

Taking Notice of Equality: Judicial Notice and Expert Evidence in Trials Involving Equality Seeking Groups

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I. INTRODUCTION

“I’m sorry, I didn’t notice . . .” This is the excuse most of us give when we are too caught up in ourselves or in our thoughts to pay attention to what we are experiencing in every moment. “I’m sorry, I didn’t know you were angry about that.” “I’m sorry, I didn’t notice the grass needed cutting.” “I’m sorry, I didn’t notice your new haircut.” These failures to notice are often answered by rebukes, among them, “Pay attention!” At the root of these rebukes is often the feeling that we get too caught up in our “stuff”. We spend a great part of our lives walking around in a haze of our own thoughts and feelings, with only rare moments spent actually observing the world around us or listening to how others experience the world.

The law often reinforces this preoccupation with oneself to the detriment of equality rights. The phenomenological – i.e., experiential – basis of equality is fundamentally a recognition that others experience the world differently from the way we do. Indeed, substantive equality is about recognizing that a rule that one group thinks is neutral and treats everyone in the same way is actually experienced differently by others. For instance, it sometimes comes as a surprise to the white, middle-class students in my criminal law class that the police are not always the friendly person to whom you turn when you need travel directions or want to report a strange person lurking around your neighbour’s back door: these students have rarely experienced fear of the police, and so are surprised to learn that racialized students in the class have a different experience of and relationship to law enforcement officers.¹

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¹ See also Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (Oxford: Oxford University Press, 2004) at 116; and Christine L. Boyle and Jesse Nyman, “Finding Facts Fairly in Roberts and Zuckerman’s *Criminal Evidence*” (2005) 2(:2) *International Commentary on Evidence* 1 at 5 [Boyle and Nyman].

The law of evidence, too, leads us to ignore the situations of others and how inequality and injustice result from this ignorance. Historically, the law encouraged witnesses and jurors alike to fully apprise themselves of the facts relevant to a case; it placed no restrictions on the ability of jurors to use their personal knowledge when judging a case. However, the doctrine of judicial notice has severely limited the trier of fact's ability to take note of her knowledge of the community, and consequently, to take note of her knowledge of the specific contexts in which justice is denied to particular groups living around her. The rules of evidence regulating the admissibility of expert evidence have also served to shut our eyes to inequality. One might think that the admissibility of such evidence as occurred in *R. v. Lavallee*¹ has the opposite effect, since it allows courts to be informed about a social context of which many of them are ignorant – i.e., the experience of a woman in a relationship with a physically abusive man – which bears on how they assess the evidence before them. However, while *Lavallee* and similar cases encourage the court to open its eyes in one regard, in another, these cases also blind the trier of fact. This occurs because the firsthand stories of individuals from equality-seeking groups who have lived through injustice and marginalization are ignored in favour of the accounts of experts.² Moreover, when these experts do not exist because

¹ *R. v. Lavallee*, [1990] 1 S.C.R. 852. In this case, the Supreme Court of Canada admitted evidence of the cycle of violence that abused women experience in order to provide context to the trier of fact when assessing the reasonableness of a battered woman's claims that she killed her partner in self-defence. For a more in-depth explanation, see Martha Shaffer, "R. v. Lavallee: A Review Essay" (1990) 22 Ottawa L. Rev. 607 and Martha Shaffer, "The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years After R. v. Lavallee" (1997) 47 U.T.L.J. 1.

² This is particularly true in litigation involving Canadian aboriginal peoples – the voices of elders and oral histories were often rejected by courts, which preferred the evidence of university professors and other "experts", many of whom were not attached to the aboriginal community. However, the situation has improved somewhat since the SCC decision in *Delgamuukw*, where the court held that the rules for the admission of evidence should be adapted in aboriginal cases in order to accommodate oral histories (*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 84). See also *Mitchell v. M.N.R.*, 2001 SCC 33 [2001] 1 S.C.R. 911 at paras. 29-35 and 62 and *R. v. Sappier*; *R. v. Gray*, 2006 SCC 54, [2006] 2 S.C.R. 686 at para. 34. However, examples in which firsthand narratives are usurped by experts still abound, for instance in cases involving medical experts. Good examples are to be found in claims by workers before the Ontario Workers' Insurance and Appeal Tribunal. In the case of Multiple Chemical Sensitivity (MCS), for instance, the tribunal would routinely accept medical and scientific evidence about MCS rather than the evidence of the claimant that the sensitivity was linked to the workplace. This difficulty arose because tribunals confused medical and scientific certainty with legal concepts of certainty, with the result that they preferred expert

the litigant's experience falls within the blind spots of social scientists, the litigant has no "expert" voice to speak for her.³

In my view, there are ways to change the trajectory of the law of evidence in Canada and in common law jurisdictions more generally, but they will require courts to notice more than what the parties present to them through the rules of evidence. Instead, courts must open their eyes to the broader social context of marginalization in which the issues of equality-seeking litigants are set.⁴ In this article, I suggest that this "eye opening" can be achieved by shifting the burden of providing social science evidence away from equality-seeking litigants and on to the Crown, particularly in criminal law. It may also be possible to develop courts with expertise in equality issues and familiar with the specific community to which an equality-seeking litigant belongs. These courts will be more likely to have their eyes wide open to the sources of social inequality that serve to marginalize equality-seeking groups.

I now turn to some concrete issues for us to grapple with in this article.

testimony to the "subjective" testimony of claimants about their symptoms and where they were caused (Geneviève Laurence, "Multiple Chemical Sensitivity Illness and the Government Employee Compensation Act: What Could It Mean to Federal Employees in the National Capital Region?" (LL.M. Thesis, University of Ottawa Faculty of Law, 2009) [unpublished]).

³ On the problem of the proliferation of experts and their tendency to usurp the function of the trier of fact, see David Paciocco, "Coping with Expert Evidence About Human Behaviour" (1999) 25 Queen's L.J. 305; J. Norris and M. Edwardh, "Myths, Hidden Facts and Common Sense: Expert Opinion Evidence and the Assessment of Credibility" (1996) 38 Crim. L.Q. 73. For judicial pronouncements on this trend, see *R. v. McIntosh* (1997), 35 O.R. (3d) 97 at 102 (Ont. C.A.).

⁴ For instance, in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, Justice McLachlin emphasized that a judge's experience must necessarily inform his or her judgment:

It is apparent, and a reasonable person would expect, that triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place. Indeed, judges must rely on their background knowledge in fulfilling their adjudicative function (at para. 39).

On this point, see also David M. Paciocco and Lee Stuesser, *The Law of Evidence*, 5th ed. (Concord, Ont.: Irwin Law, 2008) at 468. For an interesting discussion of how judicial notice could be used to broaden a judge's awareness of social context, see Patricia Cochran, "Taking Notice: Judicial Notice and the 'Community Sense' in Anti-Poverty Litigation" (2007) 40 U.B.C. L. Rev. 559.

II. THREE ISSUES IN DEALING WITH SOCIAL SCIENCE EVIDENCE IN LAW

The common law rules of evidence, some of which are now codified in various statutes, changed and developed as society changed; yet, they must evolve again if they are to be in step with the promotion of substantive equality. One area in which change is needed is in the way we deal with social science evidence. Increasingly, courts require social science evidence in order to adjudicate equality cases or cases that deal with marginalized groups. Since many judges and jurors have grown up in privileged spaces,⁵ it is understandable that the parties in these cases must educate them about the social and political implications of their judgments. However, the need to marshal social science evidence places an onerous burden on litigants from marginalized and equality-seeking groups: The very groups that have traditionally been denied access to the courts are now being asked to come to court with more evidence than groups for which equality has not been an issue. As a result, a new barrier to justice has been created. Moreover, the requirement of introducing social science evidence brings the inherent inequalities of those disciplines into the law. As Emma Cunliffe points out, “[a]ll of the systemic inequalities that plague law – unequal access to expertise and material resources, institutional biases towards the status quo, discriminatory yardsticks – can also be found in other disciplines,”⁶ and these inequalities are inserted into the courtroom by requiring social science evidence.

To illustrate the difficulties, one has only to look at aboriginal law cases. These cases involve huge volumes of evidence, and they often occur in a forum that is completely unsuited to dealing with this evidence, viz., a criminal trial for a summary offence. LeBel J. recognized this fact in his concurring judgment in *R. v. Marshall; R. v. Bernard*.⁷ There, he said the following:

⁵ On the spatial nature of privilege and marginalization, see Sherene H. Razack, “Gendered Racial Violence and Spatialized Justiced: The Murder of Pamela George” (2000) 15(2) *Canadian Journal of Law and Society* 91. On the privilege of judges, see Joan Brockman, “Aspirations and Appointments to the Judiciary” (2003) 15 *C.J.W.L.* 138 at 163 and Cochran, “Taking Notice,” *supra* note 5 at 575.

⁶ Emma Cunliffe, “Without Fear or Favour? Trends and Possibilities in the Canadian Approach to Expert Human Behaviour Evidence” (2006) 10 *Int’l J. Evidence & Proof* 280, at 304.

⁷ *R. v. Marshall; R. v. Bernard*, 2005 SCC 43, [2005] 2 S.C.R. 220.

Procedural and evidentiary difficulties inherent in adjudicating aboriginal claims arise not only out of the rules of evidence, the interpretation of evidence and the impact of the relevant evidentiary burdens, but also out of the scope of appellate review of the trial judge's findings of fact. These claims may also impact on the competing rights and interests of a number of parties who may have a right to be heard at all stages of the process.⁸

Here, Justice LeBel notes that despite the modifications to the traditional rules of evidence in aboriginal law cases resulting from *Delgamuukw*, the current adversarial system does not serve courts well when equality-seeking groups are faced with onerous evidential burdens.

Similar difficulties arise in criminal trials in which race or culture is at issue. In *R. v. Spence*,⁹ the Supreme Court of Canada dealt with whether defence counsel could challenge jurors for cause using the question: "Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the accused person is a black man charged with robbing an East Indian person?" Counsel justified this question on the basis that potential jurors of South Asian origin could sympathize with the victim, thus making the trial against the black accused unfair.¹⁰ The trial judge refused to allow the "inter-racial" question, limiting the question to potential jurors to identifying the race of the accused. While a majority of the Ontario Court of Appeal allowed the appeal of the trial judge's decision to disallow the inter-racial question, the Supreme Court of Canada reversed this decision on the basis that there is as yet insufficient evidence that jurors can be partial toward victims from the same racialized group. Writing for the Court, Binnie J. stated:

To take judicial notice of such matters for this purpose would, in my opinion, be to take even a generous view of judicial notice a leap too far. We do not know whether a favourable predisposition based on race — to the extent it exists — is any more prevalent than it is for people who share the same religion, or language, or national origin, or old school. On the present

⁸ *Ibid.* at para. 142

⁹ *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458.

¹⁰ *Ibid.* at para. 4.

state of our knowledge, I think we should decline, at least for now, to proceed by way of judicial notice down the road the African Canadian Legal Clinic has laid out for us.¹¹

Again, by delaying recognition of race-based preferences, courts are placing the burden of proving facts on an equality-seeking group.

Finally, there are criminal cases that involve cultural evidence. An example is when an accused raises the defence of provocation and attempts to demonstrate an air of reality to the defence on the basis that an act of the victim provoked him although it would not have provoked individuals outside the accused's cultural group. The most recent example of this in Ontario is the case of *R. v. Humaid*,¹² in which a Muslim man sought to employ the defence of provocation on the basis that he was provoked by his wife's infidelity, which is considered a particular insult in Muslim culture according to the expert that testified at trial. Here, expert evidence was again required from a member of an equality-seeking group in order for the defence to be left to the jury. Of course, as we will see, this case also raises issues for women's equality, thus raising the difficulty of "dueling" experts.

My proposal in all of these situations is to return to the ancient idea that underlies the common law trial by peers, namely, that the trier of fact should be drawn from the community of which the litigants form a part, because in this way, she is most likely to be familiar with the social context in which the dispute arose.¹³ Or to put it another way, the trier of fact should have her "eyes open" in the sense of paying attention to the contextualizing stories and narratives of the parties presented to her. My suggestion that the trier of fact be familiar with the social context in which the dispute arose is one way of viewing the dispute through the lens of the *Charter*, and in particular, the guarantee of equality in s. 15.¹⁴

¹¹ *Spence*, *supra* note 10 at para. 67.

¹² *R. v. Humaid* (2006), 81 O.R. (3d) 456; 208 C.C.C. (3d) 43 (C.A.).

¹³ Of course, this is a somewhat idealized view of the history of the jury system, which was historically fraught with bias, as jurors were easily manipulated by rich parties. Nevertheless, my point is that in our search for impartiality, we may have moved away from an important principle – the need for a trier of fact to be familiar with social context and the lived experience of the litigants.

¹⁴ On the importance of developing the law of evidence in accordance with *Charter* values, see Christine Boyle, "A Principled Approach to Relevance: The Cheshire Cat in

III. THE GOALS PROMOTED THROUGH A TRIAL BY PEERS

In *A Preliminary Treatise on Evidence at the Common Law*,¹⁵ James Bradley Thayer explains the historical origins of the law of evidence. A few points are of interest to us. First, the idea of trial by peers. Initially, there was no distinction between witnesses and jurors. As they were from the same community as the accused, the jurors were presumed to have personal knowledge of the matter to be tried, and if they did not, they were permitted to conduct their own investigation or inform themselves by consulting the jurors who did have personal information.¹⁶ Gradually, the functions of witness and jury were distinguished, with the function of the witness being to tell only the truth, but the function of the juror being to tell what truly occurred to the best of his knowledge.¹⁷ This distinction became further refined with the emergence of the view that jurors could not rely on anything that was not placed on the record through the evidence of witnesses.¹⁸ The common law has thus seen a significant shift from trial by jurors who have first-hand knowledge of a matter that has occurred in their community to trial by community members who are presumed to have no such knowledge.

Second, we see that equality has been emphasized since the earliest days of the common law trial. For instance, Thayer points out that the changes in the law of evidence and the modes of trial described in the previous paragraph arose out of the need to prevent juror partiality and to ensure equal access to justice. For instance, one of the primary reasons for abolishing the trial by battle in favour of a trial by witnesses and jurors was to eliminate the disadvantage that poor parties faced who, having insufficient money to hire a champion to fight for them, were at a great disadvantage in battle.¹⁹

Of course, neither of these goals could be fully achieved: as always, the grand ideals of promoting equality and curtailing juror

Canada,” in Paul Roberts and Mike Redmayne (eds.), *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (Oxford: Hart Publishing, 2007) 87 at 90-92.

¹⁵ James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (New York: Augustus M. Kelley, 1969). First published in 1898.

¹⁶ See also Learned Hand, “Historical and Practical Considerations Regarding Expert Testimony” (1901) 15 Harv. L. Rev. 40 at 40, 44.

¹⁷ Thayer, *A Preliminary Treatise*, at 100-101.

¹⁸ *Ibid.* at 109.

¹⁹ Edmund M. Morgan, “Judicial Notice” (1943-44) 57 Harvard L. Rev. 269.

partiality were undermined by the decisions of particular judges who, although motivated by lofty goals, ended up by creating a system of rules of evidence that had the effect of marginalizing equality-seeking groups and insulating jurors against a probing inquiry into their partiality.²⁰ Indeed, the goals that judges sought to achieve were undermined, as all principles are, by the limitations of principled reasoning itself. Thus, the goal of preventing the trier of fact from using his own personal knowledge is undermined by the doctrine of judicial notice, which in allowing the trier of fact to take into account notorious facts, does precisely what was sought to be avoided. The idea of promoting access to justice by eliminating trial by battle was likewise undermined by the doctrine of judicial notice, though in a more subtle way – jurors take into account their own personal knowledge, and this inevitably leads them to discredit or overlook experiences that are not their own. And since the experience of most equality-seeking groups is not shared by the average juror, the requirement that judicial notice may only be taken of notorious knowledge means that the knowledge of these marginalized groups will never be noticed – it will not enter the judicial forum.

Although the goal of the principles of evidence that emerged in the early history of the common law was to promote juror impartiality and access to justice by limiting the applicability of the individual knowledge of jurors, these goals were undermined by the doctrine of judicial notice. I turn now to details that explain how this has occurred.

IV. JUDICIAL NOTICE

The modern formulation of the doctrine of judicial notice is set out by Edmund M. Morgan: “The party seeking judicial notice has the burden of

²⁰ The method by which legal ideals are undermined by the well-meaning decisions of particular judges parallels Michel Foucault’s view that socially useful ideas are undermined by the well-meaning decisions of bureaucrats. For instance, in *Discipline and Punish*, Foucault explains how the purpose of the prison system, which is to reform prisoners, has been undermined by the suggestions of technocrats and the efforts of prison wardens, who refined penitentiary technique with the goal of rehabilitating prisoners, but who ended up merely creating a penitentiary system that encourages recidivism and produces delinquency (*Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage Books, 1995 (at 255 and 263-264)). For an enlightening explanation of how Foucault uses his archaeological methodology to uncover the self-contradictory history of an idea such as imprisonment, see Ian Hacking, “The Archaeology of Michel Foucault,” in Hacking, *Historical Ontology* (Cambridge: Harvard University Press, 2002), 73-86.

convincing the judge that (a) the matter is so notorious as not to be the subject of dispute among reasonable men or (b) the matter is capable of immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy.”²¹ This is a far narrower notion of judicial notice than is found in Thayer. The latter states four categories of facts of which the court should take judicial notice:

- 1) That of which statute requires the court to take notice (e.g., authentic records of law, etc.);²²
- 2) That which has been noticed in previous cases (e.g., the authenticity of the signature, seal and certificate of a notary public; the recognition of the international relations of the court’s country; the names and public acts of high public officials; etc.);²³
- 3) That which is necessary for the proper discharge of the judicial function (e.g., ordinary use and practice of courts; general principles and rules of law in the court’s jurisdiction; the meaning and use of the vernacular language; ordinary rules of human thinking and reasoning; ordinary data of human experience; the ordinary habits of people in the region; etc.);²⁴
- 4) That which “everybody knows” (e.g., certain notorious historical facts; common geographical knowledge; general facts about well-known literature; facts about common food or drink in ordinary use; etc.).²⁵

The breadth of what Thayer permits the court to notice, which essentially boils down to what “everybody knows,”²⁶ has been criticized by subsequent academics and courts. For instance, referring to Morgan’s

²¹ Morgan, *supra* note 20 at 286. See also John Sopinka, Sidney N. Lederman and Alan W. Bryant, *The Law of Evidence in Canada* (Markham: Butterworths, 1992) at 976; and Paciocco and Stuesser, *The Law of Evidence*, *supra* note 5 at 468.

²² Thayer, *supra* note 16 at 299.

²³ Thayer, *supra* note 16 at 299-300.

²⁴ Thayer, *supra* note 16 at 301.

²⁵ Thayer, *supra* note 16 at 301-303. Thayer is largely supported in his view by Wigmore: John Henry Wigmore, *Evidence in Trials at Common Law*, vol. 9, revised by James H. Chadbourn (Boston: Little, Brown & Co., 1981) at 732.

²⁶ James Thayer, “Judicial Notice and the Law of Evidence” (1889-1890) 3 Harv. L. Rev. 285 at 305.

criticism of Thayer, Justice Binnie rejects the Thayer formulation on the basis that “[i]t allowed the courts to make too much use of out-of-court information, and did not sufficiently recognize the limitations on a judge imposed by the adversarial process and fair trial considerations.”²⁷ Consequently, Prof. Morgan’s formulation has become the basis of the law of judicial notice in Canada. For instance, he is quoted in *Find*,²⁸ and again in *Spence*.²⁹ His characterization of judicial notice, which is narrower than that of Thayer, is based on the following premises, set out at the beginning of a 1943 *Harvard Law Review* article:

- 1) Courts resolve real, not moot, issues that arise in a dispute between litigants;
- 2) The function of the judge in a court of equity, in which there is no jury, is influenced by the different roles of judge and jury in common law courts;
- 3) The domain of the judge is questions of law;
- 4) Neither the judge nor jury begins a case with knowledge of any matter of fact in dispute;
- 5) Courts have no mechanism for discovering matters of fact in dispute – the burden of proof is allocated by the judge to the parties to order facts in an “orderly and reasonable manner”;
- 6) This system for admitting evidence is intended to produce a “rational investigation” and “rational adjustment of disputes as to both law and fact.” As a result, it presupposes a tribunal that acts rationally.³⁰

It is tempting at this point to take issue with the assumptions Morgan makes. Indeed, the last two propositions – that courts have no mechanism for discovering matters of fact in dispute and that tribunals act rationally – are clearly refuted by everyday experience.³¹ First, courts

²⁷ *Spence*, *supra* note 10 at para. 54.

²⁸ *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863 at para. 48.

²⁹ *Spence*, *supra* note 10 at para. 54.

³⁰ Morgan, *supra* note 20 at 269.

³¹ Of course, Morgan may simply have meant that common law courts are not inquisitorial. But if this is the case, he overstates his point.

often rely on their own experience,³² knowledge, and what Dickson J. called “an uncanny ability to distinguish between the genuine and the specious,”³³ otherwise known as good sense.³⁴ Second, the rules of evidence themselves undermine the presumption that tribunals act rationally; no person who wished to conduct a rational inquiry into a crime would ever set up a system of evidence based on an adversarial trial system.³⁵ As Richard Eggleston points out, our law of evidence is shaped more by history than it is by rationality:

Much of the peculiarity of the English law of evidence is due to the existence of the jury system and to the adversary nature of English legal proceedings. Whether the adversary system is attributable directly to the existence of juries or to that trait in the English character which converts utilitarian pursuits like foxhunting and fishing into games with their own artificial sets of rules may be debatable, but the fact that a legal contest in England was in the nature of a battle to be fought to a finish on a certain day has undoubtedly coloured the attitude of English lawyers to experts and to experiments.³⁶

Eggleston also goes on to point out the irrationality of using witnesses who, unlike scientific investigators, do not rely on a methodology of

³² As R. J. Allen points out, “[e]vidence is less what is produced at trial and more the interaction of what is produced with the background and experience of the fact finder” (Ronald J. Allen, “Burdens of Proof and Uncertainty and Ambiguity in Modern Legal Discourse” (1994) 17 Harv. J. L. & Pub. Pol. 627 at 641).

³³ *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120 at 156.

³⁴ See also Roberts and Zuckerman’s discussion of “juror notice,” in *Criminal Evidence*, *supra* note 2 at 211. On the use of “common sense” by legal decision-makers, see Ronald J. Allen, “Common Sense, Rationality and the Legal Process” (2001) 22 Cardozo L. Rev. 1417.

³⁵ As one commentator on my paper suggested, the adversarial system is perfectly rational if the goal is to resolve legal disputes by determining if a party has met the burden of proof placed on it. In such a case, it is rational to have both parties confront each other. However, in my view, the result of adversarial disputes in criminal court is to permit the state (if it wins) to use force to coerce and punish the accused. One must evaluate the rationality of a legal procedure by the ultimate purpose that it serves, namely, to deny a person her freedom, not simply by measuring it against intermediate goals such as meeting a burden of proof. It seems to me irrational to deny someone freedom based on a competition between parties that are frequently of unequal skill, knowledge and power.

³⁶ Richard Eggleston, *Evidence, Proof and Probability*, 2nd ed. (London: Weidenfeld and Nicolson, 1983) at 5.

observation that eliminates “inefficient and dishonest” observers.³⁷ Marilyn MacCrimmon has noted how studies of miscarriages of justice have identified the errors of inference that triers of fact make, thus demonstrating the prevalence of errors of reasoning in judicial decision-making.³⁸ However, let us grant Prof. Morgan his presumptions, and proceed to set out how Morgan believes the presumptions shape the doctrine of judicial notice.

According to Morgan, the presumption that judges know the law is actually a function of their taking judicial notice of it – judges are permitted to inform themselves of the law, aided by the parties.³⁹ Indeed, the law is not permitted to vary based on the skill of counsel – it is assumed to be the same at all time and applied to all parties in the same way.⁴⁰

The situation is different with matters of fact. The judge, in her role as trier of fact, is presumed to only know those facts regarding matters in dispute that are presented by the parties. As a result, if a fact is not introduced in evidence by a party, the court will arrive at its decision without all of the relevant facts. Moreover it is impossible to know all relevant facts, and so a court can never be said to be ascertaining the truth. Instead, the trier of fact merely determines what probably happened (or on occasion, what probably will happen) based on what she has been presented with.⁴¹

³⁷ *Ibid.* at 6. On the unreliability of eyewitnesses, see Edwin M. Borchard, *Convicting the Innocent* (New Haven: Yale University Press, 1932) at viii and Lisa Dufrainmont, “Regulating Unreliable Evidence: Can Evidence Rules Guide Juries and Prevent Wrongful Convictions?” (2008), 33 *Queen's L.J.* 261.

³⁸ Marilyn MacCrimmon, “What is ‘Common’ About Common Sense?: Cautionary Tales for Travelers Crossing Disciplinary Boundaries” (2001) 22 *Cardozo L. Rev.* 1433 at 1435 [MacCrimmon, “Common Sense”]. MacCrimmon also mentions Michael L. Perlin, “Pretexts and Mental Disability Law: The Case of Competency” (1993) 47 *U. Miami L. Rev.* 625, where he discusses how the use of judgmental heuristics can lead to errors in reasoning (at 660) and Donald Bersoff, “Judicial Deference to Nonlegal Decision-Makers: Imposing Simplistic Solutions on Problems of Cognitive Complexity in Mental Disability Law” (1992) 46 *S.M.U.MU L. Rev.* 329.

³⁹ Morgan, *supra* note 20 at 271.

⁴⁰ Morgan, *supra* note 20 at 273.

⁴¹ Morgan, *supra* note 20 at 271-272. See also Eggleston, *supra* note 38 at 1-2 and 32 and Paul Roberts and Adrian Zuckerman, “Chapter 3: Relevance, Admissibility and Fact-Finding,” in Roberts and Zuckerman, *Criminal Evidence*, *supra* note 1. For the contrary view that courts seek the truth, see William Twining, *Rethinking Evidence* (Oxford: Basil Blackwell Inc., 1990). For the view that courts do not seek the truth or determine what probably happened, see Paccioco and Stuesser, *The Law of Evidence*, who see the role of

The evidence presented by the parties alone, however, is not sufficient to allow the court (be it judge or judge and jury) to arrive at reasonable determination of what probably happened; the court must also be able to combine the facts presented, make reasonable inferences from them, and so on. In relation to matters of fact of this sort, it is the role of the doctrine of judicial notice – i.e., the ability of courts to employ their general knowledge and powers of reasoning – to permit a court to piece together the evidence given into a series of probable events. As Morgan says, “the court, including both judge and jury, must take judicial notice of what everyone knows and uses in the ordinary process of reasoning about everyday affairs.”⁴² This formulation draws Morgan much closer to Thayer and Wigmore’s view that courts should take judicial notice of “what everybody knows.”

Morgan goes on to demonstrate that it follows from his articulation of the doctrine of judicial notice that no evidence can be led to disprove what has been judicially noticed;⁴³ if a factual matter is disputable, then it must be proven in court through the laws of evidence.⁴⁴

It is submitted that not only theoretical symmetry but also practical considerations strongly support the thesis that a matter in the field of judicial notice is not subject to attack by evidence.⁴⁵

What is one to do if a party claims that a fact must be proven with evidence rather than the court taking judicial notice? According to Morgan, the parties may, without relying on the laws of evidence, point the court to material of indisputable authority to resolve the issue:

If there be a dispute as to whether a matter is a subject of dispute, the question to be answered is whether the matter lies within the field of evidence or within the field of judicial notice; and the

the court as being to evaluate whether one of the parties has met the burden placed on it (*supra* note 5 at 19).

⁴² Morgan, *supra* note 20 at 272, 273.

⁴³ Morgan, *supra* note 20 at 279.

⁴⁴ Morgan, *supra* note 20 at 287.

⁴⁵ *Ibid.*

material which may be presented or consulted in a search for the answer is in no respect limited by the rules of evidence.⁴⁶

Morgan's view is contrary to that of Wigmore, who argued that every matter of fact is only *prima facie* true. Because this holds equally for facts that are judicially noticed or those admitted through the law of evidence, facts of which a court takes judicial notice must be disputable by the parties. Thayer takes a different view – to him, some categories of facts of which the law permits a judge to take judicial notice are incapable of being refuted by evidence, while others can be so refuted.⁴⁷

The effect of Morgan's narrowing of the doctrine of judicial notice is to essentially restrict it to the point where it is no longer relevant as a means of informing the court. In a homogeneous society, when social and cultural matters are at issue, it may be possible to point to documents of "indisputable accuracy" or to speak of knowledge that is beyond dispute by reasonable persons. But in a pluralist society, it is virtually impossible to make such claims except for a very small category of facts.

What is a person seeking to promote equality to do in such a case? On the one hand, she might applaud Morgan's narrowing of judicial notice, because it restricts the court's ability to make findings of fact through the doctrine of judicial notice that may represent the stereotypical views of the majority. According to Morgan, facts of which judicial notice has been taken are not open to challenge by those with differing views, and so the narrower the purview of judicial notice, the better. However, an equality advocate might also take the opposite view. She might wish to expand what can be judicially noticed in order to avoid imposing an increasing burden on equality-seeking groups to demonstrate the nature and effect of their marginalization by introducing social science and other evidence. Is this a case of Scylla on the one shore and Charybdis on the other?

The Scylla that is the fear of prejudicial use of the judicial notice is also a fear of Morgan's. First, he correctly identifies the concern of the equality advocate:

⁴⁶ *Ibid.*

⁴⁷ See Morgan's characterization of the views of Thayer and Wigmore at Morgan, *supra* note 20 at 285.

There is danger of misuse and abuse of judicial notice. A judge may ignorantly consider a generalization drawn from the segment of human experience known to him to be so notoriously true as to admit of no reasonable question. He may erroneously regard a source of information as of indisputable accuracy. He may treat a half-truth as if it were the whole truth. These inaccuracies may not appear in the record so as to be subject to correction on review.⁴⁸

He then suggests that the following safeguards be put in place to avoid abuse of the doctrine:

- 1) The parties should be put on notice when the court is proposing to take judicial notice of some fact and provide an opportunity for counsel to make submissions on the notoriety of the fact proposed to be noticed;
- 2) The judge should note the fact taken notice of and the reasons for taking note of it in the record to permit appellate review.⁴⁹

Morgan believes that if these procedural steps are followed, then the doctrine of judicial notice is not open to abuse. The zealous advocate of equality rights can prevent the abuse of the doctrine of judicial notice by pointing to a dispute among scholars or other sources of research data about the point of which the court proposes to take judicial notice.

This leaves only Charybdis – the concern that by narrowing the doctrine of judicial review, courts will overburden an already overburdened equality-seeking litigant with providing expert social science evidence. By narrowing the parameters of judicial notice, courts are closing their eyes to their experience of inequality and the firsthand experience of the litigants and placing themselves in the hands of experts. Doing this plainly undermines equality. Indeed, Morgan was sensitive to the liberalizing force of judicial notice; he recognizes that it is a means for courts to take notice of changing social and economic circumstances. As Morgan states,

⁴⁸ Morgan, *supra* note 20 at 292.

⁴⁹ Morgan, *supra* note 20 at 293-294.

If the common law is to grow through adaptation to changing conditions by means of judicial decision, the device by which knowledge of the changed conditions becomes part of the court's working equipment is judicial notice.⁵⁰

However, his narrowing of the doctrine has resulted in it being virtually useless in performing that function.

It appears that the main concern with an expansive definition of judicial notice, viz., that courts will resort to stereotypical views that harm equality-seeking groups, is of less concern than narrowing the doctrine of judicial notice, which places an undue burden on the equality-seeking litigant to provide social science evidence to support a fact which he believes should be judicially noticed. Indeed, with a slight modification of the safeguards that Morgan places on judicial notice, I believe that a more expansive, equality-promoting conception of judicial notice is possible. First, the test should not be, as Thayer suggests, what "everybody knows." As I have pointed out, this standard may work in a society that is relatively homogeneous, but it does not work well in a heterogeneous multicultural society. Nor should the test be the narrow Morgan test of notoriety or verifiability based on sources of indisputable accuracy. Instead, courts should turn to the litigants to determine what should be judicially noticed, rather than turning away from them and looking to what the broader community knows or takes for granted. Courts should thus proceed in the following way: 1.) if an equality-seeking litigant requests the court to take judicial notice of a fact which she can demonstrate, based on her experience and that of people in her community, is highly probable (though not notorious or known by everyone); 2.) and judicial notice of the fact promotes substantive equality, the court should allocate the onus and burden of proof among the parties in order to ascertain whether the fact should be the subject of notice or not. If there is a credible minority of opinion against the fact that an equality-seeking litigation wishes to have noticed, then the matter must be proven in evidence. Otherwise, it should be judicially noticed. Where the Crown is a party to the litigation (for instance, in criminal trials), it should generally bear the burden of demonstrating on a balance of probabilities that there is a credible minority of opinion against the validity of the fact that is to be the matter of judicial notice. An example

⁵⁰ Morgan, *supra* note 20 at 289.

of how this would work is in the next section, in which I consider the issue of challenging jurors.

The idea that courts should allocate the onus and burden of proof differently in cases involving equality-seeking groups is not entirely revolutionary.⁵¹ For instance, Christine Boyle and Jesse Nyman argue that other concepts in evidence such as relevance and weight should be modified given the increasing recognition that they tend to allow or exclude evidence based on the unquestioned biases of judges and jurors. In their view, “a structure for analyzing relevance and weight grounded in legal values, including equality, would increase the legitimacy of legal fact-finding.”⁵² To illustrate their point, Boyle and Nyman mention the fact that the law traditionally permitted evidence to be led of the sexual history of the complainant in sexual assault cases. The negative effect of this evidence, which was based on sexist stereotypes, was averted by the enactment of s. 276 of the *Criminal Code*, which severely curtails the use of such evidence in sexual assault trials by placing the onus and burden of proof on the defence to demonstrate that the evidence it seeks to lead “of specific instances of sexual activity”,⁵³ is “relevant to an issue at trial”⁵⁴ and “has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice”.⁵⁵ My proposal for broadening the scope of judicial notice acts in a similar way – it creates a presumption that the equality-seeking litigant has the best knowledge about the source of her marginalization, and it places an appropriate onus and burden on other parties to demonstrate that her views are improbable based on a credible minority of opinion.

V. AN ANALYSIS OF THE DOCTRINE OF JUDICIAL NOTICE IN *SPENCE* AND SUGGESTIONS FOR REFORM

How should one apply this doctrine to the issue in *Spence*? In this section, I illustrate how my approach to judicial notice would function. However, along the way, I also provide a detailed criticism of the Supreme Court’s decision in *Spence*, demonstrating how, even if the

⁵¹ Indeed, in criminal trials, defence evidence is received more readily than Crown evidence. For instance, the onus on the defence is often a balance of probabilities when it comes to demonstrating various elements of a defence to a charge.

⁵² Boyle and Nyman, “Finding Facts Fairly,” *supra* note 1 at 9.

⁵³ *Criminal Code*, R.S.C. 1985, c. C-46, s. 276(2)(a).

⁵⁴ *Ibid.*, s. 276(2)(b).

⁵⁵ *Ibid.*, s. 276(2)(c); Boyle and Nyman, *supra* note 53.

more restrictive Morgan criteria are employed, the Court should still have taken judicial notice of race-based partiality of jurors.

In *R. v. Spence*, the black accused wished to challenge potential jurors by asking them if they would be biased against him because of an affinity for the South Asian victim. To most people who are racialized, I believe that race-based partiality is so notorious that it is indisputable among reasonable people. On that basis alone, the trial judge ought to have taken judicial notice of this partiality and allowed the question that Spence wished to ask potential jurors. However, the Supreme Court of Canada disputed this notoriety. In the court's view, there is a difference between prejudice *against* a black or aboriginal accused, and partiality *towards* members of one's own race. As Binnie J. stated:

In both *Parks* and *Williams*, the concern of the respective courts was with the possibility that the interracial nature of the crime might exacerbate the already strong prejudice *against* the black or aboriginal accused. There is nothing in the record to suggest that the fact that the complainant is East Indian would exacerbate racist emotions against the black accused. In any event, that is not the respondent's argument. He is worried about a "natural sympathy" that might be felt by an East Indian juror for an East Indian victim, thereby indirectly creating further prejudice that would be applicable to any accused of a different race.

There are four ways for critics to deal with the Supreme Court's conclusion:⁵⁶ 1.) argue that the doctrine of judicial notice ought to be applied differently to social and adjudicative facts, and demonstrate that what was really at issue in *Spence* was a social fact that is more readily noticed than an adjudicative fact; 2.) demonstrate that Spence's proposed question follows logically from the holdings in *Parks* and *Williams*, and should therefore have been a matter of judicial notice; 3.) demonstrate how the question can be resolved by properly allocating the onus and burden of proof; 4.) advocate that equality issues should be judged by courts with expertise in the area of equality law relevant to the issues raised by the parties. I will deal with each of these in turn.

⁵⁶ In this article, I deal solely with ways in which courts can develop the law. Of course, there are legislative solutions. For instance, it is possible for Parliament to shift the onus and burden of proof as I suggest in solution three by enacting legislation to this effect. Parliament intervened in this way to deal with evidentiary issues facing the Crown in sexual assault cases.

The first way of disputing the Supreme Court's conclusion in *Spence* is to rely on the distinction between social and adjudicative facts. If social facts are noticed on a lower standard than adjudicative ones and the fact in issue in *Spence* – juror partiality for a victim of the juror's own race – is categorized as a social fact, then the Court was wrong not to take notice of it by applying the restrictive Morgan criteria. I deal with this proposal first because, like Binnie J., I find the distinction between adjudicative and social facts unconvincing. “Adjudicative” facts are facts that dispose of the guilt or innocence of the accused or of the contentious issues between the parties in civil litigation. “Social” facts are facts about the social, cultural, economic or other circumstances that form the context in which the adjudicative decision is to be made.⁵⁷ The distinction was initially made by Kenneth Culp Davis,⁵⁸ and Binnie J. relies on the distinction in *Spence* to provide some “wobble room” so that facts that are not clearly dispositive of the issue can be admitted under the doctrine of judicial notice even if they do not meet the strict Morgan criteria.⁵⁹

It is when dealing with social facts and legislative facts that the Morgan criteria, while relevant, are not necessarily conclusive. There are levels of notoriety and indisputability. Some legislative “facts” are necessarily laced with supposition, prediction, presumption, perception and wishful thinking. Outside the realm of adjudicative fact, the limits of judicial notice are inevitably somewhat elastic.⁶⁰

Binnie J. goes on to state the appropriate “relaxed” standard as follows:

When asked to take judicial notice of matters falling between the high end already discussed where the Morgan criteria will be insisted upon, and the low end of background facts where the court will likely proceed (consciously or unconsciously) on the

⁵⁷ *Spence*, *supra* note 10 at para. 56. See also C. L'Heureux-Dubé, “Re-examining the Doctrine of Judicial Notice in the Family Law Context” (1994), 26 *Ottawa L. Rev.* 551 at 556.

⁵⁸ Kenneth C. Davis, “Official Notice,” (1949) 62 *Harv. L. Rev.* 537, esp. 549-60; Kenneth C. Davis, *Administrative Law Treatise*, 2nd ed. (San Diego: K.C. Davis, 1980), vol. 3 at 139.

⁵⁹ *Spence*, *supra* note 10 at paras. 60 and 63.

⁶⁰ *Spence*, *supra* note 10 at para. 60.

basis that the matter is beyond serious controversy, I believe a court ought to ask itself whether such “fact” would be accepted by reasonable people who have taken the trouble to inform themselves on the topic as not being the subject of reasonable dispute *for the particular purpose for which it is to be used*, keeping in mind that the need for reliability and trustworthiness increases directly with the centrality of the “fact” to the disposition of the controversy.⁶¹ [emphasis in original]

This is still a restrictive standard. Binnie J. justifies it on the basis that there is no real distinction between adjudicative and social facts, especially in constitutional litigation, where adjudicative facts are often admitted by the parties, leaving questions of social fact (for instance, under the s. 1 analysis) to dispose of the issue.⁶² As I agree with Binnie J. that the distinction between social and adjudicative facts is questionable, I do not propose a different standard for judicial notice based on the nature of the fact in question.

A second way of dealing with the Supreme Court’s analysis in *Spence* is to dispute that juror partiality meets the Morgan criteria. As Morgan says, courts are presumed to know “what everyone knows and uses in the ordinary process of reasoning about everyday affairs.”⁶³ Presumably, the ability to extract a necessary condition of a proposition is part of this “ordinary process of reasoning.” The questions permitted in *Parks*,⁶⁴ which involved a black accused, and *Williams*,⁶⁵ which involved an aboriginal accused, aim at determining if a potential juror would be biased against an accused based on his race. It is a necessary condition of bias against one race that a person is partial toward another, for to think that all races are equally worthy of scorn is in fact to not show bias against any.⁶⁶ It follows from this that another way of posing the

⁶¹ *Spence*, *supra* note 10 at para. 65.

⁶² *Spence*, *supra* note 10 at para. 64.

⁶³ Morgan, *supra* note 20 at 272, 273. On the role of reason and the rules of rational thought in guiding juries to a verdict, see the comments of Vaughan CJ in *Bushell’s Case* (1671), 124 ER 1006.

⁶⁴ *R. v. Parks* (1993), 84 C.C.C. (3d) 353.

⁶⁵ *R. v. Williams*, [1998] 1 S.C.R. 1128.

⁶⁶ It is possible to be biased against one race and impartial between all others. But this is not relevant to the case at hand. If the potential juror were asked, “Are you partial to South Asians?” and he answered “Yes,” then, regardless of whether the same juror was indifferent among other non-South Asian races, the juror could be partial, i.e., prefer the evidence of, a South Asian to a witness of another race.

question permitted in *Parks* and *Williams* is to ask: “Are you partial to any race that is not that of the accused?” The inter-racial question that the accused in *Spence* sought to ask is thus simply another way of obtaining the same information as can be obtained by asking the *Parks* question: “Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the accused person is a black man?” On Morgan’s view that the court is presumed to act rationally and to have knowledge of the normal processes of human reasoning, the interracial question proposed in *Spence* should be allowed, because a positive answer to a question of partiality toward a particular race is a necessary condition for a lack of partiality toward another.

This is not to say that the question “Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the accused person is a black man?” is identical to the question “Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the accused person is a black man and the victims are white and East Indian” (the question *Spence* proposed to ask). They are logically identical, but not phenomenologically identical; i.e., they have a different impact based on the experience of the listener. For instance, a person asked “Do you like apples” might reply “Yes”. But if you then tell him that the apples will be in a salad with an oil-and-vinegar dressing, he might change his answer to “Actually, I forgot, I don’t like apples in savoury salads.” The function of the added information about the type of salad in which the apple is included serves the psychological function of helping a person to recall experiences that qualify or falsify her original answer. Thus, although the question “Are you prejudiced against blacks” is logically identical to the question “Are you partial to any particular (non-black) race,” adding an interracial element may elicit a more truthful answer. For instance, you might ask a potential juror “Would you be prejudiced against a Japanese accused,” who might in turn answer “No”. But if you asked “Would you be prejudiced against a Japanese accused when the victim is Korean,” a potential juror might change his answer because of present or past beliefs or experiences. For instance, the juror might have lived in Japan and experienced the discrimination of the Japanese against Koreans, and this might lead him to think that the Japanese accused is more likely to have committed the crime against the Korean victim because the juror has unjustly generalized from his experience and drawn the conclusion that Japanese have an animosity towards Koreans.

A third way of dealing with the issue in *Spence* is set out by Morgan himself when he suggests that the degree of probability that a fact that a party wishes to have judicially noticed is true may warrant placing the burden on a party to dispute that it ought to be judicially noticed. Although he does not deal with a situation of selecting jurors, he says the following:

That there is a priori a high degree of probability of the truth of a particular proposition may be a good reason for putting upon the party asserting its untruth the burden of producing credible evidence, or of persuading the trier, of its untruth, but it cannot justify a tribunal in taking judicial notice of its truth.⁶⁷

This passage is instructive, because in *Spence*, the proposition that jurors may not be impartial because of an affinity for a particular racialized group was held to be quite probably true if not so true as to be notorious. For instance, Laskin J.A., in dissent in the decision of the Court of Appeal for Ontario, said that the interracial question proposed by Spence was not only not objectionable, it might also have been desirable.⁶⁸ Applying Morgan's suggestion to *Spence*, if the Crown disputes the possibility of partiality between jurors and victims of the same racialized identity despite its assertion by the accused, who will lead some evidence supporting his assertion is notorious in his community, if there is a logical connection between such partiality and bias against a particular racialized identity, then, as I argued in the previous section, the burden ought properly to be placed on the Crown, who disputed the truth of the defence's claim, to cast doubt on the untruth of Spence's assertion based on a credible minority of opinion. If the Crown were successful, then the matter could be one on which evidence should be led by both parties. But if it failed, then having met an evidentiary burden to demonstrate the notoriety of partiality in the accused's community and demonstrated the equality issues raised by the question, the court ought to take judicial notice of possible juror bias as a result of race-based partiality.⁶⁹

⁶⁷ Morgan, *supra* note 20 at 274.

⁶⁸ *R. v. Spence* (2004), 73 O.R. (3d) 81.

⁶⁹ The upshot of this is that the accused need not prove that a fact he seeks to have judicially noticed is notorious. Instead, the general notoriety test is replaced by proof of the notoriety of the fact in a particular identifiable equality-seeking community to which the accused belongs, existence of a substantive equality basis for the admission of the evidence, and a failure of the Crown to prove that the fact is not generally notorious.

Of course, to place the burden on the Crown in this case would require overturning *Spence*. In *Spence*, Binnie J. relied on the test for questions to potential jurors set out in *Williams*, which requires that for a challenge for cause question to be permitted, the accused must demonstrate “whether there is reason to suppose that the jury pool *may* contain people who are prejudiced [the attitudinal component] and whose prejudice *might not* be capable of being set aside on directions from the judge [the behavioural component]”⁷⁰ [emphasis in original]. In *Spence*, Binnie J. stated that the burden was on the accused to demonstrate that these two elements of the test are met.⁷¹ He cites no authority for this allocation of the burden of proof, but it is presumably drawn from *Williams*.⁷² It is my contention that the view of Binnie J. in *Spence* and McLachlin J. in *Williams* that the accused must demonstrate an “air of reality” to the potential for partiality in the community and the inability of jurors to overcome this partiality should be changed; instead, it should be up to the Crown to demonstrate that there is no air of reality to juror partiality.⁷³

There are many equality-based arguments for why the onus and burden of proof should be allocated as I have suggested. First, accused from equality-seeking groups often lack the resources to gather the relevant research. This is certainly the case with self-represented accused. But it is also the case with accused represented by counsel funded by legal aid: there is no separate funding available from legal aid for extensive social science research. Rather, this research must be conducted within the hours allocated to Charter motions for the various types of offences.⁷⁴ Second, there is the challenge of finding research about the equality-seeking group to which the accused belongs.⁷⁵ Although there is increasing research about equality-seeking groups that

⁷⁰ *Williams*, *supra* note 66 at para. 32.

⁷¹ *Spence*, *supra* note 10 at para. 41.

⁷² *Williams*, *supra* note 66 at para. 42. *Williams* in turn depends on *R. v. Sherratt*, [1991] 1 S.C.R. 509 at 535-536, which discusses the burden in challenges for cause based on pre-trial publicity of the case.

⁷³ Indeed, this change has been partly achieved in Ontario, where it is now recognized that there is an automatic right to challenge for cause based on the race of the accused (*R. v. Koh* (1998), 42 O.R. (3d) 668 (C.A.) at para. 36).

⁷⁴ See *Tariff and Billing Handbook* available online at: <<http://www.legalaid.on.ca/en/info/Resources.asp>>.

⁷⁵ As Boyle and Nyman point out, “[a]ppeals to logic or rationality alone cannot ensure that we find facts fairly, given that even scientific disciplines are not immune from bias. . .” (“Finding Facts Fairly,” *supra* note 1 at 6).

have a long history in the jurisdiction (such as aboriginal peoples, African-Americans, African-Canadians, etc.), there is less about recent immigrants and new Canadians, and even less about the interaction between recent and established equality-seeking groups. Third, courts are increasingly aware that equality-seeking groups litigating in the public interest face a problem accessing justice. This is particularly the case in awards of costs, where courts are increasingly prepared to not penalize public interest litigants who litigate in the public interest, or even provide for advance costs awards for these groups regardless of the outcome of the litigation.⁷⁶ Finally, placing the burden on the Crown serves an important democratic function, namely, providing an incentive for the collection and creation of research that promotes equality, an important value enshrined in our constitution.

My fourth proposed solution to the issue in *Spence* is to use judges who are drawn from a community that will be familiar with the experience of an equality-seeking group.⁷⁷ As I have already mentioned, this is an old practice that dates back to the origins of the common law, when a special jury would be empanelled that had particular knowledge of the case to be tried.⁷⁸ In modern times, the practice of appointing expert adjudicators is common in administrative law; indeed, this is one of the primary purposes of creating administrative tribunals such as those that operate in the area of human rights, labour law, immigration law, etc. Although less common, it is also possible for judges to express a particular expertise.⁷⁹ For instance, the commercial list is a list of judges in the Toronto area who have particular expertise in the area of complex commercial litigation.⁸⁰ Similarly, drug treatment courts with special expertise operate in Edmonton, Regina, Ottawa, Toronto and Vancouver, as do youth mental health courts in Ottawa, Oshawa and London,

⁷⁶ *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371.

⁷⁷ This need not mean that the judge is drawn from the same racial or other community as the accused. Of course, an even better suggestion would be for all judges to have such familiarity, but this seems unlikely in practice.

⁷⁸ Hand, *supra* note 17 at 41-42.

⁷⁹ The expertise of a judge in a particular area of law should be distinguished from the old common law practice of having “special juries” of experts in a particular area to determine the facts of a case and judge it. On this practice, see W.S. Holdsworth, *A History of English Law* (London: Methuen, 1926) at 211-214; see also Mason Ladd, “Expert Testimony” (1951-52) 5 Vand. L. Rev. 414 at 414.

⁸⁰ *Superior Court of Justice, Ontario Courts*, online: <<http://www.ontariocourts.on.ca/scj/en/commercialist/index.htm>>.

Ontario. If a party is from an equality-seeking group, it should be able to bring its matters before a court that has expertise and experience in equality law. In regard to evidential matters, such a court will be better placed to determine when the court should take judicial notice of particular systemic issues faced by an equality-seeking group and to judge when evidence is necessary to justify notice being taken.⁸¹ It will also be able to determine how to properly allocate the burden of proof in cases where judicial notice cannot be taken and an equality-related matter must therefore be proven through expert evidence. Such decisions must necessarily be made on a case-by-case basis. As Boyle and Nyman argue, it is virtually impossible to create a system of universal rules to combat discriminatory generalizations: “the decision of when a judge should instruct him or herself or a jury on the need to question generalizations would need to be decided on a case by case basis. The infinite permutations of the human experience make universal truths rare, both in terms of inferential generalizations and fixed evidentiary rules.”⁸² As a result, having a group of judges with special experience in the area of equality might help in making these case-by-case decisions. At the very least, it would bring together judges who are used to questioning their own generalizations and assumptions to root out discriminatory ones.⁸³

VI. EXPERT EVIDENCE

It is impossible to survey all of the equality issues that arise in the admission of expert evidence. Emma Cunliffe has identified some of the issues that arise out of the shifting standards that courts have set for the admission of evidence relating to human behaviour. She identifies increasing skepticism on the part of courts towards this evidence, from the high water mark in *Lavallee*, which opened the door to such evidence, to later cases such as *R. v. D. D.*⁸⁴ and *R. v. J.-L.J.*,⁸⁵ in which the threshold for admitting evidence of human behaviour appears to have

⁸¹ In *R. v. Gladue*, the Supreme Court of Canada performed this function, stating that sentencing judges should “take judicial notice of the systemic or background factors and the approach to sentencing which is relevant to aboriginal offenders,” but pointing out that there will be instances in which “some evidence will be required in order to assist the sentencing judge in arriving at a fit sentence” ([1999] 1 S.C.R. 688 at para. 83).

⁸² Boyle and Nyman, “Finding Facts Fairly,” *supra* note 1 at 10.

⁸³ On the importance of questioning one’s own assumptions, see Boyle and Nyman, “Finding Facts Fairly,” *supra* note 1 at 11; and Boyle, “A Principled Approach,” *supra* note 15 at 115-116.

⁸⁴ 2000 SCC 43, [2000] 2 S.C.R. 275.

⁸⁵ 2000 SCC 51, [2000] 2 S.C.R. 600.

been raised.⁸⁶ Boyle and MacCrimmon have also noted the increasing recognition among lawyers working in the area of equality law that the pursuit of equality requires courts and lawyers to have a broader conception of the kinds of evidence that should be admitted at trial: evidence is no longer simply restricted to “facts” and expert evidence, but is increasingly open to narratives and stories of oppression:

In some instances, the law is becoming more open to stories of oppression and doctrine is emerging to facilitate the incorporation of those stories into fact determination. It can no longer simply be asserted that “facts are facts.” Facts are constructed and the law is beginning to discipline that construction to be egalitarian.⁸⁷

In this section, I limit myself to considering how to counter the increasing burden on equality-seeking groups of presenting expert evidence in court to back up their equality-based claims. I suggest that changes need to be made to both procedure and doctrine (i.e., the rules of evidence) to promote equality. I take two types of cases as examples: cases dealing with aboriginal rights and aboriginal title and criminal cases involving defences that have an equality dimension. In short, I suggest that courts must play a more active role in equality cases by allocating the onus and burden of proof in these cases on a case-by-case basis, and by requiring the Crown to provide certain types of evidence where it is necessary to determine an equality issue. Also, I suggest that we should begin to reinterpret the meaning of relevance in such a way to allow the perspective of litigants to be presented as narratives rather than as a series of disjointed “facts”. In my view, this is a return to the origins of the law of evidence in common law courts.

Expert evidence was not traditionally admissible in court. As Learned Hand notes, the admission of expert evidence is an anomaly, because it is opinion evidence about how to draw inferences from the facts rather than evidence about the facts themselves.⁸⁸ When it was admitted, this was done by means of the principle of judicial notice.⁸⁹ For instance, in *Reference re: Anti-Inflation Act*, one of the earliest cases

⁸⁶ Cunliffe, *supra* note 7.

⁸⁷ Christine Boyle and Marilyn MacCrimmon, “To Serve the Cause of Justice: Disciplining Fact Determination” (2001) *Windsor Yearbook of Access to Justice* 55 at 62.

⁸⁸ Hand, *supra* note 17 at 50, 54, 55, 56; see also *R. v. Abbey*, [1982] 2 S.C.R. 24 at 42.

⁸⁹ Morgan, *supra* note 20 at 279.

in which the Supreme Court of Canada considered whether to admit large amounts of social science evidence to resolve a constitutional matter, Chief Justice Laskin stated that evidence relating to the effect of the *Anti-Inflation Act* was admissible under the principle of judicial notice and the rule in *Heydon's Case*, which sets out four rules for determining the legislator's intent when interpreting legislation.⁹⁰ Similarly, in the United States, the doctrine of judicial notice was likewise used to admit expert evidence. For instance, in *State v. Damm*,⁹¹ the court held that scientific evidence about the relationship between parents' blood-types and the blood-type of their child was admissible through the judge's judicial notice of the science relating the two.⁹²

The rules on the admissibility of expert evidence have moved away from their origin in the law of judicial notice. Today, judges must consider four factors when deciding whether to admit expert evidence: relevance, necessity, the lack of any other exclusionary rule, and a properly qualified expert. However, even if these factors are satisfied, the judge may still reject the evidence if she feels that it will have a prejudicial effect on the conduct of the trial that outweighs the probative value of the evidence.⁹³ Despite this shift in the law which at first glance appears to be beneficial to equality-seeking groups, the willingness of courts to accept expert evidence is not necessarily a good thing for these groups, given the burden that presenting such evidence represents. Indeed, the shift away from using the doctrine of judicial notice has limited some of the salutary effects of the law of judicial notice, which in my view can have a positive effect on equality litigation. For instance, the doctrine of judicial notice traditionally permitted courts to conduct their own research, as Doherty J.A. did in *Parks*,⁹⁴ to determine if it should take judicial notice of a particular fact. However, some of the restrictions that characterize the law of judicial notice are not helpful in advancing equality. For instance, if we required expert evidence to meet

⁹⁰ *Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373 at 388-391.

⁹¹ 64 S.D. 309, 266 N.W. 667 (1936).

⁹² *Ibid.* at 318, 266 N.W. at 671. See also *Watson v. Tax Commission*, 135 Ohio St. 374, 21 N. E. (2d) 106 (1939) and Morgan, *supra* note 20 at 290-291, where Morgan discusses the use of the doctrine of judicial notice for consideration of factual evidence relating to the constitutionality of a statute. See also Charles T. McCormick, "Judicial Notice" (1951-1952) 5 Vand. L. Rev. 296 at 297 and 301, 316, 318.

⁹³ *R. v. Mohan*, [1994] 2 S.C.R. 9; *R. v. D.D.*, *supra* note 85 at para. 11.

⁹⁴ *Supra* note 65 at paras. 20, 44-55. Cochran also argues that "the best interpretation of judicial notice provides judges with the authority and obligation to seek out relevant social context information" ("Taking Notice," *supra* note 5 at 563).

the standard for the court to take judicial notice of a fact, namely, that it be notorious or provable through sources of indisputable accuracy, this would set too high a standard and make proof of facts of importance to equality-seeking groups extremely difficult.

The magnitude of the problem faced by equality-seeking groups that must present expert evidence to support their positions is significant. This is particularly the case with aboriginal groups. Boyle and MacCrimmon describe the challenge that these groups face:

Characterizing issues as factual and complex then placing the burden on Aboriginal peoples to establish these facts has affected their access to justice in several ways. For instance, applications by First Nations to have their rights determined by way of summary trial have, in recent cases, been unsuccessful. As a result Aboriginal peoples must incur the time and expense of a full trial in order to establish their rights. The Secwepemc Band and the Okanagan Indian Band have argued, in response to the Crown's argument that a full trial is necessary, that the combination of the Bands' poverty and the cost of a trial means that the Bands will not have 'effective access to justice as a means of defending themselves and vindicating their constitutional rights.'⁹⁵

One possible solution to the challenge faced by aboriginal people is to rely less on litigation and to place greater emphasis on developing the meaning and content of the duty to consult.⁹⁶ However, another possible solution along the lines of what I proposed in relation to

⁹⁵ Boyle and MacCrimmon, *supra* note 88 at 67, with a quote from L. Mandell, "Logging Cases," in *Litigating Aboriginal Title* (Vancouver: The Continuing Legal Education Society of B.C., 2000) 1.1.

⁹⁶ For the latest on the duty to consult, see Dwight D. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich, 2009). Sonia Lawrence and Patrick Macklem argue in an article that pre-dates the SCC case law on the duty to consult that *Delgamuikw* imposes a duty on the Crown to consult with Aboriginal peoples before acting in a way that could violate their rights ("From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000) 79 Can. Bar. Rev. 252 at 262. On problems with the duty to consult such as the use of the doctrine to force consultation on aboriginal peoples or the tendency of courts to find against Aboriginal peoples even if they voice opposition during consultation as long as the consultation has occurred, see Lynda Collins, "Protecting Aboriginal Environments: A Tort Law Approach" (in S. Rodgers, Rakhi Ruparelia and Louise Bélanger-Hardy, *Critical Torts* (Toronto: Lexis, 2008) at 69.

challenges for cause would be to have some factual matters relating to aboriginal title and aboriginal rights established before trial by aboriginal law experts – preferably, experts in the aboriginal law drawn from a particular aboriginal group – in consultation with the Crown and relevant affected parties. This would permit a shorter, summary trial⁹⁷ to resolve outstanding issues and to undertake any balancing that must occur between aboriginal interests and the interests of non-aboriginal Canadians. Courts appear to be more willing to accept statements of aboriginal law by acknowledged aboriginal law “experts.” For instance, in *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation*,⁹⁸ the Ontario Court of Appeal cited Algonquin law, which imposed a moratorium on mining in its territory, on the authority of elder William Commanda. No proof of the accuracy of this statement of aboriginal law was necessary – it was simply cited as a fact on which the court could rely.⁹⁹

A reliance on a panel of experts who would usurp the function of the trier of fact is not an outrageous suggestion. It was made early on in the last century by Learned Hand, who suggested that expert witnesses should be assessed by a panel of experts rather than by jurors. In Hand’s view, the trier of fact is incapable of choosing between the views of various experts on a complex issue, because he is not versed in the relevant subject matter. Hand suggests that the system of “advisory tribunals” would function as follows:

[T]o this tribunal would be transferred the present so-called expert evidence. Either side might call all the experts that money could procure or diligence discover, and put hypothetical questions for them to answer till the end of time. The right of cross-examination could be exercised without limitation. Only the difference would be that the final statement of what was true would be from the assisting tribunal.¹⁰⁰

⁹⁷ Perhaps a trial by petition with the submission of affidavits and examination of the affiants, rather than a trial with pleadings, examination for discovery, etc. (see *British Columbia (Minister of Forests) v. Westbank First Nation*, [1999] B.C.J. No. 2546, 92 A.C.W.S. (3d) 555).

⁹⁸ *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation*, 2008 ONCA 534; 91 O.R. (3d) 1; 295 D.L.R. (4th) 108.

⁹⁹ *Ibid.* at para. 27.

¹⁰⁰ Hand, *supra* note 17 at 56.

Boyle and MacCrimmon have also noted the increasing openness of courts toward social context evidence – i.e., evidence necessary for fact finders to appreciate the equality issues that arise in the case they are deciding.¹⁰¹ They cite cases such as *R. v. Gladue*,¹⁰² in which factors previously not considered material to sentencing aboriginal peoples were now considered essential for determining a fit sentence for aboriginal offenders, whose history of marginalization in Canada is well-established, and *R. v. Lavallee*,¹⁰³ in which evidence of the cycle of violence that abused women experience and recognize was admitted by the court to contextualize the meaning of reasonableness when a battered woman claims she killed her partner in self-defence.

Several issues arise in relation to the admissibility of social context evidence. First is the question of stereotypical images. If social context evidence is admitted, it may be a means for stereotypes to be introduced in court. For example, Canadian aboriginal law limits the evidence that is admissible to prove an aboriginal right or aboriginal title to evidence about the social practices of aboriginal peoples before their contact with Europeans. As John Borrows and Leonard Rotman point out, this limitation on social context evidence perpetuates a stereotype about aboriginal peoples. It

. . . draws on inappropriate racialized stereotypes of Aboriginal peoples by attempting to distil the essence of Aboriginality by reference to their pre-contact activities. This caricature presupposes that Aboriginal peoples and their legal systems did not develop in response to European influences, and it freezes them at the point of contact.¹⁰⁴

As Boyle and MacCrimmon point out, an equality-based approach would have “considered whether the facts selected reflected stereotypical images of Aboriginal peoples.”¹⁰⁵

If we pursue Boyle and MacCrimmon’s criticism, it suggests that one of the factors judges should consider when admitting expert evidence

¹⁰¹ Boyle and MacCrimmon, *supra* note 88 at 69.

¹⁰² *R. v. Gladue*, [1999] 1 S.C.R. 688.

¹⁰³ *Supra* note 2.

¹⁰⁴ John Borrows and Leonard I. Rotman, “The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference?” (1997) 36 *Alta. L. Rev.* 9 at 36.

¹⁰⁵ Boyle and MacCrimmon, *supra* note 88 at 73.

is the stereotypical images that are likely to be promoted by this evidence. There are two ways that judges could take these stereotypes into account. First, they could simply evaluate the prejudicial effect of stereotypical evidence against its materiality and probative value and disallow evidence where the prejudicial effect outweighs the other factors. Second, they could require evidence from the opposing party that could help to expose stereotypes and educate the judge or, if the trial is a trial by jury, the jurors, about potential stereotypes promoted by the evidence.

Another equality concern arises from the courts' increased appetite for social context evidence. This is the concern that the introduction of social context evidence might serve to disadvantage a group of which the litigant is not a part. As is well known in feminist circles, our identities have multiple facets – for instance, there is no univocal notion of who “women” are. Instead, women’s oppression stems not only from their gender, but often also from the sexual identity, racial identity, and so on.¹⁰⁶ A good example of how this multi-faceted identity can lead to the introduction of social context evidence is the case of men who murder their female partners and seek to excuse themselves on the basis of the defence of provocation. In *Humaid*, discussed above, a man from an equality-seeking group, namely, Muslims in Canada, introduced expert evidence to demonstrate that a wife’s infidelity is more offensive to Muslim men than it is to Canadian men of other faiths. Clearly, allowing this kind of social context evidence is, if left unchallenged, detrimental both to Muslims who do not hold this view, and to women who are partners of Muslim men. In *Humaid*, the Crown brought its own expert to counter the defence expert. However, if the Crown does not lead such evidence, it is important for courts to be aware of the potential stereotypes promoted by the evidence that the defence wishes to lead, as well as the potential detrimental effects on the rights of other equality-seeking groups. In such situations, courts should impose on the Crown the duty, as officers of the court and protectors of the public interest, to retain an expert to provide a more balanced view to the court.¹⁰⁷

¹⁰⁶ See for instance the multiple consciousness theory articulated by Angela Harris in “Race and Essentialism in Feminist Legal Theory” (1990) 42 *Stanford Law Review* 581-616.

¹⁰⁷ For more discussion on how courts should balance competing claims of equality-seeking groups, see Graham Mayeda, “Who Do You Think You Are? When Should the Law Let You Be Who You Want to Be?” in Laurie J. Shrage, “*You’ve Changed*”: Sex

Finally, courts should be wary of forgetting the roots of the law of expert evidence. As I pointed out, its origins are in the common law of judicial notice. Historically, jurors, following the human preference for a narrative to make sense of a complex set of facts¹⁰⁸ relied on their own knowledge of the events that occurred in order to grasp the social context in which the evidence of the witnesses was to be placed. I suggest that courts can be aided by the stories that litigants tell. Of course, these stories should not be taken purely at face value, but they can help the court to decide what competing values might be at stake in a case, and this knowledge can in turn help to avoid a court trying to fit a case into the sclerotic categories of the case law. However, it can also be helpful for doing the triage necessary to determine on whom to place the onus for leading social context evidence, what the appropriate burden of proof should be, and what matters can and cannot be taken judicial notice of.

VII. CONCLUSION

The increasing burden on parties to provide social science evidence to courts in cases involving equality issues or equality-seeking groups puts a tremendous pressure on these groups, and it acts as a potential barrier to justice. Culminating in the decision of the Supreme Court of Canada in *R. v. Spence*, the law of judicial notice has become so restrictive that it no longer serves a useful function in presenting to the trier of fact the evidence of the social, cultural and economic context in which the dispute between the parties arose. From a phenomenological perspective, the result of this is a collective closing of the trier of fact's eyes to the lived realities of equality-seeking litigants. The trier of fact is no longer permitted to take notice of the claims of injustice made by litigants, but is forced instead to see this injustice through the shards of "facts" presented to the trier by means of the rules regulating the evidence of witnesses.

To counter the threat to equality-seeking groups, I suggest a number of reforms of the law of evidence in this area. Far from being a complete departure from common law tradition, my suggestions for

Reassignment and Personal Identity (Oxford: Oxford University Press, 2009) 194, where I discuss how to balance the claims of people with transgender identity against the interests of biological women in the context of access to rape counselling services.

¹⁰⁸ Nancy Pennington and Reid Hastie, "The Story Model for Juror Decision Making," in Reid and Hastie (eds.), *Inside the Juror: The Psychology of Juror Decision Making* (1993) 192 at 194. See also MacCrimmon, *supra* note 39 at 1438.

reform are consistent with the spirit of the common law, which sought to have matters tried by members of the community in which the litigants live. The idea of community justice was intended to ensure that a case was judged by individuals who were familiar with the social context in which the dispute arose. In accordance with this spirit, I suggest the following:

- 1) The scope of judicial notice should be expanded so that, where the narrow Morgan test is not met, a judge can assign the onus and burden of proof to the parties to provide evidence to help the court decide whether or not to take judicial notice of a fact. The onus and burden should be distributed amongst the parties based on consideration of the equality implications for impecunious equality-seeking groups. Where possible, the Crown should have the duty of disproving a fact that an equality-seeking group seeks to have judicially noticed if that fact, although not notorious and provable on the basis of sources of indisputable accuracy, is true according to members of that group (in this regard, the party from an equality-seeking group would have an evidential burden placed on it).
- 2) To ensure that equality-seeking groups are not further marginalized by the burdens of providing social science evidence, courts with expertise in equality issues and with knowledge of the community to which the litigants belong should be constituted that would be able to evaluate factual issues and assign the onus and burden of proof in a more context-sensitive way.
- 3) One of the factors relevant to assessing the admissibility of expert evidence is the balancing of the interests of different equality-seeking groups – courts must be prepared to consider the equality implications of admitting certain types of evidence from equality-seeking groups and be prepared to allocate the onus and burden of proof in an appropriate way in order to ensure that the evidence does not promote stereotypes or have negative implications for equality in Canada.
- 4) Courts should employ special advisory panels that would advise the trier of fact on particular factual matters in complex areas such as aboriginal law. Allowing important matters of fact to be

decided by such expert panels would permit any remaining issues to be determined by a more summary procedure that places less of a burden on equality-seeking groups.

The upshot of my suggestions is that judges should notice more, not less. The fiction that they are neutral arbiters whose eyes are closed to the social context in which the crimes and disputes they adjudicate arise until the parties place evidence before them is a danger to equality-seeking groups. Humans organize their views of the world based on story-lines into which they fit the experiences they have in everyday life. For this reason, the law of evidence must encourage rather than discourage courts from dealing with the inequality that forms the background story of the lives of equality-seeking litigants. The closer the law comes to confronting face-to-face the real lives of litigants, the more possible it becomes for judges to fulfill their ethical responsibilities to these litigants.¹⁰⁹

¹⁰⁹ For a discussion of how ethical responsibility arises from the face-to-face interaction of individuals, see Robert Gibbs, "Present imperative," (1993) 76(1) *Soundings* 163; Simon Critchley, *The Ethics of Deconstruction: Derrida and Levinas* (Oxford: Blackwell, 1992); Graham Mayeda, "Re-imagining Feminist Theory: Transgender Identity and the Law" (2005) 17(2) *Canadian Journal of Women and the Law* 423-472 at 430-440, and Mayeda, *supra* note 108 at 202-203.