

LECTURE

Conversations on Equality

THE HONOURABLE
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I. LEARNING THE LANGUAGE OF EQUALITY

I PROPOSE TO SHARE with you some thoughts on a topic which is near to my heart—equality. In particular, since I believe that good answers can only be found by first asking the right questions, I propose to explore some of the *whose*, *whats*, *whens*, *wheres*, and *whys* of equality. I sincerely hope that these questions will provide a basis for us to pose other questions, both of ourselves and of others. For talking to each other, and thinking about what the concept of equality does mean and should mean will help us all come to a better understanding of this concept, how it applies, and what it means, both in our lives and in the law.

A. Why Is Equality So Important To Us?

I will begin with a *why*. Why are we not prepared to accept that we can be treated with less dignity because of the groups to which we belong or with which we identify? In my opinion, our desire for equality stems from our desire for justice and, put simply, inequality is injustice. It is unjust to treat people as less worthy or less deserving because of inherent personal characteristics, circumstances in which they find themselves, or fundamental choices they have made. It is unjust for those who have historically held advantages and privileges in society to continue those privileges at the expense of others. When there is inequality, oppression is allowed, facilitated, and encouraged. In our country, where we believe every individual is a full member of society, it is antithetical to

Justice of the Supreme Court of Canada. Madame Justice L'Heureux-Dube presented a number of separate addresses in Winnipeg, February, 1999. Though she was formally a guest of the Manitoba Bar Association and the University of Manitoba, Faculty of Law, she has kindly agreed to publish her lectures with the *Manitoba Law Journal*. The lectures have been combined into one paper and any errors are solely attributable to the *Manitoba Law Journal*.

our conception of justice to suggest that people can be treated as less worthy, less deserving, or less equal because of their personal characteristics. I ask you: if you were given the opportunity to design a model society, not knowing *a priori* who you would be or into what role you would be born, knowing only that the odds were roughly even that you would be born into a position of relative empowerment or relative disempowerment, what would your society look like? I put it to you that almost anyone put in such a position would design a society which treats each and every individual with dignity, and offers them equal opportunity to realise their goals and expectations. Of course, I am not talking about you, but about your children, and your children's children. The call to arms of equality seekers today is really an investment in tomorrow.

B. Where do we look for inequality?

So, the next logical question is *where* do we look for inequality? John Stuart Mill, one of the first philosophers to recognise the interrelationship between individual human dignity and the good of the community, observed that the law assumes that existing relationships of domination and subordination are "natural."¹ He argued that the law, in adopting the *status quo*, then plays an even more insidious role, from an equality perspective, of converting into a legal right a relationship of inequality which was previously but a physical fact. Once the physical fact has reached the level of a legal right and clothed itself within the legitimacy of the law, it receives the sanction of society.²

Mill asks if there is ever domination that does not appear natural to those who possess it.³ Mill's observation is as true today as it was when he made it. Inequality permeates the social, legal and political institutions central to the workings of our society. A renewed commitment to its eradication requires that we look deep into ourselves and into the reality experienced by those who do not "by nature," or because of history, dominate.

It is interesting to note that when the Canadian *Charter of Rights and Freedoms*⁴ was proclaimed in force in 1982, thereby constitutionalising certain human, civil, and political rights in Canada, there was one section whose implementation was delayed until 1985. That section was s. 15, which guarantees

¹ D. Proulx, "L'objet des droits constitutionnels à l'égalité" (1988) 29 C. de D. 567 at 570.

² L. Clark, "Liberalism and the Living Tree: Women, Equality and the Charter" (1990) 28 Alta.L.Rev. 384 at 390, citing J.S. Mill, "The Subjugation of Women" in *Essays on Sex Equality*, ed. by Alice S. Rossi (Chicago: University of Chicago Press, 1970) at 129-30.

³ *Ibid.* at 391

⁴ *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter the *Charter*].

“equality without discrimination” to all individuals. Equality without discrimination does not sound like a very new or revolutionary concept. Why did we delay its implementation for three years beyond any of the other newly constitutionalised fundamental human rights? In my view, this delay assisted in the profound re-examination of Canada’s basic laws and institutions which was required by the recognition of such a right. I find it a somewhat disturbing indictment of our past that, in 1982, we thought our laws might be so discriminatory as to need several years’ grace before permitting individuals to challenge them.

A few brief comments on some of Canada’s historical equality benchmarks demonstrate why the concerns of our drafters may have been justified. For instance, it was not until 1930 that we finally recognised women as persons, and thereby able to be appointed to the Senate. Since that time, slowly but surely, other obstacles to equality have fallen under the relentless pressure of social change. However, many of these moves occurred much later than many Canadians realise. To name among the most blatant examples, women could not vote in Québec elections until 1940. Federally, Japanese Canadians could not vote until 1948, and status Aboriginals gained the franchise only in 1960. Inequality permeated the very foundations of our democracy well into this century.

Although the enactment of an equality guarantee in the *Bill of Rights*⁵ by the Parliament of Canada in 1960 was certainly a positive step, no great immediate strides toward substantive equality came about as a result. The Canadian *Bill of Rights* was but a statute like any other. It lacked the authority of a constitutional document and was therefore interpreted narrowly. In one case, *Bliss v. Canada (Attorney-General)*⁶ the denial of benefits on the basis of pregnancy was held not to constitute sex discrimination. In another, *Canada (Attorney Canada) v. Lavell*,⁷ a law which disqualified native women who married non-natives from receiving certain benefits related to Indian status, but did not similarly disqualify native men, was held not to be discriminatory, since all native women were treated equally with each other. These cases demonstrated that the *Bill of Rights*, as it was interpreted by the Supreme Court of Canada, only guaranteed equality to the extent that people were the same. Women, minorities, and the disabled were fully equal, but only to the extent that they were no different from white, able-bodied men. For those disadvantaged because they were different from what society considered the “norm,” this road to equality was a dead end.

⁵ *Canadian Bill of Rights*, S.C. 1960, c. 44; reprinted in R.S.C. 1985, App. III [hereinafter *Bill of Rights*].

⁶ [1979] 1 S.C.R. 183.

⁷ [1974] S.C.R. 1349.

C. What Do We Mean In Canada When We Speak Of Equality In This Day And Age?

That brings us to the *Charter*. What do we mean in Canada when we speak of equality in this day and age?

Although in a sense equality is a comparative concept, it does not always require that we treat people in the same way. In fact, sometimes it requires that we treat them differently. Unlike the American *Bill of Rights*,⁸ the Canadian *Charter* does not simply assert a right to be equal. It speaks of "equality without discrimination." In my view, the recognition that equality and discrimination are inextricably linked is an important one. It is indicative of an advanced and nuanced understanding of the values that underlie equality. For equality is not really about being treated the same, and it is not a mathematical equation waiting to be solved. Rather, it is about equal human dignity, and full membership in society. It is about promoting an equal sense of self-worth. It is about treating people with equal concern, equal respect, and equal consideration. These are the values that underlie equality. These are the values that are offended when we discriminate, consciously or not.

In Canada, our present approach to equality, based on the recognition that true equality requires substantive change and accommodation (rather than simply formalistic egalitarian treatment), was precipitated by the obviously unfair and inequitable results of equality claims determined under the Canadian *Bill of Rights*. As a result, when we moved from the *Bill of Rights* to the *Charter*, we made three very important changes. First, we elevated equality rights to a constitutional level. Second, we broadened the measure of equality rights. Third, we broadened the reach of equality rights. All three of these changes constituted essential elements of a trend intended to promote and achieve substantial democracy in Canada, rather than just procedural democracy. With the *Charter*, we have gone from requiring that laws be applied in the same way to everyone, to requiring laws, themselves, treat individuals as substantive equals. This is finally the language of substantive equality.

Several Supreme Court of Canada cases illustrate particularly well the ways in which a determination of whether substantive equality rights have been violated requires an examination of a group's treatment in the context of Canadian society, and of whether an individual's fundamental dignity is violated. They show why differential treatment may in some cases lead to substantive equality, while in other cases, similar treatment may lead to substantive inequality.

*Weatherall v. Canada*⁹ is an example of a case where being treated differently did not lead to substantive inequality. In that case, the appellant had challenged the fact that male prisoners in penitentiaries were searched and patrolled

⁸ U.S. Const., amend. II [hereinafter *American Bill of Rights*].

⁹ [1993] 2 S.C.R. 872.

by female guards, but that female prisoners were supervised only by members of their own gender. The unanimous judgment of our Court noted the historical, biological, and sociological differences between men and women, the history of women's disadvantage in society and the realities of male violence against women. Because of these factors, cross-gender searches do not have the same effects on men as they would have on women. The appellant was not discriminated against in relation to female prisoners, because true equality does not always require identical treatment. The Court's judgment, which upheld the different treatment of male and female prisoners shows that equality may instead allow or require differential treatment.

The Court's decision in *Eldridge v. British Columbia*¹⁰ shows the reverse side of the same coin: that sometimes being treated the same is discriminatory. In *Eldridge*, the appellants, who were deaf, challenged the failure of the British Columbia government to provide sign language interpreters as part of its publicly funded health care system. The Court held that this constituted discrimination, since those who were not hearing-impaired did not require interpretation services, and they were provided with all the services necessary to receive effective medical care. In contrast, hearing-impaired people, who required interpreters in order to receive effective treatment, were required to pay for this service, and therefore, unlike others, did not receive the necessary services to enjoy free medical care. Though formally this constituted identical treatment, substantively, the hearing-impaired did not receive equal services from the health care system.

Another example is the case of *Vriend v. Alberta*.¹¹ That case dealt with the failure of the Alberta *Individual's Rights Protection Act* to provide gays and lesbians with protection against discrimination. Technically, gays and lesbians and heterosexual people were treated the same: neither could bring claims under the Alberta human rights legislation based on sexual orientation. However, the fact that only gays and lesbians, not heterosexuals, generally experience discrimination based on sexual orientation meant that the failure to include them in the legislation, even though it formally treated all citizens equally, constituted discrimination. *Eldridge* and *Vriend* show how treating everyone the same way may in fact contribute to inequality.

The Court's decision in *Vriend* also shows the importance of not looking only to constitutions for the protection of equality rights, since the constitution examines only government action. In looking for *where* inequality occurs, we must also turn our attention to the actions of people outside government, to ensure that in relations with others individuals, companies and groups conduct

¹⁰ [1997] 3 S.C.R. 624 [hereinafter *Eldridge*].

¹¹ [1998] 1 S.C.R. 493 [hereinafter *Vriend*].

themselves in accordance with the principles of equality. Provincial and federal statutory human rights codes remind us all that our actions must be consistent with the principles of non-discrimination, and that we must constantly be vigilant to ensure that we respect others' equality rights. Decisions of the Supreme Court and of human rights commissions have reminded us that, for example, when sexual harassment occurs,¹² when there is systemic discrimination within a workplace,¹³ or when rules of the workplace have a negative impact on members of certain groups,¹⁴ discrimination has occurred.

Because of their importance, our Court has recognised that human rights codes have taken on a "quasi-constitutional" status. For this reason I have advocated a large and liberal evolving interpretation of the protections contained in them. In *Canada (Attorney-General) v. Mossop*,¹⁵ for example, I argued for an expansive interpretation of the prohibition in the Canadian *Human Rights Act*¹⁶ against discrimination based on "family status." Mr. Mossop did not receive bereavement leave to attend the funeral of his male partner's father, although he would have received this leave if his partner had been female. I argued that respecting the promise of equality contained in the Act required an evolving and expansive definition of family, which recognised the reality of the diverse types of families that exist in our society. The application of the principles of equality required going beyond traditional definitions of family, to explore what "family" means to different people in our society.

However, the need to identify inequality is not present only when allegations of discrimination have been brought under s. 15 of the *Charter* or under human rights codes. Rather, in examining other areas of law, we must be alert to the ways the law's assumptions may not respect the principles of equality. This concept offers us new understandings in family law, in criminal law, and into how the law affects the poor and the elderly. It is changing the way we approach sexual orientation, sexual assault, disability, freedom of expression, and pornography. The task of rooting out inequality and injustice from our society is now advancing to a higher stage, since increasingly we are recognising that inequality and discrimination stem not from positive intentions on the part of any given individual, but rather from the effects of often innocently motivated actions. This analysis requires that we understand equality, and make it part of

¹² *Janzen v. Platy Enterprises*, [1989] 1 S.C.R. 1252.

¹³ *Action Travail des Femmes v. Canadian National Railway Company*, [1987] 1 S.C.R. 1114.

¹⁴ *O'Malley v. Simpsons-Sears*, [1985] 2 S.C.R. 536.

¹⁵ (1993), 100 D.L.R. (4th) 658 (S.C.C.) [hereinafter *Mossop*].

¹⁶ *Canadian Human Rights Act*, S.C. 1976-77, c. 33; reprinted R.S.C. 1985, c. H6.

our thinking, rather than treading heavily on it with the well-worn shoes of unquestioned, and often stereotypical assumptions.

I will mention just two examples where the analysis in other areas of law has required solid attention to the concept of equality. In *Moge v. Moge*,¹⁷ consideration of the principles of equality, and of the historic disadvantages women faced from marriage breakdown, informed the determination of the appropriate interpretation of the *Divorce Act*¹⁸ provisions on spousal support. Focusing on equality enabled the Court to look at the perspective and experiences of women, and ensure that the principles on spousal support took into account women's needs and realities. In *R. v. Lavallée*,¹⁹ Justice Wilson, writing for the majority of our Court, considered the circumstances of women in relationships with abusive spouses and redefined the criminal law on self-defence in light of the realities of their experiences. These cases, and others like them, show that thinking about equality is more than just analysing discrimination claims or interpreting human rights codes. Rather, its pursuit requires an understanding of the historical disadvantages experienced by members of some groups, an awareness of groups' differences and unique experiences, and a sensitivity to the fact that much of the law has been designed around and for those with power and privilege. It requires that in the analysis we undertake in nearly every area of law, we consider various perspectives, think about the experiences and realities of disadvantaged groups, and examine the assumptions on which our laws and jurisprudence are based.

D. Who Should Be Concerned About Inequality?

Who should be concerned about inequality? Many of us in this room are advantaged in many ways. Many of us have never directly experienced discrimination. Nonetheless, inequality is a problem that does affect us all. It is shortsighted to assume that it is in our interests to preserve the systems and institutions that perpetuate our advantage and the relative disadvantage of others. We now understand that people are interdependent, and the health and dignity of our society depends on the way we treat all of its members. When some lack the opportunities others have, or are treated without dignity, society suffers. When individuals or governments refuse to recognise or respect the differences of others, the cost is the fostering of intolerance in our society. Discrimination imposes costs on us all, not just on those who are its direct victims.

¹⁷ [1992] 3 S.C.R. 813.

¹⁸ R.S.C. 1985, c. 3 (2nd Supp.).

¹⁹ [1990] 1 S.C.R. 852.

Crime, poverty, unemployment, the fear of walking in the streets of one's own neighbourhood at night, the burgeoning cost of social programs: few will now dispute that all of these problems have at least some of their roots in inequality. While working to stamp out inequality will not make these problems go away, it is clear that ignoring inequality may very well aggravate them. Given that inequality, discrimination, and perceived injustice are highly destabilising forces in society, anyone who seeks a stable society gains by weakening those forces. We all have something to learn in this regard, particularly those who think of equality only in terms of the costs required to achieve it. As my colleague on the Court of Appeal for Ontario, Madame Justice Rosalie Silberman Abella has observed, "We have no business figuring out the cost of justice until we can figure out the cost of injustice."

For these reasons we cannot be concerned only with inequality and discrimination that affect us directly, but we must be vigilant to inequality affecting others. Working toward a society free from inequality demands that we try to see the world as experienced by others. We must not only recognise the ways in which others are similar to us, but also acknowledge and celebrate others' differences. If we are privileged in certain ways, we must also affirm that others may be entitled to differential treatment in order to remedy past or present disadvantages imposed by society.

Despite the struggles of many people, and despite governmental steps taken to eliminate discrimination and disadvantage, our goal is far from being achieved in Canada. We must remember that inequality and discrimination are as much an attitude as an action. All of us now have a responsibility to continue to work to bring about changes that will enable the philosophy of non-discrimination to become a reality of substantive equality. The quest for equality does not stop when, for instance, a woman gets a job. It demands pay equity, and a workplace that is sensitive to the social and familial demands that women often face. Equally important, it demands that we recognise that not all men measure success purely by virtue of career and financial advancement. New opportunities in the workplace will not bring meaningful change until it becomes socially acceptable to use them. And in striving to achieve such ends we must never be deterred by novel solutions.

E. How Do We Advance The Battle For Equality?

So, *how* do we advance the battle for equality? Equality is a term that, in a vacuum, means nothing. It has no universally-recognised, inherent, or intrinsic content. In this vein, I think that it is helpful to regard equality as a language like every other: with rules of grammar and syntax, nuances, exceptions, and dialects. More importantly, language is more than a form of communication. It is an embodiment of the norms, attitudes, and cultures that are expressed through that language. Learning a language and learning a culture go hand in hand. I believe that all of us are already familiar with the basic terminology of

equality. On the other hand, I hesitate to say that we are fluent in this language when, in fact, we may only have a working knowledge. This language is new to us because the equality analysis does not easily fit into traditional legal discourses and concepts. The analysis of the multiple and overlapping manifestations of equality in our society is not easily undertaken using traditional legal tests.

It strikes me as both fitting and ironic that Canada, a country composed almost completely of immigrants and foreigners, is now near the forefront of taking on this new language and way of thinking, although we still have further to go. Like many immigrants who once came, and continue to come to Canada, we have now firmly taken on the obligation of learning a language which will help carry us into tomorrow. Most importantly, though we have long since recognised that the language of equality can be spoken in different ways; only recently and after much delay have we finally committed ourselves to learning to speak in terms of *meaningful* equality.

In our quest to learn the language of equality, we are going through many of the same difficulties encountered by someone trying to learn a new language. And even though we have learned and studied the basic vocabulary and rules of grammar, we still prefer to listen rather than to speak. We interpret simple sentences very well. However, we lack the practical experience to deal with more difficult situations. We may improvise by applying approaches found in the traditional legal discourse, but experience shows that resort to those rules is only appropriate when the assumptions underlying the two languages are substantially the same. Our new task is to revisit our underlying assumptions about people and society, to look beyond the four corners of our respective legal and social institutions, and to contemplate change where our examination reveals that the languages are inconsistent. We must try to think in terms of this new language. As any of you who have tried to learn a second language know, learning to think in that language is probably the most important step to ultimately understanding the language, and having an understanding in that language is what is needed in turn to speak it fluently.

We are all students of this language called equality. I add now that this course is particularly difficult because it is a course in which the students must teach themselves. Fortunately, we are not without direction. Our Rosetta Stone, our key to understanding, lies in our respective past social experiences, in the present realities endured by those less fortunate, and in the future aspirations of one and all. And yet the job does not end here. Implicit in our task of breaking down barriers, learning a new language, and questioning assumptions underlying some of our oldest and most venerable institutions is the undertaking to rebuild what we take apart.

You will recall that I began my remarks to you by posing the question, "Why equality?" I now conclude by observing that the question in my mind is no longer "why equality?" but rather "when equality?" In my view, moreover, the appropriate answer is "Now!" To permit or perpetuate inequality is to permit or perpetuate injustice. Our public policies, our workplaces, our institutions, and our homes may serve us well, but how do they serve others? Do they enable all people to enjoy full membership in society, and an equal sense of self-worth? Do they accord each human being equal concern, respect and consideration? These are difficult questions to ask, but I put it to you that we owe a duty to ourselves, to others, and to the generations to come, to answer these questions, and then to act on the answers until we have lived up to the equality standard.

The urgency of the task of promoting equality means that the guarantee of equality in our *Charter* is perhaps the most important constitutional or legal instrument we have. It will, I hope, be at the centre of much of the work of the courts in coming years, not only when appeals based on the section itself are heard, but as a tool that informs and influences our analysis throughout the law. Like all students of a language, our understanding of this concept is evolving, and requires a constant questioning of our work and our assumptions to ensure our task is being accomplished well. By conversing about equality, by explaining to each other our experiences and understandings, and by listening to others, we can better comprehend the nuances of its language. A person's native language or mother tongue, is understood and spoken without effort in an intuitive and natural way. My hope is that for that for the generations who come after us, the language of equality will be spoken in this way: as their mother tongue.

II. MAKING A DIFFERENCE: THE PURSUIT OF A COMPASSIONATE JUSTICE**

"WILL WOMEN JUDGES REALLY MAKE A DIFFERENCE?" Nine years have passed since Madame Justice Wilson first posed and responded to this now familiar question in her well-known address at Osgoode Hall Law School.²⁰ During this period, the issue of gender's impact on judging has inspired an unprecedented wealth of media commentary, academic writing, and even empirical research.²¹

** This paper is based upon an earlier paper of the same title as published in (1997) 31 U.B.C. L. Rev. 1. These notes come from an *Address to the Equality Section of the Manitoba Bar Association*, Winnipeg, Manitoba, delivered 6 February 1999.

²⁰ B. Wilson J., "Will Women Judges Really Make a Difference?" (1990) 28 Osgoode Hall L.J. 507.

²¹ As Alberta Chief Justice Catherine Fraser has pointed out:

[t]here have been no less than fifty-seven national, provincial and territorial reports, studies, and articles on gender bias and the law, sixteen which docu-

The interest in the influence of gender on judicial decision-making has been sparked, no doubt, by the increased representation of women in all areas of the legal profession, whether on the bench, in the lecture halls of Canada's law faculties, or in public or private practice. From the appointment of Canada's first woman magistrate in the early part of this century to today, the number of women judges has continued to rise slowly, but steadily. In 1990, the year of Madame Justice Wilson's speech, almost 9 percent of superior court judges in Canada were women, compared to only a fraction of that number in preceding decades.²² In 1993 the *Report of the Canadian Bar Association Task Force on Gender Equality in the Legal Profession* estimated that women made up 12 and thirteen per cent of the federal and provincial judiciaries, respectively.²³ More recent estimates hold that women make up 20 percent of the federally appointed judiciary²⁴ and 22.08 percent of those provincially appointed.²⁵ The proportion women represent of new judicial appointments is also growing at a higher rate than ever before.²⁶

Progress in the representation of women in other areas of practice is even more encouraging. As it is the legal profession which most often determines what issues are properly the focus of law, participation in it represents an essential goal for any marginalised group.²⁷ Women will soon make up a third of all

ment the concerns of the Aboriginal communities about the justice system and eight which investigate the effects of racial bias in the Canadian legal system ...

"Judicial Awareness Training" (Address to the Australian Legal Convention, 25 September 1995) [unpublished].

²² I. Grant & L. Smith, "Gender Representation in the Canadian Judiciary" in *Appointing Judges: Philosophy, Politics and Practice* (Toronto: Ontario Law Reform Commission, 1990) 57 at 63 [hereinafter Grant & Smith].

²³ C.B.A., "Touchstones for Change: Equality, Diversity and Accountability" (Report of the Canadian Bar Association Task Force on Gender Equality in the Legal Profession) (Ottawa: C.B.A., 1993) at 49-51 [hereinafter C.B.A.].

²⁴ According to the Canadian Judicial Council there were 196 women judges out of a total of 992 federally appointed judges as of 1 January 1999. Notably, 201 of the 992 are supernumerary judges. See, online: Canadian Judicial Council <<http://www.cjc-ccm.gc.ca>> (last modified: unknown).

²⁵ Estimates from the Office of the Chief Justice of each province as provided by the Association of Provincial Court Judges (CAPCJ). As of February 1999 there are 872 provincially appointed judges of which 197 are women.

²⁶ The pattern first noted by the CBA task force, *supra* note 23 at 187-88; Grant & Smith, *supra* note 22 at 63, continues to hold true in the more recent estimates.

²⁷ C.A. Corcos, "Portia goes to Parliament: Women and their Admission to Membership in the English Legal Profession" (1998) *Denv. U. L. Rev.* 307 at 311. This article traces

practising lawyers and law professors.²⁸ An even more dramatic change is the increased enrolment of female students in law faculties across the country. More than half of first year students are now women, seven times their ratio to male students in the early seventies.²⁹ Certainly, the very presence of women, not only on the bench, but in all areas of the profession, constitutes a tremendous difference from previous eras.³⁰

As the second woman to be appointed to the Supreme Court of Canada, I am often asked for my perspective on the impact of gender on judging. It is an issue to which I have given a lot of thought over the years. In considering this question, I am, of course, greatly heartened by the increased representation on the bench of not only women but other groups previously excluded from the judiciary.³¹ My interest in the theory and research addressing the influence gender has on the adjudication process also remains strong. These developments and my own experience have, however, led me in a slightly different direction in thinking about this issue than those whose primary concern is the change to be brought by women judges.

As I contemplate what we have learned about gender and other kinds of bias in the law, I become ever more convinced that our concern must not stop at forming a representative bench. Rather, we must extend our efforts to transform the approach to judging taken by all of its members.³² My preferred focus is

the history of women's entry into the legal profession in England as well as other countries of Europe and the Commonwealth. She concludes that the arguments for and against the inclusion of women has been similar throughout these societies. Moreover, the changes to the profession, of both form and substance which result from this increase in the representation of all marginalised groups warrants further exploration by both men and woman.

²⁸ C.B.A., *supra* note 23 at 47-49.

²⁹ *Ibid.* at 47.

³⁰ There has also been considerable progress more generally in the work force in developing countries. From 1983-1992 the average annual growth was 2.1% for women, more than double the 0.8% growth rate for men. As of 1994 the International Labour Organisation (ILO) reported that 44% of the work force was female. The ILO studies that include the informal sector (ie. rural workers or informal urban workers) showed an activity increase for women from 13% to 88% in India and 11% to 63% in Bangladesh. M. De los Angeles Moreno, "Women's Rights and International Dialogue" (1997) 16 *Dick. J. Int. L.* 191.

³¹ See National Association of Women and the Law, "Creating Diversity on the Bench" in *Submission to the Department of Justice on Revising the Federal Judicial Appointments Process* (1993).

³² For a criticism of the superficiality of placing the need for increased impartiality on the shoulders of the minority, see M. Minow, "Stripped Down like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors" (1992) *Wm. & Mary L. Rev.* 1201.

thus not on the difference that women and other previously excluded groups will make in judging, but on how we can enable all judges, indeed all individuals in positions of authority and power, to make a difference, and to ensure that the law responds not only to the needs of those whose interests it has traditionally served, but to those of all members of society.³³

Our understanding of gender and other types of bias in the law and potential solutions to this problem has nonetheless been greatly enriched by the theory and research examining gender differences observed in judicial decision-making. This work is of unquestioned assistance in addressing my own query, for it highlights significant problems in some traditional approaches to judging. It has also informed the view of several other women judges in their analysis of recent progress and the set backs.³⁴ Moreover, much of this analysis is applicable to the circumstances of other groups whose members experience bias when seeking justice. For example, former Dean Lynn Smith (now Justice Smith), and Professor Isabel Grant of the University of British Columbia canvassed a number of ways in which the presence of women may influence the adjudicative process—observations which, in my view, carry some important lessons for all judges. Their propositions share a common basis: the recognition that women's life experiences will tend to differ from men's in some significant shared ways, and that women's perspectives are thus equally important to men's in determining a just result to a legal question or dispute.³⁵ A concomitant revelation is that what we have until now considered universal neutral legal norms have been built on a partial reality: that of those traditionally involved in the study and practice of law.³⁶ These authors hope that "the appointment of more female

³³ For an in-depth review of legal practice, its myths and realities see J. Hagan & F. Kay, *Gender in Practice, A Study of Lawyers' Lives* (London: Oxford University Press, 1995).

³⁴ See e.g., The Honourable Wendy Baker of the Supreme Court of B.C., "Women's Diversity: Legal Practice and Legal Education—A View from the Bench" (1996) 45 UNB L.J. 199 [hereinafter Baker]; The Honourable R. S. Abella J.A., "Appellate Judicial Law Making: Ten Realities of the Judicial Role" (Address given at the Canadian Appellate Court Seminar, Québec City, 27 April 1995) [unpublished]; The Honourable Maryka Omatsu, "The Fiction of Judicial Impartiality" (1997) 9 Can. J. Wom. & L. 1.

³⁵ In a similar way Professor Richard Devlin argues that we are all racialised and that both those who judge and those who are judged are deeply affected by their experiential contexts. See "Judging and Diversity: Justice or Just Us?" (Fall 1996) 20 *Prov. Judges J.* No. 3, 4–22.

³⁶ Our neighbours to the south live a similar experience. Author M. D. Ramos writes:

White men are 33% of the population in the United States, yet they are 85% of the tenured professors, 85% of the partners in major law firms, 80% of the U.S House of Representatives, 90% of the U.S Senate, 95% of the Fortune

judges would increase the likelihood that certain perspectives, shared by many women, would be available on the bench."³⁷

Dean Smith and Professor Grant outline four ways in which women may bring these perspectives to and thereby influence judicial decision-making. First, women may, due to cultural expectations and gender-based roles and experiences, bring an approach to ethical choices which focuses on considerations formerly lacking in the law, such as the context of a particular dilemma or the importance of obligations and relationships. Second, women judges may be more willing and able to hear and understand the stories of women litigants. The will and capacity to understand events from another's point of view have become essential elements to effective judging as we have come to acknowledge the limitations and partiality of each judge's own base of knowledge and experience. A third way in which female members of the judiciary may have an impact is through their ability to identify and overcome gender bias in legal principles and doctrines. Finally, women may also bring special expertise to the adjudication process, gained both professionally and through life experiences.³⁸ Through these four avenues of influence, it is hoped that women will be able to render a more gender-sensitive justice.³⁹

Less hopeful that the mere presence of women will bring about these changes is Professor Regina Graycar. She sees the role of judging to be persistently "gendered and implicitly male," describing the evolution of this state of affairs in these words:

Given the fact that women were not even permitted to practice law until well into this century, there is no question that the substantive legal doctrines we use on a day-to-day basis were developed by men, with their problems and concerns in mind, and reflecting their perspectives on the world. Despite the recent entry of women into the profession, and their increasing numbers ... legal doctrines and legal reasoning appear

500 CEO's, 95% of School Superintendents, 99.9% of the professional athletic team owners, and 100% of the U.S. Presidents.

Unqualified to Be Voiceless: Inaudible Screams on the Deaf Ears of a Not So Color-Blind Society, (1998) 13 Berkeley Women's L. J. 1 at 9.

³⁷ Grant & Smith, *supra* note 22 at 67.

³⁸ Professor Minow maintains that:

Women fall into every category of race, religion, class and ethnicity, and vary in sexual orientation, handicapping conditions and other sources of assigned difference. Claims to speak from women's point of view, or to use women as a reference point, threaten to obscure this multiplicity and install a particular view to stand for the views of all.

Forward Justice Engendered (1987) 101 Harvard L. Rev. 10 at 62-63.

³⁹ Grant & Smith, *supra*, note 22 at 66-78.

to have remained almost completely impervious to perspectives other than those of the [dominant] White, middle-class male.⁴⁰

As a result, in her view, the male perspective in the law persists as the neutral unquestioned norm from which all other views appear to deviate. As Professor Graycar explains, we do not ask whether male judges make a difference or examine the impact of male judicial decisions.⁴¹

This Australia-based author attempts to do just that, through articulating research questions for examining how gender influences judgments. Her impetus derives partially from the belief that simply bringing more women to the bench will not succeed in altering the pervasive bias of perspective in the law as it stands now.⁴² Using examples from recent decisions spanning the areas of tort, family, and criminal law, Professor Graycar shows how myths, stereotypes, and personal beliefs about women are drawn upon by both male *and female* judges. In understanding how the law becomes infused with such beliefs, she finds it helpful to examine the role played in judicial opinions by “common sense.” This term is set in quotation marks for it is argued to represent not universal truth, but rather a highly personal and gendered version of reality. An identification of the many paths by which biased “common sense” assumptions enter the law illustrates how reality may be constructed by judges to ignore or distort women’s experiences.⁴³

Avenues for the introduction of biased beliefs into the law include the rules of evidence that govern which stories are heard and believed; and the difficult distinction between fact and law. Judging can be described as the piecing together of a story which will never be more than partial and will always reflect the legal rules which govern its telling. Furthermore, in Professor Graycar’s words:

[A]s those who have written about women’s credibility, both within and outside the law, have noted, there are enormous obstacles to women’s stories occupying the same space and having the same authority as the stock stories that underpin the common sense of deeply gendered legal discourses.⁴⁴

⁴⁰ R. Graycar, *The Gender of Judgments: An Introduction*, in M. Thornton, ed., “Public and Private: Feminist Legal Debates,” (Melbourne: Oxford University Press, 1995) 262 at 266–67 [hereinafter Graycar].

⁴¹ *Ibid.* at 264–65 and 267.

⁴² *Ibid.* at 268–69.

⁴³ *Ibid.* at 272–274.

⁴⁴ R. Graycar, “The Gender of Judgments: An Introduction” in M. Thornton, ed., *Public and Private: Feminist Legal Debates* (Melbourne: Oxford University Press, 1995) 262 at 280–81.

While unable to conclude whether women's judgments will fundamentally transform the law, Professor Graycar does hypothesise that more women on the bench will at least bring a broader spectrum of experience and "common sense" to the process of judging. This is necessary, for as she states:

[I]t does seem clear that some of the most basic legal building blocks need repositioning (or at the very least, renovating) before women's lives can ever be adequately represented in law's discourses and practices.⁴⁵

In her view, women's judgments will not make a difference. However, until women's stories can be told and heard and the myth of the neutrality of the male perspective is exposed as just that, we will be left with a partial view of reality as opposed to a norm against which other narratives are evaluated.⁴⁶

Canadian Professor Audrey Kobayashi also argues that employment equity and impartiality are only half the story. She prefers the more fundamental approach that challenges the basic premise of judicial rationality. In the context of a discussion on bias of gender or race she writes:

Instead of focussing on greater representation and diversity on the bench, therefore, we should expect a fundamental shift in judicial reasoning to make the experiences of racialized people and, in particular, racialized women (because they experience the intersection of gender and 'race' oppression) part of the normal understanding of life in Canada.⁴⁷

Another view, that of Professor Susan Boyd, looks at the effect of legal solutions more generally as a remedy for what she refers to as the public/private divide along gender lines. She concludes that, although the law alone is insufficient to alter the embedded nature of discrimination by gender in our society, neither can it be abandoned as a site of struggle.⁴⁸

The works of such authors provide helpful insights into how gender may affect judging, especially in certain areas of the law. Their discussions of what judges "know," how this "knowledge" is influenced by their experiences, values, and beliefs, and how these, in turn, become incorporated into judicial decisions, provide us with models for understanding how gender and other forms of bias come to infuse the law. In so doing, they also contribute some ideas about changes judges may wish to make in their traditional approaches to decision-making. I certainly agree that in the instances described, and others, the law has

⁴⁵ Graycar, *supra* note 44 at 281.

⁴⁶ *Ibid.* at 281-82.

A. Kobayashi, ed., *Women, Work and Place* (Montreal: McGill-Queens University Press, 1994).

⁴⁸ S.B. Boyd, "Can Law Challenge the Public/Private Divide? Women, Work, and Family" (1996), 15 *Windsor Yearbook of Access to Justice* 161 at 185. For a very favourable comment on this article see Professor Rebecca Johnson, "Hoop Shots and Social Transformation: A View from the Bleachers" (1998), 10 *Can. J. Women & L.* 264.

failed in the past to recognise women's experience.⁴⁹ I myself have written about myths and stereotypes and have highlighted their impact on legal reasoning in a number of my judgments.

In *R. v. Seaboyer*⁵⁰ for example, in my dissenting determination of the constitutionality of the "rape-shield" provisions of the *Criminal Code of Canada*,⁵¹ I recounted a number of myths related to sexual assault which had persistently informed the application of the criminal law in this area.⁵² The stereotypes of victims had proven so persistent that Parliament's enactment of a clear restriction on the right of the defence to cross examine and lead evidence of a complainant's prior sexual conduct had become necessary. 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 and the consequent discouragement of complaints.⁵³

My dissenting reasons in *Symes v. Canada*⁵⁴ underlined 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 every day realities of businesswomen faced with the responsibility of child care, but on the stereotypical businessman who simply is unlikely to bear the primary duty in this regard.

In *Thibaudeau v. Canada*,⁵⁵ a case where the scheme of taxation of and deductions for child support payments was challenged under the equality provision of the *Charter*, again in dissent, I attempted to illustrate how an analysis which treated the former spouses as a couple for tax purposes failed to comport with the reality of most custodial parents. The majority of these parents are women living in financially difficult circumstances with very little power over their former spouses' actions or economic resources. Moreover, the assumption that the family law system could address the custodial parents' concerns did not account for the difficulties—whether practical, financial, or emotional—involved in seeking redress through that scheme.

⁴⁹ See generally, C. MacKinnon, "Feminism Unmodified: Discourses on Life and Law" (Cambridge, MA & London, England: Harvard University Press, 1987); *Omatsu*, *supra* note 34.

⁵⁰ [1991] 2 S.C.R. 577.

⁵¹ R.S.C. 1985, c. C-46 [hereinafter *Criminal Code*].

⁵² *Seaboyer*, *supra* note 50 at 651–665.

⁵³ *Ibid.* at 706–7.

⁵⁴ [1993] 4 S.C.R. 695.

⁵⁵ [1995] 2 S.C.R. 627.

Thus, I do recognise that women's diverse experiences have been sadly lacking in many areas of the law, and have continually emphasised the necessity of incorporating them into our judicial decisions.⁵⁶

I also believe it crucial to have more women in positions of power, whether they be judges, legislators, politicians or other important decision-makers. Women make up half of the population and have a right to be included and respected in all important decisions which affect their lives. This ensures that women, as a whole, have a voice, a voice that has been more or less absent until quite recently.

For many years now, we have witnessed the important contributions which women have made to judicial decision-making. Dean Smith, Professors Grant and Graycar give an excellent example in their references to Madame Justice Bertha Wilson and her judgment in *R. v. Lavallée*.⁵⁷ In that case, Madame Justice Wilson allowed the submission and consideration of expert evidence regarding violence against women. This testimony was considered necessary in order to alter the current legal norms to include and respond to the needs and reality of battered women. In doing so, Madame Justice Wilson recognised that judges are not all-knowing and, indeed, need to be educated about circumstances and situations with which they may have little or no experience.⁵⁸

Indeed, in this transitional period where we seek to ensure access for all women to a gender-sensitive justice, female judges will likely continue to play an important role. In her address concerning women judges, Madame Justice Wilson similarly concluded that more women are needed in the judiciary to counteract a predominantly male biased perspective in particular areas of the law. She refers to the work of Carol Gilligan who has described women's sense of morality as differing from men's. According to this theory, women tend to focus more on relationships, connection, and context in deciding what is just or fair. Through their unique approach to decision-making, it is hoped that women judges will bring these elements to our general understanding of the law.⁵⁹

Madame Justice Wilson also stated, however, that "it will be a Pyrrhic victory for women and for the justice system as a whole if changes in the law come only through the efforts of women judges and women lawyers."⁶⁰ I too am very concerned that without further thought and a widespread commitment to the

⁵⁶ For a comment on this view see Marilyn MacCrimmon, *Generalizing about Racism* (1997) 9 Can. J. Women & L. 184 at 188.

⁵⁷ *R. v. Lavallée*, [1990] 1 S.C.R. 852 [hereinafter *Lavallée*]. See also Graycar, *supra* note 40 at 268 and 277-78; Grant & Smith, *supra* note 22 at 75-76.

⁵⁸ *Lavallée*, *supra* note 57.

⁵⁹ *Ibid.* at 519-22.

⁶⁰ *Ibid.* at 516.

reasons we are seeking a more representative judiciary, the sole focus on women's judgments may result in only cosmetic change.

An initial and worrisome danger in focussing solely on the difference women will make on the bench has become evident in recent years. 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.⁶¹

A further reason for broadening our focus is that not only stereotypes and misconceptions about women may infuse the law, but myths and beliefs about many others whose experiences differ from those in positions of power. Thus, in making a difference, judges cannot only be concerned with women's reality, but also the varying and diverse experiences of children, men, people with disabilities, people of colour, people who are poor, members of Canada's First Nations, and indeed all other types of human experiences which may form the background against which law is applied. In fact, the question may well become not whether women will make a difference, but how to make a difference. And in asking how, in such a diverse society, we end up facing the more general question of: "What do we make of difference?"

In making this observation, I note that women do not form a monolithic or homogenous group. In the context of women in the judiciary, we have only to look at two women on the United States Supreme Court: Justices Sandra Day O'Connor and Ruth Bader-Ginsburg. Both women in positions of power, these judges have approached the concerns of women in very different ways, and with somewhat contrasting results.⁶²

I also observe that men are no more homogenous a group. Mentioning only those who are no longer on the Bench of our Supreme Court, I think immediately of Chief Justice Dickson and Justice Beetz, both men in positions of power, and both extremely gender-sensitive. Chief Justice Dickson penned many of the opinions of the Supreme Court which elaborated and broadened our understanding of what constitutes sex discrimination. In *Brooks v. Canada Safeway Ltd.*,⁶³ for example, he established that distinctions related to pregnancy in em-

⁶¹ Ironically, several authors describe a "backlash" of increased scrutiny for bias for the very characteristics that the particular adjudicators are said to bring to the bench, rather than a reconsideration of the concept of impartiality. See M. Omatsu, *supra* note 34 at 9; B. Bhandar, "R v. R.D.S.: A Summary" (1998), 10 CJWL 163 at 181; M. MacCrimmon, "Generalizing about Racism" (1998), 10 Can. J. Wom. & L. 184 at 198.

⁶² See S. Davis, "The Voice of Sandra Day O'Connor" (1993) 77 *Judicature* 134; E. Martin, "Women on the Bench: A Different Voice?" (1993) 77 *Judicature* 126; M.J. Confusione, "Justice Ruth Bader Ginsburg and Justice Thurgood Marshall: A Misleading Comparison" (1995) 26 *Rutgers L.J.* 887.

⁶³ [1989] 1 S.C.R. 1219.

ployee health benefits would fall into this category of discrimination, thereby overruling an earlier and much criticised finding in a related context.⁶⁴ In such decisions, Chief Justice Dickson showed a deep sensitivity to concerns facing women. Justice Beetz was also a strong proponent of women's equality. For an example of his sensitivity to one of the most difficult issues for women, one must simply look to his reasons in *R. v. Morgentaler*.⁶⁵

Not only were these male judges gender-sensitive, they strove to remain aware and responsive to the rich diversity of experiences which make up our society. Chief Justice Dickson, in preparation for and in undertaking what he considered a revolutionary role for the judiciary in applying and upholding the *Charter*, constantly sought to educate himself about the social issues and experiences which the *Charter* was meant to address.⁶⁶

Chief Justice Dickson called his approach to justice one of compassion. In his view, law and compassion were equally necessary elements of the pursuit of justice. In his 1986 convocation address to the University of Toronto Faculty of Law, he made the following remarks:

I view law as the means by which we order social relations to create social conditions for human cooperation and the attainment of justice. By compassion, I mean a feeling of empathy, or sympathy for the hardships experienced by others—a feeling, which extends to a sense of responsibility and concern to alleviate hardship at least in some measure ... What is the relationship between these two concepts—law and compassion? It is my belief and contention that for the law to be just, it must reflect compassion. For a judge to reach decisions which comport with justice and fairness, he or she must be guided by an ever-present awareness and concern for the plight of others and the human condition ... Compassion is not some extralegal factor magnanimously acknowledged by a benevolent legal decision-maker. Rather, compassion is part and parcel of the nature and content of that which we call "law."⁶⁷

Our former Chief Justice's words and jurisprudence reflect, in my view, the ideal that *everyone* who is in a position of power is born to make a difference. Essential to this difference are a willingness and a sense of responsibility to understand the perspectives which differ from our own, and to reflect these in the law—particularly where these have been met in the past with dismissive or stereotype-driven responses, or, simply, silence.

What we must seek, therefore, is to develop an increased sensitivity on the part of all judges to the diversity of human experiences which are presented to courts on a daily basis. Professor Jennifer Nedelsky provides us with a helpful

⁶⁴ See *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183.

⁶⁵ [1988] 1 S.C.R. 30.

⁶⁶ See Dickson C.J.C., "Judges and Judging" (Address at the Dinner with the Justices of the B.C. Supreme Court at Government House, 9 May 1986)[unpublished].

⁶⁷ Dickson, C.J.C., "Law and Compassion" (Convocation Address to the University of Toronto Faculty of Law, 20 June 1986)[unpublished].

analysis on embodied diversity with her review of three feminist perspectives, namely Iris Young, Elizabeth Spellman and Carol Gilligan, in addition to the perspective of a renowned neurologist. She concludes that, through diversity, we can influence the process of judicial deliberation and develop a new perception of impartiality which acknowledges difference in a manner which is committed to equality. In particular, I agree with this author's articulation of a need for a universal claim of equal moral worth.⁶⁸

The question becomes how to instil openness and will to understand in the hearts and minds of future lawyers and judges. Some might conclude that it is impossible. Only someone who has lived an experience will be able truly to understand it. This concern certainly contributed to Madame Justice Wilson's emphasis on bringing more women into the judiciary. In her view, we may need more women judges, as only they can bring a different analysis and perspective to judging—one which is centred equally on women's and men's needs and experiences.

As the authors I have mentioned also recognise however, the need for increased sensitivity and compassion will not necessarily disappear as the Bench becomes more representative of society. If we believe otherwise, we may fall into the trap of considering particular judges adequately representative of and responsive to all members of the groups to which they may belong. Professor Graycar alerts us to this difficulty. As she points out, many women legal scholars, particularly women of colour, have shown us the folly and oppressive potential of assuming that women form a homogenous category. These writers have exposed the danger of assuming that one woman may speak to the experiences of all.⁶⁹ As judges, regardless of gender, we simply cannot escape the task of seeking to understand and include the vision of someone who will be different from us in ways which significantly impact on his or her experience of the world.

Of course, this means that we need to hear and respond to as many different voices as possible in the law, and thus have a representative bench and profession. This may be where the role of women judges is particularly important. This role should not, however, withdraw the accompanying responsibility from the entire profession to develop the awareness needed to listen to and understand those voices which are different from our own, whether of judges or those who come before us seeking justice. We need not, and in fact we must not, sacrifice one for the other. To do so would mean to place solely on women judges and others belonging to groups which are under represented in the judiciary the

⁶⁸ J. Nedelsky, "Embodied Diversity and Challenges to Law" (1997) 42 McGill L. J. (1997) 91 at 116.

⁶⁹ See Graycar, *supra* note 44 at 265–66.

burden of understanding and responding to the concerns of those who have met insensitivity in the law. Madame Justice Wilson's prophecy of a "Pyrrhic victory" will have been realised.

Professor Mari Matsuda has described a jurisprudential method which resonates strongly with my own philosophy on this issue: that which she terms a "multiple consciousness." She emphasises the importance of academic scholarship by those who belong to groups previously excluded from thinking and reasoning about the law to the pursuit of justice and the education of future jurists. In addressing the students and faculty at the Yale Law School Conference of Women of Colour and the Law in 1988, she offered the following recommendation:

The multiple consciousness I urge lawyers to attain is not a random ability to see all points of view, but a deliberate choice to see the world from the standpoint of the oppressed. That world is accessible to all of us. We should know it in its concrete particulars. We should know of our sister carrying buckets of water up five flights of stairs in a welfare hotel, our sister trembling at 3 a.m. in a shelter for battered women ... The jurisprudence of outsiders teaches that these details and the emotions they evoke are relevant as we set out on a road to justice. *These details are accessible to all of us, of all genders and colours. We can choose to know the lives of others by reading, studying, listening, and venturing into different places.*⁷⁰ [emphasis added]

Professor Matsuda maintains her recognition that the experiences of differing individuals and groups will not be co-extensive, while at the same time, pledging herself not to meet the story of another's hardship with ignorance.⁷¹

I am struck by the similarity between Professor Matsuda's words and those of Chief Justice Dickson. It is interesting that two individuals of different genders, ages, races, and positions should similarly articulate the role of a person in a position of power when faced with the impact of inequality on those of differing life experiences. It is also significant that both viewed education about diversity and oppression as perhaps the most important means of making a difference. Chief Justice Dickson, in addressing the educators gathered at the National Conference on Legal Education in 1985, stated the aim of legal education in these terms:

The primary goal of legal education should be to train for the legal profession people who are, first, honest; second, compassionate; third, knowledgeable about the law; fourth, committed to the role of law and justice in our democratic society.⁷²

⁷⁰ M. Matsuda, "When the First Quail Calls: Multiple Consciousness as Jurisprudential Method" (1992) 14 *Wom. Rts. L. Rep.* 297 at 299.

⁷¹ *Ibid.* at 300.

⁷² Dickson, C.J.C., "Excerpts from the Speech Delivered at the Closing Dinner of the Conference on Legal Education" in R. Matas and D. McCawley, eds., *Legal Education in Canada: Reports and Background Papers of a National Conference on Legal Education*

He further stressed the importance of admissions policies reflecting these goals, and of doing more to encourage access to legal education by women, minority groups, people from different economic circumstances and First Nations. Chief Justice Dickson also believed it:

[e]ssential 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.⁷³

I could not agree more. In the field of law, law schools have the primary responsibility in this connection as has the Bar and the educational programs for judges. In my view, it is only when future lawyers and judges (this applies to politicians as well) can be “ordered” to get rid of their myths and stereotypes, that every judge will make a difference.

The education of judges seems perhaps the most logical and obvious place to begin creating a more sensitive judiciary. In Canada, concern on the part of both judges and the public about the need for judicial education in diversity and equality-related matters has been part of the legal landscape for more than a decade.⁷⁴ While, as in many common law jurisdictions, some members of the judiciary have continued to express reservations about the effect of such education on their independence as judges, the prevailing view of those with the mandate of educating judges is that increased sensitivity to gender and other potential biases in decision-making *accords* with the principle of judicial independence.⁷⁵ In fact, the mission of the National Judicial Institute, which implements the educational policies of the Canadian Judicial Council, specifically includes the goal “to engender a high level of social awareness, ethical sensitivity and pride of excellence, within an independent judiciary.”⁷⁶

(Winnipeg, Manitoba, October 23–26, 1985) (Ottawa: Federation of Law Societies of Canada, 1985) 68 at 69.

⁷³ *Ibid.* at 71.

⁷⁴ As Professor Martin Friedland stated in his 1995 Report: “Judicial education in Canada has been taken seriously by the judiciary.” Canadian Judicial Council, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995) at 171.

⁷⁵ L. Armytage, “Judicial Education on Equality” (1995) 58 *Modern L. Rev.* 160 at 162; N.J.I., “Editorial Comment” (1993) 6(3) *Bulletin* 1 at 1; *Wilson*, *supra* note 20 at 515–17.

⁷⁶ N.J.I., *Annual Report 1996–1997* (Ottawa: N.J.I., 1996) at 3.

The National Judicial Institute is currently working with members of the academic community and others to realise this objective.⁷⁷ Many initiatives have already been and continue to be undertaken (in most provinces and on a national scale) to create opportunities for judges to receive education of this type. Canadian Judicial Centre seminars have focussed on gender myths operating in the courtroom, the specific needs of children, and the role of judging in a multicultural context.⁷⁸ I believe that if judges adopt the perspective of Chief Justice Dickson and Professor Matsuda: that this understanding is not a peripheral concern with respect to dispensing justice, but a crucial element thereof—reservations about effects on judicial independence may eventually dissipate. The number of judges who have been sensitised to gender and other forms of bias is growing. Many of them, regardless of age, gender, or race, can be truly seen as making a difference.

It is the future judges and lawyers who are attending our law schools and bar admission courses, however, who must attract our greatest attention. As I visit law schools to speak with students—an activity which I enjoy immensely—I am constantly amazed at the spirit and energy many students exude in their compassion and determination to eradicate inequality in our society. We must ensure that law schools foster this spirit and combat the view that these concerns are not an essential part of legal training. To this end, I would encourage what I consider to be very valuable interaction between the Manitoba Equality Bar and the Manitoba Law School.

In the context of legal education, the danger of relying solely on those who fall into a previously excluded group to educate others becomes even more apparent. The energy and emotion involved for students from such a group in standing up for their right to speak, if in an environment where theirs are the only voices expressing such concerns, can serve all too readily to silence them. This phenomenon has been described by many academic authors who discuss the task of encouraging gender and race sensitivity in legal education and was specifically highlighted by an earlier publication of the Canadian Bar Association's Task Force on Gender in the Legal Profession.⁷⁹

Thus, as I believe is the case with women judges, we must remain wary of asking solely whether female students, students of colour and those with disabilities, will make a difference. Rather, we must develop ways in which those

⁷⁷ N.J.I. *supra* note 76 at 4.

⁷⁸ See C.J.C., "Judging In a Multicultural Era: Background Papers" (C.J.C. Seminar in Aylmer, Québec, July 1993); C.J.C., "Equality and Human Rights Issues in Superior Court Practice: Background Papers" (C.J.C. Seminar in Aylmer, Québec, July 1993); C.J.C., "Judicial Discretion: Eliminating Gender Myths in the Courts, Background Papers" (C.J.C. Seminar in Calgary, Alberta, 1989).

⁷⁹ See S. Wildman, "The Question of Silence: Techniques to Ensure Full Class Participation" (1988) 38 J. of L. Ed. 147; C.B.A., *supra* note 23 at 33–36.

involved in teaching and administration at law faculties can help to make this difference, by encouraging these students to speak and, at the same time, communicating an unerring commitment on their own parts to equality and a compassionate justice. Much effort has been made in several law faculties which is very encouraging.

No doubt many of these changes were inspired by the report of the C.B.A. Task Force, also known as the 'Wilson Report.' In this document, a number of elements of a more diversity-centred approach to legal education are identified which also appear in most of the academic writing on this issue. Curriculum which addresses discrimination and bias, and which provides a number of differing perspectives on the law; the hiring of law professors who represent various groups and perspectives; teaching methods which support this type of learning; and the encouragement of scholarship regarding such issues (both in a specialised sense and in their impact on more general areas of the law) have been consistently recommended. These reports further warn of the danger of marginalising these issues, and instead urge law faculties to integrate them into the day to day teaching of the basic components of a law program.⁸⁰ In other words, the approach articulated by Chief Justice Dickson and Professor Matsuda—an openness and sensitivity to difference and its potentially oppressive consequences in society and the law—should form a basic principle underlying legal education.

Thus, I share the interest and concern of those who wish to research the impact of judgments by women. I am very interested in the questions of how legal decision-makers, and in fact all members of the legal profession, think about and deal with gender and other differences. Nonetheless, while it is absolutely essential to give women, and in fact all people, the means whereby their differing voices and experiences will be heard and addressed, this is only part of the inquiry. Other decision-makers must be prepared to listen and respond to their stories. I choose to place greater emphasis on the *difference* we are attempting to make and *how* we can effectively do so. In asking these questions, *difference* becomes the "operative word."

⁸⁰ C.B.A., *supra* note 23 at 30–31; E. Schneider, "Task Force Reports on Women and the Courts: The Challenge for Legal Education" (1988) 38 J. of L. Ed. 87 at 90–93; See also K. Mahoney, "Challenges for Legal Education in the 21st Century," in A. Esau and J. Penner, eds., *Lawyering and Legal Education into the 21st Century* (Winnipeg: University of Manitoba-L.R.I., 1990) 41; Lawyers Ad Hoc Working Group on Gender Issues, "Gender Equality Issues Affecting Lawyers in Manitoba Justice: Submission to Justice Committee on Gender Equality" (Submitted to Justice Committee on Gender Equality Manitoba Justice, May 1994); F.M. Kay, N. Dautovich, C. Marlor, "Barriers and Opportunities within the Law: Women in a Changing Legal Profession" (A Report to the Law Society of Upper Canada, 1990–1996).

We cannot escape difference. Judges, lawyers, and law students will constantly be faced with problems involving life experiences and situations which are different from their own, and which may not previously have been reflected or recognised in the law. The question is what we make of these differences. Will we ignore them? discount them? perceive them as a stereotypical category? or, will we face them head-on, and seek to understand them and the consequences which they bring in our society, even when this may uncover some uncomfortable truths about our own history or relationships with others? Professor Martha Minow describes the challenge in these terms:

Justice is engendered when judges admit the limitations of their own viewpoints, when judges reach beyond those limits by trying to see from contrasting perspectives, and when people seek to exercise power to nurture differences, not to assign and control them.⁸¹

Academic writing which discusses how gender and other forms of bias influence judging will hopefully help judges learn to reach beyond these limits.

It will not be enough to bring more women to the bench. We must foster in judges, both current and future, an openness and unerring sense of responsibility to make these changes: to hear and act upon what women judges and many others have to say about their realities when faced with the law. This is not an exercise of abstraction and principle alone, but an immersion of ourselves in the details of the everyday and individual lives. The duty is crucial, for if those in positions of power do not take it seriously, how can those less empowered make the difference that is essential to a democratic society. This point becomes perhaps more concrete and evident if we consider it in the context of legal education. If, for example, the message of compassion, understanding, and equality is not expressed by the Dean and professors at a particular law faculty, how can we expect these attitudes on the part of students?

When I speak of making a difference, or what we make of difference, I am describing the pursuit of justice in its most full sense. The pursuit of a compassionate justice must remain the responsibility of *all* law professors, lawyers, law students, and especially, of *all* judges, regardless of gender.

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Minow, supra note 32.