

Reflections: On Judicial Diversity and Judicial Independence

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Sonia Lawrence*

I am silver and exact. I have no preconceptions.¹

This contribution is an effort to conceptualize the ways in which we might understand the role that diversity on the bench plays in the independence of the judiciary. Could a judiciary homogenous in terms of race and gender also be an independent judiciary?² In this paper, I explore the relationship between diversity and judicial independence and suggest that judicial independence may require a bench which “reasonably reflects the diversity of the society which it serves”.³

In the Canadian context, judicial independence - the “cornerstone of democracy” - is described as dependent on a wide variety of conditions, including judicial remuneration, court budgets, the discipline of judges, politics and the appointments process, but these do not

* Associate Professor, Osgoode Hall Law School. With thanks to the editors of this volume for suggesting the topic and for helpful preliminary discussions, encouragement and editorial comments. I am grateful for the excellent, thoughtful research and editorial assistance of Arati Dubey (Osgoode 2009). Special thanks to Dr. Mary Stratton of the Forum on Civil Justice for a helpful conversation about primary research into public perceptions. All errors are entirely my own.

¹ “Mirror”, in Sylvia Plath, *The Collected Poems*, ed. by Ted Hughes (NY: Buccaneer Books, 1981) at 173.

² The term ‘race’ here is understood to have a social as opposed to a biological meaning. The lack of scientific foundation to a biological classification system notwithstanding, the social significance of racialization in the unequal distribution of goods cannot be ignored. Trying to be colour blind is as problematic as reifying the concept. My use of the term is intended to capture its social significance without accepting any biological meaning or implying any support for the way that ‘race’ is used in social processes.

³ The phrase is from standard advertisements of judicial vacancies at the Ontario Court of Justice. See Ontario Judicial Appointments Advisory Committee, *Annual Report for the period January 1, 2005 to 31 December 2005*, (Toronto: OJAAC, January 2006). Judicial independence is not the only value which speaks to the importance of an independent judiciary. For instance, we could turn to anti-discrimination principles: see Dame Brenda Hale, “Equality and the Judiciary: Why Should We Want More Women Judges?” (2001) Public Law 489 (discussion of equal opportunity); Sir Leonard Peach, “Independent Scrutiny of the Appointment Processes of Judges and Queen's Counsel”, online: Department for Constitutional Affairs <<http://www.dca.gov.uk/judicial/peach/indexfr.htm>>; Sally J. Kenney, “Equal Employment Opportunity and Representation: Extending the Frame to Courts” 11 (2004) *Social Politics* 86.

usually include a diverse judiciary.⁴ There is also a significant, but almost completely separate, Canadian literature about diversity on the bench.⁵ Why the separation? Part of the reason is that judicial independence (like any concept worth its salt) is not particularly well defined. Attempts at definition are often cabined by jurisdiction or limited to the world of theory. Furthermore, judicial independence is not a “goal in itself,” but rather a means to impartiality and legitimacy, so that links between diversity and legitimacy and impartiality might not explicitly mention judicial independence despite a clear connection.⁶ Another possible reason for the paucity of direct considerations of the topic may be the sense that we believe we have established institutional level judicial independence in this country. Thus even the government is prepared to accept that the bench ought to be diverse, and many will recognize the problem

⁴ In Canada, judicial independence is protected under the *Charter* s. 11(d), and ss. 96-100 of the Constitution. Judicial independence is a principle of fundamental justice under section 7 of the *Charter*, and it is an unwritten constitutional principle. For example, see Carl Baar, "Judicial Independence and Judicial Administration: The Case of Provincial Court Judges" (Summer 1998) 9 *Constitutional Forum* 114; Michael Bryant, "Judging the Judges: Judicial Independence and Reforms to the Supreme Court of Canada Appointment Process" (2004) 24 *Supreme Court Law Review* 29; Martin Friedland, "Judicial Independence and Accountability in Canada" (2001) 59 *The Advocate* 859; Ian Greene, "The Doctrine of Judicial Independence Developed by the Supreme Court of Canada" (1988) 26 *Osgoode Hall Law Journal* 177; William R. Lederman, "Independence of the Judiciary" (1956) 34 *Canadian Bar Review* 1139; Wayne Renke, "The Independence and Impartiality of Provincial Court Judges" (Summer 1998) 9 *Constitutional Forum* 121; Gerald T.G. Seniuk, "Judicial Independence and the Supreme Court of Canada" (1998) 77 *Canadian Bar Review* 381; "First World Conference on the Independence of Justice: Universal Declaration on the Independence of Justice" (Adopted By The First World Conference On The Independence Of Justice, Montreal, June 1983). In S. Shetreet and J. Deschênes, Eds., *Judicial Independence: The Contemporary Debate*, (Boston: Martinus Nijhoff Publishers, 1985). Peter Russell & David O'Brien, eds., *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (Charlottesville: University Press of Virginia, 2001). Critiques of judicial appointments processes in other jurisdictions have more clearly developed the link between judicial independence and the identity of judges. See especially Du Bois, "Judicial Selections in post apartheid South Africa" in Peter Russell & Kate Malleson, eds., *Appointing Judges in an Age of Judicial Power: Critical Perspectives From Around the World* (Toronto: University of Toronto Press, 2006).

⁵ Almost all of this literature is about gender; see for instance, National Association of Women and the Law, *Creating Diversity on the Bench: Submissions to the Department of Justice on Revising the Federal Judicial Appointments Process* (Ottawa: NAWL 1993); Reg Graycar, "The Gender of Judgments: Some Reflections on Bias" (1998) 32 *University of British Columbia Law Review* 1. Madam Justice C. L'Heureux-Dubé, "Making a Difference: The Pursuit of a Compassionate Justice" (1997) 31 *U.B.C. L. Rev.* 1 at 7. Some of this literature takes an empirical approach, see: James Stribopoulos, Moin A. Yahya, "Does a Judge's Party of Appointment or Gender Matter to Case Outcomes?: An Empirical Study of the Court of Appeal for Ontario" (Summer 2007) 45 *Osgoode Hall L.J.* 315; Peter McCormick and Twyla Job, "Do Women Judges Make a Difference - An Analysis by Appeal Court Data" (1993) 8 *Can. J.L. & Soc.* 135 (but see critique in Joan A. Brockman, "Difference without at Distinction" (1993) 8 *Can. J.L. & Soc.* 149.).

⁶ American scholar John Ferejohn, in "Independent Judges, Dependent Judiciary: Explaining Judicial Independence" (January/March 1999) *South California Law Review* at 353 argues that judicial independence has no value in and of itself, but is only a means to other ends: "Institutional judicial independence is, however, a complex value in that it really cannot be seen as something valuable in itself. Rather, it is instrumental to the pursuit of other values, such as the rule of law or constitutional values."; Peter Russell describes impartiality as a "sister concept" to judicial independence (Russell, "Towards a General Theory of Judicial Independence" in Russell & O'Brien, *supra* note 4 at 2).

of a bench that lacks diversity – but we cannot recognize it as a judicial independence problem.⁷ Most of the commentary about judicial independence consists of the argument that a given change or group of changes (usually changes initiated by government) is harming judicial independence.⁸ Linking diversity on the bench to judicial independence, on the other hand, would suggest that we have not truly had judicial independence in the past, since historically it has been undeniably a homogenous bench – at least in terms of race, ethnicity and gender. The context of many judicial independence controversies means that arguments for judicial independence are often - read simply - arguments against interference with existing practice.⁹ Demand for a diverse bench, in contrast, usually consists of requests for a break with past practice. Establishing the link between judicial independence and diversity on the bench brings in new questions and opens new areas for research and policy making.

In part I of this paper I begin to sketch an answer to the question, “can a homogenous bench be an independent bench?”, focusing on democratic legitimacy, public confidence and the idea of structural impartiality. In part II, I suggest that ‘diversity’ cannot cure the problems that have been identified, and that legitimacy and public confidence require some attention to the courts as representative institutions. I then attempt to sort through the complications arising from this suggestion, and defend the notion of a representative bench from some of the main critiques. Part III briefly describes two systems of judicial appointment in Canada, and the different approaches they take to the question of diversity and representation. Finally, I conclude by describing basic research questions which arise from this exploration, and accepting the limitations of calls for a ‘reflective’ bench.

⁷ Government statements, politically expedient as they may be, indicate that reflecting society and diversity are goals in judicial appointment. For the goal statements of the Ontario Judicial Appointments Committee and the Office of the Commissioner for Federal Judicial Affairs, see *infra* notes 56, 68.

⁸ Although few would define judicial independence as threatened only by the activities of governments, the majority of commentary and judicial consideration in Canada is focused on this aspect. One counter example is Patricia Hughes, “Judicial Independence: Contemporary Pressures and Appropriate Responses” (2001) 80 Canadian Bar Review 181 (considers the possible impact on judicial independence of harsh public critique of feminist judges or decisions with feminist underpinnings). There is a more extensive American literature on threats to judicial independence from organized non state actors. See for instance, Richard Delgado, Rodrigo’s Committee Assignment: A Skeptical Look at Judicial Independence, (1999) 72 S. Cal. L. Rev. 425.

⁹ A third argument, at its most cynical, suggests that debate over judicial independence is a device which distracts critical attention away from the (sometimes unjust or discriminatory) substance of judicial decisions. See Delgado, *supra* note 8 at 438.

Can a Homogenous Bench be an Independent Bench?

Peter Russell writes: “The study of judicial independence cannot possibly cover all of the connections between the judiciary and the world in which it is embedded.”¹⁰ One of the important connections that Russell asks about is the connection between the identity characteristics of judges and the status hierarchies apparent in the larger social structure. Where the identity characteristics of the judges are those of the powerful in other sectors of social, political and economic life, as opposed to a mirror of the population being judged, has judicial independence really been established? I offer two suggestions about how independence is affected by such conditions. First, the judiciary has strong social and identity connections to already powerful identity groups in an unequal society. This sets the judiciary up as a symbol of social exclusion which may harm the democratic legitimacy of the institution (particularly in the perception of excluded groups). Second, the judiciary as a group is largely homogenous, and the institution and its individual members are largely able to pursue their work without facing ‘the challenge of difference’ from peers and colleagues (although they may well face it daily on the other side of the bench).

These two suggestions rely on a particular vision of impartiality (the sister concept of judicial independence), a critical and realist approach which accepts that individual experiences have shaped and formed each person, and they condition the way that we see and understand things. In a society deeply marked by inequality, our experiences are closely linked to our ascriptive identities. However, we also recognize judicial independence as a characteristic which manifests at both the individual and the group level. This moves us beyond a consideration of individual ascriptive characteristics and towards an exploration of the way that these characteristics in aggregate can affect the independence of the group or institution.

My first suggestion indicates that we cannot ignore the connection between the judiciary and the other hierarchies which mark our society without allowing the judiciary to be a(nother) symbol of hierarchy through difference, another marker of where power resides in terms of colour, ethnicity and gender. Arguably, some harm to judicial independence is done through

¹⁰ Russell, in Russell & O’Brien, *supra* note 6 at 4 (Russell goes on to ask “What are the relationships that are thought to have the greatest bearing on judicial independence in terms of enhancing or threatening judicial independence?”)

the connection of the judiciary with the powerful members in society through a variety of forms of privilege differentially distributed through (for the purposes of this discussion) ascriptive identity characteristics. I do not mean to equate this social connection with insecure tenure or insufficient remuneration, issues which might lead to doctrinal or constitutional arguments about a lack of judicial independence. For one thing, these bonds of social connection are not easily manipulated like tenure and remuneration. Instead, my point is that dominant understandings of judicial independence may ignore simple truths about unequal societies. In some ways, the bench is just another symbol of persistent exclusion, and as such it may fail to attract the confidence of the public, particularly those sections of the public that are unrepresented.¹¹ If the consequences of a homogenous bench could include a loss of faith in the ability of the courts to deliver fair and impartial justice, this creates a clear and important role for diversity on the bench in establishing and maintaining judicial independence.

In part, the issue I have raised, of exclusion, public confidence and legitimacy, is an empirical question, and unfortunately there is a dearth of solid and relevant data. This is not simply because of a lack of strong data sets, but also because the data that does exist suggests that many of us are “deeply confused,” demanding that judges adhere to tradition and at the same time believing that judges are “old and out of touch”¹². Questions about how judicial diversity might affect public confidence, and in particular the confidence of minority populations, are complicated by the possibility that for many, the classical image (white, male, older, able bodied) of the judge is comforting and inspires confidence precisely because of the deep roots of the privilege accorded this group. If, as the public, we have confidence in a group of judges because we have internalized a set of prejudicial, racist and sexist attitudes, ought we to be allowed to use this to defend an unrepresentative judiciary?

Although some authors have concluded that judges do not understand the public that they serve, the question of whether or not the public – or which publics – connect this lack of

¹¹ Sherrilyn A. Ifill, “Judging the Judges: Racial Diversity, Impartiality, and Representation on State Trial Courts” (1997) 39 B.C. L. Rev. 95 at 98 (the persistent exclusion point). The homogeneity of the bench is obviously linked with, although not completely explained by, the homogeneity of the bar.

¹² Hale, *supra* note 3 at 501-02 (concern with people associating authority, neutrality and seriousness with older middle class men).

understanding with the identity of individual judges, the diversity on the bench, or the representativeness of the judiciary is not answered by the available data.¹³ The Canadian Forum on Civil Justice has concluded that “[s]uch [large scale] results as are available are mixed, but usually more positive than negative,” but perhaps more importantly, “...there is surprisingly little reliable empirical evidence about public perceptions of the justice system – we know less than we thought we did and there is a lot that we do not know.”¹⁴

There are some U.S. and U.K. studies which suggest that distrust of the court system (generally, as opposed to specific positions within that system, such as judges) is higher among some minority communities, and that a lack of diversity within the system enhances this distrust.¹⁵ One U.K. study found that significant numbers of minorities said that increased numbers of ethnic minority personnel (not limited to judges, however) would enhance legitimacy of, authority of, and confidence in, the courts.¹⁶ However, experts in both the UK and Canada describe a serious need for more and better empirical research into this particular question.¹⁷ We could also, of course, approach the question of democratic legitimacy normatively instead of or in addition to empirically and argue that “it is wrong in principle for

¹³ See for instance, D. Martinson, “Some Thoughts on Public Perceptions of the Role of Judges in the Administration of Justice in Canada” in J.M. Brisson and D. Greschner (eds.), *Public Perceptions of the Administration of Justice* (Montreal: Les Editions Themis, 1995) at 35-56.

¹⁴ Mary Stratton, “Public Perceptions of the Role of the Canadian Judiciary” *The Canadian Forum on Civil Justice*, (December 2005), online: CFCJ <<http://cfcj-fcjc.org/docs/2005/cjsp-perceptions-en.pdf>>.

¹⁵ Both studies can be found at the National Center for State Courts website: David B. Rottman et al, “Perceptions of the Courts in Your Community: The Influence of Experience, Race and Ethnicity. National Center for State Courts” (January 2003), online: <http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PerceptionsPub.pdf>; F. Bennack, “How the Public Views the State Courts: A 1999 National Survey” (14 May 1999), online: <http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf>.

¹⁶ Shute et al, *A Fair Hearing? Ethnic Minorities in the Criminal Courts* (Portland: Willan Publishing, 2005) at 115. See also Julie Vennard et al, “Ethnic minority magistrates’ experience of the role and of the court environment” (2004), online: Department for Constitutional Affairs (UK) <http://www.dca.gov.uk/research/2004/3_2004.htm> at 50, 115. The Vennard et al study looked at magistrates, appointed as lay people. It found some evidence that ethnic minority magistrates felt that more ethnic minority appointments would improve the confidence of minority communities in the Magistrates courts.

¹⁷ Personal communication with Dr. Mary Stratton, Research Director at the CFCJ (July 31, 2008). See also C. Thomas, *Judicial Diversity in the United Kingdom and Other Jurisdictions: A review of research, policies and practices*. (London: Commission for Judicial Appointments, 2005) at 108 (“A more comprehensive study of whether ethnic minorities and whites view the courts (and judicial diversity) differently in terms of the fairness of courts and confidence in the judiciary, and what impact recent direct court experience has on these different group’s opinions...would more directly address the issue of whether the current make-up of the judiciary meets the justice needs of a multicultural Britain.”)

[such] authority to be wielded by such a very unrepresentative section of the population”.¹⁸ Developing the empirical side of this argument, however, may provide substantial persuasive power in public policy debate. It would also encourage attention to public opinion as a critically important and under-researched aspect of judicial independence.

My second suggestion about why a homogenous bench cannot be judicially independent looks at the judicial community as a significant part of the context informing each individual members decision making: “impartiality is not some stance above the fray, but the characteristic of judgments made by taking into account the perspectives of others in the judging community¹⁹” Taking the phrase “judging community” quite literally, a judiciary that is homogenous arguably lacks what American scholar Sherrilyn Ifill calls “structural impartiality”:

Structural impartiality is realized through the interaction of diverse viewpoints on the bench and the resulting decreased opportunity for one perspective to consistently dominate judicial decision making.²⁰

Jennifer Nedelsky draws a connection between familiarity with diverse viewpoints and the exercise of judgment:

...if the faculties and student bodies of law schools, the practicing bar as well as the judiciary actually reflected the full diversity of society, then every judge would have had long experience in exercising judgment, through the process of trying to persuade (in imagination and actual dialogue) people from a variety of backgrounds and perspectives. This would better prepare judges for judging situations about which they had no first- or even second-hand knowledge. It would vastly decrease the current likelihood of a single set of very limited perspectives determining the judgment.²¹

Nedelsky suggests that imagination can play a role, whereas Ifill’s structural impartiality is a concept she has argued for in litigation and requires the interaction to be between real people. But both are recognizing that when there is a “difference” in a room, it is the whole room

¹⁸ Hale *supra* note 3 at 502.

¹⁹ Jennifer Nedelsky, “Embodied Diversity and the Challenges to Law” (1997) 42 McGill L.H. 91 at 107. See also The Hon. Maryka Omatsu,, “The Fiction of Judicial Impartiality” (1997) 9 Canadian Journal of Women and the Law 1 at 7 (arguing that the presence of members of underrepresented groups on the bench compensates for a lack of experience which can create “systemic” blind spots).

²⁰ Sherrilyn A. Ifill, “Judging the Judges: Racial Diversity, Impartiality, and Representation on State Trial Courts” (1997) 39 B.C. L. Rev. 95 at 119.

²¹ Jennifer Nedelsky, *supra* note 19 at 107-108.

which, in some ways, becomes different than it was before. To the extent that judge's dining rooms, libraries, training sessions, and the like are homogenous, they do not offer as many opportunities for facing different perspectives as they could.²² As a group, the range of beliefs, experiences and attitudes is narrower than that found in society as a whole. Perhaps their range of approaches and solutions is as well. The significance of diversity is heightened (and the empirical evidence is even more clear) when we look at appellate courts sitting as panels, where judges must deliberate and craft decisions as a group.²³ This concept is fundamental to understanding the role that diversity plays in furthering judicial independence. Empirical evidence supports the view that diversity on judicial panels changes the dynamic in ways which give rise to changed decisions. To the extent that this suggests that appointing and elevating judges in ways which create homogenous courts is a method of manipulating decisions, it also suggests that democratic legitimacy is potentially harmed if judges are not appointed and elevated in ways which reflect the society being judged.

Beyond Diversity: The Reflective Judiciary

Having suggested some problems arising out of a homogenous judiciary, I now turn to the question of what would rectify these problems. The original brief of this article was to comment on diversity and judicial independence, but now I am not sure that diversity is the right term at all. I suspect that one of the ways that questions about diversity on the bench get separated from questions of judicial independence through the use of the term 'diversity' itself. In exploring what the term itself means, I consider the kinds of diversity relevant to this discussion and suggest that the term diversity be replaced by the notion of reflection, or representativeness.

²² See Jeremy Webber, "The adjudication of contested Social values: Implications of Attitudinal Bias for the Appointment of Judges" in *Ontario Law Reform Commission, Appointing Judges: Philosophy, Politics and Practice* (Toronto: OLRG, 1991) at 27 ("...broad representation within the court system...is valuable first as a way of confronting judges with the fact of normative diversity. When different perspectives are represented among their colleagues judges are less likely to fall into an easy consensus, a consensus which may not reach much beyond the courthouse, large downtown firms and those firms' clients.....we must have more of the diversity of our society represented on the bench, so that the inescapable residue of attitudinal bias in adjudication reflects something of the range of attitudes present in our society.").

²³ See for instance, Stribopoulos and Yahya, *supra* note 5. Outside the Canadian context and more generally on this topic, see: Harry T. Edwards, "The Effects of Collegiality on Judicial Decision, Making", (2003) 151 U. Pa. Law Rev. 1639; Lewis A. Kornhauser & Lawrence G. Sager, "The One and the Many: Adjudication in Collegial Courts" (1993) 81 Cal. Law Rev. 1.

Diversity itself could have many meanings in the context of the judiciary: diversity of political opinion; diversity of routes to the bench; diversity of practice specialties prior to elevation. In this paper, the basic question (can a homogenous bench be an independent bench?) relies only on an absence of diversity. But what is the opposite? I propose that diversity is too vague, and suggest instead the notion of a judiciary which represents or reflects the community it serves.

Whether we use the term diverse, representative or reflective, we have to answer basic questions about which aspects of identity we are interested in. If we seek to change the composition of the bench because of concerns about inequality and power compromising judicial independence, then it should be those aspects of identity most relevant to inequality and power which interest us. Relying on an anti-oppression or anti-subordination framework, we can assert that questions of difference and diversity are important because of the ways that the power to subordinate and oppress classes of people operates and is reinforced through the marking of difference. The enormous power of the law makes the judiciary particularly critical, and as Peter Russell has written, the public is increasingly demanding this “unmasking the power of judicial elite to recreate itself and the social exclusiveness of that elite.”²⁴

We should, then, concentrate on those differences which serve as society, or “significant social divisions” in society at large. This paper does not purport to outline which differences matter – especially since my argument acknowledges that these will differ amongst jurisdictions and through time - but it does seem that some measures of difference amongst the judiciary, such as practice specialties prior to elevation, do not mark significant social divisions in society at large (although there is the important possibility that they are an indirect marker, a vehicle for systemic forms of discrimination).²⁵ In seeking out those differences which mark major

²⁴ Here I refer both to the choice of judges and to the activities of judges. See Errol Mendes, “Promoting Heterogeneity of the Judicial Mind: Minority and Gender Representation in the Canadian Judiciary” in *Ontario Law Reform Commission, Appointing Judges: Philosophy, Politics and Practice* (Toronto: OLCRC, 1991) at 94: “...the Canadian legal system reinforces an unrepresentative and assimilating “power paradigm””. Peter Russell, “Conclusion” in Russell & Malleson, *supra* note 4 at 422.

²⁵ The Department for Constitutional Affairs in England collects information on type of practice as part of its efforts to ensure a more representative judiciary. See *infra* note 48. Similarly, this paper does not look directly at ideological commitments, political party affiliations or donations, a complicated and controversial area of study. See, for instance, Matthew Hennigar, Troy Riddell & Lori Hausegger “Judicial Selection in Canada: A Look at Patronage in Federal Appointments since 1988” (2008) 58 *University of Toronto Law Journal* 39 (using evidence of donations to political parties to suggest that patronage plays a role in federal judicial appointments); Craig Forcese and Aaron Freeman, *The Laws of Government: The Legal Foundations of Canadian Government* (Toronto: Irwin Law, 2005); Kirk Makin, “Appointment of Judges too Political Critics Say” *Globe and Mail* (16 May 2005); Peter H. Russell and Jacob S. Ziegel, “Federal Judicial Appointments: An Appraisal of the First Mulroney

social divisions I could look to a variety of sources – recent political controversy, recent legal controversy, media reports, public opinion polls. We should not underestimate the significance of the choice of “relevant” difference, since these choices participate in the creation and recognition of the categories we claim to merely recognize.²⁶ For instance, none of the characteristics central to this paper feature in the *Supreme Court Act* – but that *Act* does require that three of the judges appointed be from the Province of Quebec.²⁷ There is also a long term custom of appointing the other judges in a way which creates regional diversity on the Court, all of which constitutes recognition of the significance of regional divisions in Canada. Dubois points out that in South Africa, at least, there is reason to be concerned that “dimensions of diversity that may be less central to social conflict (e.g., sexual orientation and physical handicaps) fall by the wayside”.²⁸ In this light, we might also think about the broad support garnered by (ultimately unsuccessful) calls for an Aboriginal judge to sit on the Supreme Court of Canada as indicative of the ongoing centrality of the settler/First Nations conflict in this country.²⁹ South Africa’s Constitution requires that judicial officers “reflect broadly the racial and gender composition of South Africa” but it is perhaps worth noting that, centrality to social conflict aside, it is the relatively larger vulnerable groups (women, racialized people) who have achieved constitutional mention in South Africa.³⁰ The Canadian statistics squarely raise the question of prioritization in mechanisms for ending the domination of the bench by a single group, since they show a remarkable improvement in the appointment of women, but significantly less progress in appointing visible minorities, First Nations people and the disabled.

Government’s Appointments and the New Judicial Advisory Committees” (1991) 41 University of Toronto Law Journal 37. See also Russell, in Russell & O’Brien, *supra* note 6 at 17: “The greatest danger to judicial independence from political manipulation of the staffing or promotion process is ideological conformity.”

²⁶ Du Bois, *supra* note 4 at 282; see also Russell, in Russell & Malleon, “Conclusion” *supra* note 4 at 432.

²⁷ *Supreme Court Act* (R.S., 1985, c. S-26), s.6.

²⁸ Du Bois, *ibid.* at 282.

²⁹ National organizations and prominent scholars supported this call. See for instance, Richard Blackwell, “Lawyers call for native on top court” *The Globe and Mail* (3 October 2005); see also the Canadian Bar Association’s Resolution 05-01-A: “Recognition of Legal Pluralism in Judicial Appointments” (passed August 2005), online: CBA <<http://www.cba.org/cba/resolutions/pdf/05-01-a.pdf>>; Canadian Association of Law Teachers, Panel on Supreme Court Appointments Report June 2005 (concluding, *inter alia*, that “The Supreme Court should have at least one justice who is an aboriginal person and the independent commission should have aboriginal representation. The Supreme Court should be composed of no fewer than four women.”, online http://www.acpd-calt.org/english/docs/SupremeCourt_panel.pdf

³⁰ *Constitution of the Republic of South Africa, 1996*, s.174(2) (“The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed..”).

There are, of course, complications involved in trying to discuss the composition of the judiciary from an anti-oppression standpoint. First, current appointments requirements ensure that the judiciary cannot reflect the population. In Canada, the group of people eligible to become judges consists entirely of lawyers. Since socio-economic status combines measures of education, occupation and income, lawyers will tend to sit at the higher reaches of any scale.³¹ In other words, there are built-in limitations or occupational qualifications which ensure that, for instance, no one with limited education could ever become a judge. Likewise, judicial salaries all but ensure the financial security and socio economic status of sitting judges. Given the significance of the judiciary as a part of society and a branch of government, these inherent limits are significant.

Since education requirements alone ensure that the judiciary can never be a perfect cross-section of society, the gatekeeping functions performed by universities and law schools become inextricably intertwined with the appointments process and its outcomes. Opponents of changes in appointment methods to create a representative bench assert that we can simply wait for a “trickle up” effect – as more women and minorities graduate for law schools and practice law, they will gain the seniority necessary for a successful application to become judges.³² Yet the data are at least equivocal on this point. In Canada, for instance, there are clear indications that women in the legal profession are choosing markedly different career paths than men.³³ Likewise, the empirical research in the U.K. shows critical differences

³¹ But see Dame Brenda Hale, *supra* note 3 at 503: “...by definition judges will be middle class when appointed but that does not mean that they should be middle class when they are born.” A few sample statistics will indicate the high earnings of lawyers and judges. Recent Canadian statistics (based on the 2004 tax year) show that those earning over \$89 000 per year are in the top 5% of tax filers: High-Income Canadians September 2007 8(9) *Perspectives on Labour and Income*. Online, <<http://www.statcan.ca/english/freepub/75-001-XIE/2007109/articles/10350high-en.htm>>. In 1995, when the average income of all earners was \$30, 600, the average income of lawyers was \$75, 200. Lawyers earned 146 times the average: Abdul Rashid, *Earnings of Lawyers Spring 2000 Perspectives* (Statscan) 18. Catalogue 75-001 XPE. Judicial salaries in Canada are set by statute. Bill C-17, granted royal assent in December 2006 raised judicial salaries so that the Chief Justice of the Supreme Court made \$298,500 and the other judges of that court \$276,400 each. Judges of the Ontario Superior Court of Justice received \$232, 300: *Judges Act* (R.S., 1985, c. J-1), ss. 9, 12(d).

³² This indicates the critical role of early educational equality of opportunity in terms of creating a representative pool of potential judges. See K.D. Ewing, "A Theory Of Democratic Adjudication: Towards A Representative, Accountable And Independent Judiciary" (2000) 38 *Alberta Law Review* 708 at 721 (suggesting a career judiciary as an appropriate solution to the lack of representativeness on the bench in the U.K.).

³³ In the Canadian context, see: J.M. Leiper, “It was like ‘wow!’: the experience of women lawyers in a profession marked by linear careers” (1997) 9 *Can. Journal of Women and the Law* 115; David Stager & David Foot, (1989) “Lawyers Earnings Under Market Growth and Differentiation 1970–80” 22 *Canadian Journal of Economics* (1989) 151; Fiona M. Kay, “Flight from Law: A Competing Risks Model of Departures from Law Firms.” (1997) 31 *Law and Society Review* 301; J. Hagan & F. Kay, *Gender in Practice: A Study of Lawyers*

between the career paths of minorities and whites entering the legal profession.³⁴ These differences are precisely those which affect competitiveness for a judicial position. These data are clear that simply waiting for trickle up effects will not produce a bench which is representative of the profession, let alone of the public.

A second significant complication when moving from mere diversity to reflectiveness is that categorizing and counting (to measure whether the goal is met) requires a certain reshaping of complex realities and frequently raises thorny questions. Many categorizations or ascriptive markers present difficulties because they are particularly fluid or variegated. Disability, for instance: many people move into (and out of) the category of disabled; the category includes conditions which are visible and those which are invisible; the category includes conditions which create severe hardship in everyday life, and those where the hardship is considerably less significant. Sexual diversity also presents challenges when we are trying to describe what a reflective judiciary might look like.³⁵ Although “there is evident sexual diversity within the judiciary,” as well as evident homophobia, empirically measuring that sexual diversity requires recognizing the extent to which sexuality is a fluid category, and thinking about the complicated ways in which “members of the judiciary manage the boundary between invisibility and visibility”.³⁶ What is the nature of the contribution a closeted gay judge makes to judicial diversity?³⁷ The attention that queer theory pays to identity and group membership

Lives (Oxford: Oxford University Press, 1995); J.M. Leiper, *Bar Codes: women in the legal profession* (Vancouver: UBC Press, 2006); Kathleen E. Hull and Robert L. Nelson, “Assimilation, Choice, or Constraint? Testing Theories of Gender Differences in the Careers of Lawyers” (Sep. 2000) 79 *Social Forces* 229; Lianne Krakauer & Charles P. Chen, “Gender barriers in the legal profession: implications for career development of female law students” (June 2003) 40 *Journal of Employment Counseling* 65.

³⁴ See Hale, *supra* note 3 at 492 (Referring to the situation in the U.K. for “women, members of ethnic and religious minorities, gays, and other non-standard issue”... “[m]ost serious outside observers know that it is not so simple”).

³⁵ See Leslie J Moran, 'Judicial diversity and the challenge of sexuality: Some preliminary findings', (2006) 28 *Sydney Law Review* 28(4), 565 at 575 (“...merely adding lesbian and gay sexualities to the agenda of judicial diversity is problematic.”).

³⁶ Moran, *supra* note 35 at 571; see also Todd Brower, "Multistable Figures: Sexual Orientation Visibility and Its Effects on the Experiences of Sexual Minorities in the Courts" *bepress Legal Series* (11 August 2006), online: <<http://law.bepress.com/expesso/eps/1519>>. (Brower discusses clients and court workers, but does not appear to have had judges as respondents to his questions).

³⁷ This type of question is certainly not unique to the identity category of sexuality. In different forms – perhaps more often than many would think – it applies to other identity categories as well.

promises to provide new and challenging ideas for this area of research.³⁸ Even those ascriptive categories that we tend to treat as solid (and I treat as such in other parts of this paper) are much less reliable than we might think.

Shifting the discussion from one about diversity and judicial independence to one about reflectiveness or representation and judicial independence is an important discursive move (certainly not a novel one!).³⁹ Representativeness is a comparative concept, meaning more than just difference. A representative bench aims to mirror the identity characteristics of the population it judges.⁴⁰ Calling for a diverse bench avoids some of the complications of representativeness but it may also avoid attention to underlying issues and encourage “tokenism”. Calling for representation more squarely confronts the ways in which a homogenous – or otherwise non-representative – bench threatens impartiality, by calling attention to the disparity between the judges and the judged.

Ironically, part of the reason that representativeness offers a direct challenge to the ideal of impartiality is because of the assumption that judges who are appointed under a system which

³⁸ See Moran’s questions about a model which “assumes that the lesbian-and-gay community can be singled out and differentiated; that it is a relatively coherent, homogenous, social, culturally and spatially distinct and separable entity.”, *supra* note 35 at 574. Some of Moran’s interview subjects make this point explicitly. Moran also notes the ways in which these identity labels can reinforce binaries (e.g., homosexual:heterosexual) that might be better challenged, and may leave unchallenged the privileges accorded to the more privileged side of the divide. See *supra* note 35 at 575-6.

³⁹ Du Bois, *supra* note 4 (describing a critical but subtle difference between the two). Other authors also refer to representation, for instance see Isabel Grant and Lynn Smith, “Gender Representation in the Canadian Judiciary” in *Ontario Law Reform Commission, Appointing Judges: Philosophy, Politics and Practice* (Toronto: Ontario Law Reform Commission, 1991) at 57, *passim*; Dame Brenda Hale, *supra* note 3 at 502 (“As individuals, my colleagues are a remarkably diverse bunch, but I do not need to rehearse the facts about how unrepresentative they are...”). The Ontario Judicial Appointments Advisory Committee does as well: “The provincial judiciary should be reasonably representative of the population it serves.” in Ontario, Judicial Appointments Advisory Committee, *Annual Report for the Period from 1 January 2005 to 31 December 2005* (Toronto: JAAC, 2006) at 10; The UK Department for Constitutional Affairs usually chooses to use the word diversity (see, for instance, online: DCA <<http://www.dca.gov.uk/judges/diversity.htm>>).

⁴⁰ In certain areas of scholarship, different types of representation are recognized. Political scientists looking at electoral politics tend to differentiate between descriptive representation (where ascriptive characteristics are matched) and substantive representation (where issues and views are advanced by the representative). Researchers looking at bureaucracy have distinguished between active representation (in which decision making is guided by a diversity of views and experiences) and passive representation (similar to descriptive representation). See Jessica Sowa and Sally Coleman Selden, “Administrative Discretion and Active Representation?: An Expansion of the Theory of Representative Bureaucracy (2003) 63 *Public Administration Review* 700; Manon Tremblay & Réjean Pelletier, “More Feminists Or More Women? Descriptive and Substantive Representations of Women in the 1997 Canadian Federal Elections.” (2000) 21 *International Political Science Review* 381; Richard Ogmundson, “Does it Matter if Women, Minorities and Gays Govern?: New Data Concerning an Old Question.” (2005) 30 *Canadian Journal of Sociology* 315.

aims at representation will actually attempt to “represent” a particular community in their judgments – usually the role of the legislature.⁴¹ I shall avoid directly confronting the enormity of this conflict and offer only two counter-arguments to this position, both of which see the critique as a misread of the demand for reflection/representation. First, the complexities of community and identity are such that one cannot easily determine how a judge could best craft judgments which would represent the views of an identity group (although it may be easier to determine what a judge would avoid doing). This, of course, has not prevented judges who belong to minority communities from being seen as “representatives” in this sense, leaving them vulnerable to claims of bias.⁴² Second, if the argument against representation is correct, its proponents must confront the possibility that in a system which appoints only those already marked by racial or gender or ethnic privilege to the bench, appointees might easily understand part of their role to be the preservation of that privilege.⁴³ As such, the critique deserves attention, but it cannot forestall the argument for reform. One result of these critiques is the conclusion that representation itself is a misleading and provocative term, and we would be better off using the metaphor of a mirror which reflects the composition of society. This idea could capture both the audience – the public – who look into the mirror, and at the same time the openly superficial nature of descriptive representation.⁴⁴

⁴¹ These arguments are particularly fraught in the U.S. context, where many judges are elected, and problems with racial underrepresentation persist due to a variety of structural constraints. See Ifill, *supra* note 11, passim. See Jeremy Webber, *supra* note 22 at 23: “Any attempt to improve their representativeness would run headlong into alternative conceptions of their role, the most obvious being that of defenders of individual rights against majoritarian control”.

⁴² There are a number of examples. For a small taste, see: *R v. R.D.S.* [1997] 3 SCR 484, 151 DLR (4th) 193. An important case in the American context is *Commonwealth of Pennsylvania v. Local Union 542, International Union of Operating Engineers*, 388 F. Supp 155 (E.D. Penn, 1974), a race discrimination case against the Union, in which Judge A. Leon Higginbotham was asked to recuse himself. At least in part, the Union relied on a speech the Judge had given to a group of African American historians where the Judge used the word “we” in addressing the historians.

⁴³ Proponents of this argument are usually careful to argue that it is the shift from pure merit to the inclusion of a concern about representation which encourages judges to try to act as representatives, while systems constructed around traditional understandings of merit further the sense that judges should be impartial decision makers.

⁴⁴ Descriptive representation is a limited concept, and it is difficult to attack it on the grounds that it lacks substance. For studies and explanations of descriptive representation, see Claudine Gay, “Spirals of Trust? the Effect of Descriptive Representation on the Relationship between Citizens and their Government.” (2002) 46 *American Journal of Political Science* 717; Kira Sanbonmatsu, “Gender-Related Political Knowledge and the Descriptive Representation of Women.” (2003) 25 *Political Behavior* 367.

The discursive shift I advocate does not, however, imply a rejection of the idea of diversity. Diversity can capture some critically important aspects of the need for difference on the bench. For instance, as Erica Rackley writes,

Properly understood, judicial diversity is not simply about ensuring that a strategic assortment of judges (or whoever) of varying ages, sex, race, class, culture and so on live ‘happily ever after’ – an evening up of the numbers on the bench to ensure a kind of numerical aestheticism. Nor is it about securing the resigned acceptance by the status quo of the inclusion of difference as a political necessity – albeit with the tacit assurance that nothing will really change.Rather, diversity requires the usual to be transformed by the remarkable, and the extraordinary to become the norm.⁴⁵

Yet Rackley also admits that as a term, ‘diversity’ has often been used in ways which have watered down its significance and rendered it shorthand for a political compromise which agrees to diversity as a way of preserving the status quo.⁴⁶

Moving to either representativeness or reflection instead of diversity as a goal creates a new and complicated set of questions. When looking at how we might measure the representativeness of our judiciary – the extent to which it embodies structural independence and is representative of the public it serves – we must decide how perfect a reflection of society is required. This forms the dividing line between mere diversity and representativeness. Should the group of visible minorities be broken down into various sub-groups in order to provide a more accurate measure of whether or not there is “reflection”? What about those “in the intersections”? Should the percentage of visible minority females in society be reflected in the number of visible minority females on the bench? Or should we count in single categories? What about demographic differences? Should the bench in Toronto reflect the demographics of the city or the country.

This paper can barely scratch the surface of these questions. But it does seem that one would seek the answers to these questions by returning to the reasons why I suggested that the judiciary should be reflective: creating structural impartiality in the judiciary, improving public

⁴⁵ Erika Rackley, “Judicial Diversity, the woman judge and fairy tale endings” 27 (2006) *Legal Studies* 74 at 94.

⁴⁶ *Ibid*, at 93 (“Diversity-light does little more than scratch the surface of the bench, allowing the more invidious effects of a homogenous judicial culture and instinctive understandings of the judge and judging to continue relatively unscathed.”).

confidence, and improving democratic legitimacy. We could also look to the experience and efforts of other jurisdictions. With respect to intersectionality, then, since structural impartiality rests on the notion that different experiences shape one's worldview, we should take account of those characteristics which produce significant variation in experience.⁴⁷ We could also look to the ongoing experience in the UK, for instance, which has an extremely detailed categorization table to measure the representativeness of its judiciary. The chart below illustrates all of the applicants for the position of High Court judge in the 2005 competition.⁴⁸

All Applicants		Male					Female					Grand Total
		Bar	Sol	QC	F/T /Other	Total	Bar	Sol	QC	F/T /Other	Total	
White	British	3	1	67	28	99	0	0	10	6	16	115
	Irish	0	0	1	0	1	0	0	0	0	0	1
	Other	0	0	6	0	6	0	0	1	0	1	7
	Total	3	1	74	28	106	0	0	11	6	17	123
Mixed	White & Black Caribbean	0	0	0	0	0	0	0	0	0	0	0
	White & Black African	0	0	0	0	0	0	0	0	0	0	0
	White & Asian	0	0	0	0	0	0	0	0	0	0	0
	Other	0	0	2	0	2	0	0	1	0	1	3
	Total	0	0	2	0	2	0	0	1	0	1	3
Asian	Indian	0	0	0	0	0	0	0	0	0	0	0
	Pakistani	0	0	0	0	0	0	0	0	0	0	0
	Bangladeshi	0	0	0	0	0	0	0	0	0	0	0
	Other	0	0	0	0	0	0	0	0	0	0	0
	Total	0	0	0	0	0	0	0	0	0	0	0
Black	Black Caribbean	0	0	0	0	0	0	0	0	0	0	0
	Black African	0	0	0	0	0	0	0	0	0	0	0
	Other	0	0	0	0	0	0	0	0	0	0	0
	Total	0	0	0	0	0	0	0	0	0	0	0
Chinese (inc Other)		0	0	0	0	0	0	0	0	0	0	0
Other Ethnic Group		0	0	0	0	0	0	0	0	0	0	0
Unknown (inc Declined)		0	0	3	0	3	0	0	0	0	0	3
Grand Total		3	1	79	28	111	0	0	12	6	18	129
% Total		86					14					

⁴⁷ The concept of intersectionality was initially developed by American Critical Race Scholar Kimberle Crenshaw. See Crenshaw, "Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law" (1988) 101 Harv. L. Rev. 1331; Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics" (1989) 139 U. Chi. Legal F. 139; Crenshaw, "Mapping the margins: intersectionality, identity politics, and violence against women of color", (1991) 43 Stan. L. Rev. 1241. The concept is not limited to the intersections of gender and 'race', however.

⁴⁸ Department for Constitutional Affairs, "Judicial Appointments 8th Report 2005-2006" (March 2007) online: DCA <<http://www.dca.gov.uk/judicial/ja-arep2006/comp-table1.htm>>

All Applicants	Male					Female					Grand Total
	Bar	Sol	QC	F/T /Other	Total	Bar	Sol	QC	F/T /Other	Total	
	Average Age				54.7	Average Years in Practice				27.8	

Without the kind of detail in the table, it would be difficult to come to any conclusions about reflectiveness or representation. Proving the presence of diversity, on the other hand, might require much less.

It is impossible to deny that creating a more representative bench through descriptive representation is a terribly limited solution to the problem of structural partiality. Particularly intriguing is the extent to which the norms of judging can assimilate difference. These pressures may be all the greater for women, members of minorities, and the disabled (since these judges may be more likely to be criticized for any decisions which can be seen to favour their own identity group(s)).⁴⁹ What do they have to live up to? The Chief Justice of Canada was remarkably candid on this subject:

We all possess a certain image of a judge. He is old, male, and wears pinstriped trousers.He is respected and revered. His word is, literally and figuratively, the law, eternal, majestic. Even those of us who do not fit naturally into the traditional image tend to grow into it. The truth cannot be avoided. We judges like the old image. We cling to it. And why not? It brings comfort, the comfort of knowing one is right, at least pending the verdict of a higher court, although most of us learned to rationalize that as well. It brings security, the security of knowing what to do and when to do it. And it brings gratification, the gratification of knowing we are important and appreciated.⁵⁰

In almost poignant terms, the Chief Justice hints at the kinds of stresses facing all judges, but particularly judges who are not in “the traditional image”. As Baroness Hale asks, “...how difficult it is...to forge a new picture of a judge who does not fit the traditional model but is still recognizably a judge”⁵¹ They may shift their opinions and activities to match that image.

⁴⁹ See note 42 *supra*, on same point.

⁵⁰ Right Honourable Beverly McLachlin P.C., “The Role of Judges in Modern Society” (The Fourth Worldwide Common Law Judiciary Conference, Vancouver, 5 May 2001), online: <http://www.scc-csc.gc.ca/AboutCourt/judges/speeches/role-of-judges_e.asp>. See also Hale, *supra* note 3 at 497 (arguing that many women continue to wear the traditional wig because “[i]n making [women barristers and judges] look more like a man [a wig] adds the appearance of weight, seriousness and selflessness to what they do”.); Erika Rackley, “Representations of the (Woman) Judge: Hercules, the Little Mermaid, and the vain and naked Emperor.” (2002) 22 *Legal Studies* 602.

⁵¹ Hale, *supra* note 3 at 498.

In doing so, they may eliminate some (all?) of the difference that they brought to the bench. Justice Harry LaForme's (tongue in cheek?) description of himself as "a red man dispensing white man's justice" makes poetry of the deep ambiguity involved in this diversity/representation project, however we want to describe it.⁵² These judges push us to wonder not only whether it can be done 'with difference,' but whether it is something we want done at all.

A second caveat, despite my arguments that identity factors shape experiences and beliefs and that therefore we can hypothesize similarities within identity groups, is that the convergence should not be overstated. The subtleties of discrimination and individual response ensure that there will be differences of more or less significance within identity groups as well as between identity groups. Categorizing all racial minorities into one group may obscure the fact that discriminatory patterns and practices are often quite specifically directed against particular groups. It may also obscure the particulars of intersectionality. Membership in a crudely categorized identity group gives only a limited indication of experiences and a limited indication of the beliefs and ideologies formed in response to those experiences. Since judges are educationally and occupationally elite, even the experiences of judges from 'non traditional backgrounds' might not always be substantially different to those of their (white, male) colleagues. My discussion has accepted some of the limits of the current system – but if we do not? It is hard if not impossible to imagine judges who are not educationally elite, and what their contributions – as judges, not as members of the public - might be.

A final caveat relates to the discussion of public confidence, particularly the confidence that minority communities place in the justice system:

“...[T]he symbols and substance of justice in this country create such a huge gap in terms of appreciation of vulnerability, that increased female, native or minority representation in the Canadian judiciary will never be sufficient by itself.”⁵³

⁵² Quoted in Harry LaForme, "You Be The Judge" *The York University Magazine for Alumni and Friends* (August 2000), online: York University
<<http://www.yorku.ca/ycom/profiles/past/aug00/current/dept/gprofile/gprofile2.htm>>

⁵³ Mendes, *supra* note 24 at 94.

The identity of judges is only part – and perhaps a small part – of the development of public confidence in the justice system. Although there is no wall which separates the judge from the law – judges make the law as they apply it – the substance of the law and the operation of law in society are obviously of prime significance in terms of public confidence. Still, what evidence we have suggests that we are far from even the illusion of sufficiency in terms of female, native or minority representation, and there is little reason to assume that we will get there any time soon.

Through a glass...: Operationalizing Appointments

Turning to the systems we use to appoint judges, it is difficult to gather basic information about both the pool of applicants and the successful candidates in Canada. The National Association for Women and the Law (NAWL) reported some years ago that almost all we do know is that there is under representation.⁵⁴ There is little evidence of substantial improvement on that front. On issues such as race and ethnicity, much of the available information appears to be based on personal knowledge and anecdote, so it appears in fragmented form without documentation.⁵⁵

⁵⁴ National Association of Women and the Law, *supra* note 5 at 13: “Since human rights legislation does not allow questions, success is difficult to measure.” Current federal and Ontario legislation does not bar data collection under appropriate circumstances and in fact encourages organizations to collect and analyze data about the diversity of their workforce. See: “Policy and Guidelines on Racism and Racial Discrimination: Part III - Guidelines for Implementation: Monitoring and Combatting Racism and Racial Discrimination”, online: Ontario Human Rights Commission <<http://www.ohrc.on.ca/en/resources/Policies/RacismPolicy?page=RacismPolicy-PART-3.html#Heading653>>. See also *Employment Equity Act*, S.C. 1995, c. 44 (requiring employers who fall under the Act to collect data on four underrepresented groups).

⁵⁵ This kind of information suggests that less than twenty judges in Canada are Black, and about twenty are Aboriginal: “Bench still lacking ethnic diversity” *Law Times* (02 March 2008), online: *Law Times* <http://www.lawtimesnews.com/index.php?option=com_content&task=view&id=1347&Itemid=82> - Speaking at a conference organized by and for Black law students, Judge Daniel Dortelus of the Court of Quebec said that “less than 20 [of Canada’s 2000 judges] are Black and the majority...are in Ontario.” A variety of claims can be found, but there are few definitive sources of information (one exception is the Annual Reports of the Ontario Judicial Appointments Advisory Committee, which provide data on provincially appointed judges in Ontario who were appointed since 1989). See for instance, Ontario Bar Association, “Federal Judicial Appointment Process” (October 2005), online: OBA <<http://www.cba.org/CBA/Submissions/pdf/05-43-eng.pdf>> at 9 (“fewer than two dozen” Canadian judges are Aboriginal); LSUC, “National Aboriginal Day 2007: The Role of Aboriginal Judges: A Balance of Perspectives” (25 June 2007), online: LSUC <<http://www.lsuc.on.ca/latest-news/b/archives/?i=12260>> (“Justice Ducharme pointed out that there are only five federally appointed judges in Canada, four in Ontario and one in Manitoba.”). See also the claim that there are eighteen Aboriginal judges in Canada: “Justice Sinclair to speak on “Aboriginal Legal Issues the Courts are Going to Have to Decide Someday””, online: University of Windsor <<http://www.uwindsor.ca/units/law/newschannel/news.nsf/inToc/1D1B77E7734963608525727B006511E7?OpenDocument>> ; Another article asserts that there are twenty provincial court judges of aboriginal descent in Manitoba and Saskatchewan: See “Native point of view needed in top court, experts argue” *Capital*

In this final section of the paper, I take a brief look at judicial appointments in Canada, in order to explore the way that the question of diversity and representation on the bench has been dealt with on the ground. For the purpose of this brief discussion, I looked at only the Ontario and Federal systems of judicial appointment. Despite a similar basic framework, in which arms length judicial appointments committees are used, the systems differ markedly in terms of the attention they appear to be giving to questions of diversity, representativeness, and in terms of transparency of process.

In Ontario, the Ontario Judicial Appointments Advisory Committee (OJAAC) was established in 1989 to improve the appointment system of Provincial Court judges. Its mandate was two-fold: (1) to develop sound criteria for selecting judicial appointees; (2) to interview appointees and make recommendations to the AG.⁵⁶ Since 1989, 240 judges have been appointed based on the Committee's recommendations.⁵⁷ The Committee's advertisements for judicial vacancies state that the judiciary "should reasonably reflect the diversity of the population it serves,"⁵⁸ and it is required under the Courts of Justice Act to issue an annual report on its activities⁵⁹. The annual reports set out the criteria used in making appointments: (1) professional excellence (2) community awareness (3) personal characteristics such as patience and high ethics (4) demographics having regard to reasonable representation of the population.⁶⁰

The 240 appointments made in Ontario from 1989 to 2005 are described in the table below. These statistics show that the different identified underrepresented groups are achieving quite different levels of success. At the same time, this set of statistics addresses neither concerns about intersectionality amongst categories, nor the frequently made observation that differences amongst visible minority/racialized groups are analytically important. Questions

News Online (18 March 2005), online: Carleton University <<http://www.carleton.ca/jmc/cnews/18032005/n2.shtml>>. I offer these cites not to try to answer the question of how many Aboriginal judges are sitting, but rather to point out that there is some appetite for this information but that the government and judicial system do not, by and large, provide it

⁵⁶ Ontario, Judicial Appointments Advisory Committee, *Annual Report for the Period from 1 January 2005 to 31 December 2005* (Toronto: JAAC, 2006) at ix.

⁵⁷ *Ibid.* at vii. One issue that remains unclear is whether or under what circumstances a Minister of Justice can depart from the recommendations of the Judicial Advisory Committee.

⁵⁸ *Ibid.* at 4.

⁵⁹ *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 43(13).

⁶⁰ *Supra* note 56 at 10. A significant issue here is language, specifically, proficiency in French.

like, are more judges being appointed from some racialized communities than others, or are judges from racialized groups more likely than white judges to be male, or less, cannot be answered.

Group	Percentage of appointments ⁶¹	Percentage in the Ontario legal profession ⁶²	Percentage in the Canadian population ⁶³	Percentage in the Ontario population ⁶⁴
Women	33.8%	35.1%	49.5%	50.7%
First Nations	2.0%	0.6%	2.2%	1.3%
Visible Minority	6.7%	9.2%	16.2%	22.8%
Persons with Disabilities	0%	Not Available	12.4% ⁶⁵	13.5% ⁶⁶

Ontario’s process is relatively open and involves a significant amount of data collection and reporting. The situation at the federal level, where one of the goals is “ensuring the development and maintenance of a judiciary that is representative of the diversity of Canadian society,” and the “committees are encouraged to respect diversity and to give due consideration to all legal experience, including that outside a mainstream legal practice” is quite different. ⁶⁷ The application materials contain few other references to diversity. There is a page in the Personal History Form which states: “OPTIONAL Given the goal of ensuring the development and maintenance of a judiciary that is representative of the diversity of Canadian society, you may, if you choose, provide information about yourself that you feel would assist in this objective. There is no obligation to do so.”⁶⁸ There does not appear to be any information which would allow a measure of accountability around diversity goals and

⁶¹ *Ibid.* at 2-3

⁶² Michael Ornstein, “A Report to the Law Society of Upper Canada: The Changing Face of the Ontario Legal Profession”, 1971-2001, online: The Law Society of Upper Canada <<http://rc.lsuc.on.ca/jsp/equity/policies-publications-reports.jsp>> at 2-3

⁶³ *2001 Census Data Products*, online: Statistics Canada <<http://www12.statcan.ca/english/census01/Products/standard/themes/DataProducts.cfm?S=1>>

⁶⁴ *Ibid.*

⁶⁵ *Participation and Activity Limitation Survey, 2001*, online: Statistics Canada <<http://www.statcan.ca/english/freepub/89-577-XIE/canada.htm>>

⁶⁶ *Ibid.*

⁶⁷ *Process for an Application for Appointment*, online: Office of the Commission for Federal Judicial Affairs [OCFJA] <<http://www.fja.gc.ca/fja-cmf/ja-am/process-regime-eng.html>>

⁶⁸ *Federal Judicial Appointments Personal History Form*, online: OCFJA <<http://www.fja.gc.ca/fja-cmf/ja-am/pf-fc/files-fiches/phf-fc-judge-juge-eng.pdf>>

procedures. The Office of the Commissioner for Federal Judicial Affairs provides information about numbers of male and female sitting judges.⁶⁹ No information about race/ethnicity, Aboriginality or disability is available, and an unsuccessful Freedom of Information request suggests that this information is not collected in aggregate form at all.⁷⁰ There is no publicly available information about the applicant pool.

The differences between the operational details of these systems need some investigation. Reasons for the dearth of information from the federal system can be imagined, but not analysed without more information (is there a federal lack of interest, concern about difficulties in creating appropriate measurement instruments, desire to conceal the situation or just avoid the issue, unease about collecting such information, or concern about provoking opponents of efforts to appoint a judiciary which reflects the diversity of the population?).

Some jurisdictions offer significant information about the composition of the judiciary. Most notably, the Department of Constitutional Affairs in the UK collects information about ethnic origin, gender, disability status and professional background for every level of the judiciary, from the entire applicant pool, successful applicants, and sitting judges. These statistics are quite detailed in their categorization, and allow for comparisons between the British general

⁶⁹ These statistics describe only those judges appointed in a particular year.

Year	Male judges	Female Judges	Total
2005	30	21 (41%)	51
2006	31	16 (34%)	47
2007	42	18 (30%)	60
2008 (to 2008/04/29)	15	8 (53% (to 2008/04/29))	23

Office of the Commissioner for Federal Judicial Affairs, “Number of Federal Judges on the Bench as of August 1st 2008”, online: OFCJA <<http://www.fja.gc.ca/fja-cmf/ja-am/n-judges-juges-eng.html>> gives the current statistics on the number of women in federally appointed positions. **on file with author

⁷⁰ The OCFJA is not covered by federal freedom of information legislation (*Access to Information Act*, R.S., 1985, c. A-1). After being verbally advised by the OCFJA that such information is not available in aggregate form, I filed a request for “information about the pool of applicants considered for appointment to the Superior Courts, Federal Court, Federal Court of Appeal and Tax Court of Canada, and/or those actually appointed to same. Specifically: aggregate numbers or percentages of applicants/appointees who are members of underrepresented groups (First Nations, Visible Minorities, Persons with Disabilities). For years after 2000 or most recent year available” with the Department of Justice, but not surprisingly received a letter on May 21, 2008 informing me that “a search of the records under the control of the Department of Justice has revealed none on this subject”. The letter refers me to the website of the OCFJA for information on the number of women judges. The letter is on file with the author. Without engaging the significant public and academic debate over the keeping of statistics based on ‘race’, I will point out that this context is arguably far less complicated than the question of ‘race’/crime statistical records.

population and the judiciary to be made with ease, and for the different success rates in appointing members of different minority groups to be clearly measured. If representativeness – or even diversity *simpliciter* – is the goal, without these numbers there is no accountability.⁷¹

Conclusion

This brief exploration of judicial independence and judicial diversity does offer some clear directions for further Canadian research. We need answers to some basic questions in terms of judicial independence, judicial appointments, diversity and representation. Most importantly, it seems, we lack empirical data on the current make up of the judiciary. We also lack data on key questions in terms of public confidence in the judiciary, and how public opinion does or does not differ between different population subsets. Comparative research on strategies used across the country in recruiting judges, and with respect to different underrepresented groups would also be useful. Why have we been so successful, comparatively, in increasing the representation of women on the bench, but less so with respect to visible minorities? Developments in the UK ought to be followed with close attention, as that country embarks on an ambitious effort to improve representation on the bench. Finally, the results of this research could be used to develop answers to the immensely complicated question of how to assess “reflectiveness” – at what level of precision and with attention to which identity characteristics? Without more basic data, advocates for a bench that lives up to the government’s stated goals (one that would “reflect the diversity of the population it serves”) are reduced to reacting to particularly charged appointments and egregious instances of judicial ignorance.

Of course a more representative bench is a goal both very ambitious and not ambitious enough. It is very ambitious because it will require more than just changes to appointment processes – it will require that the opportunities to become candidates are opened up as well. The long path to a judgeship means many “entry points” need to be similarly ready to become

⁷¹ For instance, the federal *Employment Equity Act* (1995, c. 44) which requires employers to keep records in order to identify and rectify underrepresentation:

- s9. (1) For the purpose of implementing employment equity, every employer shall
- (a) collect information and conduct an analysis of the employer’s workforce, in accordance with the regulations, in order to determine the degree of the underrepresentation of persons in designated groups in each occupational group in that workforce;

more open to a representative societal group. Yet at the same time, the goal is not ambitious enough because it will not cure the injustices that we currently create within our system of justice. Judicial education will continue to be critical in alerting judges to the experiences of the population they are asked to judge.⁷² Improving appointments is far from the only thing we need to do to foster a truly inclusive society.

⁷² On judicial education's role in this process, see Elizabeth Handsley, "The Judicial Whisper Goes Around: Appointment of judicial officers in Australia" in Russell & Maleson, *supra* note 4 122-144 at 130. See also the thoughtful contribution of Rosemary Cairns-Way in this volume.