A CRITICAL LOOK AT THE ART OF JUDGING

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INTRODUCTION

In 1772, a case came before the English Court of King's Bench concerning a negro who had been purchased off the African coast as a slave by a Virginian man named Stewart.[1] The negro's name was James Somerset; however he is usually referred to as "the negro" in the reasons. Stewart's intention was to take him back to Virginia, where of course slavery was at that time legal. He had been put on board a vessel lying in the Thames River, by force; and was there detained against his will until returned in obedience to a writ of habeas corpus.

Counsel for the respondent argued that slavery was not unknown in other parts of the world and at other times in history; that there was no evidence that Stewart intended to treat Somerset cruelly; and that there would be alarming consequences following a decision in favour of the applicant; it was pointed out that about 14,000 slaves were presently in England and some 166,914 in Jamaica, where the computed value of a negro was 50 pounds a head. About this, counsel said:

> "There are very strong and particular grounds of apprehension, if the relation in which they stand to their masters is utterly to be dissolved on the instant of their coming into England."[2]

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[1] Somerset v. Stewart (1772) 98 E.R.499.

[2] At 505.

Although the Court indicated that it would have accepted a voluntary settlement which would have avoided the far-reaching impact of its decision, this was not to be. The Court then gave reasons, in which Lord Mansfield said:

> "Compassion will not, on the one hand, nor inconvenience on the other, be to decide; but the law ...
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> The now question is, whether any dominion, authority or coercion can be exercised in the country, on a slave according to the American laws? The difficulty of adopting the relation, without adopting it in all its consequences, is indeed extreme; and yet, many of those consequences are absolutely contrary to the municipal law of England...
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> The setting 14,000 or 15,000 men at once free loose by a solemn opinion, is much disagreeable in the effects it threatens...
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> If the parties will have judgment, fiat justitia, ruat coelum, let justice be done whatever be the consequence."[3]

The actual ruling was made in these words:

> "The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: it's so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged."[4]

In 1915, a writ of mandamus was sought from the Cour Superieure of Quebec by Annie Macdonald Langstaff, to compel the Bar of the province of Quebec to admit her to the examination preliminary to becoming a student at law.[5] The

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[3] At 509.

[4] At 510.

[5] Dame Langstaff v. The Bar of the Province of Quebec (1915) 47 S.C.131.

Bar "strenuously opposed" her application on several grounds, the last of which was that "the applicant in the present instance is a woman, and what was still more objectionable, a woman under marital authority..."[6]

On that issue, the Court had the following to say:

> "With the reform here suggested in the sense that the field of labour for persons of the female sex should be enlarged and their means of earning their livelihood increased whenever the thing is within the range of possibility, I am in full sympathy; but I cannot lose sight of the fact that, here, my power of action is circumscribed by the very nature of the functions I am called upon to fulfil. I am not a legislator but a judge, and the question submitted to me is not whether it should be more fair and more reasonable that women should be placed on a footing of equality with men and allowed to become, along with them, members of the legal profession,-- but whether at the time when the law which incorporated the Bar of the province of Quebec into a legal body, the legislator intended that women should be included in the law, and given the same privileges which were granted to the male sex."[7]

Having concluded that in determining whether the pronoun "he" in the Quebec Bar Act was meant to cover the feminine as well as the masculine gender, the context and purport of the whole act must be looked into, the Court went on to comment that the pronoun could not be intended to include women under the Militia Act or the legislation dealing with police forces and fire brigades, and that the functions of an advocate in the province must be examined. That examination led to these comments:

> "Let us for a moment picture to ourselves a woman appearing as defending or prosecuting counsel in a case of [rape] and putting to the complainant the questions which must of all necessity be asked in order to make proof of the acts which are of the essence of the crime or which are equally necessary to meet and repel the charge.

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[6] At 133.

[7] At 137 - 138.

> No woman possessing the least sense of decency could possibly do so without throwing a blur upon her own dignity and without bringing into utter contempt the honor and respect due her sex."[8]

The Court added that no woman in France or England had ever made any attempt to be admitted as a member of the legal profession (citing no authority for that statement), nor even anywhere upon the continent of Europe. Rhetorically, the Court asked, "Who were the best judges of their fitness for such struggles, if they themselves were not?"[9]

Finally, the Court said:

> "Under our law, [a] married woman even when separated as to property, cannot engage in any business without the consent of her husband, and failing this, that of a judge in certain cases...No proof was made before me that prior to offering herself as a candidate for examination with the ulterior object of adopting the practice of law as her profession the applicant had obtained either from her husband or from one of the judges of this court the authorization to do so."[10]

Needless to say, the writ of mandamus did not issue.

What I would like to talk about today is a particular feat which judges are sometimes called upon to perform, and which I think the Somerset case illustrates. That feat is the exercise of "heightened objectivity." By that term I mean a degree of objectivity in addition to the objectivity which is exercised as a matter of course, and which is central to the role of the courts: the

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[8] At 139 - 140.

[9] At 140.

[10] At 144.

dispassionate and disinterested decision-making between the parties so that the law is applied to a given set of facts without fear or favoritism -- even when one of those parties is the state or an acquaintance or when one of the parties or the facts of the case arouse strong emotions. The approach to decision-making which I will call "heightened objectivity" is that which is not only dispassionate and disinterested but also manifests three other characteristics:

(1) a rigorous disregard for common assumptions and expectations about people deriving from their membership in particular groups;

(2) an exercise of the power of the imagination, to consider an issue from the perspective of those involved even though that perspective may be very different from that of the decision-maker; and

(3) an exercise of the creative and analytical faculties, in asking whether the law itself is skewed by a history built upon preconceptions about particular groups or disregard for their perspective.

I think that a decision such as that of Lord Mansfield in Somerset v. Stewart is an example of heightened objectivity: the Court not only rose above any particular relationships with or emotions aroused by the parties, but also above convenient assumptions regarding members of groups to which the judge would never belong. It would have been quite possible for the case to have been decided the other way, by a judge who concluded that slavery was common, had always existed, and was the only appropriate state for inferior beings. He might have accepted the argument presented by the respondent to the effect that

slavery and servitude are similar, and a decision against slavery would mean that one's footmen could abandon one on the highway with impunity. But the Court did not take that route. I think it refrained from doing so in large measure because it was able to imagine the horrors of slavery from the point of view of the slaves. To refrain from exercising the imagination in that regard would have been a denial of the humanity of James Somerset, and would have lacked objectivity.

On the other hand, the Langstaff case is an example of a court failing to exercise heightened objectivity. While the Reasons begin with a passage espousing equality in principle, and while the judge declares himself not a legislator but a judge who can only interpret the law as he finds it, there was no more a rule of positive law in this case than there had been in Somerset's Case. Nonetheless, the Court, as had courts in numerous similar cases in other jurisdictions,[11] found in favour of the status quo, because it corresponded with the judge's own assumptions about the abilities and sensibilities of women and his view about the way the world is and must be. Thus the status quo became the legal rule until dislodged by the legislature.

The only individual assessment of the applicant is in the final paragraph of the Reasons:

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[11] In re Mabel P. French (1905) 37 N.B.R. 359; Bradwell v. State of Illinois (1873) 16 Wall.130; Re Mabel French (1912) 1.W.W.R.488, 19 W.L.R. 847, 17 B.C.R.1, 1 D.L.R. 80 (B.C.C.A.); Rex v. Cyr (Alias Waters) [1917] 3 W.W.R. 849, 12 Alta L.R. 320, 29 C.C.C. 77, 38 D.L.R. 601 (Alta A.D.); Bebb v. Law Society [1914] 1 Ch. 286 (C.A.)

"The proof filed in the record I have before me shows that the petitioner in the present case is a young woman of good morals and that she is possessed of considerable ability. After what I have said above, she will no doubt understand that her ambition in life should be directed towards the seeking of a field of labor more suitable to the sex and more likely to ensure for her the success in life to which her irreprocheable [sic] conduct and remarkable talents give her the right to aspire."[12]

THE NEED FOR HEIGHTENED OBJECTIVITY

My purpose today is not to tell horror stories or take cheap shots at past or present members of the judiciary whose views may now seem antiquated. Nor is my message that judges are solely responsible for social reform or that they are compelled, in all circumstances, to find in favour of change or to decide all issues in favour of minorities and women. Rather, it is that in making decisions based on the law, judges should attempt to do so with a conscious disregard for certain assumptions and preconceptions which many ordinary people share, with an attempt to imagine themselves truly in the position of the litigants, and with a skeptical view of legal doctrine built up in areas where erroneous preconceptions and assumptions have been operative.

I make this argument not only because I think that taking this approach is the right thing to do but also because it is consistent with the spirit of the common law and, now, with the spirit of the Canadian Charter of Rights and Freedoms.

A brief digression on the Charter, which I am sure many of you have heard entirely enough about in the last four years to last a lifetime. The existence of section 15, with its express, strong statement that every individual (which I read

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[12] At 145.

to mean human being and not corporation) is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination ... based on race, national or ethnic origin, religion, sex, age, or mental or physical disability, is relevant in this context for two reasons. First, as Madame Justice Wilson has pointed out[13], the role of the judiciary has changed. She said:

> "I think the conclusion is inescapable that the scope of judicial review of legislative and executive acts has been vastly expanded under the Charter and that, indeed, the courts have become mediators between the state and the individual. Judicial protection of individual and minority rights vis-a-vis the majority clearly requires a distinct segregation of the courts from the majoritarian machinery of the legislatures and the Parliament. The independence of the judiciary has never been more crucial. Nevertheless, there has to be a concern about the legitimacy of the Court in this expanded role and we see this concern manifesting itself publicly in a greater interest in how judicial appointments are made and in the backgrounds and social philosophy of the incumbents on the Bench, particularly on the Supreme Court of Canada. I believe that the expanded role also calls for a more sophisticated appreciation by the judges themselves of the process in which they are engaged and a better understanding of that process on the part of counsel and the public, but especially counsel.
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> [Referring to section 1] This section reveals why these particular rights and freedoms were selected for special protection under the constitution. It is because they represent the fundamental values of a free and democratic society and, if any limits are to be put on them, then the government must establish to the satisfaction of the courts that those limits can be justified in that kind of society."

The courts, in other words, directly enforce the Charter rights when they are applicable in a particular case, and those rights now include the equality rights. That in itself points to the need for heightened objectivity, at least in those contexts.

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[13] In the second of her David B. Goodman Memorial Lectures at the University of Toronto in 1985.

Second, the Charter's statement of fundamental values goes beyond its application in any particular case. The existence of section 15, I think, should be taken as a clear statement that there is now an underlying premise of equality between people even when they differ according to one of the listed characteristics. It is a reminder that heightened objectivity is to be expected when it comes to race, religion, sex, national or ethnic origin, age, or disability.

In a sense, it is a distraction to speak of the Charter, because the kind of decision-making which I am praising is not new. Lord Mansfield's decision in Somerset's Case illustrates that. I am going to try to show you that it is not an isolated example, and that there are many, drawn from many areas of the law, jurisdictions, and times.

I will present you with these examples and explain how they seem to me to illustrate the three kinds of "heightened objectivity" I have identified.

ILLUSTRATIONS

(1) Rigorous disregard for common assumptions and expections about people deriving from their membership in particular groups.

In a 1984 case, Ogg-Moss v. Her Majesty the Queen,[14] the Supreme Court of Canada had to decide whether section 43 of the Criminal Code, which provides a defence for a parent or teacher who uses reasonable force to correct a child or

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[14] [1984] 2 S.C.R. 173, 11 D.L.R. (4th) 549, 14 C.C.C.(3d) 116, 41 C.R. (3d) 297.

pupil, was available to a Mental Retardation Counsellor charged with assaulting a mentally disabled twenty-one-year old who was in his care, by striking him on the forehead five times with a large metal spoon. The Court said that section 43 was not available, because a mentally handicapped person is not a "child" or "pupil", and a Mental Retardation Counsellor is not in the position of his parent or teacher. The analogy with children is often made in the case of mentally handicapped people, but the Supreme Court of Canada said that, in this case at least, it was a false one. The Court said:

> "The foregoing factors of history and statutory construction make the appellant's proposed interpretation highly unlikely. Beyond them, the skepticism which would in any event be the proper judicial response to the appellant's proposed extension of the category of persons the common law made subject to corporal correction is in no way allayed even by his "functional" reading of the term "child". The single basis cited by Mr. Ogg-Moss for his metaphorical reading of the word "child" is the purported correspondence between the dependency on a parenting figure by a severely retarded adult and by a "child". Beyond this single asserted correspondence, there are no submissions that would support a conclusion as to the "childish" or "childlike" nature of mentally retarded persons; nor do I believe that any such arguments could be successfully maintained. Certainly the description in the record of Mr. Henderson's condition affords no support for such an argument. Incapacity for speech, "headbanging" and inability to recall incidents for more than a few minutes are signs of severe physiological affliction. They do not correspond to any recognizable image of childhood. I agree with the Attorney General for Ontario that there is a qualitative difference between "immaturity," "childishness" or "childlike" behaviour and the behaviour of a mentally retarded adult, especially as in the present case, of a severely retarded adult.
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> A further important consideration is that chronological childhood is a transitory phase, and for a child in the chronological sense the suspension of the criminal law's protection against certain kinds of assault is a temporary phenomenon. For the mentally retarded person the definition of "childhood" proposed by the appellant is a life sentence and the consequent attenuation of his right to dignity and physical security is permanent. I cannot believe that it is the intention of the Criminal Code to create such a category of permanent second-class citizens on the basis of a mental or physical handicap.[15]

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[15] At S.C.R. 186-187.

In my respectful view, this case perfectly illustrates an exercise of heightened objectivity. It would have been quite possible to analogize between mentally handicapped people and children and to reach the conclusion which had been reached by one lower court, that section 43 should be applicable. But someone who thinks about the issue without preconceptions about mentally handicapped people is able to see the differences between them and children, with specific reference to the individual in the case. And someone who attempts in some measure to put himself or herself into the place of the mentally handicapped person sees that there is something abhorrent about a "life sentence" of childhood entailing subjection to physical discipline and consequent attenuation of the right to dignity and physical security. Although the Court's reasons do not articulate this kind of reasoning process, I suggest to you that it was present.

A second example to illustrate a rigorous disregard for common assumptions and expectations about people deriving from their membership in particular groups is to be found in the decision of the Alberta Court of Appeal in Roebuck v. Roebuck.[16] In that case the issue was the custody of a four and one-half year old girl and the appropriateness of the "tender years doctrine", whether based upon law or "common sense." The mother and father were found by the trial judge to be equally good parents; he awarded custody to the father, who was a farmer, and would be able to be more flexible about his time than the mother, who was working as a secretary. The majority of the Court held that it was:

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[16] (1983) 148 D.L.R. (3d) 131; 45 A.R. 180.

"...no part of the law of Canada that a judge is bound to say that human nature dictates that only females can perform that parental role labelled as 'maternal'."[17]

The Reasons for Judgment of the majority include language which makes express the reasoning process:

> [referring to the tender years doctrine] "This view confused cultural tradition with human nature; it also traps women in a social role not necessarily of their choosing, while at the same time freeing men...[T]he 'tender years principle', which at first glance seems only innocently sentimental, is seen by many as part of a subtle systemic sexual subordination.
> ...
> All that can be said in this age of changing attitudes is that judges must decide each case on its own merits, with due regard to the capacities and attitudes of each parent. We should take care not to assign to this idea or that (all actually of recent origin and unique to our society) the august status of being the only one consistent with human nature or common sense."[18]

Einstein is quoted as saying:

> "common sense [was] the collection of prejudices acquired by age 18."[19]

Again, with respect, I suggest that this case illustrates the exercise of heightened objectivity, and I need not belabour that point. However, the case does raise another point, a very important one at the present time in the area of family law. That is that, while courts seem to be moving away from some positions which reinforce stereotypical views of women (as economically helpless and therefore in need of maintenance, and as naturally better custodians for

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[17] At D.L.R. 145.

[18] At 145.

[19] At 144.

children), and toward a gender-neutral view of family law, the world (the job market, the availability of child care arrangements, part-time work, etc.) is lagging behind. Thus, there is now a growing body of evidence that gender-neutral decision-making which treats both marriage partners as equally capable of supporting themselves and which looks to the best interests of children without considering economic readjustments which might enable the mother to equal the advantages to be offered by the father, is producing an unprecedentedly large class of impoverished women and children and unfairness for mothers seeking custody of their children.[20]

To hypothesize on the facts in Roebuck for a moment, suppose that the evidence was that, not only would the child receive more time with the farmer father, but also she would have a higher standard of living and the benefit of a surrogate mother in the person of the father's girlfriend. Suppose as well that the reason for which the mother was tied to a low-paying secretarial job, was her earlier decision to devote herself full-time to the home and child, thus forgoing career advancement or training. Should the court ignore the possibility of awarding the mother a higher amount in the division of property, or a higher sum in monthly maintenance, to enable herself to be as "good" a parent as the father? My suggestion is that the only way to look at the matter objectively in this context is to ask, "Who would be the better parent, assuming economic

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[20] Lenore J. Weitzman, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America (Free Press, 1985).
Carol S. Bruch and Norma J. Wikler, "The Economic Consequences", (1985) 36 Juvenile and Family Courts Journal 5.
Dr. Jocelynne A. Scutt, "Principle v. Practice: Defining 'Equality' in Family Property Division on Divorce" (1983) 57 Australian L.J. 143.
See also Judge Rosalie Silberman Abella, "Family Law in Ontario: Changing Assumptions" (1981) 13 Ottawa L.J.1.

factors are equal?", rather than "Who would be the better parent, given the existing division of income and assets?" After the decision about the better parent on the merits is made, if necessary, a decision to make a reallocation of income or assets can follow which will permit that parent to carry out that role.

Also, in the area of maintenance, there has been a trend to award "rehabilitative" maintenance only, even when the female spouse is shouldering the responsibility for child care. Time-limited maintenance awards sometimes correspond with reality, and often do not. In the real world, 45 year old women are not routinely able to obtain retraining and employment which makes them economically self-sufficient. In the real world, mothers with the care of children are not routinely able to finance child care and re-education which enables them to attain a standard of living above the poverty line.

Thus, in an important way, it is not enough to eschew stereotypical roles and treat both spouses as if they are equal; the fact is that in the Canadian economy and social structure they usually are not. Aesop's fable of the fox and the stork comes to mind; the offer of a drink of milk out of a narrow-necked bottle to both of them is fine for one but not the other. In the area of family law, therefore, there are particularly challenging decisions to make -- ones which do not rest upon stereotypes but do take account of the actual prospects of the individual parties in the existing world, rather than the theoretical prospects of men and women in a hypothetically equal world.

One final example of a judgment in which ordinary assumptions are questioned

is R. v. McGinty,[21] a decision of the Yukon Territory Court of Appeal. The issue there was the compellability of a spouse to testify against the other spouse in connection with a charge involving physical assault. On this issue, the majority of the Court said:

> "It emerges clearly from a review of the authorities that policy plays a large part in resolving the question of the compellability of a wife or husband to testify against his or her spouse in a case arising from an act of violence against the witness spouse. On the one hand, it is desirable that persons who commit crimes of violence against their spouses be effectively prosecuted. On the other, it is contended, compelling a husband or wife to testify against his spouse will disturb marital harmony and is repugnant to fair-minded persons.
> ...
> The interest of society in securing proper prosecution of persons who commit crimes of violence against their spouses is vital. Such crimes are common. Their consequences are frequently grave. Because they tend to be committed in the privacy of the home, very often it is impossible to prosecute them unless the victim-spouse testifies. And very often when the trial date arrives, the spouse declines to testify, whether out of fear of further brutality or blandishments or a combination of the two.
> ...
> If the victim spouse is given the option of whether to testify or not, the result is frequently that the guilty spouse is acquitted. It thus becomes possible for a spouse who has brutalized his or her mate to continue to commit crimes of violence with impunity. On the other hand, if the offending spouse knows that the victim has no choice but to testify, he or she is more likely to be deterred from committing crimes of violence or from inflicting further threats or violence to prevent him or her from testifying.
> ...
> In my opinion, a rule which leaves to the husband or wife the choice of whether he or she will testify against his aggressor-spouse is more likely to be productive of family discord than to prevent it. It leaves the victim-spouse open to further threats and violence aimed at preventing him or her from testifying, and leaves him or her open to recriminations if he or she chooses to testify. It seems to me better to leave the spouse no choice and to extend to married persons the general policy of the law that victims are compellable witnesses against their aggressor.
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> With respect to the contention that fair-minded persons find it naturally abhorrent to require one spouse to testify against another, it must also be remembered that fair-minded persons generally find it abhorrent that persons who commit crimes go unprosecuted. A crime committed against a spouse is as much a crime as a crime against a stranger, and should bear the same consequences. Crimes of violence are particularly abhorrent, raising as they

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[21] (1986) 2 B.C.L.R. (2d) 155 (Y.T.C.A.)

> do the state's duty to protect the safety of its citizens, married and unmarried. Presumably it was for such reasons that the common law centuries ago concluded that a spouse ought to be permitted to testify against her spouse where the latter had inflicted violence upon her. The same reasons dictate that such spouses should be compellable."[22]

With respect, I think that the court here is departing from the conventional wisdom about violence within a marriage, the conventional wisdom beginning with the premise that it is essentially a "private matter" and going on from there to conclude that it is "quasi-civil" and that the choice of legal consequences should be in the hands of the victim. To say, as the court does, that a crime against a spouse should be treated the same way as a crime against a stranger is to depart from what used to be the ordinary assumptions regarding appropriate marital relationships.

(2) Exercise of the power of the imagination, to consider an issue from the perspective of those involved even though that perspective may be very different from that of the decision-maker.

A pair of cases from the United States Supreme Court illustrates this point nicely. The first is Plessy v. Ferguson,[23] the decision upholding the constitutionality of Louisiana legislation providing for separate railway carriages for the white and colored races. The majority of the Court said:

> "The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a

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[22] At 178 - 180.

[23] 163 U.S. 256.

commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced.

...

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption.[24]

The dissent is memorable for its language:

"The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified on any legal grounds.

If evils will result from the commingling of the two races upon public highways established for the benefit of all, they will be infinitely less than those that will surely come from state legislation regulating the enjoyment of civil rights upon the basis of race. We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow citizens, our equals before the law. The thin disguise of "equal" accommodations for passengers in railroad coaches will not mislead anyone, or atone for the wrong this day done."[25]

As is well known, sixty years later the U.S. Supreme Court took another look at the constitutionality of "separate but equal" facilities, this time in the context

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[24] At 260 - 61.

[25] At 265.

of public education. In Brown v. Board of Education[26] the Court stated the question and answered it this way:

> "We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunites? We believe that it does.[27]

The Court placed significant weight on psychological evidence regarding the effects of segregation in education, but also cited the Reasons of one of the courts below, which had said:

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."[28]

The Court concluded that separate educational facilities are "inherently unequal" and that therefore the plaintiffs and others similarly situated were deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

My respectful view is that the Court in Brown, even without the psychological evidence which was before it, could have come to the conclusion that it did about the effects of segregated education, simply by imagining what it must be like to be a member of the black race in the context of the United States with its history of enslavement and subsequent forms of racism, and to be relegated

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[26] 347 U.S. 483 (1954).

[27] At 493.

[28] At 494.

to a different school system. The disingenuous reasoning of the court in Plessy v. Ferguson did not persuade the Supreme Court in Brown. An honest and straightforward look at the case, taking into account the point of view of the plaintiffs, was enough. Refraining from taking into account that point of view would have been wrong, as Plessy v. Ferguson illustrates.

A Canadian example may be cited as well, although in this case it is a dissenting opinion. In Mumford v. Children's Hospital of Winnipeg et al.[29] the issue was whether an application to extend the time for bringing an action in negligence, under the Limitation of Actions Act, should be granted. The applicant was a native Indian mother whose child had not been diagnosed as suffering from acute appendicitis on two occasions in 1972 when she brought her to the hospital. On the third occasion that the mother brought her to the hospital the child was admitted and subsequently operated on. Following the operation, she became a spastic quadraplegic, unable to walk and talk and affected with cortical blindness. (She had been a healthy, normal and intelligent child previously.) The mother failed to take any steps until she saw a lawyer in 1975, under pressure from an aunt who was more knowledgeable than she about the law. The mother had believed that if she complained about the doctors or the hospital the child could be taken away from her. The majority of the Court of Appeal confirmed the decision below denying her application for an extension of time. One member of the court dissented, however, saying:

> "Applying the subjective test I am of the view that this simple, undeducated and unsophisticated mother dealt with the situation confronting her in the way that she thought best. Her inaction was, of course, unwise. But when we think of the kind of person she is, her conduct becomes understandable.

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[29] [1977] 1 W.W.R. 666 (Man. C.A.).

I would not deny her and the child her day in court."[30]

In referring to the "subjective test" the dissenting member of the Court cited Central Asbestos Co. Ltd. v. Dodd,[31] in which the English House of Lords had, in referring to constructive knowledge, said that the "reasonable man" was not the standard --rather, the question was whether the plaintiff had taken all such action as it was reasonable for him to take. In the Mumford case, taking into account the individual characteristics of the mother (and the fact that she was a native Indian made her story plausible), it seemed sufficiently clear that she had taken all such action as it was reasonable for her to take.

The Mumford case illustrates how an "objective" test, grounded upon what is perceived to be a normal life experience and understanding of the legal system, can produce unfortunate and arguably unjust results for those who, through no fault of their own, are different from the "norm". It is similar to the issue which faced the Saskatchewan Court of Appeal in Saskatchewan Human Rights Commission and Huck v. Canadian Odeon Theatres[32] regarding the right of a wheelchair-reliant person to have a choice of seats in a movie theatre other than what had been offered to him by the proprietor: in his wheelchair in front of the front row of seats, or out of his wheelchair in the regular seats. The Court decided that, in some cases, to treat people equally it is necessary to treat them differently. Thus, it affirmed the decision of the Human Rights tribunal to the effect that the complainant had been discriminated against

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30 At 668.

31 [1973] A.C. 518, [1972] All E.R. 1135 (H.L.)

32 (1985) 18 D.L.R. (4th) 93, [1985] 3 W.W.R. 717, 6 C.H.R.R. D/2682.

contrary to the Saskatchewan Human Rights Code.[33]

I think, with respect, that this is a paradigm example of taking into account the point of view of a party affected, and taking it seriously. For the court to do otherwise would be to say that disabled people have the right to be free from discrimination in public facilities so long as they can use the facilities as if they were able-bodied -- obviously, a "right" in name only, and one which none of us would find particularly comforting if we were in the position of having to rely on it.

(3) An exercise of the creative and analytical faculties, in asking whether the law itself is skewed by a history built upon preconceptions about particular groups or disregard for their perspective.

What I am asking you to consider here are not laws such as the former prohibition against Orientals voting in British Columbia, or the like, for such legislation is intentionally discriminatory. (Nor am I asking you to consider laws or practices which are unintentionally discriminatory, such as height and weight or job testing requirements which operate to exclude large numbers of Orientals and women, or Election Act rules which require voters to report physically to

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[33] Leave to appeal to the Supreme Court of Canada was denied -- (1985) 60 N.R. 240, 18 D.L.R. (4th) 93. The same principle was adopted in two subsequent Supreme Court of Canada decisions: Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Limited (1986) 7 C.H.R.R. D/3102, and Bhinder and Canadian Human Rights Commission v. C.N.R. (1986) 7 C.H.R.R. D/3093. In O'Malley, Mr. Justice McIntyre, speaking for the entire court, said:

> "An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply."

the polling place and thus operate to preclude many physically disabled people from voting.) Rather, it is laws which do not squarely fit either definition of "discrimination" but rest upon a foundation of erroneous and prejudicial assumptions about a group of people, or fail to take account of the perspective of an affected group of people, and are thereby suspect.

A straightforward illustration may be found in the decisions of the Alberta Court of Appeal and the Supreme Court of Canada in R. v. Big M Drug Mart[34]. One way of looking at what happened in that case is that in both courts, the Lord's Day Act was seen as inconsistent with a constitutional guarantee of freedom of religion because it failed to take account of the perspective of those who do not observe a Sunday Sabbath. The courts refused to accept the proposition that the Lord's Day Act applied equally to everyone, did not in terms establish one particular religion, and did not expressly interfere with anyone else's Sabbath observance.

I will use the sexual offence evidentiary rules as a second illustration. At common law, it was assumed that women brought false accusations easily and that women were generally less truthful than men, either because of a conscious wish to deceive or because of unconscious motivations. In Wigmore's Principles of Judicial Proof (1937), it was said:

> "There is at least one situation in which chastity may have a direct connection with veracity, viz, when a woman or young girl testifies as complainant against a man charged with a sexual crime, -- rape, rape under age, seduction, assault. Modern psychiatrists have studied copiously the behaviour of errant young girls and women coming before the courts in all

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[34] [1984] 1 W.W.R. 625, (1983) 5 D.L.R. (4th) 121, 9 C.C.C. (3d) 310 (C.A.); 1 S.C.R.295, 18 D.L.R. (4th) 321, [1985] 3 W.W.R. 481.

> sorts of cases. Their psychic complexes are multifarious, distorted partly by inherited defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offences by men. The unchaste (let us call it) mentally finds incidental but direct expression in the narration of imaginary sex-incidents of which the narrator is the heroine or victim. On the surface the narration is straightforward and convincing. The real victim, however, too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale ... No judge should ever let a sex-offence charge go to the jury unless the female complainant's social and mental history have been examined and testified to by a qualified physician."[35]

This assumption about the veracity of women (along with a complex of other preconceptions about women and sexual offences) resulted in the corroboration requirement, the perception that the sexual history of the complainant was relevant either to the likelihood of consent or to her credibility, and the rules regarding recent complaint. Even if some of the special rules in sexual offence cases did apply to male complainants as well as female (and the corroboration requirement did, eventually) the origin of the rules made them highly questionable, and much in need of reform.[36] In my respectful view, this is an area in which heightened objectivity is crucial, and in which examples of failure to exercise it have not been difficult to find.

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[35] At para. 183, pp. 343-44. Emphasis in original.

[36] The most recent attempt is Bill C-127, "An act to amend the Criminal code in relation to sexual offences against the person...", S.C. 1980-81-82, C. 125. It is too early to assess its effect, particularly in the light of the Charter challenges which have been mounted on behalf of accused persons claiming a right to unfettered cross-examination in the interests of a fair trial: R. v. Bird and Peebles (1984) 40 C.R. (2d) 41, 12 C.C.C. (3d) 523, 27 Man. R. (2d) 241, 9 C.R.R. 69; R. v. Oquataq (1985) 18 C.C.C. (3d) 440; R. v. LeGallant (1985) 47 C.R. (3d) 170; Gayme and Seaboyer v. The Queen (1986) 15 W.C.B. 248.

CONCLUSION

It is not only judges, of course, who have occasion to make decisions which affect people's lives and who have the obligation to do so objectively. Many of us find ourselves in analogous positions, in many walks of life. Yet I am hard-pressed to think of areas in which the heightened objectivity I have described is more important or can have a more far-reaching impact than in judicial decision-making.

Several of the examples I have used can serve to illustrate more than one kind of heightened objectivity. The McGinty case, for example, shows not only a disregard for common assumptions about the roles of spouses within marriage, but also a re-evaluation of an area of the law which had been built upon preconceptions (and, historically, built upon a disregard for the perspective of wives forced to take the sole responsibility for moving the criminal process to completion.) A similar point could be made about the Roebuck case. Even when no major area of the law is being re-evaluated, a case such as the Ogg-Moss case may create changes which are felt widely in the future.

It would be interesting to speculate about how and why particular courts at particular times have been able to look at cases from the perspective I have described as "heightened objectivity", but I will refrain from indulging in such speculation, which would be uninformed and premature. I think that the exercise of heightened objectivity involves most importantly the rational, but also, to some extent, the empathetic abilities of the decision-maker. It may also involve to a large degree the ability to be skeptical about what "everyone knows".

Whatever it involves, and whatever causes it to happen, I have tried only to describe it in general terms and bring it to your attention through illustrations. Further and better analysis may follow.