he insisted that it be dealt with. A reporter who was called captured the bloodied, bruised face of the young boy and the newspaper printed the photograph. The next photograph profiles the aftermath of a serious episode of street violence, set off by incidents of racism around the bars of downtown Halifax. The police came in and arrested all the Blacks. The same thing happened when there were inter-racial

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<sup>47</sup> *Ibid* at 39.

<sup>48</sup> *Ibid*.

<sup>49</sup> *Ibid*.

<sup>50</sup> *Ibid* at 40.

<sup>51</sup> *Ibid* at 41.

<sup>52</sup> *Ibid* at 47.

<sup>53</sup> *Ibid* at 50.

fight in the schools. The police would come in and arrest all the Blacks. The whites were let off. The unfairness resulted in a large street demonstration against racism in 1991. Then the police union spokesman complained that his officers were tired of being criticized for doing their job and that morale was going down. The police chief insisted that there was no racism involved. There are multiple, documented public statements from people in power who repeatedly insisted that there was no racism involved, that that just did not happen in Nova Scotia.

Yet Nova Scotia is also the province that hosted the Inquiry into the Wrongful Conviction of Donald Marshall Jr. several years before the *RDS* case.<sup>54</sup> Some of you may remember that Donald Marshall Jr. spent many years in jail for a murder he did not commit.<sup>55</sup> The lengthy inquiry reported on the wrongful conviction, and it unveiled the existence of systemic legal racism against Indigenous and Black communities.<sup>56</sup> It documented longstanding hostility between Blacks and the police. It is hard not to see this record as a clear basis for Judge Sparks's decision.

In light of the time constraints, I am going to skip the many levels of Nova Scotia appellate court rulings within the province of Nova Scotia and move directly to the Supreme Court of Canada. In 1997, *RDS* offered the first case, believe it or not, where the Supreme Court of Canada ruled on the issue of judicial race bias. Some of you may have heard about the Feminist Court, a project in which a group of feminist lawyers and law professors decided to rewrite famous Supreme Court decisions as if they were feminist judges ruling from a "Feminist Court." It is a fascinating project, with many of the revised feminist decisions published in various law journals. In parallel with that, I like to imagine an Anti-Racist Court and how anti-racist judges might have opened their decision on *RDS*. In my fantasy we have a unanimous bench, nine judges, who say,

In 122 years of judging, we have never before had to deal with a case where the central issue was the race bias of a judge. Our all-white judiciary has rendered decisions for more than a century over a country in which racism is deeply rooted and endemic. It's a strange thing that we have never faced a legal challenge on judicial race bias. But there it is. Today, we're faced with an allegation that Canada's first Black female judge was biased against a white police officer. Oddly, there seems to be something amiss here.

I would love to see that as the opening paragraph in a Supreme Court of Canada decision. It was not to be. Instead, the Supreme Court fumbled its first case of judicial race bias. Having never before dealt with the lega-

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<sup>54</sup> *Ibid* at 59.

<sup>55</sup> *Ibid*.

<sup>56</sup> *Ibid* at 58.

cy of race bias on the part of white judges, the legal system turned itself on its head and attacked what we might call reverse racism. That is a judge who is reversing racism by assuming that the police overreacted. Judge Sparks made her ruling on the evidence before her, but she also made statements that went beyond that.

Nine white judges heard this case at the Supreme Court, but in total, there were fourteen judges, all white, who considered Judge Sparks's words as the case worked its way up through several levels of appellate courts before it got to Ottawa. Of the five white Nova Scotia appellate judges who ruled on the case, all but one (and that one only in dissent) found Judge Sparks had erred. By the time the case reached the top court, the Black community was so alarmed that it sent representatives from far and wide to Ottawa to pack the courtroom. Five of the six lawyers who represented Rodney Small or intervening organizations were Black. They stood up as the nine white Supreme Court judges entered the room, in a scene that was the complete reverse of the Dartmouth Youth Court setting three years earlier. There a white police officer and white prosecutor faced an all-Black courtroom with a Black judge on the bench. Here, Black lawyers rose to argue the case before nine white judges who must have been surprised to look out at courtroom benches stacked with Black litigators and observers. A photograph of the nine white Supreme Court of Canada judges who heard this case, all in the red felt and white ermine robes, shows the presiding chief justice at the Supreme Court of Canada, Antonio Lamer, who plays a particularly important role in the *RDS* case, in the first row, centre stage.

During the oral submissions, arguments, and questions, Chief Justice Lamer managed to outline hypothetical fact situations that he deemed relevant, using racial stereotypes against the Chinese and the Roma, comments that provoked astonishment and subsequent complaints to the Canadian Judicial Council. The Canadian Judicial Council concluded there had been no cause for discipline. Yet the judges' oral questions revealed levels of white privilege and incomprehension of racism that caused concerned lawyers and law professors to obtain and circulate the video of the hearing. Law journal articles resulted.<sup>57</sup>

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<sup>57</sup> See e.g. "Antonio Lamer: Judge Referred to Chinese As 'Tremendous Gamblers'" *Toronto Star* (4 November 1997). Dale Anne Freed, "Top Judge Accused of 'Stereotyping'" *Toronto Star* (4 November 1997) A25 [printed version]. For a few examples of the law journal coverage, see Carol Aylward, "Take the Long Way Home: *R.D.S. v. R.* – The Journey" (1998) 47 UNBLJ 286; Richard F. Devlin and Dianne Pothier, "Redressing the Imbalances: Rethinking the Judicial Role after *R. v. R.D.S.*" (1999) 31 *Ottawa L Rev* 1; Constance Backhouse "Turning the Table on *R.D.S.*: Racially-Revealing Questions Asked by White Judges" (2021) 44:1 *Dalhousie Law Journal* 181.

Three of the white Supreme Court justices, Lamer, Major, and Sopinka spoke harshly about Sparks's words. They said her words had induced a reasonable apprehension of bias. And they said her acquittal could not stand. They voted to send the decision back for retrial in front of a different judge, which would have been a white judge. Their views were outnumbered by six others on the bench who had a split set of decisions. The six were prepared to affirm Rodney's acquittal, but they stressed the importance of impartiality, and all but two of the judges spoke very harshly about Sparks. They used words that described her comments as "unfortunate" (four times), "troubling" (twice), "worrisome" (once), "inappropriate" (once), and "unnecessary" (once). They concluded her remarks had "come very close to the line."<sup>58</sup> They admonished her for her words but were not prepared to send the case back for retrial.

Only two of these justices were prepared to write reasons that affirmed that what Judge Sparks said was not wrong: Beverley McLachlin and Claire L'Heureux-Dubé, the only women on the Supreme Court of Canada at the time, both of whom had faced similar bias allegations on the basis of gender. The two women judges had first-hand experience on the question of bias. It seems to have made a difference.

I would like to spend at least a few minutes on the aftermath. Rodney Small was relieved three years later that the legal uncertainty was over. His fear that he would be sent for another full trial was dispelled. He had a few challenging years. He dropped out of school. He had more run-ins with the police. Rocky Jones, his lawyer, said to him, "Rodney, they've got their eye on you. You need to be extraordinarily careful not to get on the wrong side of another police officer." Rodney being Rodney and young, managed to have more run-ins with the police. He went to jail, but he eventually completed a university degree and began working in a non-profit organization to promote young Black entrepreneurs, and he became a leader, and still is a leader in the Black Halifax community.

Rocky Jones continued to represent legal aid clients, but he eventually left the clinic and opened his own private law practice, while he continued his work as an anti-racist icon within the Black community. I could so go on about Rocky's influence. Of the many, many people I interviewed on the significance of this case, dozens told me that it was because of Rocky's influence and urging that they went back to university, that they got law degrees, that they were practicing lawyers. I heard from person after person about Rocky's influence. Rocky Jones died in 2013. His memoir describes *RDS* as the apex of his career.

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<sup>58</sup> *R v S (RD)*, [1997] 3 SCR 484 at 543–47.

Donald Stienburg is still with the Halifax police. He told me he has not changed his mind about the trial, but he is willing to live with the final result. In retrospect, he has said that if he had known what the three years following the complaint would bring, he would never have pursued it. His brother Dean Stienburg became the head of the police union. The censure of Sparks – all those words of criticism from white judges – unfortunately gave license to other white police officers to object to other statements about allegations of racism.

Judge Sparks paid a huge price with her career. Some whites within the Halifax legal community were incensed over the fact that Sparks's acquittal was upheld. The isolation that Judge Sparks experienced as the only female Black judge, the first Black judge in Nova Scotia, only intensified. When the Youth Family Court was established, every one of the family court judges with whom she sat was elevated to the higher status. One was left out. That was Judge Sparks. An outraged Black community felt certain that this was payback for her ruling in *RDS*. And it left her without a courtroom. There was no more family court in which to sit. She became an itinerant judge who had to drive around the region, sitting as a visiting judge in far-flung courtrooms because there was no longer a Halifax Youth Court. She enrolled in graduate studies at Dalhousie Law School, and she obtained her Master's in Law degree. She wrote her thesis on reparations for Africville. She was never elevated to the higher court. The lesson meted out to her was not lost on other minority judges across Canada. As I interviewed many of them, they expressed anxiety over the professional repercussions of speaking out about racism from the bench.

In conclusion, I believe this case illustrates the failure of the legal system to examine police abuse of power. Fourteen judges, all white, considered Judge Sparks's alleged bias, and the overwhelming majority believed they saw anti-white bias in her words. A case that began with a white officer and a minor skirmish with a Black teenager led to chokeholds, handcuffs and criminal charges of assaulting a police officer. *RDS* was first and foremost a case about policing. That it somehow transformed itself into a complaint of racial bias against a Black judge is truly astonishing.

The pressing issue of racism in policing, a long-standing issue of concern for the African Nova Scotian community, disappeared, as appellate courts and surrounding commentators trained their eyes on Canada's first Black female judge. This case unveiled a legal system seriously unskilled in assessing racism. It exposed the insularity, white privilege, and white fragility of powerful lawyers and judges. That this was our first judicial race bias case tells us that Canada has run a mile from grappling with issues of racism. We just did not have the legal language to tackle the complexities of racism and anti-racism, and a distinction between the



two. Instead, we get a shutdown, no voicing of the anti-racism from the bench, buried.

That *RDS* also became a focal point for anti-racist resistance allows us to recognize the courage and strength of African Nova Scotian and broader African Canadian communities. They continue to mount sustained pressure for change.

Did *RDS* affect legal change? Did it help us dismantle racism on the ground? I think we never see a straight line of improvement. Swelling waves of improvement meet troughs of backlash, and whether the momentum materializes or continues, and in what form, rests with us.

I think *RDS* is one of the most important legal decisions on race in Canadian history. It disrupted the “racelessness” that our legal system has long revered. It upended some of the silences about the race biases interconnecting law and society. I want to finish with two photos. A tribute to Judge Sparks in her judicial robes. She personally bore the brunt of a fight that has affected all of us, that is an issue for all of us. And a picture of Rodney Small at Dalhousie Law School, standing beside a portrait of Rocky Jones, his mentor, someone he came to revere. He sent us this picture to show that he has landed on his feet, and he knows who the real heroes of this important case are.

Thank you.

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