RADICALIZING THE CURRICULUM, OR JUST KEEPING UP-TO-DATE?

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The Nineteenth Annual Viscount Bennett Lecture and Seminar is presented by the Faculty of Law and by the Mary Louise Lynch Chair in Women and Law. As the Chair in Women and Law, I want to place this year's theme, "Women's Diversity: Legal Practice and Legal Education", in context before introducing our two lecturers, The Honourable Madam Justice Wendy Baker and Dr. Sherene Razack.

The nature of legal practice and of legal analysis has, in the last decade particularly, begun to undergo a significant shift. This shift is with respect to the actors who have been identified as worthy of legal recognition, to persons whose "experiences" have been acknowledged as legally meritorious and to issues which are considered to fall within "the boundaries of law". The shift is also about how these actors identify themselves and their connection with others; in the context of this year's Viscount Bennett Lecture, it concerns how women identify themselves and how different aspects of our identity may be emphasized at different times and the implications of this reality for developing an understanding of women's experiences (in the plural) and law.

Our courts, including the Supreme Court of Canada and at least some of Canada's appellate courts, have considered the claims of marginalized or previously "excluded" groups as serious questions of law. More importantly, they have in their reasoning acknowledged the legal merit of the *perspectives* these groups bring to their claims and legal arguments. These changes have also been reflected in legislation. The shift to which I refer has, of course, been directed in large measure by the requirements of the *Canadian Charter of Rights and Freedoms*, not only directly in "*Charter* cases", but indirectly through the values reflected by the *Charter* which appear in non-*Charter* legal discourse. Regardless of the importance of the *Charter* in driving these changes, as Justice Baker will attest in her comments today, the look of law has changed in its treatment of differences.

Law does evolve and over time may become transformed. A salient element in the contemporary transformation of law – the law which *we* in this Law School and in this audience in our various capacities study, practise and implement – is its increasing complexity as it is compelled to accept the social realities of many different groups in society. It – and its human agents – must confront the

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implications of these groups' perceptions of their treatment by law as racism, sexism and homophobia. Their experiences become part of how law is defined and interpreted. What is important about this process is that the relatively unidimensional nature of law, its formation out of what we now recognize to be a relatively narrow range of experience, has been acknowledged as incomplete and exclusionary.

We see this development in many areas of law, some more obvious than others. In freedom of expression cases, the people who are the objects of the impugned speech are, metaphorically speaking (and through intervenor status, literally), given a place in the courtroom along with the speaker. In considering the consequences of James Keegstra's speech for the equality of Jews[1] and of pornographic images for the equality of women,[2] for example, the Supreme Court of Canada ensured the presence of Jews and women in the courtroom, along with the Keegstras and Butlers. A failure to consider the "section 15" implications of speech impugned on the basis of its racism or sexism is a failure to recognize that racist and sexist speech names people in ways antithetical to their own naming and creates and perpetuates perceptions of them upon which others act.[3] Concentrating on the speaker without appropriately considering those who are spoken of is law at its most abstract. *Butler*, indeed, gives us a hint of the shape of these considerations as this process advances. Although the Supreme Court of Canada adopted the position advanced by the Women's Legal Education and Action Fund (LEAF) in that case – that pornography's offence is not to public morals but to women's integrity – it has been criticized for failing to appreciate how the homogeneous view taken of women would be nuanced by having incorporated lesbian experiences into women's equality theory.

Sexuality is one area of life in which men and women often seem to speak different languages, with enormous repercussions for women when those languages are then represented in law. As Justice L'Heureux-Dubé has observed, "there is a clear communication gap between how most women *experience* consent, and how many men *perceive* consent".[4] Yet, the law's language has tended to incorporate only the man's perception and has excluded the woman's experience. The introduction of the female dialect into sexual assault law has posed a challenge

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[1] *R.* v. *Keegstra*, [1990] 3 S.C.R. 697.

[2] *R.* v. *Butler*, [1992] 1 S.C.R. 452.

[3] One hopes that the Supreme Court of Canada will continue this process in the *Malcolm Ross* case involving a teacher whose anti-Semitic comments occurred outside the classroom (argued 31 October 1995). The analysis was scant in the New Brunswick Court of Appeal's decision: *Ross* v. *Moncton Board of School Trustees, District No. 15* (1993), 110 D.L.R. (4th) 241.

[4] *R.* v. *Park*, [1995] 2 S.C.R. 836 at 864.

which jurists still struggle to meet; a struggle, not surprisingly, which often echoes the gendered experiences of the judges themselves.[5]

In sentencing, actors are more often "allowed" to wear their own garb rather than being forced to put on the costume of another culture. Thus, sentencing of Aboriginal persons convicted of criminal offences may take into account Aboriginal practices. On the face of it, this is a desirable development. Yet, it illustrates that it is important to approach these matters with a certain humility and that those of us in a majority position should listen closely to what people say about themselves. Efforts to "recognize" cultural practices in the Northwest Territories have revealed a lamentable lack of understanding of the reality of Inuit life and the imposition of stereotypical assumptions by white male judges, resulting in a "benefit" to male accused at the expense of female victims and of Inuit culture as a whole.[6]

These are complicated matters, not without controversy. We may not agree on result, but we must all understand the way in which our legal framework has been shifting. We must recognize that mainstream society, as any distinct and identifiable culture, operates on unspoken assumptions, some so endemic or entrenched that the layers of sand which cover them have hidden their contours. Yet, sand can be sifted and removed; we can find the underlying premises which form our structure of law – whether criminal, family, contract, tax or employment law, the assumptions of legal method or the presumptions underlying advocacy. Assumptions that some areas of law are immune to these challenges are misplaced. Why would we assume that legal edifices such as contract or tax law, for example, have been built on different foundations from those underlying criminal or family law? We know that they are not, once we begin our digging. We find that assumptions of neutrality are as misguided as is, I regretfully and respectfully say, the assumption that heterosexual marriage constitutes "the fundamental unit in society", the only "natural" form of marriage.[7]

Nevertheless, regardless of particular results, the firm parameters of law are being shaken. The practice of law today requires practitioners and judges to understand law as three dimensional rather than as flat and linear. Legal education which ignores these changes is as irresponsible as a legal education which is based on an assumption that the Supreme Court of Canada stopped

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[5]See *R.* v. *Osolin*, [1993] 4 S.C.R. 595. This is an example of a decision in which the male and female judges take very different views of what kind of facts could possibly underlie a defence of honest but mistaken belief in consent.

[6]See T. Nahanee, "Sexual Assault of Inuit Females: A Comment on 'Cultural Bias' " in J.V. Roberts & R.M. Mohr, eds., *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 192.

[7]*Egan* v. *Canada*, [1995] 2 S.C.R. 513 at 539.

issuing judgments in some specified year. In short, it is a given that we update our courses to include the latest significant decisions in a particular area – this is the linear development of law. It is not yet a given for all of us that we also recognize the changing texture of law, the expanded boundaries, the inclusion of new viewpoints and the nuancing of older appreciations. We may understand that law reflects power relations; what we may not understand is that we do not all experience power, or the lack of it, in the same way. Speaking of "power" glosses the differences and misses the complexity of "relations of ruling".[8] For too many instructors, the social realities on which the stuff of law is based lie beyond their definition of the appropriate syllabus. Yet, they are failing to provide a legal education which responds to the demands, increasingly, of legal practice.

Students have a right to learn about these matters and to have their own experiences reflected in their legal education as much as they are entitled to learn about the latest cases. Students also have an obligation, as do their instructors, to listen and to risk their own perceptions about the world. Our graduates must understand the dissonance between social reality and the artificiality of law and the need to bring law into line with the diverse ways in which people live their lives. Social reality is not homogeneous and neither should the law be.

The Viscount Bennett Memorial Lecturers, Professor Sherene Razack and Justice Wendy Baker, bring to this exploration different perspectives based on their own situations. Justice Baker's experience as a commercial litigator representing banks and airlines, in serving as prosecutor before professional bodies and representing persons with disabilities has provided her with a background from which she can draw her consideration of cases involving the intersection of different identities in her courtroom. As she will explain, she understands these issues because she has both advanced and defended equality claims. She will speak about the reality of judging these claims. Professor Razack has explored the limitations of law through a camera lens comprised of her own experience and an empathetic appreciation of the experiences of persons from different communities, an appreciation of the complexities of dominance and oppression and our location at different times as possessors of power and as subject to it. She will speak about how recognition of diversity, intended as a force for advancing equality, has been appropriated as a force for regression. Our speakers have accepted the challenge facing those of us engaged with contemporary legal practice and the legal framework: how to develop and implement a view of law which acknowledges and incorporates as fundamental the interrelation of sex, race, class, sexuality and ability.

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[8]T. Williams, "Re-forming 'Women's' Truth: A Critique of the Report of the Royal Commission on the Status of Women in Canada" (1990) 22 Ottawa L. Rev. 725.

I now hand this exploration over to our speakers, Professor Razack, who will provide a framework, and Justice Baker, who will help give it particular content.