

2015

Judicial Bias: The Ongoing Challenge

Kathleen Mahoney

Follow this and additional works at: <https://scholarship.law.missouri.edu/jdr>



Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Kathleen Mahoney, *Judicial Bias: The Ongoing Challenge*, 2015 J. Disp. Resol. (2015)

Available at: <https://scholarship.law.missouri.edu/jdr/vol2015/iss1/4>

This Conference is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Dispute Resolution by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

Judicial Bias: The Ongoing Challenge

KATHLEEN MAHONEY QC, FRSC*

I. INTRODUCTION

This article calls for a renewed commitment to judicial education on the roles that gender, race, class and other biases can have on judicial decisions and impartiality. This article also calls for the appointment of a more representative and diverse judiciary. An explosion of activity occurred for about a decade between the late 1980s until the late 1990s to promote and implement social context education for judges to help judges understand the realities of people most unlike themselves, and to appoint judges to be more representative of the population of Canada. But this trend has diminished to the point that judicial gender and other forms of bias are now rarely talked about or included in judicial education curricula. Judicial appointments once again are tilted sharply in favor of white male partners in large law firms.¹ This article argues that this disparity raises valid concerns about judicial impartiality, and new concerns about equality and discrimination are beginning to emerge. The first part of this article discusses the history of judicial education in Canada and the leadership role the Canadian judiciary took in creating and developing groundbreaking judicial education programs on social context issues both in Canada and internationally. The second section discusses case law since 2000, critiquing it for the paucity of social context analysis and preference for white male judicial appointments. The conclusion calls for a renewed effort to create socially relevant judicial education in current times and for a more representative judiciary.

II. HISTORY

I graduated from the University of British Columbia Law School in 1976 and from Cambridge University in 1979. At that time, women comprised no more than 25% of the students in my classes.² By the time I started teaching law in 1980, I found myself in a totally white, male dominated faculty, but the number of female students was rapidly rising to comprise about 40% of each incoming class. Throughout this period as my awareness about how the law functioned deepened, I came to understand the profound disadvantages women experienced in their

* Professor of Law, Fellow of the Royal Society of Canada, University of Calgary. Professor Mahoney is an expert in the development of judicial education programs in Canada and internationally, having pioneered social context programs for judges in Canada, Australia, South Africa and other countries.

1. Krystle Gill & Alycia Shaw, *Representing Canada on the bench: On gender balance, equality and judicial appointments*, THE CANADIAN BAR ASSOC'N, http://www.cba.org/CBA/conf_women/Women_Newsletters2013/bench.aspx (last visited Aug. 25, 2015); Stephen Lautens, *Cracking the System*, CAN. LAWYER (Sept. 1, 2014), www.canadianlawyermag.com/5266/Cracking-the-system.html.

2. This statistic was common across jurisdictions in Canada, Australia and the United States at that time. See SUSAN EHRlich MARTIN & NANCY C. JURIK, *DOING JUSTICE, DOING GENDER: WOMEN IN LEGAL AND CRIMINAL JUSTICE OCCUPATIONS* 111-13 (2nd ed. 2012).

encounters with the justice system.³ My study, engagement, and research taught me that deeply entrenched structural discrimination and exclusion existed in law.⁴ Exacerbating the problem was the fact that judging, judicial authority and enforcement of laws were overwhelmingly exercised and implemented by male, masculine, white, heterosexual, able-bodied, and class-privileged persons who, as a class, stood to benefit by legally authorized discrimination against women and minorities. Most readily observable was the discrimination that occurred when legal issues requiring judicial decisions combined gender with other personal characteristics such as race, sexual orientation, ethnicity, and religion that was shared by disadvantaged minorities.⁵

At the faculty level, mostly male professors taught core subjects such as Contracts, Property Law, Constitutional Law, Torts, Criminal Law, Trusts, Tax Law, Jurisprudence, and Family Law. These core subjects gave little or no attention to structural discrimination or bias in the substantive principles or to stereotypes and myths that influence factual determinations.⁶ Few or no questions were asked about how alternative views could be acknowledged in the resolution of legal problems. Few, if any, critical courses found their way into the curriculum—not even as an optional offering. Administratively, male colleagues comprised most seats on recruitment and promotion committees and appeared to favor male applicants.⁷

As I saw it, the problem was a multilayered one. There were problems with the law itself, problems spanning the legal profession in the composition of the bar, problems with the demographic breakdown of the judiciary⁸ and legal professoriate, and problems with socially perpetuated stereotypical thinking favoring the dominant male population.

3. My first influence was the work of Carol Gilligan in her book, *In a Different Voice*, but then several other American writers and activists in the women's movement such as Catherine MacKinnon, Ann Scales, Ruth Bader Ginsberg, Martha Fineman, Mari Matsuda, Richard Delgado, Jean Stefancic, Derrick Bell, Angela Harris, Kimberlee Crenshaw, Carrie Menkel-Meadow, Norma Wickler, Lynn Hecht Schfran, Patricia Williams and Canadian scholars such as Rosalie Abella, Christine Boyle, Constance Backhouse, Richard Devlin, Sheilah Martin, Lynn Smith, Freda Steele, Beth Symes, Joan Ryan, Margrit Eichler, Donna Greshner, Jean McBean, Sarah Salter, Mary Eberts, Kathleen Lahey, Susan Boyd, Mary Jane Mossman, Isabel Grant, and numerous others influenced my thinking in their writing in the '80s and '90s about the inherent biases in the law and the legal system.

4. In *Remembering Favourite Feminist Legal Scholarship*, the authors highlight some defining moments of feminist engagement with the law from the mid 1980s to 2005 that captured the imaginations of many of the feminist scholars of the time, including the author. See generally Constance Backhouse et al., *Remembering Favourite Feminist Legal Scholarship*, 17 CAN. J. WOMEN & L. 1, 243-70 (2005).

5. In Canada this is particularly true with respect to aboriginal women and men. See generally Margo L. Nightingale, *Judicial Attitudes and Differential Treatment: Native Women in Sexual Assault Cases*, 23 OTTAWA L. REV. 71 (1991).

6. Constance Backhouse, *Gender and Race in the Construction of "Legal Professionalism": Historical Perspectives* (Univ. of Ottawa, Working Paper, Oct. 2003), www.lsuc.on.ca/media/constance_backhouse_gender_and_race.pdf.

7. BREAKING ANONYMITY: THE CHILLY CLIMATE FOR WOMEN FACULTY (1995) (discussing discrimination in Canadian universities including law schools).

8. These views were mirrored in the first editorial of the inaugural issue of the Canadian Journal of Women in the Law. Backhouse et al., *supra* note 4 ("As we embark on the process of claiming equality as a concept that has meaning for women as well as for men, and as we begin the publication of a journal that has as one of its ultimate aims the transformation of the normative tradition itself, we are aware that this project is situated within deep contradictions in the liberal tradition. Women are oppressed by the content of the law as well as by the ideas and conduct of many lawyers, judges, legislators, and law teachers.").

All of this was occurring at the same time Canada was adopting a new *Charter of Rights and Freedoms*,⁹ which gave individual Canadians constitutional rights for the first time, including the most comprehensive equality rights in the western world.¹⁰ My view was that unless the legal community recognized judicial gender and other forms of bias existed in the law and in judicial attitudes and took some educational initiatives to address them, the *Charter* and its promise of equality would have little chance of being fulfilled. As a result, in 1986, with the help of my colleague Sheila Martin (now Justice Martin) and students at the Faculty of Law at the University of Calgary, we organized the first national conference on judicial attitudes in Canada. The title of the conference was “The Socialization of Judges to Equality Issues.”¹¹ It was chosen to emphasize the importance of the social processes by which judges develop their attitudes, expectations and values, and to convey how those attitudes are crucial to the concept of equality and fairness in judicial outcomes. The thought behind the conference agenda was that as social attitudes and conditions were changing in Canada, judges must also change. If not, the societally induced values they held could operate to perpetuate inequality. During the conference, a judge I knew quite well from the Ontario Court of Appeal took me aside and asked me whether or not I had considered whether I could be found in contempt of court for the conference.¹² He told me his brother judges had been discussing just that in the judicial lunchroom in Toronto because the conference program seemed to suggest judges were biased and such allegations, if unchecked, could bring the judiciary into disrepute.¹³ As it turned out, no contempt charges were laid, the conference was very well attended, and it was a sensation in the press.¹⁴ The conference papers published in 1987 became the first collection of its kind in Canada and made a significant impact.¹⁵

The conclusions of the majority of those attending the interdisciplinary conference—judges, practicing lawyers, experts in anthropology, political science, sociology, Aboriginal Studies, and social welfare—were that in legal theory, discrimination law, family law, tort law, criminal law, child law, aboriginal law, and human rights law, a pattern of non-neutral or biased judicial decision-making could be readily identified. All three components of equality: equality in law, equality in legal practice, and social practice of inequality were implicated in the

9. See generally Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

10. *Id.* The equality section of the Charter guarantees equality “before and under law” and equal protection and “equal benefit of law without discrimination . . . in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” *Id.* at § 15(1). Additionally, this “does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” *Id.* at § 15 (2). Section 28 of the Charter guaranteed equal treatment of men and women and section 27 confirmed Canada as a multicultural nation. *Id.* at § 28.

11. The conference took place May 22-24, 1986 in Banff, Alberta.

12. The judge was the late Hon. Justice Walter Tarnapolsky of the Ontario Court of Appeal. Justice Tarnapolsky was supportive of the conference but nevertheless felt I needed to be warned.

13. Contempt of Court offences are listed in the Criminal Code of Canada and can include: Failing to maintain a respectful attitude, remain silent or refrain from showing approval or disapproval of the proceeding; Interfering with the orderly administration of justice or to impair the Court’s authority or dignity. Canada Criminal Code, R.S.C. 1985, c. C-46.

14. Personal files of the author include copies of contemporaneous articles published at the time of the conference including copies published in the Calgary Herald and The Globe and Mail.

15. KATHLEEN E. MAHONEY, EQUALITY AND JUDICIAL NEUTRALITY (Sheilah L. Martin, ed., 1987).

findings with adverse results for equality seekers from disadvantaged minorities and for women.

The experts at the conference found that when judges rely on traditional, limiting, and inaccurate stereotypes (as defined generally by the majority), the equality rights of entire disadvantaged groups can be compromised.¹⁶ This tendency is exacerbated when judges assess individuals appearing before them based on stereotypical characteristics, abilities, and needs, with respect to social roles within those groups.¹⁷ Achieving fairness where public or private law rights are contested becomes very difficult, especially if the judge is unaware of the stereotypes he or she is using to define or characterize parties before the court. When the stereotypes used by the judge reinforces established patterns of discrimination, the judicial decision itself has the effect of perpetuating inequality. Participants at the conference called for judicial education as a way to deal with these problems of bias.

Throughout this period of the late eighties and early nineties, other academics in Canada and the United States were aggressively critiquing judgments for gender and other forms of inequality;¹⁸ test case litigation was successfully challenging biased assumptions and stereotypes in the jurisprudence and legislation;¹⁹ more women were appointed to the bench than ever before;²⁰ and law schools were admitting entering classes comprised of 50% to 60% women.²¹

On the legislative front, feminist analyses and advocacy resulted in a major overhaul of the *Criminal Code's*²² offence of rape.²³ Prior to the overhaul in 1983, deep-seated sex discrimination and gender bias were still pervasive in the law and its enforcement. At that time, the patriarchal basis of marriage was protected by the law, even going so far as to give husbands unlimited sexual access to

16. See Norma J. Wikler, *Identifying and Correcting Judicial Gender Bias*, in EQUALITY AND JUDICIAL NEUTRALITY 12 (Kathleen E. Mahoney & Sheila L. Martin, eds. 1987); Margrit Eichler, *Foundations of Bias: Sexist language and Sexist Thought*, in EQUALITY AND JUDICIAL NEUTRALITY, *supra*, at 22; Joan Ryan, *The Cultural Effects of Judicial Bias*, in EQUALITY AND JUDICIAL NEUTRALITY, *supra*, at 346; Louise Mandell, *Native Culture on Trial*, in EQUALITY AND JUDICIAL NEUTRALITY, *supra*, at 358; Constance Backhouse, *Nineteenth Century Judicial Attitudes Toward Child Custody, Rape and Prostitution*, in EQUALITY AND JUDICIAL NEUTRALITY, *supra*, at 271; Andree Ruffo, *Judicial treatment of Child Sexual Abuse: A Case Study*, in EQUALITY AND JUDICIAL NEUTRALITY, *supra*, at 337; Christine Boyle & Susannah Worth Rowley, *Sexual Assault and Family Violence: Reflections on Bias*, in EQUALITY AND JUDICIAL NEUTRALITY, *supra*, at 312.

17. *Id.*

18. See *supra* note 3 and accompanying text.

19. The Women's Legal Education and Action Fund (LEAF) was an equality advocacy group largely made up of feminist academics who intervened in key equality cases before the Supreme Court of Canada to make arguments about structural inequality in existing case law and legislation with remarkable success. Many legal challenges to discriminatory laws and policies were successful in criminal law, tort law, family law, and administrative law. See WOMEN'S LEGAL EDUC. & ACTION FUND, <http://www.leaf.ca> (last visited Aug. 25, 2015).

20. Mary Jane Mossman, *Defining Moments for Women as Lawyers: Reflections on Numerical Gender Equality*, 17 CAN. J. OF WOMEN AND THE L. 15, 15-25 (2015).

21. *Id.* at 19-20. In 2006 in Ontario for example, 58.5% of lawyers under the age of 30 were women. See MICHAEL ORNSTEIN, RACIALIZATION AND GENDER OF LAWYERS IN ONTARIO (2010), available at http://www.lsuc.on.ca/media/convapril10_ornstein.pdf. For further Canadian statistics compared with American statistics, see *Women in Law in Canada and the U.S.*, CATALYST.ORG, <http://www.catalyst.org/knowledge/women-law-canada-and-us> (last visited Aug. 25, 2015).

22. Canada Criminal Code, R.S.C. 1985, c. C-46.

23. Kwong-leung Tang, *Rape Law Reform in Canada: The Success and Limits of Legislation*, 42 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 258, 258-70 (1998).

their wives. The law recognized that men had rights over their wife's body simply by virtue of marriage.²⁴

Consequently, marital rape was not recognized as a crime. Second, women's testimony about sexual crimes was still not trusted. The Criminal Code stated that it alone could not convict a defendant of rape.²⁵ Consequently, rape complaints that were not made immediately after the attack were not considered and a woman's credibility depended on her sexual reputation.²⁶ As a result, her previous sexual conduct could be questioned and the evidence used to invalidate her complaint with respect to consent.²⁷ Finally, women's sexuality was defined by men's sexuality in that the requirement of vaginal penetration was the only standard with which a woman's body could be sexually violated in rape.

The purpose of the amendments was to focus on the violence committed by the assailant rather than the sexual nature of the offence;²⁸ to limit judicial discretion linking prior sexual activity with credibility of the victim; and to recognize women's autonomy in marriage. As a result, the offence of rape was re-cast in gender-neutral terms. A new three-tiered crime of sexual assault was enacted to capture degrees of additional violence perpetrated against women when they are sexually assaulted.²⁹ The crime was defined as a form of assault not only to contest narrow societal understandings of rape but also to undo the myriad of sex discriminatory rules for the legal processing of rape. The term *sexual assault* enabled women to charge their assailants with a range of sexual violations as opposed to merely the act of penetration. The recent complaint requirement was abrogated,³⁰ and the special rules of corroboration were repealed. Inquiries into the complainant's sexual conduct with other people were prohibited,³¹ and the defense of spousal rape repealed. The conceptual shift of rape from being a product of unequal power relationships in which women's sexuality was commoditized was a welcome step towards women's equality.³²

In concert with these changes, newly formed judicial education programs focused on multiple intersecting topics such as violence against women, racial bias, aboriginal concerns, treatment of child witnesses, and the economics of divorce,

24. Prior to 1983 rape was explicitly defined in the Criminal Code to exclude marital rape from criminal sanction. Section 143 read: "A male person commits rape when he has sexual intercourse with a female person *who is not his wife* without her consent, or with her consent if the consent is extorted . . . , is obtained by impersonating her husband, or is obtained by false and fraudulent representations as to the nature and quality of the act." Canada Criminal Code, S.C. 1953-54, c. 51, s. 135(a)-(b).

25. *Id.*

26. Criminal Code of Canada, R.S.C. 1970, c. C-34.

27. Evidence of women's past sexual history was used to support rape "myths and stereotypes"—particularly those that suggested a woman was more likely to consent to a sexual encounter if she had consented in the past. Now this use is statutorily prohibited by Section 276 of the Criminal Code of Canada which was brought into force in 1992 and is known as rape shield provisions. Criminal Code of Canada, R.S., 1992, c. C-46, s. 276. Evidence of a complainant's sexual history is not admissible to support an inference that the complainant is more likely to have consented or is less worthy of belief. *Id.* at s. 276(1).

28. Kwong-leung Tang, *supra* note 23, at 260.

29. Protecting Victims from Sex Offenders Act, S.C. 2010, c. 17.

30. Criminal Code of Canada, R.S.C. 1985, c. C-46, s. 276, 277.

31. *Seaboyer v. Gayme*, [1991] S.C.R. 577 (Can.) (holding the prohibition on questioning about past sexual history was found unconstitutional).

32. See Sheila McIntyre et al., *Tracking and Resisting Backlash Against Equality Gains in Sexual Offence Law*, 20 CAN. WOMAN STUD. 72 (2000).

taught with the goal of creating conditions favorable to achieving greater legal and social equality.³³ Judges confronted their own pre-conceptions, and re-examined legal principles and procedures for many biases that had never been recognized before.

For example, four years after the Banff conference in 1990, the first female appointee to the Supreme Court of Canada, Justice Bertha Wilson, gave instant credibility and prominence to the critique of gender bias in the law when she publicly stated that true judicial neutrality can only be accomplished when the laws and the judicial system reflect female as well as male perspectives of the world.³⁴ In her historic speech at the Osgoode Hall Law School titled “Will Women Judges Make a Difference?” she stated:

In some other areas of the law, however, a distinctly male perspective is clearly discernible. It has resulted in legal principles that are not fundamentally sound and that should be revisited when the opportunity presents itself. Canadian feminist scholarship has done an excellent job of identifying those areas and making suggestions for reform. Some aspects of the criminal law in particular cry out for change; they are based on presuppositions about the nature of women and women’s sexuality that, in this day and age, are little short of ludicrous.³⁵

Wilson noted that male judges adhere to traditional values and beliefs about the nature of women and men and their traditional roles in society. She concluded her remarks by calling for a government sponsored task force on gender bias and the development of judicial education programs, echoing the position taken by many of those presenting papers at the Banff conference.³⁶ At the time of her speech in 1990, there were 849 federally appointed judges in Canada of whom only 73, or 9%, were women.³⁷

Even before Justice Wilson’s speech, Judge Doug Campbell, (as he then was) Chair of the Western Judicial Education Center,³⁸ created a team³⁹ to advise designing and delivering judicial education programs on gender and other forms of bias in judicial decision-making, emphasizing the importance of social context education. The controversial program rapidly expanded over the next several years, after which the National Judicial Institute⁴⁰ passed a resolution in 1994 to explicitly support judicial education programs on social context, including “gen-

33. For a discussion of the Western Judicial Education Center programs, see GENDER EQUALITY AND THE JUDICIARY (Kirstine Adams & Andrew Byrnes eds., 1999).

34. See Bertha Wilson, *Will Women Judges Really Make a Difference?*, 28 OSGOODE HALL L. J. 507, 507-22 (1990).

35. *Id.* at 515.

36. *Id.*

37. Mary Jane Mossman, *supra* note 20.

38. He held this position until 1994, organizing several groundbreaking sessions for judges on issues concerning domestic and other violence against women as well as discrimination and inequality in the law on the grounds of race, gender, disability and other forms of disadvantage.

39. Feminist members of the initial team were Kathleen Mahoney, Sheilah Martin, Norma Winkler, and Lynn Smith, all of whom were professors of law at the time. Norma Winkler was a sociology professor and was from the United States where she had pioneered judicial education programs with Lynn Hecht Schafran.

40. See generally NAT’L JUDICIAL INST., <https://www.nji-inm.ca/nji/inm/a-propos-about/index.cfm> (last visited Aug. 25, 2015).

der and race (Aboriginal peoples, blacks, and other visible minorities) to be comprehensive, in-depth and credible.” In 1996, the Council mandated the National Judicial Institute (NJI) to initiate a national Social Context Education Project built on the work of the Western Judicial Education Center.

Many senior judges, both in legal decisions and in speeches and published articles, added their voices, underscoring the importance of social context awareness in achieving fair and just outcomes in judicial decisions. For example, in the *RDS* case⁴¹ two Supreme Court of Canada judges opined that a conscious social context inquiry has become an accepted step towards judicial impartiality.⁴² Other Supreme Court judges such as Justice Michel Bastarache publically commented “[o]ur understanding of rules or laws is necessarily filtered through the context of our historical, legal and social cultures,”⁴³ and in another speech said;

Ever since cases decided by the Supreme Court concerning the *Canadian Charter of Rights and Freedoms* began to dominate the legal scene in Canada, the importance of conducting a contextual analysis and taking an interdisciplinary approach has been stressed This definitely means that we have to address a wider range of knowledge and skills in our training programs. We have to realize that what we are doing is restructuring our environment and that the legal context, in its modern sense, is very broad.”⁴⁴

Justice Iacobucci, also on the Supreme Court, stated, “the process of adjudication requires that we always bear in mind the moral underpinnings of our Constitution and in particular the fundamental principle of equality;”⁴⁵ Justice L’Heureux-Dubé, more pointedly described the relevant social context saying:

“The contextual approach recognizes that the law cannot be divorced or abstracted from social realities and that the legal rules will often have been designed around the interests of those who hold power. As such, it becomes necessary to consider whether the experiences and perspectives of the more vulnerable and marginalized members of society have been excluded from the law’s development.”⁴⁶

Chief Justice of Alberta, Catherine Fraser, framed the educational challenge facing judges. She stated:

“to understand one’s own biases as well as those of the litigant before making a decision. [If one does not,] a judge’s biases may lead him or

41. *R v. S (R.D.)*, [1997] S.C.R. 484 (Can.).

42. *Id.*

43. The Hon. Justice Michel Bastarache, “The Canadian Charter of Rights and Freedoms, Domestic Application of International Values?”, Speech to the Association of Canadian Studies Conference on the 20th Anniversary of the Charter (Apr. 20, 2002).

44. Hon. Justice Michel Bastarache, “The Law’s Creative Power to Solve Present-Day Problems,” Speech to the Lord Reading Law Society (Jan. 13, 1999).

45. The Hon. Justice Frank Iacobucci, “The Broader Context of Social Context”, Remarks, Social Context Education Faculty and Curriculum Design Program 1, Part II (June 2001).

46. The Hon. Justice Claire L’Heureux-Dubé, *Beyond the Myths: Equality, Impartiality and Justice*, 10 J. SOC. DISTRESS & HOMELESSNESS 87, 94 (2001).

her to “mould” the facts of a case and thereby arrive at a decision based on an understanding that does not correspond entirely to reality To understand context . . . , judges must understand people and powerlessness: in particular the protected class or group, their values, the reality of their lives and the relationship of that group to other groups in our society.”⁴⁷

The judicial education movement grew not only in Canada in the years between 1986 and 2003. Judicial education programs on gender, race, ethnic and other issues of structural inequality started to be on the judicial education agenda in Australia,⁴⁸ South Africa,⁴⁹ India,⁵⁰ Vietnam,⁵¹ and Israel, with the involvement of Canadian experts, both judicial and academic.⁵² All these countries, as different as they are in terms of culture, race, ethnicity, population, geography, governance and wealth, shared the same problem when it came to dealing with issues pertaining to women and minorities through the use of stereotypes and myths that compromised their legal and social equality.⁵³

Some of the more noteworthy judicial decisions of the time reflected the advocacy for substantive equality in the courts and the goals of judicial education programs towards generating greater understanding of social context.⁵⁴ A landmark constitutional case in 1989 defined equality as being substantive and results orientated,⁵⁵ rather than a formal, “sameness of treatment” concept.⁵⁶ Under the

47. The Hon. Catherine Fraser, Judicial Awareness Training, Remarks (1995).

48. LIVINGSTON ARMYTAGE, EDUCATING JUDGES: TOWARDS A NEW MODEL OF CONTINUING JUDICIAL LEARNING (1996).

49. The author was the Canadian Director of the first judicial education project in South Africa, partnering with Lawyers for Human Rights and the University of Capetown Law School.

50. The India project which included the author of this article and other members of the Western Judicial Education Center was conducted with the Supreme Court of India and a Women’s NGO named Sakshi, led by lawyer Nina Kapur.

51. The Vietnam project was started much later in 2003. This CIDA project obtained by Agriteam Inc., through a competitive bidding process, was partnered with the University of Alberta. A component of the project called “JUDGE” (Judicial Development and Grassroots Engagement) had a social context and a human rights component that focused on educating judges and judicial educators.

52. The author was the Canadian Director of projects in both South Africa and Vietnam. The South Africa project, funded by CIDA, partnered with Lawyers for Human Rights and Cape Town University where a Center for Gender, Race, and Class was created to educate judges on social context. The Canadian participation initially included Judge Doug Campbell and Professor Shelia Martin (as she then was) and later included federal government representatives, as the program grew larger. In Australia, the author was a consultant to the Supreme Court of Western Australia and the Family Court of Australia in the early days of their judicial education programs on social context issues. The Canadian experts included the members of the Western Judicial Education Center faculty as well as senior judges such as Justice Claire L’Heureux-Dubé and Catherine Fraser. Social context education projects in India and Israel involved the same core Canadian group with other judges and academics participating from time to time.

53. This was recognized in the mandates of the various projects. See for example, Vietnam, Judicial Development and Grassroots Engagement (JUDGE): January 2006-July 2011, AGRITEAM CAN., <http://www.agriteam.ca/projects/profile/judicial-development-and-grassroots-engagement-judge/> (last visited Aug. 25, 2015). See also *supra* note 33 and accompanying text.

54. See Hon. Claire L’Heureux-Dubé, *It takes a Vision: The Constitutionalization of Equality in Canada*, 14 YALE J.L. & FEMINISM 363 (2002).

55. *Andrews v. Law Soc’y of B.C.*, [1989] 1 S.C.R. 143 (Can.). This was followed by *Eldridge v. British Columbia (Attorney General)*. *Eldridge v. B.C. (Attorney General)*, [1997] 3 S.C.R. 624 (Can.) (holding that sometimes equal treatment means providing different services for different groups, in this case it meant deaf patients required interpreters in order to receive equal health benefits other patients received).

earlier *Bill of Rights*,⁵⁷ the Supreme Court had interpreted its equality guarantee narrowly as a formal and procedural right rather than a substantive one. In other words, if like people were treated the same, the treatment would not be subject to scrutiny on equality grounds, even though differing social groups were not accorded equal treatment.⁵⁸

The Supreme Court firmly rejected this approach to equality in *Brooks v. Canada Safeway Ltd.*, saying that it should be recognized that not all differences in treatment will result in inequality, and that identical treatment may result in inequality. Applying the same legal rules to groups or individuals who are “similarly situated” (the test where likes are treated alike and dislikes, differently) was firmly rejected.⁵⁹

Once the foundation for substantive equality was established with the requirement of a context-based analysis, the Supreme Court had the necessary tools to find that pregnancy discrimination and sexual harassment⁶⁰ were sex discrimination even though all women did not share the same experience, and men not at all. The Court’s repudiation of its earlier pregnancy discrimination decision in *Bliss*⁶¹ signaled the insights of contemporary legal theory, including feminist legal theory, had made an impact on the Court’s traditional thinking. Historically assigned social roles that downgraded women and failed to accommodate their childbearing needs were replaced by an understanding that the law must take into account the needs of working women. The memorable words of the then Chief Justice Brian Dickson, “That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious,” was a high water mark for feminist understanding at the Supreme Court. The earlier, groundbreaking abortion decision must have influenced the Court’s thinking,⁶² and Justice Bertha Wilson could not have been more clear about putting women in the center of the analysis when she opined “[i]t is only women who bear children; no man can become pregnant.”⁶³ Her legal reasoning focused on the well-being and dignity of Canadian women, taking into account their experiences, their unique reproductive capacity and their struggle for more equitable treatment.⁶⁴ She made it abundantly clear that the key to alleviating injustice to women was to contextualize the constitutional analysis. With respect to access to abortion, contextualization resulted in finding that in order to protect a women’s constitutional personal security guarantee, decisions early in the pregnancy must be solely those of the woman, not the state.⁶⁵

56. This was the test used in a pregnancy case, *Bliss v. Att’y Gen. of Can.* *Bliss v. Att’y Gen. of Can.*, [1979] 1 S.C.R. 183 (Can.) (finding that discrimination on the basis of pregnancy was found not to be sex discrimination by using the similarly situated test as between men and women. Because men could not become pregnant, women are not similarly situated to them and therefore the denial of a job because of the plaintiff’s pregnancy could not be sex discrimination).

57. S.C. 1960, c. 44 (reprinted in R.S.C., 1985, App. 1[1]).

58. *Bliss*, [1979] 1 S.C.R. 183 (Can.).

59. *Brooks v. Can. Safeway Ltd.*, [1989] 1 S.C.R. 1219 (Can.) (overturning the Supreme Court of Canada’s earlier decision in *Bliss*, applying the principle of substantive equality to an employee disability plan that treated pregnant women differently from non-pregnant women and men).

60. *Janzen v. Platy Enters. Ltd.*, [1989] 1 S.C.R.1252, para. 49 (Can.).

61. *Bliss*, [1979] 1 S.C.R. 183.

62. *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616 (Can.).

63. *Brooks*, [1989] 1 S.C.R. 1219.

64. *Id.*

65. *Id.*

Where battered women were concerned, Justice Wilson again brought a gendered, social context perspective to create new law around the defense of self-defense. She said that to base self-defense on a “bar room brawl” model was unfair to women. Instead, the test was one from a female normative standard.⁶⁶ Instead of applying “common sense” to decide whether or not the accused was acting in self-defense when she shot her partner in the back after he threatened to kill her, Justice Wilson said expert evidence of the battered woman syndrome must be heard, and if legal norms were to be altered to include and respond to the needs and reality of battered women, expert testimony was necessary.⁶⁷ This holding explicitly realized the need for judicial education about battered women’s circumstances and situations, because in reality, most judges had little or no experience with these sensitive areas.⁶⁸

Justice Claire L’Heureux-Dubé, the second woman appointed to our highest Court, focused on judicial and legislated use of gender-based stereotypes and myths that influence judicial decisions, especially in family and criminal law, showing how they undermined gender equality.⁶⁹ In her dissent in *R v. Seaboyer*,⁷⁰ she held the “rape-shield” provisions of the *Criminal Code of Canada* should have protected rape victims from certain sexist common law assumptions, e.g., that women who have sexual relations outside of their marriage are likely to consent to any sexual activity, or the assumption that these women are likely to lie under oath. In *Seaboyer*, the accused challenged the rape shield laws, claiming they interfered with his rights to give full answer and defense to the charge. Justice L’Heureux-Dubé would have found the exclusion of the evidence could not be a violation of the accused’s rights since the evidence required a rationale invoking sexist myths about women and rape. The right to a fair trial conducted in accordance with the principles of fundamental justice does not include a right to introduce irrelevant evidence of a kind that has been proven to be a preemptively potent force in contorting and controlling the fact-finding process.⁷¹

Justice Bertha Wilson once said in her speech, titled “Will Women Judges Make a Difference,” some aspects of the criminal law in particular cry out for change because they are based on presuppositions about the nature of women and women’s sexuality that, in this day and age, are little short of ludicrous.⁷² Justice L’Heureux-Dubé later gave voice to the faulty and sexist logic underlying admissible evidence in sexual assault trials. She explained that rape myths are generalized and false beliefs about sexual assault that trivialize a sexual assault or suggest a sexual assault did not occur. Although judges and lawyers unlikely perpetuate rape myths for malicious reasons, the use of these myths is sometimes just the normative reaction to a sexual assault case, but unfortunately, this status quo surrounding rape myths has severe consequences for sexual assault victims and for maintaining sexual assault in our society. The Justice also voiced many of these myths and stereotypes:

66. *R v. Lavallee*, [1990] 1 S.C.R. 852 (Can.).

67. *Id.*

68. *Id.*

69. Brownmiller and Burt were the first to identify and discuss rape myths in our culture. SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975); Martha R. Burt, *Cultural Myths and Support for Rape*, 38 J. PERSONALITY & SOC. PSYCHOL. 217 (1980).

70. *R v. Seaboyer*, [1991] 2 S.C.R. 577 (Can.).

71. *Id.*

72. Wilson, *supra* note 34.

- Women fantasize about being rape victims;
- Women mean ‘yes’ even when they say ‘no’;
- Any woman could successfully resist a rapist if she really wished to;
- That the sexually experienced do not suffer harms when raped (or at least suffer lesser harms than the sexually ‘innocent’);
- Women often deserve to be raped on account of their conduct, dress, and demeanor; and
- That rape by a stranger is worse than one by an acquaintance.⁷³

She pointed out that preceding legislative efforts in this domain had failed to stop the discriminatory treatment of female victims of sexual assault in the criminal justice and legal systems with the consequent discouragement of complaints.⁷⁴ She stated that that the stereotyping of victims in criminal sexual assault trials had proven so persistent that Parliament’s enactment of a clear restriction on the right of the defense to cross examine and lead evidence of a complainant’s prior sexual conduct had become necessary.⁷⁵

It is obvious that Justice L’Heureux-Dubé understood that when accused persons are permitted to trade on rape myths to build a defense, the resulting distortions in the outcomes of sexual assault trials negatively impact the position of women in society. She understood that in sexual assault trials, judges must be cognizant that prejudice cuts two ways—prejudice to the accused but also prejudice to women’s position as full and equal participants in society. The difficulty in resolving the problem is the deeply embedded understanding of fairness in criminal trials that has always focused on the accused, not on the unfairness caused by the use of sexist stereotypes.⁷⁶

In family law, the Justice wrote for the Court, giving legal recognition to the disproportionate impact that child bearing, marriage, and divorce, have on women,⁷⁷ pointing out that although the Divorce Act⁷⁸ is drafted in gender neutral language, its practical effects often have gender consequences. Attempting to ground family law in both common sense and reality, the justice rejected the self-sufficiency model of divorce and replaced it with a compensatory framework that was more able to respond to the actual reality of many divorced women. The guidelines she developed sought to accomplish an equitable sharing of the economic consequences of marriage, requiring consideration of the economic and social realities for divorcing couples in Canada and the economic disadvantages faced by women resulting in the phenomenon of the “feminization of poverty.” She described the diminished earning capacity an ex-wife often experiences when she enters the labor force after years of reduced or non-participation in it: her career choices may be seriously limited by her age and her lack of up-to-date knowledge of the business world. If she has custody of children, she may be fur-

73. *Seaboyer*, [1991] 2 S.C.R. 577.

74. *Id.*

75. *Id.*

76. See Annalise Acorn, R v. Seaboyer: *Pornographic Imagination and The Springs of Relevance*, 3 CONST. F. 1, 25-28 (1991) (providing a full discussion of the case and its implications), available at https://ejournals.library.ualberta.ca/index.php/constitutional_forum/article/viewFile/11945/9101.

77. *Moge v. Moge*, [1992] 3 S.C.R. 813 (Can.).

78. Divorce Act, R.S.C., 1985, c. 3.

ther limited by the need to be close to schools and the need to work regular, predictable hours. The former husband who is not awarded custody encounters none of these impediments.⁷⁹

Justice L'Heureux-Dubé also pioneered Supreme Court jurisprudence in other areas of discrimination. She led the Court in recognizing “non-traditional” marriages, apparently convincing her fellow judges that they could decide in favor of gay and lesbian marriage rights without undermining traditional family values. She stated:

[I]t is possible to be pro-family without rejecting the less traditional forms. It is not anti-family to support protection for non-traditional families. The traditional family is not the only family form, and non-traditional family forms may equally advance true family values.⁸⁰

The justice also pioneered in the area of tax law.⁸¹ In *Symes v. Canada*, when a female lawyer sought to deduct childcare costs as a business expense, Justice L'Heureux-Dubé noted how the perception in the law of what constituted a valid business expense for the purpose of income tax deduction was based not on the everyday realities of businesswomen faced with the responsibility of child care, but was based rather on the stereotypical businessman who was unlikely to bear the primary duty in this regard. In another tax case where gender discrimination was argued,⁸² the legislative method of taxation and deductions for child support payments was based on the assumption that divorcing individuals were a couple for tax purposes. Justice L'Heureux-Dubé again in dissent, illustrated how a law that still treated former spouses as couples for tax purposes failed to comport with the reality of most custodial parents. Similar to her decision in *Mossop*,⁸³ she said that a contextual analysis would reveal the majority of custodial parents were women living in financially difficult circumstances with very little power over the actions or economic resources of former spouses. Moreover, the assumption the family law system could adequately address concerns of custodial parents, who were usually women, did not account for the difficulties—practical, financial, or emotional—that were involved in seeking redress from the non-custodial spouse through that scheme. Such a scheme was boldly discriminatory.⁸⁴

During her fifteen years on the Supreme Court from 1987 to 2002, Justice L'Heureux-Dubé participated in over six hundred *Charter of Rights* decisions, many of which were profoundly significant and often controversial.⁸⁵ The unique ways in which her work as a judge of the Supreme Court of Canada enhanced

79. *Moge*, 3 S.C.R. at 863; see also KIRSTEN DOUGLAS, *MOGE V. MOGE: A NEW VISION OF SPOUSAL SUPPORT* (1993), available at <http://publications.gc.ca/Collection-R/LoPBdP/BP/bp339-e.htm>.

80. *Can. (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, para. 119 (Can.).

81. *Symes v. Can.*, [1993] 4 S.C.R. 695 (Can.).

82. *Thibaudeau v. Can.*, [1995] 2 S.C.R. 627 (Can.).

83. *Mossop*, 1 S.C.R. 554.

84. Despite its “win” in *Thibaudeau*, Parliament amended the Income Tax Act in 1997 to eliminate the deduction formerly available to payors of child support and to end the requirement that the custodial parent include child support as part of his or her taxable income. *Thibaudeau*, 2 S.C.R. at 636.

85. See ADDING FEMINISM TO LAW: THE CONTRIBUTIONS OF JUSTICE CLAIRE L'HEUREUX-DUBÉ (Elizabeth Sheehy ed., 2004) (discussing the Justice's significant decisions) [hereinafter ADDING FEMINISM TO LAW].

women's legal and social equality in Canada included contributions to family law, tax law, human rights law, immigration law, and criminal law. She also worked to advance access to justice and the rights of Aboriginal people, gays and lesbians, and people with disabilities in Canada.⁸⁶

Both on the bench and as a public figure, the Justice unapologetically advanced a feminist analysis of law that served to enhance the quality of life for Canadian women and all equality seekers.⁸⁷ The approach she brought to judging, defined by human compassion and an ability to see and understand the lived reality of people's lives was unique and revolutionary.

Though revolutionary, many of Justice L'Heureux Dubé's analysis and approaches prevailed during the late 1990s and early 2000s.⁸⁸ In 2002, the year she retired, her legacy with respect to substantive context-based equality rights lives on, but the spark she began has dimmed with subsequent decisions of a differently constituted court.⁸⁹

III. BACKLASH

The myth of neutrality is one that has served to veil and protect the maleness of the judiciary for much of history. Whenever the myth is challenged and there is the suggestion that women might bring a different approach to judging, male backlash occurs.⁹⁰ Justice L'Heureux-Dubé's and Justice Wilson's observations that women's diverse experiences have been lacking in many areas of the law and their insistence on the necessity of incorporating them into judicial decisions, garnered both praise and condemnation.⁹¹ After she gave her famous lecture of "Will Women Judges Make a Difference" in 1990,⁹² Justice Wilson was criticized for being a feminist, for playing politics, for having a personal agenda, for not being impartial, and for destroying democracy.⁹³

Justice L'Heureux-Dubé was the object of scurrilous public ignominy for her explicit critique of a lower court judge's use of stereotypes in a rape case.⁹⁴ In her

86. See Hon. Claire L'Heureux-Dubé, *supra* note 54.

87. *Id.*

88. See Shelly Gavigan, *Outside/In: Lesbian and Gay Issues as a Site of Struggle in the Judgments of Justice Claire L'Heureux-Dubé*, in *ADDING FEMINISM TO LAW*, *supra* note 85, available at [https://apps.osgoode.yorku.ca/osgmedia.nsf/0/8692378FDD46CCAB852571B9006F7851/\\$FILE/Outside-in.pdf](https://apps.osgoode.yorku.ca/osgmedia.nsf/0/8692378FDD46CCAB852571B9006F7851/$FILE/Outside-in.pdf); see also generally *ADDING FEMINISM TO LAW*, *supra* note 85.

89. See, e.g., *N.S. (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325 (Can.) (L'Heureux-Dubé, J., dissenting) (case involving an unsuccessful claim for property by a common law spouse, and Justice L'Heureux-Dubé forwarding arguments that would eventually undermine some of the earlier decisions regarding non-traditional marriages).

90. Dermot Feenan, *Women Judges: Gendering Judging, Justifying Diversity*, 35 *J.L. & SOC'Y* 490 (2008).

91. Constance B. Backhouse, *The Chilly Climate for Women Judges: Reflections on the Backlash from the Ewanchuk Case*, 15 *CAN. J. WOMEN & L.* 167 (2003).

92. Wilson, *supra* note 34.

93. See Robert E. Hawkins & Robert Martin, *Democracy, Judging and Bertha Wilson*, 41 *MCGILL L.J.* 1 (1995).

94. *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 (Can.). Justice L'Heureux-Dubé was responding to the comments of lower court Justice McClung's characterization of the accused's coercive advances as mere "clumsy passes" that were more "hormonal" than "criminal," and that the complainant's repeated "no's" to her assailant's advances were irrelevant, implying that a woman who conceived a child out of wedlock, living common-law with a male partner, was not capable of refusing consent. *Id.* at 369, 372, 376. Justice L'Heureux-Dubé also pointed out the stereotypical treatment of the complainant when the

concurring judgment with the unanimous court in *R v. Ewanchuk*, she stated: “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. . . . It is part of the role of this Court to denounce this kind of language, unfortunately still used today, which not only perpetuates archaic myths and stereotypes about the nature of sexual assaults but also ignores the law.”⁹⁵

Amongst other things she was publically accused by the lower Court judge who had written the judgment, of “a graceless slide into personal invective,” and that her “personal convictions . . . delivered again from her judicial chair” could be responsible for the “disparate [and growing] number of male suicides being reported in the Province of Quebec.”⁹⁶

A prominent criminal lawyer, the late Edward Greenspan, stated in what was described as a “sledge hammer assault,”⁹⁷ that Justice L’Heureux-Dubé was a bully and that her feminist influence “amounted to intimidation, posing a potential danger to the independence of the judiciary.”⁹⁸ In his over-heated attack, the lawyer did not describe the Justice’s judgment, quote from it, or even set out what it was that the lawyer found offensive. To justify his remarks, it was enough to attribute to the Justice a mindless feminist ideology. A portion of his comments:

She was intemperate, showed a lack of balance, and a terrible lack of judgment. . . . Feminists have entrenched their ideology in the Supreme Court of Canada and have put all contrary views beyond the pale The feminist perspective has hijacked the Supreme Court of Canada and now feminists want to throw off the bench anyone who disagrees with them. Judge L’Heureux-Dubé was hell-bent on re-educating Judge McClung, bullying and coercing him into looking at everything from her point of view. She raked him over the coals for making remarks that may, in fact, be accurate in the given case. I don’t know. But just as he had no empirical evidence to support his view (if you discount all of human history), she has no empirical evidence to say what she says (if you discount Catharine MacKinnon’s collected works). . . . Madam Justice L’Heureux-Dubé has shown an astounding insensitivity and an inability to conceive of any concepts outside her own terms of reference and has thereby disgraced the Supreme Court.⁹⁹

lower court judge commented that she “did not present herself to Ewanchuk or enter his trailer in a bonnet and crinolines.” *Id.* at paras. 88, 89.

95. *Id.* at para. 95.

96. Mr. Justice J.W. McClung, Court of Appeal of Alberta, Edmonton, “*Right of reply*” *Letters to the Editor*, NAT’L POST, Feb. 26, 1999, at A19; see also Alanna Mitchell et al., *Legal Experts Outraged by Personal Attack on Supreme Court Judge*, TORONTO GLOBE & MAIL, Feb. 27, 1999, at A1 (commenting on the unprecedented and unparalleled nature of the attack).

97. Mr. Justice Alex Kozinski, *An Unfair Attack on a Decent Judgment*, NAT’L POST, Mar. 8, 1999, available at <http://www.fact.on.ca/newspaper/np99030x.htm>.

98. Edward L. Greenspan, *Judges have no right to be bullies*, NAT’L POST, Mar. 2, 1999, at A18, available at <http://www.fact.on.ca/newspaper/np99030l.htm>. See also Kozinski, *supra* note 97 (a critique of Greenspan’s editorial).

99. See Greenspan, *supra* note 98.

The depiction of such eminent jurists as ill-suited to judicial office serves to reinforce the perception of the woman judge as a threat to the order of law, drawing upon the historical tropes of the feminine as disorderly or dangerous.¹⁰⁰

Justice L'Heureux Dubé noted that she was not alone in experiencing this sort of backlash. She commented in 1997: "Women judges and adjudicators are finding themselves the targets of unfairly harsh criticism and allegations of bias, particularly but not exclusively when they have relied on a new perspective or more inclusive principles."¹⁰¹ Notwithstanding the outspoken critics, optimists believed the promise of equality in the *Charter* seemed to be making progress and even the Chief Justice, Brian Dickson, felt the judicial approach of Bertha Wilson was visionary and embodied a distinctive and profoundly democratic conception of the role of the judge.¹⁰² Even so, most of the impressive landmark equality cases were discrimination cases based on the one enumerated ground of sex. Very few cases involved intersecting forms of disadvantage such as race/ethnicity and sex discrimination.¹⁰³ Even fewer succeeded.¹⁰⁴

As time went on, legislation and public policy began to erode the equality advances made in the '80s and '90s. At the same time, the Supreme Court's application of the equality provisions became more and more complex and stringent.¹⁰⁵ The turning point in the equality jurisprudence was *Law v. Canada*,¹⁰⁶ where the Supreme Court adjusted the *Andrews*¹⁰⁷ equality test, making it much more difficult for plaintiffs to meet the requirements for proving discrimination. The case involved eligibility with respect to survivor pension benefits. The Court dismissed a section 15¹⁰⁸ challenge brought by Nancy Law to provisions of the Canada Pension Plan that denied her a survivor pension because she was under the age

100. See Delia Santos, *Shut Up or I'll Kill You, Dangerous Ladies, Nineteenth and Twentieth Century Femininity in Literature and Film*, CTR. FOR NEW DESIGN IN LEARNING & SCHOLARSHIP, GEORGETOWN UNIV., (April 27, 2010), <https://blogs.common.georgetown.edu/ds443-171/project> (exploring women as a source of instability and fear in fields such as mythology, the Bible, and ancient history). See also M. Thornton, *Authority and Corporeality: The Conundrum for Women in Law*, 6 FEMINIST LEGAL STUD. 147 (1998).

101. See Dermont Feenan, *Women Judges: Gendering Judging, Justifying Diversity*, 35 J. LAW & SOC. 490, 499 (2008).

102. James MacPherson, *Canadian Constitutional Law and Madame Justice Bertha Wilson - Patriot, Visionary and Heretic*, 15 DALHOUSIE L. J. 217, 220 (1992); Brian Dickson, *Madame Justice Wilson: Trailblazer for Justice*, 15 DALHOUSIE L. J. 1 (1992).

103. This seems to have been recognized in a recent keynote speech by the Chief Justice to students at the University of Toronto Convocation when on the topic of women's equality, she said: "How do we move forward? We need to challenge hidden assumptions and stereotypes about the contribution that women should be allowed to make, as well as the laws that perpetuate them." Brett Hughes, *Great Strides But More Work to Be Done: Chief Justice*, CAN. LAWYER MAG. (Oct. 20, 2014), <http://www.canadianlawyermag.com/5326/Great-strides-but-more-work-to-be-done-for-women-chief-justice.html>. McLachlin also said education is "one of the most important" contributors to equality, as it helps "lift people over barriers, and to lead them to better, more equal lives." *Id.*

104. *Id.*

105. See generally Jennifer Koshan, *Under the Influence: Discrimination Under Human Rights Legislation and Section 15 of the Charter*, 3 C. J. HUM. RTS. 115 (2014).

106. *Law v. Can.* (Minister of Employment and Immigration), [1999] 1 S.C.R. 497, 523-24 (Can.).

107. *Id.* See *supra* notes 55-56 and accompanying text for discussion of *Andrews*.

108. See *supra* note 55 and accompanying text. The *Andrews* test has 3 prongs: 1) Does the law treat the claimant differently from others, 2) do analogous grounds to those enumerated in § 15 of the Charter exist, and 3) does the law have a discriminatory purpose or effect? *Andrews v. Law Soc'y of B.C.*, [1989] 1 S.C.R. 143 (Can.). *Law v. Canada* added additional analytical requirements to determining whether or not the law was discriminatory, including listing factors that need to be considered for a contextual and purposive analysis. *Law v. Can.*, 1 S.C.R. 497.

of 35 at the time of her spouse's death. The issue was whether the sections using age as a criterion of entitlement to the survivor's pension infringed section 15 of the *Canadian Charter of Rights and Freedoms*.¹⁰⁹ The case came before the Court in a time of uncertainty in the development of Section 15 jurisprudence, because the Court had not achieved consensus about the central ingredients of section 15 analysis.¹¹⁰

In dealing with the pension legislation challenge, the Supreme Court decided to depart from the *Andrews* test,¹¹¹ adding "human dignity" as an underlying value and requirement of a section 15 violation without giving it any clear definition. The lack of precision created a formidable barrier for claimants trying to prove a breach of section 15. At the same time, its lack of clarity gave judges room to avoid consideration of social context and the social mechanisms that could impose and reinforce discrimination in a section 15 analysis.¹¹² This occurred despite Justice Iacobucci's stated intention when writing for the majority to create flexible guidelines. The ultimate effect of *Law* became a rigid and complex test.¹¹³

As a result of *Law*, in a series of decisions starting in 1999, fully half of the claimants that came before the Supreme Court failed to establish discrimination because they could not establish that the adverse treatment they experienced amounted to a violation of human dignity.¹¹⁴ Under the prior case law where the

109. Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

110. *Law v. Can.*, 1 S.C.R. 497.

111. *Id.* at 522-24. *See also* Koshan, *supra* note 105.

112. *See* Sheila Martin, *Balancing Individual Rights to Equality and Social Goods*, 80 CAN. B. REV. 299, 328-30 (2001) (discussing criticism of the introduction of the concept of dignity); June Ross, *A Flawed Synthesis of the Law*, 11 CONST. F. 74, 83 (1999), available at https://ejournals.library.ualberta.ca/index.php/constitutional_forum/article/view/11139/8551; Roger Gibbins, *How in the World Can You Contest Equal Human Dignity?*, 12 NAT'L J. CONST. L. 25 (2000).

113. The challenged law imposes (directly or indirectly) on the claimant a disadvantage (in the form of a burden or withheld benefit) in comparison to other comparable persons; the disadvantage is based on a ground listed in or analogous to a ground listed in s. 15; and the disadvantage also constitutes an impairment of the human dignity of the claimant. The claimant is required to prove these three components on a balance of probabilities, meaning that a court would need to find that it is more likely than not that a proposition the claimant advances is true. This summary of the test is somewhat deceptive, however. Although it may appear that there are only three parts to the test, each component includes subparts, all of which the claimant had to prove. For additional commentary see Martha Butler, *Section 15 of the Canadian Charter of Rights and Freedoms: The Development of the Supreme Court of Canada's Approach to Equality Rights Under the Charter*, LIBRARY OF PARLIAMENT RESEARCH PUBLICATIONS (Sept. 11, 2013), <http://www.parl.gc.ca/Content/LOP/ResearchPublications/2013-83-e.htm?cat=law>.

114. Examples from the Supreme Court's post-law jurisprudence include (in reverse chronological order): *Alta. (Aboriginal Affairs and Northern Development) v. Cunningham*, [2011] 2 S.C.R. 670 (Can.) (adverse differential treatment of status Indians not discriminatory); *Fraser v. Ont. (Attorney General)*, [2011] 2 S.C.R. 3 (Can.) (adverse differential treatment of agricultural workers not discriminatory); *Withler v. Can.*, [2011] 1 S.C.R. 396 (Can.) (adverse differential treatment on the basis of age not discriminatory); *Alta. v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567 (Can.) (adverse differential treatment on the basis of religion not discriminatory); *A.C. v. Man. (Director of Child and Family Services)*, [2009] S.C.J. No. 30 (Can.) (adverse differential treatment on the basis of age not discriminatory); *Ermieskin Indian Band & Nation v. Can.*, [2009] 1 S.C.R. 222 (Can.) (adverse differential treatment of Indian bands not discriminatory); *R v. Kapp*, [2008] 2 S.C.R. 483 (Can.) (adverse differential treatment on the basis of race not discriminatory); *Health Servs. & Support-Facilities Subsector Bargaining Ass'n v. B.C.*, [2007] 2 S.C.R. 391 (Can.) (adverse differential treatment on the basis of sex not discriminatory); *Hodge v. Can. (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357 (Can.) (adverse differential treatment on the basis of marital status not discriminatory); *Can. Found. for Children, Youth & the Law v. Can. (Attorney General)*, [2004] 1 S.C.R. 76 (Can.) (adverse differential treatment on the basis of age not discriminatory); *N.S. (Attorney General) v.*

test in the *Andrews* case¹¹⁵ was applied, these cases would have been successful establishing *prima facie* discrimination in section 15 and the burden would then have passed to the government to justify it under section 1. Because the claims could not get over the initial barrier of the dignity test, the government was not required to meet a burden of justification.

In 2008, the Court began to distance itself from the requirement to prove a violation of human dignity in the discrimination analysis, but then replaced it with the requirement that the claimant show in addition to the other criteria that the adverse treatment was a result of the operation of prejudice or stereotype. This new approach, perhaps unintentionally, created an additional barrier that resulted in even fewer equality cases succeeding.¹¹⁶ In his extensive analysis of section 15 discrimination claims, Bruce Ryder reports the success rate for claimants making section 15 claims has declined sharply in recent years. They have fallen to 11.6 percent of reported cases in the five-year period from 2005 to 2009 from 16.4 percent, and since 2009 the success rate has fallen even further to 7.2 percent.¹¹⁷ The data compiled by Ryder¹¹⁸ provides strong support to the argument made by some critical socio-legal scholars that the promise held out by section 15 was a false promise, and that now many forms of inequality are beyond the reach of constitutional rights litigation.

In a society still riven by deep structural inequalities on the basis of sex, race, ability and other prohibited grounds of discrimination, the rapidly decreasing success rate of section 15 claims raises questions about judicial commitment to the constitutional equality guarantee, the composition of the bench,¹¹⁹ and the concomitant decline in judicial education programs on gender and other forms of bias in decision making. Critics point out that the jurisprudence is moving back to a narrow formal equality standard that existed prior to the *Charter*.¹²⁰

A late and most revealing decision demonstrating the markedly different approach towards equality, especially with respect to gender equality on marriage breakdown,¹²¹ is the Supreme Court's decision in *Quebec (Attorney General) v A*.¹²² The decision upheld legislation denying all common law spouses in Quebec

Walsh, [2002] 4 S.C.R. 325 (Can.) (adverse differential treatment on the basis of marital status not discriminatory); Gosselin v. Que. (Attorney General), [2002] 4 S.C.R. 429 (S.C.C.) (adverse differential treatment on the basis of age not discriminatory); Lovelace v. Ont., [2000] 1 S.C.R. 950 (Can.) (adverse differential treatment on the basis of Aboriginal band status not discriminatory); Granovsky v. Can. (Minister of Employment and Immigration), [2000] 1 S.C.R. 703 (Can.) (adverse differential treatment on the basis of physical disability not discriminatory); Winko v. B.C. (Forensic Psychiatric Institute), [1999] 2 S.C.R. 625 (Can.) (adverse differential treatment on the basis of mental disability not discriminatory).

115. *Andrews v. Law Soc'y of B.C.*, [1989] 1 S.C.R. 143 (Can.).

116. Kapp, 2 S.C.R. 483. See also Bruce Ryder, *The Strange Double Life of Canadian Equality Rights*, 63 S.C.L.R. 261, 265 (2013).

117. Ryder, *supra* note 116, at 270.

118. *Id.*

119. Justices Dickson, Wilson, L'Heureux-Dubé, Gontier, McIntyre, and Basterache, who penned some of the most influential substantive equality decisions, have long since retired from the Supreme Court and were leaders in developing the substantive equality jurisprudence.

120. See *supra* note 114 and accompanying text.

121. The visionary *Moge* decision is one such example, as depicted by the strong equality input of Justice L'Heureux-Dubé. See *Moge v. Moge*, [1992] 3 S.C.R. 813 (Can.). This concept was ignored by the majority, and was later cited in a dissent by Justice Abella in *Quebec (Attorney General) v. A*. See *Quebec (Attorney General) v. A*, [2013] 1 S.C.R. 61 (Can.).

122. *Quebec v. A*, [2013] 1 S.C.R. 61.

the right to claim support and the right to divide family property. The Court upheld the legislation notwithstanding the factual record that *de facto* couples form long-standing unions, they divide household responsibilities, they develop a high degree of interdependence, and the economically dependent spouse is faced with the same disadvantages when the relationship dissolves as a dependent married spouse faces. The Court apparently ignored the significant disproportionate negative impact that marriage breakup has on women, and its implications for section 15 analysis. Instead it found the *Quebec Civil Code* was not discriminatory, emphasizing the objective of Quebec's support law is to preserve freedom of choice and respect the dignity and autonomy of common law relationships.¹²³ The stark difference between the majority and the dissent was Justice Abella's focus on substantive equality principles that led her to be concerned with the protection of vulnerable spouses.¹²⁴ The majority's prioritization of autonomy and choice came from a formal equality analysis, where equality only requires both parties to be treated the same. The feminization of poverty (which is understood to mean that women and children have little access to economic support either from their former spouses or the state) articulated in the Court's earlier *Moge v. Moge* decision was cited in the dissenting judgment, but not considered by the majority.¹²⁵ The result of the decision is that the legislation remains in place and upon the breakup of their common law relationships, women in Quebec are left entirely unprotected by the state with respect to support and sharing in matrimonial property.

In other parts of the country, reports about ongoing bias and systemic discrimination against women in custody and access disputes¹²⁶ find that judges place reliance on reports that are biased and unfair to women—without questioning them or analyzing them for gender bias. Recommendations for gender awareness training go unheeded. Others find that despite reforms in the law and past educational efforts to sensitize the judiciary about the dynamics of domestic and sexual violence, the judicial treatment of these crimes remains a very serious problem in the operation of the law.¹²⁷ Criminal law jurisprudence on violence against women shows a shift *away* from the enlightened reforms in the '80s and '90s to rid the law of sexually discriminatory myths and stereotypes.¹²⁸ One new myth is the notion that somehow sexual assault is inherently less serious and harmful than rape, with resulting public confusion over when and how these terms should be used.¹²⁹

This is unfortunately occurring despite national and international statistics demonstrating violence against women has not decreased, is severely underreported, and when reported, rates of perpetrators being charged and convicted are very

123. *Id.* at 67 (the majority opinion was written by Justice LeBel).

124. Justice Abella wrote the dissenting opinion on both the breach and the section 1 analysis. *Id.* at 77-80.

125. *Id.* at 118. See also *Moge*, 3 S.C.R. 813.

126. Shanaz Rahman & Laura Track, *Troubling Assessments: Custody and Access Reports and Their Equality Implications for BC Women*, WEST COAST LEAF, June 2012, at 18, available at http://www.ncdsv.org/images/WCL_TroublingAssessmentsCustodyAndAccessReports_6-2012.pdf.

127. *Id.* at 42-43.

128. David M. Tanovich, *An Equality Oriented Approach to the Admissibility of Similar Fact Evidence in Sexual Assault Prosecutions*, in LAW, LEGAL PRACTICE, AND WOMEN'S ACTIVISM 559, 579 (Elizabeth Sheehy ed., 2012), available at https://www.uwindsor.ca/law/tanovich/sites/uwindsor.ca.law.tanovich/files/tanovich-similarfactevidence_0.pdf; see also Kwong-leung Tang, *supra* note 23,

at 258-70.

129. See Tanovich, *supra* note 128.

low, generally less than 10%.¹³⁰ This very low conviction rate is of considerable concern, and quite likely relates to continuing negative views about women's credibility.¹³¹ There may be other reasons as well, but it is certainly worthy of further research and analysis. Studies indicate women's disadvantage intersects with other types of disadvantage, and the problem of conviction rates and investigations becomes exacerbated.¹³² It is a particularly serious problem for aboriginal women, poor women, and women of racial and ethnic minorities.¹³³ One only has to look at the example of what has been acknowledged about the treatment of aboriginal women and girls by the justice system in the Report of the B.C. Murdered and Missing Women Inquiry¹³⁴ to understand the extent of and depth of the problems. The report found that starting in the 1960s there have been over 1000 unsolved cases of missing and murdered Aboriginal women in Canada.¹³⁵ Undocumented and unreported instances are thought to run much higher.¹³⁶

Myths about women's sexuality and sexual assault crimes are perpetuated and exaggerated by the media and pop culture.¹³⁷ Studies indicate media and pop culture create negative effects towards women, female credibility, and female equality.¹³⁸ They also carry the ability to influence the criminal justice system.¹³⁹ Researchers investigating the prevalence of rape myths in the news media and the causal effects of exposure to these rape myths find these myths, and more importantly, the impact of these myths after only brief exposure, is sufficient to temporarily trigger negative thoughts toward sexual assault victims and heightened

130. HOLLY JOHNSON, NATALIA OLLUS & SAMI NEVALA, VIOLENCE AGAINST WOMEN, AN INTERNATIONAL PERSPECTIVE (2008). The BC Women's Hospital and Health Centre in Vancouver recently conducted a study that showed that out of 568 sexual assault files opened over a two-year period, where 291 women decided to report to the police—of those, the conviction rate was only 6%, and only 48 of the 291 women who reported to the police entered the criminal justice system. *Id.* Of those 48, there were 18 convictions (eight guilty pleas at or close to trial, and 10 findings of guilt); 25 stays of proceedings by the Crown (decisions by the Crown not to Proceed), 2 acquittals, 2 arrest warrants, and 1 trial in progress). *Id.*; see also, Larry Wilson, *Victims of Sexual Assault: Who Represents Them in Criminal Proceedings?*, THE LAW SOC'Y OF UPPER CAN., http://www.lsuc.on.ca/media/eleventh_colloquium_wilson.pdf (last visited Aug. 28, 2015).

131. See Tanovich *supra* note 128, at 579.

132. *Id.*

133. *Id.* at 570.

134. ROYAL CANADIAN MOUNTED POLICE, MISSING AND MURDERED ABORIGINAL WOMEN: A NATIONAL OPERATIONAL OVERVIEW (2014), available at <http://www.rcmp-grc.gc.ca/pubs/mmaw-faapd-eng.pdf> [hereinafter RCMP]; *Missing and Murdered Aboriginal Women and Girls: Understanding the Numbers*, AMNESTY INT'L, <http://www.amnesty.ca/blog/missing-and-murdered-indigenous-women-and-girls-understanding-the-numbers> (last visited Aug. 27, 2015).

135. See RCMP, *supra* note 134.

136. See AMNESTY INT'L, *supra* note 134.

137. See SUSAN J. DOUGLAS, THE RISE OF ENLIGHTENED SEXISM: HOW POP CULTURE TOOK US FROM GIRL POWER TO GIRLS GONE WILD (2010); For a listing of examples of media, pop culture and violence against women commentaries, see *Violence Against Women*, THE FREE RADICAL, <http://www.thefreeradical.ca/violenceAgainstWomen.html> (last visited Aug. 27, 2015).

138. DOUGLAS, *supra* note 137; see also *Attitudes, Media and Culture*, THE FAWCETT SOC'Y, <http://www.fawcettsociety.org.uk/our-work/issues/attitudes-media-culture/> (last visited Aug. 27, 2015).

139. For a general discussion of the effects of technology and media on crime, see JACQUELINE B. HELFGOTT, CRIMINAL BEHAVIOR: THEORIES, TYPOLOGIES, AND CRIMINAL JUSTICE 367 (2008), available at https://us.sagepub.com/sites/default/files/upm-binaries/19507_Chapter_10.pdf (Chapter 10: The Influence of Technology, Media, and Popular Culture on Criminal Behavior).

thoughts of victim-blame.¹⁴⁰ In Canada, Shannon Sampert studied 1,532 press articles demonstrating that the myths and stereotypes associated with sexual assault cases in the courts are the same as those held in the broader society.¹⁴¹ She documents how journalists and journalistic conventions position rape as a “sex crime,” as opposed to an act of violence, and portrays women victims as dishonest while portraying male perpetrators as innocent.¹⁴² In another of her studies she examined a popular radio host’s daily news analysis, showing how equality rights are framed and expressed in a way that promotes class, race, and gender antagonisms, creating the impression that “ordinary” Canadians are in a struggle for power with special interests groups including minorities and women.¹⁴³ This form of backlash threatens to further discredit equality agendas of activists and narrows the scope of equality claims, making it all the more important that judges and other actors in the judicial system be equipped with the skills to analyze and evaluate these stereotypes for what they are when they are manifested in the law or in trials and appeals before the Courts. When negative myths and stereotypes do inform judicial thinking, consciously or unconsciously, reporting, conviction, and sentencing decisions are affected in ways that diminish the victim’s rights to equality before the law.¹⁴⁴ The problem becomes compounded when the court’s legal analysis is both abstract and decontextualized. As such, it is often impossible to determine if the analyses of the women’s situations are receiving sufficient attention in the judicial decision.¹⁴⁵

IV. GENDER BIAS IN JUDICIAL APPOINTMENTS

A similar backslide is observable in judicial appointments over the past eight years in Canada. While law schools today graduate more women than men,¹⁴⁶ and the bar has become more or less gender balanced,¹⁴⁷ recent federal appointments to the bench grossly under represent women and minorities.¹⁴⁸ Presently in Canada there are 406 female judges out of 1,168 sitting judges, or about 35%,¹⁴⁹ but the

140. For a comprehensive discussion and study about the prevalence and impacts of rape myths and stereotypes see Renae Franiuk et al., *Prevalence of Rape Myths in Headlines and Their Effects on Attitude Towards Rape*, AURORA UNIV. (2008), http://web.aurora.edu/~rfraniuk/franiuk_rapemyth_headlines_sexroles.pdf.

141. Shannon Sampert, *Let Me Tell You a Story: English Canadian Newspapers and Sexual Assault Myths*, 22 CANADIAN J. WOMEN & L. 301, 301-28 (2010).

142. *Id.*

143. Shannon Sampert, *Verbal Smackdown: Charles Adler and Canadian Political Talk Radio*, in HOW CANADIANS COMMUNICATE POLITICALLY: THE NEXT GENERATION (David Taras & Christopher Waddell eds., 2011).

144. See T. BRETTEL DAWSON, WOMEN, LAW AND SOCIAL CHANGE: CORE READINGS AND CURRENT ISSUES (2002).

145. See Tanovich, *supra* note 128.

146. Women in Law in Canada and the U.S., CATALYST KNOWLEDGE CTR., <http://www.catalyst.org/knowledge/women-law-canada-and-us> (last visited Aug. 27, 2015); 2010 Law Societies Statistics, FED’N OF LAW SOC’YS OF CAN., http://www.flsc.ca/_documents/2010-Statistical-Report.pdf (last visited May 1, 2015).

147. See 2010 Law Societies Statistics, *supra* note 146.

148. See Gill & Shaw, *supra* note 1.

149. Number of Federally Appointed Judges as of July 1, 2015, OFFICE OF THE COMM’R FOR FED. JUDICIAL AFFAIRS CAN., <http://www.fja.gc.ca/appointments-nominations/judges-juges-eng.html> (last visited Aug. 27, 2015); see also Wojtek Gwiazda, *Is Canada Appointing Enough Female Judges?*,

overall rate of female appointments is declining. In 2011, only eight women, about 16% of the 49 appointments, were appointed to the federal judiciary from a pool of about 500 applicants.¹⁵⁰ In the past 5 years, of the 197 federal judicial appointments made, just three were people of color.¹⁵¹ The appointment rate for Aboriginal judges is 1.04% and just .5% for visible minority judges, despite 4.3% of the Canadian population being aboriginal¹⁵² and 19% being comprised of visible minorities.¹⁵³ The visible minority population in large urban centers is significantly greater. For example, Vancouver has a 45.2% visible minority population and Toronto, 47%.¹⁵⁴ The most recent data on judicial appointments indicates the typical lawyer appointed to the bench is a white 53 year old male, and a civil litigator practicing in a firm of more than 60 lawyers,¹⁵⁵ who would not, as a rule, practice family law, human rights, immigration law or aboriginal rights which are of course areas of particular concern to women and minorities.¹⁵⁶ Justice Donna Martinson of the British Columbia Supreme Court and Professor Marjorie Griffin Cohen of Simon Fraser University concluded in a recent article on the importance of gender balance and diversity within the judiciary in the province of British Columbia:

The under-representation of women and ethnic minorities on B.C.'s highest trial court is discriminatory and needs to change. The lack of family law expertise adds to the problems created. The Minister of Justice has an obligation to the people of British Columbia to take immediate action to create a Court that truly represents all of the people of British Columbia and their interests. We deserve no less.¹⁵⁷

The advisory Panel on Judicial Diversity for the Judiciary of England and Wales commented similarly, adding that an unrepresentative judiciary creates a democratic deficit:

In a democratic society it is unacceptable for an unelected institution that wields the power of the judiciary to be drawn from a narrow and homogenous group that reflects neither the diversity of society nor that of the legal profession as a whole. Failure to appoint well-qualified candidates

RADIO CAN. INT'L (Sep. 3, 2014), <http://www.rcinet.ca/en/2014/09/03/is-canadian-government-appointing-enough-women-judges/>.

150. Kirk Makin, *Appointments of Female Judges Slump Under Harper's Tories*, GLOBE & MAIL (Nov. 11, 2011), <http://www.theglobeandmail.com/news/politics/appointments-of-female-judges-slump-under-harpers-tories/article4183464/>.

151. James Morton, *Diversity Bypasses the Bench*, TORONTO STAR (Jan. 8, 2012), http://www.thestar.com/opinion/editorialopinion/2012/01/08/diversity_bypasses_the_bench.html#.

152. STATISTICS CAN., ABORIGINAL PEOPLES IN CANADA: FIRST NATIONS PEOPLE MÉTIS AND INUIT 6 (2011), available at <http://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/99-011-x2011001-eng.cfm>.

153. *Id.* at 14.

154. *Id.* at 17.

155. Cristin Schmitz, *Gender Equality in Judiciary Urged*, THE LAW. WKLY., Apr. 16, 2012, at 1, 3.

156. *Id.*

157. Marjorie Griffin Cohen & Donna Martinson, *Supreme Court of B.C.: Who's the Judge?*, VANCOUVER SUN (Oct. 22, 2012) http://www.vancouversun.com/opinion/op-ed/Supreme+Court+judge/7427983/story.html#__federated=1.

from diverse backgrounds to judicial office represents exclusion from participation in power.¹⁵⁸

In August of 2013, the Canadian Bar Association took a public stance on the lack of diversity in the federal judiciary, pointing out “the low number of women and members of racialized and other minority groups appointed to the federal courts does not reflect the gender balance or diversity in the Canadian population.”¹⁵⁹

In June of 2014, the federal Justice Minister, Peter MacKay, who controls all of the federal appointments to the judiciary, stunned several lawyers at a meeting of the Ontario Bar Association when he was asked about the dearth of women and visible minorities on federally appointed courts. His response was that they just “aren’t applying” for the jobs.¹⁶⁰ MacKay went on to frame his justification in terms of motherhood stereotypes, opining that women fearing an “old boys” network on the bench might dispatch female judges to circuit work for cases in courthouses across a region—a prospect the minister described as unappealing for women with children at home. He went on to reference his wife, home with their young child, as an example.¹⁶¹ Though the Justice Minister’s acceptance of the traditional stereotype that women’s place is in the home was bad enough, by totally ignoring the part of the question that asked him about the dearth of minority appointments to the judiciary, he demonstrated that he failed to even see the question as relevant or important at all.¹⁶²

By appointing almost exclusively white male lawyers to the bench when many women and minorities are qualified and have applied, the Justice Minister is perpetuating the myth that women and minorities are unsuited for judging and judicial authority. Based on white, male-centered perspectives, norms and images, these notions are linked to broader structural and systemic exclusions of women and minorities from judicial offices that have the male “authoritative knower” at their core.¹⁶³ Women and minorities become the “other” to the image of judicial authority.¹⁶⁴ The argument that male judges may need to make room for women judges and minorities has been partly defended on the apparently neutral grounds of appointment for “merit” or preserving judicial “impartiality.” Given the disproportionate numbers of white male judges, the implicit suggestion is that merit and impartiality is more often to be found among white males than others.

158. ADVISORY PANEL ON JUDICIAL DIVERSITY, THE REPORT OF THE ADVISORY PANEL ON JUDICIAL DIVERSITY 2010 15 (2010), available at http://www.ucl.ac.uk/laws/judicial-institute/files/Report_of_the_Advisory_Panel_on_Judicial_Diversity.pdf.

159. Dean Crawford, *Diversity on the Bench: What can we do about it?*, THE CANADIAN BAR ASSOC’N (June 1, 2014), <http://www.cbabc.org/Professional-Development-Resources/Publications/BC-Publications/BarTalk/2014/BarTalk-June-2014/Diversity-on-the-Bench> (referring to CBA Resolution 13-04-A, *Equality in Judicial Appointments*, approved August 18, 2013, no longer available online).

160. *Peter McKay and the Mystery of the missing female judges*, GLOBE & MAIL (June 22, 2014), <http://www.theglobeandmail.com/globe-debate/editorials/peter-mackay-and-the-mystery-of-the-missing-women-judges/article19275200/>.

161. *Id.*

162. See Women in Law in Canada and the U.S., *supra* note 146.

163. See generally MARGARET THORNTON, DISSONANCE AND DISTRUST: WOMEN IN THE LEGAL PROFESSION (1996).

164. See Claire L’Heureux-Dubé, *Outsiders on the Bench: The Continuing Struggle for Equality*, 16 WIS. WOMEN’S L.J. 15 (2001); Shirley S. Abrahamson, *The Woman Has Robes: Four Questions*, 14 GOLDEN GATE U. L. REV. 489 (1984).

This is not merely offensive; it demonstrates the assessment and the definition of merit and impartiality that need to be reconsidered. It cannot be true that “merit” on any rational test is scarcer among women and ethnic minorities.¹⁶⁵ The government apparently does not consider the ability to contribute to a diverse judiciary to be meritorious,¹⁶⁶ or that the assumed neutrality of male judges should be questioned.¹⁶⁷ It is now obvious that in many areas of law, male biases are easily discernible,¹⁶⁸ and the myth of male neutrality can no longer be sustained. At the same time, the need for diversity, equal opportunity, representativeness, democratic legitimacy, enhancement of public trust, and confidence in the judiciary is a recognized imperative.¹⁶⁹ In a number of jurisdictions, the processes, procedures, and criteria for judicial appointments have been reformed to create more diversity on the bench,¹⁷⁰ yet the Justice Minister of Canada remains unpersuaded. The only changes he has made to the composition of the judiciary have been to increase the complement of white males.¹⁷¹ From looking at the current state of affairs, the attitudes of some of those in power have not changed since 1990, when former Justice Wilson was criticized “for playing politics,” and “not being impartial” for suggesting that more women should be appointed as judges in order to bring alternative perspectives to judging.¹⁷²

V. CONCLUSION

The debate about how much judges should think about social context and the wider social implications of their work stretches back to a classic 1897 essay in the Harvard Law Review called “The Path of the Law.” U.S. Supreme Court Justice Oliver Wendell Holmes Jr., decried the “blackletter man” who learned the law as a closed system of knowledge based on past precedents, without reconsidering whether laws are working for the public good.¹⁷³ Chief Justice Dickson of

165. See Morton, *supra* note 151; B. Hamilton, *Criteria for Judicial Appointment and “Merit”*, 15 QUEENSLAND UNIV. TECH. L. REV. 10 (1999); Hilary Sommerlad, *Can Women Lawyer Differently? A Perspective from the UK*, in WOMEN AND THE WORLD’S LEGAL PROFESSION 191 (Schultz & Shaw eds., 2003).

166. See Alan Paterson & Chris Paterson, *We need to rethink how we define merit for Supreme Court appointments*, THE GUARDIAN (Mar. 26 2012, 13:19 EDT), <http://www.theguardian.com/law/2012/mar/26/rethink-merit-supreme-court-appointments>.

167. See MAHONEY, *supra* note 15; WOMEN AND THE LAW: JUDICIAL ATTITUDES AS THEY IMPACT ON WOMEN (Anne Thacker ed., 1998); R. GRAYCAR & J. MORGAN, THE HIDDEN GENDER OF LAW (2d ed. 2002); M. Omatsu, *The Fiction of Judicial Impartiality*, in FEMINISM, LAW, INCLUSION: INTERSECTIONALITY IN ACTION 70-88 (G. MacDonald et al., eds., 2005).

168. Brenda Hale, *Equality and the Judiciary: Why Should We Want More Women Judges?*, 2001 PUB. L. 489, 489-504 (2001).

169. GEOFFERY BINDMAN & KARON MONAGHAN, JUDICIAL DIVERSITY: ACCELERATING CHANGE (2014), available at <http://ukscblog.com/judicial-diversity-accelerating-change-report-published/>.

170. See MAHONEY, *supra* note 15; WOMEN AND THE LAW: JUDICIAL ATTITUDES AS THEY IMPACT ON WOMEN, *supra* note 167; GRAYCAR & MORGAN, *supra* note 167; M. Omatsu, *supra* note 167.

171. See Women in Law in Canada and the U.S., *supra* note 146.

172. This was the position of REAL Women in a letter to the editor. See *Bertha Wilson, pro-feminist, anti-family*, TORONTO STAR, Feb. 24, 1990, at D3.

173. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897); see also Courtney Humphries, *New Harvard Law School program aims for systemic justice*, THE BOS. GLOBE (Feb. 6, 2015), <http://www.bostonglobe.com/ideas/2015/02/06/new-harvard-law-school-program-aims-for-systemic-justice/PeGBqIenWhqqCuJ37Y20kJ/story.html>.

the Canadian Supreme Court also believed in this importance of legal learning outside the confines of doctrine:

It is essential that law schools and indeed the entire legal profession, devote a great amount of attention and energy to studying and understanding some of the deep social problems of our time—problems of poverty, inequality and the environment. If the legal profession as a whole is to help solve some of the seemingly intractable difficulties faced by the poor . . . native people, other minorities, new immigrants, and others, it seems to me that process must start in Canadian law schools.¹⁷⁴

When traditional qualifications to be appointed to the judiciary require a candidate to be from an elite, white, male group whose qualifications required no more than mastery of existing laws and knowledge of how to apply them, it is highly foreseeable that their judgments will not address the broader public good.

Today, widespread acknowledgment that justice is often not working for the public good underscores the need for new and innovative education programs for judges and other members of the profession. Decades of scholarship have shown how systemic social biases based on criteria such as race, gender, sexual orientation, or ideology find their way into written laws and judgments, and judges don't always have the tools to identify or counteract the injustices that result. The creator of Harvard Law School's new "Systemic Justice" program says: "If you're thinking about systemic justice, you need to be thinking about legal education . . ."; the professor creating the program also believes that this education should be less about learning the *status quo* and more about how the next generation of lawyers can change it.¹⁷⁵

Going beyond legal doctrine to understand how history, psychology, and economics explain the causes of injustice or how societal norms with respect to gender, race, ethnicity or sexual orientation could unconsciously affect judicial decision making requires a commitment to examine both the substance and process of the law in these broader contexts. Equality seekers argue that to fully understand the requirements of equality, judges must also augment and update their education on a regular basis to be sensitive to increasingly insidious forms of discrimination, hone their abilities to critically evaluate existing concepts of equality, and develop their capacity to formulate new methods of thought and understanding.

In the late 1980s and early '90s in Canada, coincidental with the developing jurisprudence under the *Canadian Charter of Rights and Freedoms*,¹⁷⁶ robust judicial education programs were designed and implemented on the topic of equality, especially with respect to categories of disadvantage. Within five years, social context education for judges was institutionalized as a distinct part of the judicial continuing education curriculum offered by the National Judicial Institute (NJI). But, in 2003 the national program, with equality and equal justice at its core, was

174. Claire L'Heureux Dubé, *Conversations on Equality*, 26 MAN. L. J. 273, 295 (1999).

175. See Courtney Humphries, *supra* note 173 (quoting Harvard Professor Jon Hansen, who described his class at Harvard Law on systemic justice that would "go beyond legal doctrine to show how history, psychology, and economics explain the causes of injustice").

176. Many transformative decisions were made during this period that recognized and protected historically disadvantaged groups. See *supra* notes 56-72 and accompanying text; *infra* notes 183-90 and accompanying text.

suddenly dropped as a standalone category of continuing judicial education. The explanation provided by the NJI was social context education was to be integrated into broader optional programs as one of three components of judicial education along with substantive law and skills development.¹⁷⁷ This decision should be rethought because its effect is to downgrade social context education to that of an “add-on” or a minor concern with greater emphasis on technical competency rather than on judicial fairness.

The constant turnover among judicial personnel underscores the need for social context education to be an enduring effort and priority. New emerging stereotypes particularly with respect to gender, such as the myth that Canadian men and woman are equal now in terms of income and status with no existing innate barriers, must be challenged. If Courts accept this stereotype they could be widening a gap that already exists.¹⁷⁸ Supreme Court of Canada Justice Rosalie Abella commented on this myth when she said:¹⁷⁹

But for every woman in the thousands whose glass ceiling has been melted, shattered or raised, there are women in the millions who think a glass ceiling is just one more household object to polish. There is still a huge gap between what the public thinks has happened to women, because several thousand have had the luck, guts, finances, friends, encouragement or supportive partners to break barriers, and what is really happening for the majority of women.¹⁸⁰

She says these women “are waiting for equality to hit home; they are waiting for the rhetoric of equality they can hear to turn into the reality of equality they can live.”¹⁸¹ Chief Justice Beverly McLachlin, the present Chief Justice of Canada says we must challenge the “hidden assumptions and stereotypes about the contribution that women should be allowed to make,” as well as “the laws that perpetuate them.”¹⁸² Education is “one of the most important” contributors to equality, as it helps “lift people over barriers, and to lead them to better, more equal lives.”¹⁸³

In order for the education referenced by the Chief Justice to be effective, it should allow judges to critically analyze existing case law, identify and question the steps in a judgment’s logic, and present new lines of legal argument. The

177. A summary of the development of social context education is provided by the National Judicial Institute. T. BRETTEL DAWSON, *THE SOCIAL CONTEXT EDUCATION PROJECT SUMMARY* (2004), available at <http://web.law.columbia.edu/sites/default/files/microsites/clinics/sexuality-gender/files/SG13.pdf>.

178. Isabella Bakker, Laureate Trudeau Fellow, Lecture at Brock University: Beyond the Strategic Silence: Towards the Global Economic Empowerment of Women (Feb. 2, 2011). See also *Canada Lagging in Gender Equality: Trudeau Scholar*, BROCK NEWS (Jan. 28, 2011), <http://www.brocku.ca/brock-news/?p=7868#sthash.nTWe59XH.dpuf>.

179. ROSALIE ABELLA, *EQUALITY, HUMAN RIGHTS AND WOMEN* 15 (1994); see also *The 1995 Jean Edmonds Lecture on Women and Work* (Canadian Center for Management, VHS Recording, 1995).

180. ABELLA, *supra* note 179.

181. *Id.*

182. *Id.*

183. Brett Hughes, *Great strides but more work to be done for women: Chief Justice*, LAW. WKLY. (Oct. 20, 2014), <http://www.canadianlawyermag.com/5326/Great-strides-but-more-work-to-be-done-for-women-chief-justice.html> (quoting Beverley McLachlin, Chief Justice of the Supreme Court of Can., Key Note Address at University of Toronto Charter Day Convocation, Oct. 20, 2014).

types of questions that need to be asked are: what would equality look like if women's and other minorities' perspectives were taken seriously? What if realities of poverty, disability, racialization, exclusion and power were placed at the center of the legal analysis, not its margins? If we took substantive equality seriously, how would the law be different? Why are the courts not recognizing real-world harms caused by systemic discrimination? Questions should be asked about how evidence is treated, what dynamics are unquestioned or unexamined, and how constitutional remedies are applied. Ultimately, judicial education should open up the judicial dialogue to hear the voices of those most in need of equality rights.

To revitalize social context education, equality, and judicial impartiality, judicial diversity must be addressed. For many years, judicial appointments in Canada have not been at all consistent with equality, and consequently, impartiality.¹⁸⁴ Female representation grew to a high point of about 34% in the early 2000s, but the representation of racial, ethnic, disabled, and sexual minorities on the judicial bench has been almost non-existent.¹⁸⁵ In recent times, the overwhelming preference for white, male appointments from elite law firms demonstrates the Canadian government's unwillingness to address the biased structure of the judicial system. By failing to incorporate the appropriate ratio of women or minorities into judicial office, public confidence in the judiciary and the law is being undermined. The official position that they are "guided by the principles of merit and legal excellence in the selection of judges" bears no credibility.¹⁸⁶ Minority groups have protested, stating the Government equates merit to skin color, failing to see merit in the contributions aboriginal lawyers and lawyers from racial minority communities make to the Canadian justice system through their cultural insights and perspectives.¹⁸⁷

In closing, three comments by each of three great champions of equality on the Supreme Court summarize the contention that judicial bias is an on-going challenge that needs to be conquered. In 1990, Justice Bertha Wilson in her famous speech "Will Women Judges Make a Difference?" asked for patience and long term commitment to the goal of equality. She said: "In order to change the legal culture—to have it absorb new ideals and shape them into legal doctrine, much more needs to be done."¹⁸⁸ Justice Claire L'Heureux-Dubé's inspirational comments in 2002 also gave us reason to never give up the struggle, when the Justice said what has kept her so committed to equal justice is her firm belief "that

184. For a discussion about why diversity is necessary for judicial impartiality, see *On Judicial Diversity ... It's the Fair Thing To Do*, LAW COURTS & THE CANADIAN PARALEGAL INST. (Feb. 2014), <http://lawcourtscenter.camp7.org/Resources/Documents/Law%20Courts%20Center%20Briefly!%20February%202014.pdf> (quoting Justice Lynn Smith). Many other scholars have examined impartiality through the lens of diversity and the nature of judgment. See Jennifer Nedelsky, *Embodied Diversity and Challenges to Law*, 42 MCGILL L.J. 91 (1997); Maryka Omatsu, *The Fiction of Judicial Impartiality*, 9 CANADIAN J. WOMEN & L. 1 (1997); Richard Devlin et al., *Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards a "Triple P" Judiciary*, 38 ALTA. L. REV. 737 (2000). See also *R v. S (R.D.)*, [1997] 3 S.C.R. 484 (Can.) (exploring these same issues).

185. Rosemary Cairns Way, *Deliberate Disregard: Appointments Under the Harper Government* (Working Paper No. 2014-08, 2014), available at <http://ssrn.com/abstract=2456792>.

186. Kirk Makin, *Minority Lawyers Demand Diversity Among Appointed Judges*, GLOBE & MAIL (May 8, 2012), <http://www.theglobeandmail.com/news/politics/minority-lawyers-demand-diversity-among-appointed-judges/article4105837/>.

187. See *supra* notes 185-86 and accompanying text.

188. See Wilson, *supra* note 34.

justice without equality is no justice at all.”¹⁸⁹ Finally, the current Chief Justice Beverly McLachlin in 2012 underscored the need for judicial diversity when she said: “If we are to fully meet the challenges of judging in a diverse society, we must work toward a bench that better mirrors the people it judges.”¹⁹⁰

189. See ADDING FEMINISM TO LAW, *supra* note 85, at 375.

190. Judging: the Challenges of Diversity, Remarks of the Right Honorable Beverly McLachlin, P.C., Chief Justice of Canada, Judicial Studies Committee Inaugural Annual Lecture, JUDICIARY OF SCOTLAND (June 7, 2012), at 17, <http://www.scotland-judiciary.org.uk/Upload/Documents/JSCInauguralLectureJune2012.pdf>.