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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. 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. 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

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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. My study, engagement, and research taught me that deeply entrenched structural discrimination and exclusion existed in law.

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.

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. 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.

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 judiciary 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 Schifran, 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 Saltz, 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).


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*,
which gave individual Canadians constitutional rights for the first time, including the most comprehensive equality rights in the western world.

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 Sheilah 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.”

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. 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. As it turned out, no contempt charges were laid, the conference was very well attended, and it was a sensation in the press. The conference papers published in 1987 became the first collection of its kind in Canada and made a significant impact.

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

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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.
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.
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. 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. 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 reinforce 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; test case litigation was successfully challenging biased assumptions and stereotypes in the jurisprudence and legislation; more women were appointed to the bench than ever before; and law schools were admitting entering classes comprised of 50% to 60% women.

On the legislative front, feminist analyses and advocacy resulted in a major overhaul of the Criminal Code’s offence of rape. 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).
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.
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.
taught with the goal of creating conditions favorable to achieving greater legal and social equality.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{37}

Even before Justice Wilson’s speech, Judge Doug Campbell, (as he then was) Chair of the Western Judicial Education Center,\textsuperscript{38} created a team\textsuperscript{39} 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 Institute\textsuperscript{40} passed a resolution in 1994 to explicitly support judicial education programs on social context, including “gen-

\textsuperscript{33} For a discussion of the Western Judicial Education Center programs, see \textit{GENDER EQUALITY AND THE JUDICIARY} (Kirstine Adams & Andrew Byrnes eds., 1999).
\textsuperscript{35} \textit{Id.} at 515.
\textsuperscript{36} \textit{Id.}
\textsuperscript{37} Mary Jane Mossman, \textit{supra} note 20.
\textsuperscript{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.
\textsuperscript{39} Feminist members of the initial team were Kathleen Mahoney, Sheila 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.
\textsuperscript{40} \textit{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 case\(^1\) two Supreme Court of Canada judges opined that a conscious social context inquiry has become an accepted step towards judicial impartiality.\(^2\) 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;”\(^3\) 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.”\(^4\)

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;”\(^5\) 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.”\(^6\)

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

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42. Id.
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.”

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, South Africa, India, Vietnam, and Israel, with the involvement of Canadian experts, both judicial and academic. 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.

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. A landmark constitutional case in 1989 defined equality as being substantive and results orientated, rather than a formal, “sameness of treatment” concept. Under the

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 Sheila 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 contest 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.
earlier Bill of Rights,\textsuperscript{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.\textsuperscript{58}

The Supreme Court firmly rejected this approach to equality in \textit{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.\textsuperscript{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 harassment\textsuperscript{60} 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 \textit{Bliss}\textsuperscript{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,\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{65}

\textsuperscript{56} This was the test used in a pregnancy case, \textit{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).

\textsuperscript{57} S.C. 1960, c. 44 (reprinted in R.S.C., 1985, App. 1[I]).

\textsuperscript{58} \textit{Bliss}, [1979] 1 S.C.R. 183 (Can.).

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

\textsuperscript{60} \textit{Janzen v. Platy Enters. Ltd.}, [1989] 1 S.C.R.1252, para. 49 (Can.).

\textsuperscript{61} \textit{Bliss}, [1979] 1 S.C.R. 183.

\textsuperscript{62} Morgentaler v. The Queen, [1976] 1 S.C.R. 616 (Can.).


\textsuperscript{64} \textit{Id.}

\textsuperscript{65} \textit{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. 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. 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.

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. In her dissent in *R v. Seaboyer,* 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.

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. 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:

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).
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. 

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. She stated 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.

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.

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, pointing out that although the Divorce Act 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-
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

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.  

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. 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. 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.

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. 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. After she gave her famous lecture of “Will Women Judges Make a Difference” in 1990, Justice Wilson was criticized for being a feminist, for playing politics, for having a personal agenda, for not being impartial, and for destroying democracy.

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. In her
concurring judgment with the unanimous court in *R v. Ewanchuck*, 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.”

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.”

A prominent criminal lawyer, the late Edward Greenspan, stated in what was described as a “sledge hammer assault,” 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.” 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.”

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.


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. Canada106 where the Supreme Court adjusted the Andrews107 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 U., (April 27, 2010), https://blogs.commons.georgetown.edu/ds443-171project (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).


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.canadianlawmag.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.


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.\textsuperscript{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.\textsuperscript{110}

In dealing with the pension legislation challenge, the Supreme Court decided to depart from the\textsuperscript{111} test, 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{114} Under the prior case law where the

\textsuperscript{109} Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.).

\textsuperscript{110} Law v. Can., 1 S.C.R. 497.

\textsuperscript{111} Id. at 522-24. See also Koshan, supra note 105.


\textsuperscript{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.

test in the Andrews case\textsuperscript{115} was applied, these cases would have been successful establishing \textit{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.\textsuperscript{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.\textsuperscript{117} The data compiled by Ryder\textsuperscript{118} 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,\textsuperscript{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 \textit{Charter}.\textsuperscript{120}

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

\textsuperscript{117} Ryder, supra note 116, at 270.
\textsuperscript{118} Id.
\textsuperscript{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.
\textsuperscript{120} See supra note 114 and accompanying text.
\textsuperscript{121} The visionary \textit{Moge} decision is one such example, as depicted by the strong equality input of Justice L’Heureux-Dubé. \textit{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 \textit{Quebec (Attorney General) v. A.} \textit{See} Quebec (Attorney General) v. A. [2013] 1 S.C.R. 61 (Can.).
\textsuperscript{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. 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. 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. 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 disputes 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. 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. 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.

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

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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.
127. *Id.* at 42-43.
129. See Tanovich, *supra* note 128.
low, generally less than 10%.\textsuperscript{130} This very low conviction rate is of considerable concern, and quite likely relates to continuing negative views about women’s credibility.\textsuperscript{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.\textsuperscript{132} It is a particularly serious problem for aboriginal women, poor women, and women of racial and ethnic minorities.\textsuperscript{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 Inquiry\textsuperscript{134} 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.\textsuperscript{135} Underdocumented and unreported instances are thought to run much higher.\textsuperscript{136}

Myths about women’s sexuality and sexual assault crimes are perpetuated and exaggerated by the media and pop culture.\textsuperscript{137} Studies indicate media and pop culture create negative effects towards women, female credibility, and female equality.\textsuperscript{138} They also carry the ability to influence the criminal justice system.\textsuperscript{139} Researchers investigating the prevalence of rape myths in the news media and the culture create negative effects towards women, female credibility, and female equality.\textsuperscript{140} 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.\textsuperscript{132} It is a particularly serious problem for aboriginal women, poor women, and women of racial and ethnic minorities.\textsuperscript{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 Inquiry\textsuperscript{134} 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.\textsuperscript{135} Underdocumented and unreported instances are thought to run much higher.\textsuperscript{136}

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thoughts of victim-blame. 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. 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. 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. 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.

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, and the bar has become more or less gender balanced, recent federal appointments to the bench grossly under represent women and minorities. Presently in Canada there are 406 female judges out of 1,168 sitting judges, or about 35%, 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_rapemytheadlines_sexroles.pdf.


142. Id.


145. See Tanovich, supra note 128.


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

148. See Gill & Shaw, supra note 1.


https://scholarship.law.missouri.edu/jdr/vol2015/iss1/4
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 aboriginal 152 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

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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#.
153. Id. at 14.
154. Id. at 17.
156. Id.
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.

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


\^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.

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.\footnote{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 \textit{status quo} and more about how the next generation of lawyers can change it.\footnote{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 \textit{Canadian Charter of Rights and Freedoms},\footnote{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

\footnote{175} See Courtney Humphries, \textit{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”).
\footnote{176} Many transformative decisions were made during this period that recognized and protected historically disadvantaged groups. \textit{See supra} notes 56-72 and accompanying text; \textit{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. 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. Supreme Court of Canada Justice Rosalie Abella commented on this myth when she said:

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.

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.” 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.” 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.”

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


179. ROSALIE ABEIIA, 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. ABEIIA, supra note 179.

181. Id.

182. Id.

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. 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. 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. 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.

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.”


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

188. See Wilson, supra note 34.
justice without equality is no justice at all."\textsuperscript{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."\textsuperscript{190}

\textsuperscript{189} See ADDING FEMINISM TO LAW, supra note 85, at 375.