

**GENDER AND RACE IN THE CONSTRUCTION OF  
“LEGAL PROFESSIONALISM”: HISTORICAL PERSPECTIVES**

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This is a paper solicited to contribute to a colloquia canvassing issues of “legal professionalism.” When first asked to participate, I was advised that the colloquia had been designed by the Chief Justice of Ontario’s Advisory Committee on Professionalism to “promote professionalism, civility, and a spirit of community and collegiality in the legal profession.”<sup>2</sup> The concept of “professionalism” is one that has always caused me a certain degree of hesitation. I think back to the Osgoode Hall classroom in which I sat as a third year law student, decades ago in the mid 1970s, listening to Dean Harry Arthurs lecture on “The Legal Profession.” Try as I might, I could never quite get over my bewilderment that the hallmarks of “professions” apparently included self-regulating codes of conduct, and an ethic of public service. I remember leaning back in my chair, surprise twinned with skepticism, and wondering, as I have more than once in subsequent years, “just whom do they think they are kidding?”

So it was with some sense of unease that I asked myself whether I was actually the right person to agree to contribute to the colloquium. While mulling this over, I was out walking with a professor of history who teaches at Carleton University. I told her about the professionalism colloquium and mentioned my hesitation. She retorted, “Professionalism? Professionalism is all about power and exclusion.” I returned home slowly from that walk, pondering the connections between professionalism, power and exclusion. My expertise is within the field of history. And

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<sup>2</sup> The objectives of the colloquia, including these, are set out in the promotional flyer announcing the 20 October 2003 event.

what I have learned about the history of the Canadian legal profession resonates far more with words such as power, exclusion, and dominance than it does with concepts such as civility, or the extension of community and collegiality.

In the end, I resolved to prepare a paper for the professionalism colloquium, but a paper that attempts to chronicle what we know about how lawyers have resorted to ideas of “professionalism” to exercise power and exclusion based on gender, race, class and religion. It describes some of the barriers that were placed before the working class, Black, Jewish, Aboriginal and female individuals who sought admission to the legal profession.<sup>3</sup> It examines some of the discriminatory practices visited by lawyers and judges upon those who managed to obtain admission to the profession despite the barriers. And it gives some consideration to the wider impact such discrimination has wrought upon disadvantaged communities and society more generally. But a word of caution at the outset. Historical records are frequently produced at the behest of the powerful, and it is their achievements and victories that grace the pages of most written sources. Disadvantaged communities rarely maintain full accounts of their experiences of discrimination, and the fragmentary records they do create are often lost in time.<sup>4</sup> What I have been able to uncover so far is, without a doubt, the tip of the iceberg.

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<sup>3</sup> This list is not, of course, exhaustive. I have not dealt with discrimination against other ethnic and religious minorities, persons with disabilities, gays and lesbians. These areas all require more historical research, and examination into the continuing impact that discrimination has upon such communities within law.

<sup>4</sup> See, for example, Jacalyn Duffin “The Quota: ‘An Equally Serious Problem’ for Us All” Canadian Bulletin of Medical History 19:2 (2002) 327-49, which discussed the search for historical proof of the quotas on women in medicine at the University of Toronto. Duffin described how difficult it was to “prove historically” what she “knew to be true existentially.” After a difficult search, she managed to locate several written records, as well as a living witness who could offer evidence regarding the existence of quotas. “What happens to the history of entrenched practices that leave no tracks?” she queried, adding: “We are confronted with the poverty of a historical method that privileges the written word. Had those two archival documents not been kept, or had [the witness] not been found, the quota would have existed anyway, encased in a paper silence, characterized as strident rumour mongering, suppressed by retrospective shame, and potentially lost to our contemplation forever. [...] Historiographically, then, we know that some histories are not and cannot be told through the usual channels.”

### Barriers to Entry: Something Less Than a Warm Welcome?

The very concept of "professionalism" has been inextricably linked historically to masculinity, whiteness, class privilege, and Protestantism. In its formative years, when the Law Society of Upper Canada first established entrance examinations, the objective was to winnow out candidates who did not possess the "gentlemanly" accoutrements of fluency in classics. In 1820, describing the first admissions tests as important to "secure to the Province a learned and honorable Body to assist their fellow subjects," the Law Society passed Rule 18, requiring candidates:

to give a written translation in the presence of the Society of a portion of one of Cicero's Orations or perform such other exercise as may satisfy the Society of his acquaintance with Latin and English composition, and that no person who cannot give these proofs of a liberal education shall hereafter be admitted upon their Books.<sup>5</sup>

In 1825, the Law Society determined that its efforts to weed out the "ungentlemanly" had not gone far enough. "No small injury" had been done, it noted, "to that portion of the youth of this country intended for the profession of law" by "confining their examination to Cicero's Orations."

An additional resolution was promulgated:

It is unanimously resolved that in future the Student on his examination will be expected to exhibit a general knowledge of English, Grecian and Roman History, a becoming acquaintance with one of the ancient Latin Poets as Virgil, Horace or Juvenal - and the like acquaintance with some of the celebrated prose works of the ancients such as Sallust or Cicero's Offices, as well as his Orations or any author of equal celebrity which may be adopted...and it will also be expected that the student will show some reasonable portion of mathematical instruction.<sup>6</sup>

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<sup>5</sup> William Renwick Riddell The Legal Profession in Upper Canada in Its Early Periods (Toronto: Law Society of Upper Canada, 1916) at 39.

<sup>6</sup> *Ibid.* at 40-1.

The notion of “becoming acquaintance” conveys so much all on its own. The second resolution was not subsequently approved by the judges and was not therefore enforced, but the classical foundation that the benchers of the Law Society wished to see carried unmistakable connotations of class, gender and race. Training in the classics was largely restricted to Anglo-Canadian families of means, who reserved such education primarily for promising young boys. Some sense of this imbues the account of Patrick MacGregor, a white, male, Scottish immigrant who set himself the task of preparing for the entrance examination in 1834. Building upon the classical education he had already received at school, he devoted the months of February through April to studying “with great earnestness and application.” His diary recounts the ordeal:

Went over six books of Euclid. Read Paley’s Moral Philosophy twice-over, and read the revised Algebra, Tyler’s Elements of General History, Goldsmith’s Greece and Rome (abridged), Revised Geography and Astronomy, Cicero’s Select Orations, and some of Virgil.... On the 19<sup>th</sup> of April 1834, in the morning, after being furnished with money and a new suit of clothes by my uncle, I set out for the City of Toronto, Capital of Upper Canada (formerly Little York) to be examined by the Benchers of the Law Society. [...] Presented my Petition and fee of L10 to the Secretary. [...] After delaying some time, till there was a quorum, we were examined. I was called in, and Baldwin gave me the 7<sup>th</sup> chapter of Cicero’s speech on the Manilian Law to translate. [...] We were afterwards called in to read our translations. Knowing their prejudices, I imitated the English style, as well as I could and succeeded.<sup>7</sup>

A formidable task, successfully completed. And how clearly the relieved young Scot seems to have been the beneficiary of his ethnicity, class and gender. Each had given him a foundation upon which to build, and the time and resources with which to prepare. Equally important, he was also the recipient of a fresh suit of clothes in which to make the sort of impression that would help

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<sup>7</sup> These extracts of MacGregor’s diary are taken from D.G. Kilgour “A Note on Legal Education in Ontario 125 Years Ago” *University of Toronto Law Journal* v.13 (1959-60) 270-272.

to convince the crusty old benchers that he had, indeed, the proper "proofs of a liberal education."<sup>8</sup>

The lawyers who became members of the Law Society of Upper Canada in the nineteenth century were quite homogeneous, mostly drawn from the ranks of the privileged, and closely linked through firm partnerships, intermarriage, and social connections. Family names that lawyers still recognize today stretch back generations, in some cases far back into the nineteenth century: McCarthy, Osler, Blake, Cartwright, Fasken, Beatty, Smith, Robinette. The very notion of professionalism embodied the image of a tightly knit community, with shared culture, traditions and expectations. Established lawyers hired family and friends, and the dynastic legacies lengthened.<sup>9</sup>

By way of comparison to medicine, recent research into the admissions process of the University of Toronto medical school has revealed that the rules were dramatically bent to accommodate the sons of physician parents, at the same time as quotas were installed to reduce the numbers of women and Jewish students at various points during the 1940s, 1950s, and 1960s.<sup>10</sup> It is still only a matter of speculation, but one wonders what similar historical scrutiny of the admissions practices at Canadian law schools and hiring decisions within Canadian law firms would

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<sup>8</sup> Other accounts of young lawyers during this era suggest that studies at Upper Canada College often provided a thorough background in classics with which to impress the benchers during admission examinations. Larratt William Violet Smith, who immigrated to Canada from England as a child, described the course of study he had pursued at UCC: "The pupils began Latin in the first form and by the time they reached the sixth form they could construe Horace, Cicero, and Virgil, and were proficient in Greek as well." He successfully passed his admission examinations at the age of nineteen in 1839. See Mary Larratt Smith Young Mr. Smith in Upper Canada (Toronto: University of Toronto Press, 1980) at 7-9, 14.

<sup>9</sup> For details on the inter-generational nature of some of these legal families, see Christopher Moore The Law Society of Upper Canada and Ontario's Lawyers, 1797-1997 (Toronto: University of Toronto Press, 1997).

<sup>10</sup> Jacalyn Duffin "The Quota: 'An Equally Serious Problem' for Us All" Canadian Bulletin of Medical History 19:2 (2002) 327-350. For more general discussion on Jewish quotas, see Charles Levi "The Jewish Quota in the Faculty of Medicine, University of Toronto: Generational Memory Sustained by Documentation" Historical Studies in Education 15:1 (Spring 2003) 130; W.P.J. Millar "We wanted our children should have it better: Jewish Medical Students at the University of Toronto 1910-51" Journal of the Canadian Historical Association (2000) 109.

reveal. That Bora Laskin, who would later become the first Jewish Chief Justice of the Supreme Court of Canada, was forced to take unpaid articling positions, and after graduation from Harvard Law School to write head-notes for a law publisher because he could not secure a permanent paid position with a law firm, is instructive.<sup>11</sup>

In spite of the homogeneity of the image of the legal profession, there have always been individuals from outside the circle who sought elevation to the rank of lawyer. Delos Rogest Davis claimed publicly in the late 19<sup>th</sup> century that he wished to become the first Black lawyer in Canada.<sup>12</sup> His reception at the hands of the legal profession was anything but civil. Davis was unable to find a lawyer who would agree to serve as his principal, and so he was not allowed to obtain the requisite years of articling experience. Instead, he had to petition the Ontario Legislature for admission. Pointing out that he had already been appointed a commissioner of affidavits and a public notary, and had studied law for eleven years, Davis successfully convinced the legislators to admit him by special statute. On 19 May 1885, at the age of thirty-nine, he was finally admitted to the bar as a solicitor, and in 1886 as a barrister. Both admissions were over the protests of the Law

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<sup>11</sup> On Bora Laskin's experience as an articling student, see Philip Girard's forthcoming biography of Laskin. On the head-note writing experience, see Irving Abella "The Making of a Chief Justice: Bora Laskin, the Early Years" in *Law Society of Upper Canada Gazette* 24:3 (1990) 187. Gretta Wong Grant, who would become the first Chinese-Canadian female lawyer when she was called to the Ontario bar in 1946, recalled that antisemitism was rife among the Osgoode Hall student body, and that Jewish students who wished to find articling positions outside of Jewish firms had an almost impossible task. See "Oral History Interview with Gretta Grant" conducted by Constance Backhouse and Anna Feltracco, 11 July 1991 and 17 September 1991 at 16-17; Constance Backhouse "Gretta Wong Grant: Canada's First Chinese-Canadian Female Lawyer" *The Windsor Yearbook of Access to Justice* 15 (1996) 3 at 33.

<sup>12</sup> Although Davis was the first to lay public claim to this achievement, there were others of mixed race who preceded him. Robert Sutherland, who is now acknowledged to be the first Black person called to the bar in Ontario, was called in 1855. His parents were a Scottish father from Jamaica and an African-Jamaican mother. He was identified as "coloured" when he attended Queen's University in Kingston from 1849 to 1852, graduating with honours in classics and mathematics, subjects that would have stood him in good stead on admission criteria. Sutherland set up practice in Walkerton after his call. Whether because he did not seek it or for other reasons, Sutherland does not appear to have received public recognition as the first "coloured" lawyer until very recently. See Ian Malcolm "Robert Sutherland: The First Black Lawyer in Canada?" *Law Society of Upper Canada Gazette* 26:2 (June 1992) 183-6.

Society.<sup>13</sup> The Black law students who followed Davis throughout the first half of the twentieth century often had trouble finding articling positions, and typically worked only for other Blacks, or with Jewish lawyers.<sup>14</sup> Neither Blacks nor Jews, it seems, fit the "professional" mold according to those who set the dictates of the white, Protestant, wealthy men who had founded the Law Society and fashioned it in their own image.

Davis's ordeal was soon to be equalled with the admission of the first woman lawyer, Clara Brett Martin. A well-to-do, white Torontonion of Anglican-Irish heritage, with a degree from Trinity College, Martin fit the contemporary image of the legal professional in every respect but gender. In 1891, at the age of seventeen, she formally petitioned the Law Society of Upper Canada for registration as a student member. A committee of benchers, chaired by Samuel Hume Blake, ruled her ineligible because of her gender.<sup>15</sup> The decision was cheered by legal commentators, one of whom wrote that there must be "a more suitable place in life" for women than that of counsel: "A woman does not, as a rule, arrive at a conclusion by logical reasoning, but rather by a species of

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<sup>13</sup> Subsequent to his admission, Davis set up practice in Amherstberg, Ontario, near the county of his birth. His son, Frederick Homer Alphonso Davis, eventually joined him in practice in 1900. Davis became the first Black King's Counsel in 1910. See *An Act to Authorize the Supreme Court of Judicature for Ontario to admit Delos Rogest Davis to practice as a solicitor*, S.O. 1884, c.94; *An Act to authorize the Law Society of Upper Canada to admit Delos Rogest Davis as a Barrister-at-Law*, S.O. 1886, c.94; Lance C. Talbot "History of Blacks in the Law Society of Upper Canada" *Law Society of Upper Canada Gazette* 24:1 (March 1990) 65-70; Robin W. Winks *The Blacks in Canada, A History* 2<sup>nd</sup> ed. (Montreal and Kingston: McGill-Queen's University Press, 1997) at 328.

<sup>14</sup> See Lance Carey Talbot "History of Blacks in the Law Society of Upper Canada" *Law Society of Upper Canada Gazette* 24:1 (March 1990) 65-70. Ethelbert Lionel Cross, who appears to have been the fourth Black admitted to the Law Society of Upper Canada, and the only one between 1900 and 1923, was called in 1924, after articling with E.F. Singer. Bertrand Joseph Spencer Pitt, the fifth, articulated with Cross and was called in 1928. Blacks who articulated with Pitt included James Watson, Myrtle Blackwood Smith, and George Carter. Many of the early Black lawyers in Nova Scotia articulated with Joseph Eaglan Griffith, a Black immigrant from the British West Indies, who was called to the bar in 1917 and practised in Halifax until his death in 1944. For details, see Constance Backhouse *Colour-Coded*, chapters 4 and 5.

<sup>15</sup> Constance Backhouse *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada* (Toronto: Women's Press, 1991) at 293-326.

instinct, which, no matter how unerring, cannot assist others to arrive at the same conclusion."<sup>16</sup> Some who contemplated women becoming lawyers labelled the mere idea "hilarious," asserting that the prospect of women exercising a profession would "banish all maiden mawkishness," something that was "so novel, so contrary to all notion of feminine sweetness, modesty, and delicacy" that it deserved nothing but mockery.<sup>17</sup> The Canada Law Journal editors had previously counselled that refusing to allow women "to embark upon the rough and troubled sea of actual legal practice" was "being cruel only to be kind."<sup>18</sup>

Martin next pursued the same route as Davis had done. She petitioned the Ontario Legislature to require the lawyers to admit women. The debates that ensued on the floor of the legislature inspired another bencher of the Law Society, William Ralph Meredith, also the provincial leader of the opposition, to rant against the admission of women. He claimed that the dictates of female fashion would never allow women to wear "the same official robes" as men, and was backed up by the Canada Law Journal, which insisted that "a new and becoming headgear would have to be devised in place of the hideous horse-hair wig; some bewitching structure of dainty curls, of the particular shade of gold fashionable at the moment."<sup>19</sup> Meredith argued that the presence of women would wreak havoc with jury trials, because male jurors would find their chivalrous instincts running out of control as they tried to compare the positions of male and female lawyers. "It would upset the whole equanimity of the twelve good men and true," he warned, closing with these words:

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<sup>16</sup> A.H. O'Brien (Arthur H. O'Brien) "Legal Scrap Book" Canada Law Journal (Toronto: J.E. Bryant Co.) v.28:7 (April 1892) 202 at 205.

<sup>17</sup> n.a. "Woman's Rights" Canadian Illustrated News (Montreal) 21 November 1874 at 323-4.

<sup>18</sup> See Canada Law Journal v.15 (June 1879) 146; (June 1880) 161.

<sup>19</sup> "Female Students-at-Law" Toronto *Daily Mail* 6 April 1892; "Women as Lawyers" Toronto *Daily Mail*, 7 April 1892; Canada Law Journal v.32 (June 1896) 784.

“Women were not intended for the position of advocate. Nature intended women should occupy a different position to men in the community. If the House were carried away by gush and sentiment, it would be disastrous to the best interests of women.”<sup>20</sup> Another legislator, Nicholas Awry, insisted that the very “homes and womanhood of Ontario” were at stake.<sup>21</sup> Catastrophic disruption was predicted: nurseries attached to courtrooms, shrill demands to change laws perceived as discriminatory, abandoned families in unkempt homes as mothers who should have been attending to domestic duties lingered in law offices.<sup>22</sup> The entrenched masculinity of the legal profession was transparently arrayed in the types of arguments put forward. The feminization of law was viewed with consternation and dismay as heralding an end to the very foundation of the profession.

It took Clara Brett Martin two separate statutes of the Ontario Legislature, a series of contentious votes within the Law Society, and six full years to obtain admission as the first female barrister and solicitor in Canada, on 2 February 1897.<sup>23</sup> She sat through taunting, hissing, and vicious classroom harassment during the student lectures put on by the benchers. Her race and class privilege enabled her to secure articles, unlike Delos Rogest Davis, but she found articling to be a miserable experience, for the other articulated clerks avoided her and made things “as unpleasant as they possibly could.”<sup>24</sup> When she was called to the bar, no one would initially hire her, and she was

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<sup>20</sup> “Female Students-at-Law” *Toronto Daily Mail*, 6 April 1892; “Women as Lawyers” *Toronto Daily Mail*, 7 April 1892.

<sup>21</sup> *Toronto Globe*, 5 April 1895.

<sup>22</sup> Backhouse *Petticoats and Prejudice* at 334.

<sup>23</sup> *Ibid.* at 293-321; *An Act to Provide for the Admission of Women to the Study and Practice of Law*, S.O. 1892, c.32; *An Act to amend the Act to provide for the admission of Women to the Study and Practice of Law*, S.O. 1895, c.27.

<sup>24</sup> The articling period at this time was three years, and Martin secured a position with the prominent Toronto firm of Mulock, Miller, Crowther, and Montgomery, in part due to her long-standing friendship with Sir William Mulock’s daughter. She switched articles part-way through to another well-known Toronto firm, Blake, Lash, Cassels. In an interview with the *Buffalo Express*, Martin described feeling like “an interloper, if not a

forced to place a self-deprecating advertisement in a Toronto newspaper: "Miss Clara Brett Martin, Barrister &c., desires position in a law firm, where experience can be had in practical work, that being the object rather than salary."<sup>25</sup> The barriers erected by the all-male legal profession were so high that Martin almost abandoned her goal, stating at one point: "If it were not that I set out to open the way to the bar for others of my sex, I would have given up the effort long ago."<sup>26</sup> In one of the ironies of history, recent documentation has surfaced to show that Martin was antisemitic, illustrating how experience of discrimination in one format does not always teach people to prize principles of egalitarianism more generally.<sup>27</sup> Her antisemitism also indicates just how well Clara Brett Martin fit into the dominant mold of the legal profession in every aspect but her gender.

The barriers facing early Aboriginal applicants were, if anything, even more impenetrable. One of the best examples is the case of Andrew Paull, an Aboriginal man from British Columbia, who obtained a position with the law offices of Hugh St. Quentin Cayley in 1917. After a four year stint there, Paull sought to be admitted as a student-at-law. Vancouver lawyer, D.W.F. McDonald,

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curiosity" at these firms, and confessed that she found the articling experience an "obstacle" that nearly "doomed [her] to failure." See Backhouse Petticoats and Prejudice at 309-14; Buffalo *Express*, undated clipping circa 1896, Archives, Women's Law Association of Ontario.

<sup>25</sup>Toronto *Telegram*, 3 February 1897. She eventually secured a position with a two-man law firm operated by John Shilton and William H. Wallbridge, and practised with them until 1906, when she established her own firm. She went to court several times in the early years, but the fuss that always greeted her presence ultimately discouraged her, and she began to retain male barristers to act for her clients when they needed courtroom representation. Her practice centred upon wills, real estate, and family law. See Backhouse Petticoats and Prejudice at 321-3.

<sup>26</sup> Buffalo *Express*, undated clipping circa 1896, Archives, Women's Law Association of Ontario.

<sup>27</sup> For detailed discussion of Martin's antisemitism, see Backhouse Petticoats and Prejudice at 323-4; Constance Backhouse "Clara Brett Marti: Canadian Heroine or Not?" Canadian Journal of Women and the Law 5:2 (1992) 263-279; Lita-Rose Betcherman "Clara Brett Martin's Anti-Semitism" Canadian Journal of Women and the Law 5:2 (1992) 280-97; Brenda Cossman and Marlee Kline "And if not now, when?: Feminism and Anti-Semitism Beyond Clara Brett Martin" Canadian Journal of Women and the Law 5:2 (1992) 298-316; Lynne Pearlman "Through Jewish Lesbian Eyes: Rethinking Clara Brett Martin" Canadian Journal of Women and the Law 5:2 (1992) 317-50; Constance Backhouse "Response to Cossman, Kline and Pearlman" Canadian Journal of Women and the Law 5:2 (1992) 351-4; Lita-Rose Betcherman "Response to Cossman, Kline and Pearlman" Canadian Journal of Women and the Law 5:2 (1992) 355-6.

wrote to the British Columbia Law Society on Paull's behalf in 1922, noting: "Mr. Paul [sic] has had a thorough education at the Mission and High Schools...and is looked upon as one of authority by the Indians. He is desirous of taking up the study of law; he is about twenty-eight years of age, and speaks and writes English fluently. He has not had much instruction in Latin, though he speaks and writes French." The Law Society denied his application, indicating that "no concessions will be made as to the subject of Latin." The secretary of the Law Society also noted that Paull was barred by another criterion for admission: that all applicants must be entitled to vote in the province. Aboriginal individuals were barred by statute from voting in British Columbia provincial elections until 1949.<sup>28</sup> Andrew Paull went on to a very distinguished career as an advocate for First Nations' land claims in British Columbia, but never became a lawyer.<sup>29</sup>

Indeed, the historical understanding of Aboriginality and professionalism was such that the federal government had enacted a provision, in effect for more than seventy years from 1876 to 1951, that provided that if Aboriginal individuals became a lawyer (or a doctor, minister, or held a

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<sup>28</sup> For details of the exclusion of Aboriginals from the legal profession in British Columbia, see Joan Brockman "Exclusionary Tactics: The History of Women and Visible Minorities in the Legal Profession in British Columbia" in Hamar Foster and John McLaren eds. *Essays in the History of Canadian Law: British Columbia and the Yukon*, v.6 (Toronto: The Osgoode Society, 1995) 508 at 519-25 and 549; E. Palmer Patterson "Andrew Paull and Canadian Indian Resurgence" Ph.D. Thesis (University of Washington: 1962). The requirement that applicants have the right to vote, Law Society of British Columbia Rule 39, had been passed in response to the efforts of several Japanese and Chinese men to be admitted as students-at-law in 1918-19, and stated: "No person shall be admitted or enrolled who is not the full age of sixteen, is a British subject, and who would, if of the age of twenty-one years, be entitled to be placed on the Voter's List under the Provincial Elections Act." Asians were prohibited from exercising the provincial suffrage until 1949. For details regarding the prohibitions on voting for Aboriginals and Asian-Canadians, see Backhouse *Colour-Coded*, chapters 4 and 5.

<sup>29</sup> In the mid 1920s, Andrew Paull, Peter Kelly, and their lawyer, A.E. O'Meara, brought a successful claim on behalf of the Allied Tribes of British Columbia before a Joint Committee of the Senate and House of Commons of Canada. Almost immediately after, in 1927, Parliament made it a crime to raise money from Aboriginal communities for the prosecution of Aboriginal claims, unless the Department of Indian Affairs had given prior written consent. See *An Act to amend the Indian Act*, S.C. 1926-27, c.32, s.6. The prohibition on fund-raising was not removed until the enactment of *The Indian Act*, S.C. 1951, c.29. George Manuel attributed the enactment of the prohibition to a backlash in response to Paull, Kelly and O'Meara's success; see George Manuel and Michael Posluns *The Fourth World: an Indian Reality* (Don Mills: Collier-Macmillan Canada, 1974) at 86-7 and 94-5.

university degree) they were no longer capable of holding the status of "Indian."<sup>30</sup> To be a lawyer meant, in legal terms, not to be Aboriginal. It is unclear how this affected the first Aboriginal lawyer to be called to the bar in Ontario, (and the first in Canada), Norman Lickers. Born in Tuscarora Township on the Six Nations Territory, and orphaned by the time he reached school age, Lickers was raised at the Mohawk Institute in Brantford. He graduated from Brantford Collegiate Institute, and then obtained a B.A. from the University of Western Ontario in 1934. In the fall of that year he was admitted as a student-at-law to Osgoode Hall Law School, and articulated with J.O. Trepanier in Brantford. Lickers was called to the bar in 1938, and set up practice in Brantford, where he specialized in criminal law. Disbarred in 1950, Lickers moved on to a successful career as an ironworker and as a leader in Aboriginal politics.<sup>31</sup> The theme of disbarment, which arose to plague a number of the early racialized lawyers, including some of the early Blacks, sends up a discordant note that suggests the need for further research into the difficulties that beset such path-breakers, and the discriminatory types of disciplinary supervision they may have been accorded by provincial law

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<sup>30</sup> The *Indian Act, 1876*, S.C. 1876, c.18, s.86(1) provided: "Any Indian who may be admitted to the degree of Doctor of Medicine, or to any other degree by any University of Learning, or who may be admitted in any Province of the Dominion to practice law either as an Advocate or as a Barrister or Counsellor or Solicitor or Attorney or to be a Notary Public, or who may enter Holy Orders or who may be licensed by any denomination of Christians as a Minister of the Gospel, shall *ipso facto* become and be enfranchised under this Act. Section 88 provided that the effect of enfranchisement was that such individuals "shall no longer be deemed Indians within the meaning of the laws relating to Indians, except in so far as their right to participate in the annuities and interest moneys, and rents and councils of the band of Indians to which they belonged...."

<sup>31</sup> Lickers was born 10 June 1913. His father, a farmer, was Henry Lickers. His Western degree was an honours BA in political science and economics. His call to the bar took place on 17 November 1938, and his disbarment on 28 September 1950. Although details of the disbarment are not publicly accessible, the press referred to misappropriation or failing to account for a client's funds. Lickers's iron-working career involved work at Hamilton Bridge and Tank, service in the ironworkers' union, and establishing courses to teach Aboriginal youths the trade. In 1951, Lickers acted as a consultant to the federal government on amendments to the *Indian Act*. He was one of the most vocal protesters against White Paper issued by Indian Affairs in 1969, served as a founding president of the Association of Iroquois and Allied Indians, and was active on his band council from 1958 to 1974. Lickers was also an accomplished athlete. For details, see Law Society of Upper Canada Archives, Past Member Files; obituary "Canada's first native lawyer dies on Six Nations Reserve" Brantford *Expositor* 16 March 1987. I am indebted to Susan Lewthwaite of the Law Society of Upper Canada Archives for this information.

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### Differential Treatment Accorded the Path-Breakers

It wasn't just admission to law that created consternation. Those who broke down the barriers, and many who came after, could find their careers additionally burdened by gendered, racist, class-biased treatment at the hands of white, male lawyers. The experience of some of the first judges to break the traditional mold is filled with examples. Emily Murphy and Alice Jamieson, the first two women appointed as police magistrates in Canada in the early twentieth century, were both faced with complaints from male counsel who objected that as non-persons, women had no legal entitlement to preside over courtrooms. Supreme Court of Alberta Judge David Lynch Scott, who ultimately upheld women's right to sit, could not resist adding that he personally "entertain[ed] serious doubts" whether a woman was "qualified to be appointed," but the government of the day had apparently thought otherwise, and he could not find any legal impediment in the way.<sup>33</sup>

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<sup>32</sup> E. Lionel Cross was disbarred in 1937. Of the five Black lawyers practising in Ontario in the 1940s and 1950s, two were disbarred, one in 1948 and another in 1953. See Talbot "History of Blacks in the Law Society" at 66-8. On the disciplinary vigilance that the Law Society showed towards Black lawyers, who were accused of "touting" and "conduct unbecoming," see Oral History Transcript of Mr. Charles Roach, The Osgoode Society, November-December 1989.

<sup>33</sup> Although neither woman was a lawyer, as was the case for many non-legally-trained police magistrates of the time, their experiences in judicial posts set a precedent that is important to examine. Emily Murphy became the first woman police magistrate in the British Empire in 1916, when she was appointed to the Women's Court in Edmonton. She was joined the same year by Alice Jamieson, who was named a police magistrate in Calgary. During her first year on the bench, Magistrate Murphy was advised by one of the male lawyers who appeared before her that she was not "legally a 'person' under the British North America Act and had no right to be holding court." The argument was temporarily resolved until Magistrate Jamieson was similarly challenged in 1917. Defence counsel attempted to quash Jamieson's conviction of Lizzie Cyr for vagrancy because a woman was "incompetent and incapable of holding the position of police magistrate." In *Rex v. Cyr* (1917), 12 Alta. L.R. 321, Judge David Lynch Scott of the Supreme Court of Alberta concluded: "While I entertain serious doubts whether a woman is qualified to be appointed to that office, I am of opinion that the legality of such appointment cannot be questioned or inquired into on this application." The accused appealed, and the Alberta Court of Appeal declared that "in this province and at this time in our presently existing conditions there is at common law no legal disqualification for holding public office in the government of the country arising from any distinction of sex," and that "Mrs. Jamieson is not disqualified from holding the office of police magistrate." Emily Murphy's discomfort with these attacks led her to launch a campaign, which took more than a decade to complete, to have women judicially declared "persons." The "Person's Case" resolved the matter permanently, when the Privy Council

Madam Justice Bertha Wilson became the first woman appointed to the Ontario Court of Appeal in 1976, and to the Supreme Court of Canada in 1982.<sup>34</sup> She found her entry to both courts marred by incidents of exclusion and hostility from some of the other judges. Madam Justice Wilson's biographer described the treatment she received from Mr. Justice Arthur Jessup at the Court of Appeal, who made it clear he disliked sitting on panels with her, asked that she be replaced on "complex" cases, and ignored her completely whenever possible.<sup>35</sup> The biography also recounted the obvious awkwardness exhibited by Chief Justice Bora Laskin when he spoke at Madam Justice Wilson's swearing-in at the Supreme Court of Canada, and Mr. Justice Antonio Lamer's pointed refusal to rise from his chair along with the rest of his colleagues when she entered the conference room for her first judicial conference. Even more troubling was the fact that Madam Justice Wilson was routinely isolated from the informal decision-making discussions that the male judges engaged in at the Supreme Court of Canada, a phenomenon that deeply disturbed her, and impeded her ability to influence the court.<sup>36</sup> Professional norms of civility and collegiality were used here to demarcate,

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overturned the Supreme Court of Canada decision that had held that women were not qualified to sit as "persons" in the Senate; *Henrietta Muir Edwards et al. v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.) reversing [1928] S.C.R. 276; Catherine L. Cleverdon *The Woman Suffrage Movement in Canada* (Toronto: University of Toronto Press, 1950) at 73-4, 102, 142. For another example, see the description of the "petty tyrannies" that plagued Helen Gregory MacGill, appointed assistant judge in the Vancouver Juvenile Court in 1917, in Elsie Gregory MacGill *My Mother The Judge* (Toronto: Peter Martin Associates, 1981).

<sup>34</sup> Ellen Anderson *Judging Bertha Wilson: Law as Large as Life* (Toronto: University of Toronto Press, 2001) at 85, 128.

<sup>35</sup> Anderson *Judging Bertha Wilson* at 94.

<sup>36</sup> Anderson *Judging Bertha Wilson* at 128, 150, 153-4, 164. After his retirement, former Chief Justice Antonio Lamer took issue with Madam Justice Wilson's biographer's assertion that she had felt excluded at the court. "There was no little clique," he told the *Lawyers Weekly*, "no little gang. Like-minded people tend to congregate....I guess some of us just figured, 'well, there's no point in going and trying to convince Bertha that it's going to be this, and not that,' because she is not going to change her mind ... and maybe she felt isolated about that, but we never isolated her." Cristin Schmitz "Former chief justice Lamer reflects on his brightest, darkest moments as Canada's top jurist" 29 March 2002, p.1, 7. University of Toronto law professor Jim Phillips, a former clerk for Madam Justice Wilson, wrote back that Mr. Justice Lamer had failed "to take into consideration that, had she been invited to participate in more of the informal discussions among the judges forming majority opinions without the benefit of her input, she might have been able to change their minds." "Says Lamer's reaction confirms Wilson's

bolster and protect the masculine judicial circle. These ethical norms, so touted in professional rhetoric, were not used to extend collegial community to the first woman as an equal, but to isolate and exclude her. The treatment underscored that the judiciary was, first and foremost, masculine, and that the introduction of a female component on the bench was viewed as highly intrusive and inappropriate.

Madam Justice Claire L'Heureux-Dubé became the first woman appointed to the Quebec Court of Appeal in 1979, and the second female Supreme Court of Canada appointee in 1987.<sup>37</sup> She described her shock when she discovered that one of the judges at the Supreme Court of Canada initially refused to speak with her. "He wouldn't talk to me for three months. After that, he sent me a note saying: 'You've passed your probation.'"<sup>38</sup> Madam Justice L'Heureux-Dubé characterized the early years on the Supreme Court as akin to an "old boy's club" where she and Madam Justice Wilson were "isolated" and "felt the sting of exclusion." She even considered resigning from the bench during that early period, due to "ideological battles among the judges over the Charter, loneliness, and the reluctance of [some of the male judges] to accept a second woman judge."<sup>39</sup>

Madam Justice L'Heureux-Dubé was also subjected to a barrage of remarkably disrespectful and uncivil commentary by other judges and lawyers. In 1999, she released the *Ewanchuk* decision, in which she articulated the egalitarian principles that applied to the assessment of consent in sexual assault law. Her decision was signed by one of her colleagues, and concurred in by another, who

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version" Letters to the Editor *The Lawyers Weekly* 18 April 2002, p.5.

<sup>37</sup> Teresa Scassa "Claire L'Heureux-Dubé (1927- ) in Rebecca Mae Salokar and Mary L. Volcansek eds. *Women in Law: A Bio-Bibliographical Sourcebook* (Westport, Connecticut: Greenwood Press, 1996) at 136-43.

<sup>38</sup> "Gatecrashing the old boys club" Toronto *Globe & Mail*, 2 May 2002, p.A8. The judge was not named in the article.

<sup>39</sup> "Top court 'can always be improved'" Ottawa *Citizen*, 5 May 2002, p.A4.

wrote a shorter more general judgment.<sup>40</sup> The decision was later characterized by academic commentators as strongly worded but by no means aberrant.<sup>41</sup> Yet, in what has been described as an “unprecedented and unparalleled personal attack,” Mr. Justice John Wesley McClung, whose decision she overturned, published an open letter in the *National Post* in which he disparaged Madam Justice L’Heureux-Dubé for “feminist bias” and a “graceless slide into personal invective.” In a surprising assertion, he also wagered that her “personal convictions...delivered again from her judicial chair” could be responsible for the “disparate (and growing) number of male suicides being

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<sup>40</sup> *R. v. Ewanchuk*, [1999] 1 S.C.R. 330. The Alberta Court of Appeal judgment under appeal had characterized the accused’s coercive advances as “clumsy passes” that were more “hormonal” than “criminal.” It dismissed the complainant’s repeated “no’s” as irrelevant, and implied that a woman who had had a child out of wedlock, living common-law with a male partner, was not capable of refusing consent. The decision had also rebuked the complainant for being dressed in shorts, commenting that she “did not present herself to Ewanchuk or enter his trailer in a bonnet and crinolines.” The portion of Justice L’Heureux-Dubé’s judgment that came under scrutiny, which was concurred in by Justice Charles Doherty Gonthier, read (at 369, 372, 376) as follows: “Complainants should be able to rely on a system free from myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions. ... It is part of the role of this Court to denounce this kind of language, unfortunately still used today, which not only perpetuates archaic myths and stereotypes about the nature of sexual assaults but also ignores the law.” Chief Justice Beverley MacLachlin issued a shorter concurring opinion.

<sup>41</sup> Academic researchers who have examined the substance and tone of appellate decisions have concluded that the type of “censure” contained in Madam Justice L’Heureux-Dubé’s decision in *Ewanchuk* was by no means unique. Barbara Billingsley and Bruce P. Elman characterized the opinion as “an example of the Supreme Court accusing the Court of Appeal of a serious or flagrant misunderstanding of the law” that was “relatively rare but certainly not aberrant.” Barbara Billingsley and Bruce P. Elman “The Supreme Court of Canada and the Alberta Court of Appeal: Do the Top Courts Have a Fundamental Philosophical Difference of Opinion on Public Law Issues?” *Alberta Law Review* 39:3 (November 2001) at 728. The “Ethical Principles for Judges” promulgated by the Canadian Judicial Council used language very similar to that adopted by Madam Justice L’Heureux-Dubé:

Judges should not be influenced by attitudes based on stereotype, myth or prejudice. They should, therefore, make every effort to recognize, demonstrate sensitivity to and correct such attitudes. Judges should avoid comments, expressions, gestures or behaviour which reasonably may be interpreted as showing insensitivity to or disrespect for anyone. Examples include irrelevant comments based on racial, cultural, sexual or other stereotypes and other conduct implying that persons before the court will not be afforded equal consideration and respect. [Canadian Judicial Council *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 1998) at 23-4.]

For a fuller analysis of the decision and the response to it, see Constance Backhouse “The Chilly Climate for Women Judges: Reflections on the Backlash from the *Ewanchuk* Case” forthcoming in *Canadian Journal of Women and the Law*.

reported in the Province of Quebec.”<sup>42</sup> Alan Gold, a prominent Toronto defence lawyer, was quoted in the Toronto *Star* as describing Madam Justice L’Heureux-Dubé’s “radical feminist judgment” as “ridiculous” and in the Calgary *Herald* as “totalitarian.”<sup>43</sup> The *National Post* reported that lawyer Gwen Landolt, founder of REAL Women, had “branded Judge L’Heureux-Dubé as a feminist out of step with ordinary Canadians,” quoting her as stating: “We shouldn’t have to pay the salary of a radical feminist who sits on the bench and uses her position to promote her own personal agenda.”<sup>44</sup>

Perhaps the strongest invective came from Edward L. Greenspan, a Toronto defence lawyer. His letter to the editor, published in the *National Post*, began with this remarkable image: “When the Supreme Court judges swore their oath...[t]hey were not given the right to pull a lower court judge’s pants down in public and paddle him.” The letter continued:

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

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<sup>42</sup> Mr. Justice J.W. McClung, Court of Appeal of Alberta, Edmonton “Right of reply” Letters to the Editor *National Post*, 26 February 1999, p.A19. On the unprecedented and unparalleled nature of the attack, see Alanna Mitchell, Jill Mahoney and Sean Fine “Legal Experts Outraged by Personal Attack on Supreme Court Judge” *Toronto Globe & Mail*, 27 February 1999, p.A1.

<sup>43</sup> “Defence lawyer criticizes ‘radical feminist’ ruling” *Toronto Star*, 26 February 1999, p.A7; “L’Heureux-Dubé attacked as support for McClung builds” *Calgary Herald*, 4 March 1999, p.A12.

<sup>44</sup> “Top judge ‘tore him to pieces’” *Toronto National Post*, 4 March 1999, p.A05.

concepts outside her own terms of reference and has thereby disgraced the Supreme Court.<sup>45</sup>

Mr. Justice McClung was ultimately the recipient of a mild reprimand from the Canadian Judicial Council, but none of the lawyers were faced with complaints of unprofessional behaviour or conduct unbecoming a barrister and solicitor. Critiques of such a nature, visited upon a female judge because she was expressing feminist views, seem almost to border on hysteria. Such comments coming from other judges and lawyers are rarely if ever publicly circulated about male judges, and suggest the fragility of acceptance of women on the bench. The widespread tolerance of such commentary within professional circles underscores the fact that concepts such as professionalism, civility, community and collegiality do not extend to women judges perceived as feminist.

Some of the first Black judges also experienced attacks. Madam Justice Corinne Sparks was subjected to serious challenge when she acquitted a Black male teenager of assaulting and resisting a white police officer in 1994, at the same time as she stated that the young officer "probably overreacted," something that police officers were known to do when they were "dealing with non-white groups."<sup>46</sup> Madam Justice Sparks was the only Black then sitting on the bench in Nova Scotia, and Canada's first African-Canadian woman judge.<sup>47</sup> Complaints from the white Crown attorney resulted in an appeal, and a finding by the white judges of the Nova Scotia Court of Appeal that the remarks had created a reasonable apprehension of racial bias, a ruling that was later narrowly

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<sup>45</sup> Edward L. Greenspan "Judges Have No Right to be Bullies" *Toronto National Post*, 2 March 1999, p.A18.

<sup>46</sup> The case, which was ultimately decided by the Supreme Court of Canada, was *R. v. S. (R.D.)* (1997), 10 C.R. (5<sup>th</sup>) 1 (S.C.C.).

<sup>47</sup> Constance Backhouse "Bias in Canadian Law: A Lopsided Precipice" *Canadian Journal of Women and the Law* 10:1 (1998) 170 at 176.

overturned by a divided Supreme Court of Canada, where the majority censured Sparks's comments as "worrisome."<sup>48</sup> Numerous official reports have documented racial inequities within the Canadian legal system, and many commentators have suggested that Judge Sparks's decision actually reflected her sensitivity to the racism within the community, rather than "racial bias" against the police.<sup>49</sup> Perhaps the most astonishing feature of this entire episode was the surprising fact that it appears to have been the first Canadian case in which there was a finding of apprehension of racial bias on the judiciary.<sup>50</sup> Scores of white judges, many of whom have historically made far more inflammatory racial statements, escaped critique,<sup>51</sup> but the first Black female judge in Nova Scotia incited censure in highly debatable circumstances. Elsewhere, I have argued that Judge Sparks's position as one of the only Black judges made her more vulnerable to challenges such as these, and that this case, among others, reflects the pervasiveness of racial inequality within our legal system.<sup>52</sup> It is also an indication that the traditional deference extended to members of the judiciary by lawyers and other judges is not accorded those perceived as different from the norm. In fact, in an earlier 1993 jury selection case of *R. v. Parks*, white male Ontario Court of Appeal Judge David Doherty

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<sup>48</sup> *R. v. S. (R.D.)* (1997), 10 C.R. (5<sup>th</sup>) 1 (S.C.C.).

<sup>49</sup> See, for example, Royal Commission on the Donald Marshall, Jr., Prosecution (Halifax: Royal Commission, 1989); Report of the Aboriginal Justice Inquiry of Manitoba (Winnipeg: Queen's Printer, 1991); Report of the Royal Commission on Aboriginal Peoples (Ottawa: Minister of Supply and Services, 1996); Justice on Trial: Report of the Task force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta (Edmonton: Task Force, 1991); Report of the Royal Commission on Systemic Racism in the Ontario Criminal Justice System (Ontario: Royal Commission, 1995). On the analysis concerning Madam Justice Sparks's decision, see Christine Boyle et al. "Case Comments, *R. v. R.D.S.*: An Editor's Forum" Canadian Journal of Women and the Law 10:1 (1998) 159-212.

<sup>50</sup> Richard Devlin "We Can't Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective in *R. v. R.D.S.*" Dalhousie Law Journal 18 (1995) 408 at 423.

<sup>51</sup> See below, for examples.

<sup>52</sup> Constance Backhouse "Bias in Canadian Law: A Lopsided Precipice" Canadian Journal of Women and the Law 10:1 (1998) 170-83; Constance Backhouse "The Chilly Climate for Women Judges: Reflections on the Backlash from the *Ewanchuk* Case" forthcoming in Canadian Journal of Women and the Law.

foreshadowed Judge Sparks, articulating the existence of racism as part of the Canadian "community's psyche" in words substantially stronger than she had used. There was no appeal, and no complaint of racial bias ever taken against the white male judge.<sup>53</sup>

Lawyers receive their training at law schools, and here, too, differential treatment of those who represent diversification has interfered with the rhetorical objectives of professionalism. Many women law professors in the 1970s, 1980s and 1990s reported experiencing a "chilly climate" within Canadian law schools, that impeded their ability to teach, participate in administration, and write. They described very serious devaluation, trivialization, and harassment directed at them from some male professors, administrators and students. They reported abusive attacks in the classroom and during faculty meetings, discrediting rumour campaigns, a failure to acknowledge gender bias, and rationalizing of male abuse.<sup>54</sup> The attacks were clearly motivated by gender. They constituted a deliberate and protracted effort to diminish the scope of authority of women law professors and to maintain the law schools as a bastion of masculinity. Some of the first Aboriginal women law professors reported abuse that was specific to their racialization: tokenism, disrespectful challenges to their authority, teaching evaluations that complained that they wore "too many beads and feathers to class," and a general unwillingness to open up space for Aboriginality within legal education.<sup>55</sup>

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<sup>53</sup> *R. v. Parks* (1993), 84 C.C.C. (3d) 353 at 369 (Ont. C.A.), leave to appeal denied [1994] 1 S.C.R. x.

<sup>54</sup> See, for example, Sheila McIntyre "Gender Bias within the Law School: 'The Memo' and Its Impact" in The Chilly Collective eds. Breaking Anonymity: The Chilly Climate for Women Faculty (Waterloo: Wilfrid Laurier University Press, 1995) at 211-63; Bruce Feldthusen "The Gender Wars: 'Where the Boys Are'" in The Chilly Collective eds. Breaking Anonymity: The Chilly Climate for Women Faculty (Waterloo: Wilfrid Laurier University Press, 1995) at 279-313. For a wider appraisal of these patterns, which beset women and racialized professors both inside and outside of law faculties, see Constance Backhouse et al. "The Chilly Climate for Faculty Women at Western: Postscript to the *Backhouse Report*" in The Chilly Collective eds. Breaking Anonymity: The Chilly Climate for Women Faculty (Waterloo: Wilfrid Laurier University Press, 1995) at 97-132; The York Stories Collective York Stories: Women in Higher Education (Toronto: TSAR, 2000).

<sup>55</sup> See, for example, Patricia A. Monture-OKanee "Introduction: Surviving the Contradictions: Personal Notes on Academia" in The Chilly Collective eds. Breaking Anonymity: The Chilly Climate for Women Faculty (Waterloo: Wilfrid Laurier University Press, 1995) at 11-28; Patricia Monture-Angus Thunder in My Soul: A

Even at the front end of professional development, at the root and foundation of legal training, white male dominance has been evident.

At What Cost? The Consequences of a Masculine, White, Privileged Legal Profession

Why does it matter that the norms of the legal profession have historically been framed around deeply entrenched notions of masculinity, white supremacy, and class privilege? Obviously, the costs to those who have been excluded from the profession because of their gender, race, and class, have been enormous in terms of career opportunities, economic benefits, and social status. But the consequences run much, much deeper. The homogeneous nature of the profession and its resistance to diversification in the name of preserving professionalism have serious implications for the services that lawyers offer to the public, the arguments that lawyers make in courtrooms, and the decisions that are rendered by judges.

Our understandings of the most beneficent theories of professionalism suggest that legal services should be available to all, and that lawyers should provide well-honed advocacy skills that properly represent the interests of their clients' causes. Yet communities that have gone under-represented in the profession have substantially less access to information about legal rights, and to the lawyers who could represent them. If and when they do identify the legal aspects of their problems and retain legal services, the lawyers are often unable to represent them properly.

No where is this more evident than with Aboriginal communities. The historical record is replete with examples of completely inept lawyering on cases of critical importance to Aboriginal clients. When Euro-Canadian legal authorities first attempted to assert jurisdiction over Aboriginal communities - in terms of criminal, civil and property law - there were a host of arguments that

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Mohawk Woman Speaks (Halifax, Fernwood, 1995).

should have been made contesting the validity of this assertion. There had been no conquest, no surrender of sovereignty on the part of Aboriginal nations, and where there were treaties, these were woefully vague on issues of legal jurisdiction. Yet Euro-Canadians blithely arrested Aboriginal individuals, imposed their own understandings of substantive law, and scheduled trials that operated under Euro-Canadian procedural rules, presided over by Euro-Canadian judges. Aboriginal peoples frequently contested the right of European newcomers to assert such jurisdiction, but their voices were ignored. When Aboriginal clients were represented by white lawyers, almost every effort to put the jurisdictional question on the record was misconstrued by counsel, unheard or mangled.<sup>56</sup> White lawyers seem to have been simply incapable of comprehending the complex Aboriginal political and justice systems that had been operating for centuries before contact, or of imagining that the Euro-Canadian system was not the only option. The basic questions of sovereignty, then, were never truly considered or adjudicated. Not only did this result in the failure to accord Aboriginal communities basic legal rights, but it also left these questions outstanding, continuing to plague Aboriginal-Canadian relations into the present and the future.

Historical court archives are also filled with examples of white male lawyers making blatantly racist and sexist arguments. Hamilton barrister, C.W. Reid Bowlby, was representing a group of Ku Klux Klansmen from south-western Ontario, after they had used mob intimidation in 1930 to prevent a marriage in Oakville between a white woman and an African-Canadian man. During the criminal trial, Bowlby proclaimed that his clients had done “a humane, decent thing in taking her away from that man.” He begged the court for a dismissal of all charges, adding “I am sure that there are hundreds of parents throughout the Dominion of Canada who would be eternally

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<sup>56</sup> See, for example, Cornelia Schuh “Justice on the Northern Frontier: Early Murder Trials of Native Accused” *Criminal Law Quarterly* 22 (1979) 74; Constance Backhouse *Colour-Coded* at chapters 3 and 4.

thankful that such a step had been taken.”<sup>57</sup> Regina lawyer Douglas J. Thom K.C. appeared before Regina City Council in 1924, to argue that Chinese-Canadian restaurateur Yee Clun ought not to be granted a licence that would enable him to hire white female employees. In an unabashedly racist argument, Thom asserted that “Chinatowns have an unsavory moral reputation,” and that “white girls lose caste when they are employed by Chinese.”<sup>58</sup> Nineteenth- and early twentieth-century sexual assault and seduction trials are filled with misogynistic arguments. Generally without any evidentiary basis whatsoever, male lawyers asserted that victims of sexual abuse lied, and were sexually promiscuous, rabble-rousing, foul-tongued, ill-mannered and intemperate in drinking habits. They accused women and children of fabricating sexual complaints out of delusional fantasies, desires for revenge, and conspiracies to blackmail. These character assassinations, pursued in zealous efforts to protect accused men, frequently convinced all-male juries to acquit in trials where the evidence of the crime was strong and convincing.<sup>59</sup>

The fact that so many lawyers were drawn from the ranks of privileged white males also affected their understandings of the world when they later became judges. Indeed, the feminist decisions of Madam Justices Wilson and L’Heureux-Dubé, and the anti-racist decision of Judge Sparks, which provoked such critique, form an intriguing comparative backdrop to some of the

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<sup>57</sup> For a discussion of the activity of the KKK in Canada, the trial, and the appeal, which resulted in a short jail term for one of the Klansmen, see Backhouse Colour-Coded at chapter 6.

<sup>58</sup> Saskatchewan had been one of four Canadian provinces to pass a law limiting the right of Asian-Canadian men to hire white women in the early twentieth century. For discussion of the legislation and its enforcement, including the Yee Clun case, see Backhouse Colour-Coded at chapter 5.

<sup>59</sup> Backhouse Petticoats and Prejudice, at chapters 2 and 3; Constance Backhouse “Attentat à la dignité du Parlement : Viol dans l’enceinte de la Chambre des communes, Ottawa 1929” Ottawa Law Review 33:1 (2001-02) 95-145; Constance Backhouse “The Doctrine of Corroboration in Sexual Assault Trials in Early Twentieth Century Canada and Australia” Queen’s Law Journal 26:2 (Spring 2001) 297-338; Constance Backhouse “Don’t You Bully Me: Justice I Want If There Is Justice To Be Had: The Rape of Mary Ann Burton, London, Ontario, 1907” in Constance Backhouse and Jon Swainger eds. People and Place: Historical Influences on Legal Culture (forthcoming University of British Columbia Press, fall 2003).

comments and decisions issued by white, male judges, whose decisions inspired few complaints, and no discipline. To provide only a few examples, George T. Denison, a white judge who became Toronto's most famous magistrate from 1877 to 1921, openly referred to Jews as "neurotic," southern Europeans as "hot-blooded," the Chinese as "degenerate," Aboriginal peoples as "primitive," and Blacks as "child-like savages."<sup>60</sup> William Renwick Riddell, a white Court of Appeal judge in early twentieth-century Ontario, described the Inuit and First Nations' people of western and northern Canada as people with "savage appetites," who "seldom considered themselves to be bound by anything but their own desires," in contrast to whites, whom he designated as a "higher race." Riddell publicly portrayed Blacks as incompetent and uncivilized.<sup>61</sup> The historical record reveals countless statements made by male Canadian judges exhibiting explicit suspicion of, and hostility towards, women.<sup>62</sup> William Campbell, who served as Ontario Chief Justice in the early nineteenth century, heard a family law dispute in which a husband had brandished a whip over his wife in front of multiple witnesses, after beating his wife repeatedly for a long period of time. Mr. Justice Campbell declared that "a man had a right to chastise his wife *moderately*," and ruled that the wife had had no justification in leaving the marital home. This legitimization of wife-battering stood for years as the prevailing Canadian judicial edict on husband's rights.<sup>63</sup> More recently, R.M.

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<sup>60</sup> George T. Denison Recollections of a Magistrate (Toronto: Musson Book Co., 1920), as cited in Carolyn Strange Toronto's Girl Problems: The Perils and Pleasures of the City, 1880-1930 (Toronto: University of Toronto Press, 1995) at 16, 153, 250; Robin Winks Blacks in Canada at 298; Constance Backhouse Petticoats and Prejudice at 404; Gene Howard Homel "Denison's Law: Criminal Justice and the Police Court in Toronto, 1877-1921" Ontario History 73:3 (1981) 171-86; National Archives of Canada MG29, E29, "Denison Papers" (Diaries 1850-1923 and Scrapbooks 1859-1925).

<sup>61</sup> Strange Toronto's Girl Problems at 250, Winks Blacks in Canada at 298; William Renwick Riddell "Administration of Criminal Law in the Far North of Canada" Journal of Criminal Law, Criminology and Police Science 20 (1929) 294.

<sup>62</sup> Backhouse Petticoats and Prejudice.

<sup>63</sup> *Hawley v. Ham*, Midland District Assizes in Upper Canada, September 1826, unreported, as discussed in Backhouse Petticoats and Prejudice, chapter 6.

Bourassa, a white male Territorial Court judge from the Northwest Territories, made a remarkable series of statements that attracted widespread criticism as being both racist and sexist. The judicial inquiry into his conduct found no reasonable apprehension of bias.<sup>64</sup> The shocking revelation of the wrongful criminal conviction of Donald Marshall Jr., an Aboriginal man from Nova Scotia, resulted in an inquiry into the behaviour of the five white appellate judges who upheld his conviction. The white judges of the Judicial Council of Canada concluded that there was nothing to impugn the impartiality of the court.<sup>65</sup>

### The Future of the Concept of Legal Professionalism

The examples I have produced in this short paper cannot capture the fullness of the historical record, in part because this research is so new, and in part because the recipients of such behaviour did not commit thorough accounts to writing in forms that have survived in archival collections. Yet what is here allows us to get some sense of the climate that fostered a deep and longstanding intolerance of lawyers and judges who were not male, white, economically privileged Gentiles. The history of the legal profession illustrates that concepts such as professionalism, civility, community, and collegiality have been imbued with discriminatory intent and practice. These are, indeed, ideas that have been pressed into service to allow the most privileged of lawyers and judges to exercise power and promulgate exclusion based on gender, race, class and religion.

What does this mean for the future? Are such concepts so tainted by their historical foundations that they are impossible to rehabilitate? Are efforts to promote an ethic of

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<sup>64</sup> *Re Inquiry Pursuant to Section 13(2) of Territorial Court Act: Re Inquiry into Conduct of Judge Bourassa*, [1990] N.W.T.R. 337.

<sup>65</sup> Canadian Judicial Council Inquiry Committee Report to the Canadian Judicial Council of the Inquiry Committee Established Pursuant to Subsection 63(1) of the Judges Act at the Request of the Attorney General of Nova Scotia (August 1990).

professionalism doomed to failure? Certainly, I would argue that some of these concepts are irretrievably misconceived. "Collegiality" is a word that has long been used within the academy to justify the need to hire and retain faculty members who "fit the mold," who blend well into existing structures and ways of doing things. It almost never represents a desire to extend camaraderie or support to individuals and groups who have long been outside the fold. When previously excluded groups articulate the problems they perceive, they are accused of "lack of collegiality," of "lack of civility," of failing to behave "professionally." The concepts are turned on their heads, and those who have been exercising power for the purpose of exclusion claim that it is they who are aggrieved.

Perhaps we are better to turn away from words that are so laden with historical baggage. I think we might move forward from our history of exclusion more quickly if we were to focus upon different ideals, such as anti-racism, gender equality, respect for Aboriginality, religious tolerance, reduction in wealth disparity, and social justice. The legacy left by our profession's historical practices continues to impact upon the present. Major structural changes are required to set things right. These, far more than "professionalism" and "civility" are the principles that require the utmost of urgent attention if we are to achieve a profession worthy of the name.