Ten theses on dissent

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TEN THESES ON DISSENT

Belleau and Johnson respond to the three articles in the Focus Feature. Agreeing with the general proposition that dissent matters, that it is valuable, and that it strengthens our system of law, they share ten theses on dissent. These theses touch on: dissent as a structural feature of our system; the linking of emotion and reason in the language of dissent; the articulation of tensions between principle and practice across different categories of dissent; the variable emergence of dissent across different legal topics; the need for attention to both heightened dissent and its absence; the impact of judicial identity on dissent; dissent as a (sometimes invisible) process rather than only a product; different currents with respect to dissenting practice at the trial, appellate, and Supreme Court levels; dissent as legal pedagogy; the role of the reader of dissent; and the place of dissent in nourishing the legal imaginary. In brief, they argue that lawyers, law professors, and the public more generally ought to attend to judicial dissent in order to engage with the ways that our system of justice operates, renews itself, and changes.

Keywords: judges, dissent, identity, language

It was a pleasure to read Peter Hogg and Ravi Amarnath's article, 'Why Judges Should Dissent.' Hoping to persuade judges that they need not be reluctant to dissent, they lay out a compelling argument for a presumption towards dissent, providing a clear map of risks and benefits.[1] They set out the virtues of dissent, address common worries, and offer comfort to those who worry about the politicization of the judiciary, the

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1 Peter Hogg and Ravi Amarnath, like Robert Richards and Freda Steele, take the position that they understand 'dissent' to include 'concurring opinions.' We share this view. While one might count concurring opinions alongside the majority when one is interested in the 'result' of a case, concurring opinions must be counted alongside dissenters where the focus is on 'reasons.' That the concurrence is best understood as a form of dissent is even more visible in French than in English. The English terms for 'dissenting' and 'concurring' appear in French as '*l'opinion dissidente sur le résultat*' and '*l'opinion dissidente sur les motifs*.' In French, thus, both opinions are very clearly marked as two forms of dissent. For more on the semantics of concurrence and dissent and the ways in which attention to the English and French versions of the words can make visible the different focuses on agreement and disagreement, see Marie-Claire Belleau, Annie Packwood, & Rebecca Johnson, 'L'honorable Louise Charron: une analyse quantitative comparée de sa jurisprudence' (2014) 65 SCLR (2d) 33 at 38–9.

challenges of indeterminacy, and the threats to collegiality. These worries, they argue, should not overwhelm the importance of judges taking seriously their individual responsibility to exercise judgment or the importance of transparency, making visible to the public that debate among judges is real.

We share the view expressed here that dissent matters, that it is valuable, and that it strengthens our system of law. To situate our interest, let us begin by saying that, following law school, each of us had the opportunity to work as a law clerk to Justice Claire L'Heureux-Dubé, often referred to as the 'Great Dissenter.' A dozen years back, in the context of planning a conference upon her retirement, we had decided to organize a session on her written dissents as a particular kind of '*oeuvre*.' It was only as we gathered the cases together (with the intention of reading all of the dissents) that we came to appreciate that she did indeed merit the title: of her 262 authored opinions, only sixty-nine were written on behalf of the majority. The remainder (nearly 75 per cent) were the expression of dissent, whether on the result or the reasons.[2] Clearly, the judge we had worked for did not need to be convinced that judges should dissent!

After we had read what turned out to be nearly 200 dissenting opinions, we began wondering more systematically about dissenting opinions as a phenomenon. In the spirit of engaging with Hogg and Amarnath's article, and with the rich texts of Judges Freda Steel and Robert Richards as reference, what we offer here are 'ten theses on dissent' based on some of our own work on dissenting judgments over the past years.

I *In the Canadian legal system, judicial dissent is not pathological but is structural. Judicial dissent is more than just 'a vote' on outcome. Because judicial dissent is a combination of result and reason, it is helpful, in exploring its operation, to be attentive to the differences between disagreement over results and over reasons*

Dissent is a structural feature of our legal system. This first thought may seem banal. But it is something that has struck us time and time again in our research over the years. Published judicial dissent is not a phenomenon

2 26.3% were majority reasons (of those reasons, unanimous decisions represented 14.5% of the total), 39.9% were dissents, and 33.8% were concurring reasons. See Marie-Claire Belleau & Rebecca Johnson, 'La dissidence judiciaire: réflexions préliminaires sur les émotions, la raison et les passions du droit/Judicial Dissent: Early Reflections on Emotion, Reason and Passion in Law' in M-C Belleau & F Lacasse, eds, *Claire L'Heureux-Dubé à La Cour Suprème Du Canada, 1987–2002* (Quebec City: Wilson and Lafleur, 2004) 699 [Belleau & Johnson, 'La dissidence judiciaire'].

of all legal systems. Other legal systems do the balancing that Hogg and Amarnath discuss in different ways and have views of the stability of law that result in judgments being written in the singular voice. This does not mean, however, that dissent is not playing an important part in the production of those decisions. It simply means that the dissenting views are not published.[3]

It is one thing to encourage dissent, of course, and another thing to try to understand it. In the Canadian legal order, the publication of dissenting opinions opens up our system to certain kinds of scrutiny. And this scrutiny is a site of great richness. Judicial decision making, including the phenomenon of dissent, is an area of significant interest to people in law, sociology, and political science.[4] And there are people looking at opinions from perspectives that are empirical, doctrinal, and literary. Each angle provides something of interest; each angle raises questions.

One can study dissent by focusing on specific cases and by looking at what individual judges say at specific moments in time. But time poses additional challenges. For an idea expressed in dissent at one moment in time is an idea expressed by the majority at a different time.[5] In studying dissent, then, one might be tracking the shift in ideas, for example, focusing on the difference between individual and group rights (at its most simplistic, does a court seem pro-union or pro-management?). Here, one might focus on perennial challenges where ideas are mapped metaphorically as if they were on a pendulum, sometimes leaning more towards individual freedoms, sometimes leaning more towards collective rights. From the point of view of a particular judge at a particular moment in time, the question is always surrounded by the context of 'the case.' But whether or not a judge is moved to dissent will inevitably be a question of where the other judges stand. That is, we cannot understand dissent only by looking at the dissenter. Dissent is relational, it is a

3 See e.g. Wanda Mastor, *Les Opinions Séparées Des Juges Constitutionnels* (Aix-en-Provence, FR: Presses universitaires d'Aix-Marseille, 2005).

4 In sociology, Peter McCormick has devoted significant attention to documenting the voting and writing practices of the court. See e.g. Peter McCormick, *Supreme at Last: The Evolution of the Supreme Court of Canada* (Toronto: James Lorimer and Company, 2000) [McCormick, *Supreme at Last*]; Peter McCormick, 'Blocs, Swarms, and Outliers: Conceptualizing Disagreement on the Modern Supreme Court of Canada' (2004) 42 Osgoode Hall LJ 99.

5 Individual judges have been known to change their views over time, particularly as the society around them also changes. On Dickson J's shift in thinking between *R v Morgentaler*, [1976] 1 SCR 616 and *R v Morgentaler* [1988] 1 SCR 30, see Robert J Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey*, Osgoode Society for Canadian Legal History (Toronto: University of Toronto Press, 2003) [Sharpe & Roach, *Brian Dickson*].

product of a group, and its manifestation at a particular moment thus requires attention to the full context in which the disagreement emerges. In our non-seriatim system, where dissent emerges from a dialogue with the majority and where reasons matter as much as results, the dissent is as likely to carry a will to change the law as to plead for respect of the status quo. But whichever way dissent goes, it is valuable since it challenges the reasons and the argumentation of the majority.[6]

II *Judicial language has always been a rich source of knowledge, and judicial dissent may be a particularly rich spot for exploring the place of emotion/passion in legal reasoning*

Dissent offered another interesting context for us to explore language and the place of 'voice.' We began by referring to our experience of reading the dissents of L'Heureux-Dubé J. Our experience was that they sometimes 'felt' different, seeming to be more emotionally charged than we were accustomed to seeing in judicial writing. This is not to say that we had never read majority reasons marked by emotive language. Nor is it to say that the language of emotion in a judgment comes with a countervailing reduction of reason. It is rather to say that 'passion,' which is always present in law, may be more visible in the spaces of dissent.[7] Majority judgments, with strength of numbers, undergirded by the power of 'authority' and invested in the mission of uttering 'the law,' may not need (or choose) to draw so deeply on these persuasive tools. Dissent is thus a rich location for exploring how reason and emotion are woven together in law.

In this respect, we have found the work of Jerome Bruner and Anthony Amsterdam and their articulation of 'noetic space' particularly enlightening.[8] Noetic space describes the distinctive imaginative space

6 In his work on dissent in the United States, Sunstein argues that the presence of dissenting views produces better decisions and that Republican and Democrat judges importantly influence each other on mixed benches. Sunstein identifies situations of 'ideological amplification' (the phenomenon in which like-minded persons magnify their own perspectives), showing how exposure to competing views creates ideological dampening. In short, diversity in groups tends to counterbalance 'group think,' and this seems to be true in the United States at least in regard to political affiliation. See Cass Sunstein, *Why Societies Need Dissent* (Cambridge, MA: Harvard University Press, 2003) at 4.

7 For a fuller exploration of this point, see Marie-Claire Belleau & Rebecca Johnson, 'Faces of Judicial Anger: Answering the Call' in Myriam Jézéquel & Nicholas Kasirer, eds, *Les sept péchés capitaux et le droit privé* (Montréal: Éditions Thémis, 2007) 13.

8 Anthony G Amsterdam & Jerome Bruner, *Minding the Law: How Courts Rely on Storytelling and How Their Stories Change the Ways We Understand the Law – and Ourselves* (Cambridge, MA: Harvard University Press, 2000).

maintained in every culture. It is the space linked to 'a distinctively human mental capacity that *compels* us to project our imaginations beyond the ordinary, the expectable, the legitimate – and to involve others in our imaginings.'[9] The term noetic space, they note, comes from the Greek 'nous,' which includes not only the deliberations of the rational mind but also its appetites and affections – its beliefs, desires, feelings, hopes, and intentions.[10] Noetic space is a space of the mind, a space that integrates emotions and passions. Amsterdam and Bruner tell us that noetic space is special because it allows us to test the limits of the possible. As such, it is a pragmatic place that 'must honour the limits of lifelikeness – the limits beyond which [it] cannot go without losing the imaginative engagement of the audience.'[11] Noetic space is the space of literature, stories, and plays.

We suggest that this is also an apt description of a body of judicial dissent. Judicial dissent is not simply a record of the judicial imaginary. Noetic dissent attempts to involve the legal reader in its imagination. This dissenting imagination does not merely sketch out fantasy space or utopian strivings. It is a purposefully pragmatic space. It attempts to persuade the reader that this alternative is within reach. Successful interventions in noetic space do not only say 'things could be different' but also encourage their listeners to (using the words of *Star Trek*'s Jean-Luc Picard) 'make it so.' Successful work in the noetic, we suggest, necessarily draws deeply on the tools of persuasion, attempting to convince its listeners at the rational, the emotional, and the visceral levels.

Of course, judges also have their own styles of writing and their own authorial voices. A particular judge's voice may seem warmer or colder, marked by humour, anger, passion, or restraint. For judges who have been masters in their own realm and move to appellate work, this poses new challenges of voice. It is not simply that a judge writes (in their own voice) on behalf of their fellow judges. As the number of participants increase, both dissenting and majority opinions may be the product of many different voices, voices that need to negotiate not only the message but also the way it is delivered. As in a choir, individual voices must shift to harmonize with those around them. In many cases, the resulting text (whether majority or dissenting) emerges as a truly collective work. This is another way of understanding the role of collegiality in appellate decision making.

In a conversation with L'Heureux-Dubé J, Marie-Claire posed the question: 'Did you write differently when you knew you were writing in

9 Ibid at 235 (emphasis in the original).
10 Ibid at 237.
11 Ibid.

dissent?' And the immediate answer was: 'No. It was the same.' But, later, after some reflection, the judge returned with a different answer: 'Maybe.' There was, she reflected, more freedom for the judge writing in dissent.[12] It was not that the judge did not need to think as practically about the details of enacting their view but, rather, that the dissenting judge had space to write more freely, to open the debate, to sketch out details in other realms, to explore other visions of justice. And so there was of course the follow-up question: 'What about concurrence? Is writing a concurrence more like writing for the majority or like writing for the dissent?' Again, there is space for thinking about the languages of concurrence and dissent; the times and places in which the language spills into disagreements not only over reason or, indeed, over result but also over contested visions of justice and law.

It may be that, for some judges, such spaces of dissent arise infrequently. And where dissent does arise, there are differences in what the dissenting judges articulate. Sometimes it seems enough for a dissenter to simply register an alternative path or a line of disagreement. At other times, dissenters seem to express more urgency. For the judge thinking about dissent, it may be that these questions are the ones that are weighed differently, particularly in the context of trial and first appeal courts, where, as both Steele and Richards JJ remind us, the volume of cases is high. But the point remains. Non-unanimous cases provide a rich context for exploring the languages in which judges articulate and document sites of disagreement. Both for the judge thinking of dissenting and for the reader of dissent, it is worth attending to the language in which the judicial 'path not taken' is sketched out.

III *Judges are called upon to adjudicate different types of problems, and there may thus be different types of dissent*

While there are cases that expressly require a judge to deal with highly contested questions about the ordering of our society, there are others that, though perhaps no less important, are much more technical in their import. Steele J points to this reality when she argues that the work of a judge sometimes lies in the work of correcting errors. Hogg and Amaranth advert to complex demands made on judges when they point to Judge Diane Wood's identification of three categories for her dissenting judgments: on principles, on process, and on accuracy (whether on

12 In this, she echoes the words of Laskin J, who said: 'A judge never writes more freely than when he writes in dissent.' See Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: University of Toronto Press, 2014) at 453.

law or facts).[13] These distinctions resonate with an ongoing discussion in common law jurisdictions about the range of skills necessary for legal education. In his now classic 1967 inaugural lecture, 'Pericles and the Plumber,' William Twining spoke to the tension between visions of education focused on the enlightened policy maker or the wise judge and those grappling with the need for education about the practical and vocational side of law.[14] In more recent discussions of 'Pericles as Plumber,' we again see people working with the double demands of law: that judges be alert to questions both of principle and of practice.[15] Certainly, appellate judges are pulled in both directions, and it may be that different challenges face the judge considering dissents of differing types.[16]

Certainly, the integrity of our system of appellate judging requires attention to both the 'big picture' and the 'daily operations.' Thinking about dissent through this lens was a way of helping us to really make visible the need for attention to both sets of questions. While the big picture questions may get more press time (whether in majority or dissenting reasons), the technical dissents often play equally important roles. Further, principle and practice may be woven together in complicated ways. That is, it may well be that a dissenting voice (particularly on principle) is shared in many ways by the majority, but that the majority fears that the principle cannot be operationalized without prior thoroughgoing work (on the plumbing). The articulation of a view in dissenting space may function to support public/legislative debate that must happen before forward movement is necessary. For example, people have made the argument that *Egan v Canada* operated in this way.[17] This case concerned the lack of access by same-sex spouses to pension benefits. The majority of the Supreme Court of Canada agreed that the

13 Peter W Hogg & Ravi Amarnath, 'Why Judges Should Dissent' (2017) 67:2 UTLJ 126 at 133–34, citing Diane P Wood, 'When to Hold, and When to Reshuffle: The Art of Decision Making on a Multi-Member Court' (2012) 100 Cal L Rev 1445 at 1463–73 [Wood, 'When to Hold'].

14 This article is drawn on in debates about the shape of legal education; William Twining, *Pericles and the Plumber: An Inaugural Lecture Delivered before the Queen's University of Belfast on 18 January 1967* (Belfast: Queen's University, 1967)

15 Craig Collins, 'Pericles Was a Plumber: Towards Resolving the Liberal and Vocational Dichotomy in Legal Education' in Ian Morley & Mira Crouch, eds, *Knowledge as Value: Illumination through Critical Prisms* (Amsterdam: Editions Rodopi, 2008) 189.

16 Bonnie Androkovich-Ferries explores dissent at the Supreme Court of Canada in her Master's thesis and suggests a slightly different typology to get at the variety of forms of dissent that is visible. She identifies: decisions in waiting; creative; failed accommodations; repetitive; and perfunctory. See Bonnie Androkovich-Ferries, 'Judicial Disagreement Behaviour on the Supreme Court of Canada' (Master's thesis, University of Lethbridge, 2004).

17 *Egan v Canada*, [1995] 2 SCR 513.

Pension Act denied pension benefits to same-sex couples, where those same benefits were available to heterosexual couples.

Five of the judges 'saw' discrimination on the basis of sexual orientation.[18] But one of those five judges concluded that, since sexual orientation was still a 'novel' form of discrimination, the government's decision to deny benefits in this way was reasonable in a free and democratic society (according to section 1 of the Canadian Charter of Rights and Freedoms).[19] In short, one majority gave 'recognition' (by acknowledging that the plaintiffs suffered discrimination), but a different majority denied 'redistribution' (by allowing the discrimination to continue).[20] Questions of principle and practice were powerfully articulated in both the majority and the dissenting space. One might see the Court here as sidestepping, by offering something (and denying something) to each side. There is, however, an argument to be made that this form of mixed dissent operated as a way of 'holding space,' maintaining a kind of legal uncertainty to enable the case to do its work in the social and political domains. One cannot help but wonder if this 'interim dissenting space,' in fact, played a part in the eventual shift in legal and social politics that led to a more thoroughgoing shift in the Canadian legal landscape in *Vriend v Alberta* and *Reference re Same-Sex Marriage*, which were to follow.[21]

IV *While possibility of dissent is always present, it may emerge with more or less intensity both across different topic areas of law and in different periods of time*

Dissent, while always possible, is, of course, not present in every case. Nor is it evenly distributed across appellate courts. As all three articles point out, dissent rates are much lower in the provincial appellate courts than at the Supreme Court of Canada. But given the facticity of dissenting practice, are there particular topic areas that are more likely to generate dissent? In one early piece of research, we gathered together all

18 *Pension Act*, RSC 1985, c P-6.

19 Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

20 Indeed, the case raises a classic instance of the redistribution/recognition dilemma outlined by Nancy Fraser, *Justice Interruptus: Critical Reflections on the 'Postsocialist' Condition* (London: Routledge, 1996).

21 *Vriend v Alberta*, [1998] 1 SCR 493 (reading in sexual orientation as a prohibited ground of discrimination); *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698 (upholding the constitutional validity of same-sex marriage in Canada). This is a significant shift from *Canada (Attorney General) v Mossop*, [1993] 1 SCR 554. In this case, just over ten years earlier, the majority of the Supreme Court of Canada had upheld the definition of spouse requiring partners to be of the opposite sex.

the Court's cases from 1982 to 2004 and organized them by topic (using the topics designated in the headnotes).[22]

Several things were visible in the numbers, and some were what we expected to see. For example, given patterns of funding for legal aid, certain topics were more highly represented than others. We were unsurprised to gather 913 criminal law cases and 313 constitutional law cases and were similarly unsurprised that private law cases in the same period appeared in much lower numbers (for example, seventy-four family law, sixty-four corporate law, fifty-nine insurance, and thirty-three secured transactions). But it did not seem to be the case that dissent rates within these topics were correlated with the frequency with which the topic was addressed by the Court. That is, a small number of cases within a topic does not mean a small proportion of dissent within that topic. So, for example, while there were about the same number of 'jury' and 'bank' cases during the period, fourteen of the twenty-three jury cases involved divided cases (60 per cent dissent in this topic), while only six of the twenty-four bank cases divided (25 per cent dissent in this topic).

We also noted that the general topic headings (like 'criminal law') masked differential patterns of dissent within that topic. For example, the general topic of criminal law included 913 cases, of which 413 involved dissent, equalling a dissent rate of 45 per cent, which places it just above the mean dissent rate of 43 per cent for all cases during that period. However, when those cases were followed into their secondary headings, the profile changed. Criminal law cases in the 'substantive' and 'investigation' categories showed significantly higher rates of dissent; those in the 'trial process' and 'sentencing' categories showed much lower rates of dissent.[23] This difference in dissent rates brings to mind Richards J's suggestion that judges show restraint when considering dissent in sentence appeals.[24]

We were also unsurprised to find that, while dissent ultimately was present in every topic, there were indeed areas that showed a greater intensity of dissenting practice. However, we did note that the topics generating lower levels of dissent occurred mainly in areas of private law and, more specifically, private economic law. This observation led us to

22 A chart of the data can be found at Rebecca Johnson, 'Topics of Dissent: Some Questions' *Judging Dissent* (September 19, 2016), online: WordPress <https://judgingdissent.wordpress.com/2016/09/19/topics-of-dissent-some-questions/>.

23 For 'substantive law,' the rate was 59.77% (104 of 174 cases). For trial process, the rate was 53.8% (99 of 184 cases). Trial process had a rate of 40.9% (227 of 555 cases); sentencing has a rate of 39.19% (29 of 74). Only 2 cases were identified by the topic 'general,' and neither of these involved a dissent (0 of 2 cases, for a 0% dissent rate). See *Judging Dissent*, *Ibid.*

24 Robert G Richards, '"Writing Separately"' (2017) 67:2 UTLJ 149.

reflect on Justice Bertha Wilson's famous address, 'Will Women Judges Really Make a Difference?' In this speech, one in which she suggested that diversity on the bench would bring new viewpoints into the dialogue, she also suggested that there were whole areas of law where the principles were so sound and fixed that there would be no need to 'invent any new spokes.'[25] She went on to say that she had in mind areas of law like real property, contract, and business associations. A look at the data on topics seems to bear out her observation. Those were indeed topic areas showing lower levels of dissent.

More interestingly, when we read those cases in order to think more about the forms of dissent captured in cases around business associations, corporations, banking, and bankruptcy, we noted that very few of them involved dissents that were principle based or process based. Such dissent as there was seemed most likely to fall in the category that Wood J described as 'accuracy based.'[26] In particular, where there was dissent, it often involved a conflict over the facts in the case rather than over principles of law. Indeed, in our own exploration of dissenting judgments, we also noticed that even those judges most known for dissent do not seem to show that pattern in these areas of law. We were left wondering if there were something to be learned from thinking more about this space of apparent unanimity.

V *There may be as much to learn from low levels of dissent as from high levels of dissent – that is, it may be important for legal scholars to attend to spaces where dissent is absent: unanimity should also be the subject of our critical eye*

Often, it seems that dissent is the thing that must be justified, that certainty has a greater value, and that those who argue for change bear the burden of argument. The proper balance between stability and change was at the heart of the argument between Edmund Burke and Alexander de Toqueville at the time of the French Revolution. The tension between stability and change, between certainty and responsiveness, is one of the great and unavoidable tensions in law. It is here that dissent may indeed be important for making visible alternative threads within a legal question, such that the current law is better understood as a provisional holding place rather than as something fixed and permanent. With this in

25 Bertha Wilson, 'Will Women Judges Really Make a Difference?' (1999) 28 Osgoode Hall LJ 507 at 515 [Wilson, 'Will Women Judges'].

26 Wood, 'When to Hold,' supra note 13.

mind, it is worth noting that there are reasons to turn as much of a critical eye to unanimity as to dissent.

Noteworthy to us is the seeming unanimity of presumptions about business and about the need for certainty rather than ambiguity. Indeed, in these cases, there seems to be a certainty so thoroughgoing that it prevents even the articulation of alternatives. For us, this seems most clear if one sets alongside each decision a judicial commentary on 'the best interests of the child' and 'the best interests of the corporation.' In the former, there is significant room for discussion about what it means to be a fiduciary for a child as well as contestation over what its best interests might be, including differences between parents who both have relations to that child and who disagree as to what his or her best interests might be. In the context of a corporation, again we have a legal person whose legal life is linked to the directors who are in a fiduciary relationship to it. But, in the case law, we do not see a significant judicial contestation over what the 'best interests of the corporation' might be.[27]

On these latter questions, there is minimal discussion. One might join with Joel Bakan in concluding that judges are enforcing the hegemony of corporate culture in their decisions.[28] This is not quite the argument we make here. What intrigues us is the seeming absence of alternative imaginaries on this question. Judges, as we said earlier, also understand themselves as limited by the arguments brought before them as well as by the 'legal consciousness' they acquire – as all jurists do – through training and practice.[29] If we see a lack of judicial imagination when it comes to this area of law, one might argue that it is shared in legal culture more generally, as, indeed, it is in large segments of our broader culture.

The absence of dissent is itself worthy of interrogation. The absence of dissent may tell us that there is broad agreement on legal principles. But it may also point to a number of questions as to why there is such seeming agreement, particularly in the face of increasingly visible local and

27 Indeed, the two main pronouncements from the Supreme Court of Canada on this question involve unanimous decisions. See *Peoples Department Stores Inc (Trustee of) v Wise*, [2004] 3 SCR 461; *BCE Inc v 1976 Debentureholders*, 2008 SCC 69, [2008] 3 SCR 560.

28 Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997). Related questions are pursued in Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Toronto: Penguin Canada, 2004); Harry Glasbeek, *Wealth by Stealth: Corporate Crime, Corporate Law and the Perversion of Democracy* (Toronto: Between the Lines, 2002).

29 Duncan Kennedy, 'Toward a Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940' (1980) 3 Research in Law and Sociology 3.

global social movement protests over income inequality and the design/operation of global financial markets.[30] The absence of dissent over 'principles' in these areas is also worth some thought. If there is space for noetic alternatives and contested imaginaries in other topics linked to foundational concepts (equality, justice, best interests of the child, and so on), why is it that contestation is not also possible when the subject is our current economic order? This is something that is worth thinking about.

VI *Identity sometimes plays a role in judgment. The diversity inherent in experiences of identity may manifest itself in practices of dissent. It is worth asking questions about how identity may be playing a role through dissent*

In the process of thinking about all of the good reasons for the practice of dissent, we found ourselves wondering about judicial diversity, and so we returned to Wilson J's article 'Will Women Judges Really Make a Difference?'[31] We were certainly intrigued by the early research suggesting that the pioneer women on the Supreme Court of Canada dissented at above average rates.[32] What intrigued us initially were questions about the place of 'difference' in dissent. That is, we wondered about gender and dissent.[33] What could be learned by looking not simply at how judges voted but also at the ways they participated in the writing of majority, dissenting, and concurring opinions? How was difference articulated through dissent? What role, if any, did 'identity' play in the work of judges?

And so we looked at practices of dissent with an eye on gender, noting the ways that identity has surfaced as a marker in different ways and at different times.[34] For example, at one point in time, the three judges

30 Questions of economic ordering have been a focus of many world social forum meetings, various G7 protests, protests in the Occupy movement, and in much of the Idle No More activism. See Nancy Fraser, *Undoing the Demos: Neoliberalism's Stealth Revolution* (Cambridge, MA: The MIT Press, 2015).

31 Wilson, 'Will Women Judges,' supra note 25.

32 McCormick, *Supreme at Last*, supra note 4; FL Morton et al, 'The Canadian Charter of Rights and Freedoms: A Descriptive Analysis of the First Decade, 1982-1992' (1994) 5 NJCL 1.

33 E.g. Marie-Claire Belleau & Rebecca Johnson, 'Les femmes juges feront-elles véritablement une différence? Réflexions sur les décisions des femmes juges à la Cour suprême du Canada' (2005) CJWL 27; Marie-Claire Belleau & Rebecca Johnson, 'Judging Gender: Difference and Dissent at the Supreme Court of Canada' (2008) 15 International Journal of the Legal Profession 57; Marie-Claire Belleau & Rebecca Johnson, 'La diversité identitaire et les opinions dissidentes de la Cour suprême du Canada: conséquences sur la sécurité juridique?' (2008) 110 La Revue du Notariat 319.

34 Belleau & Johnson, 'La dissidence judiciaire,' supra note 2; Marie-Claire Belleau et al, 'Les décisions de la juge McLachlin à la Cour suprême du Canada: une analyse statistique comparative' in D Wright & A Dodek, eds, *Public Law at the McLachlin Court: The*

with the highest rates of dissent had been L'Heureux-Dubé, Wilson, and McLachlin JJ, who were also the first three women appointed to that Court. Data gathered in the first ten years of Charter jurisprudence, however, also made visible the fact that the first three women judges did not vote together: they were as likely, indeed, to disagree with each other as with their male colleagues. What was shared in that period of time was rather a higher than average propensity to see something different in a given case and then write about it in dissent.

But, as we continued to track the cases over the years, it was also visible that these differences (identity markers) seemed to be more or less evident at different moments in time.[35] So, for example, Justice Beverley McLachlin's dissent rate moved in a downwards rate over time. This move had also been true of Justice Bora Laskin and Justice John Sopinka. Again, this makes visible simply that different time slices make visible different tensions and patterns of disagreement.

What the data suggested was not that the outcome of a decision could be predicted by the gender, race, or religion of a judge but, rather, that difference (of the sort sometimes described through markers of identity) was sometimes productive of dissent. Of course, there were other questions that came up for us as we explored the place of identity within the phenomenon of dissent. In particular, we were reminded that dissent is not just a function of the dissenter. In some ways, a dissent may be as much a production of 'the majority that cannot incorporate the insight' as it is a product of 'the judge who sees something different.'[36]

First Decade (Toronto: Irwin Law, 2011) 39 [Belleau et al, 'Les décisions de la juge McLachlin']; Marie-Claire Belleau et al, 'Voicing an Opinion: Authorship, Collaboration and the Judgments of Justice Bertha Wilson' (2008) 41 SCLR (2d) 53; Marie-Claire Belleau et al, 'L'honorable Charles D Gonthier: une analyse jurisprudentielle quantitative compare' in Michel Morin et al, eds, *Responsibility, Fraternity and Sustainability in Law: In Memory of the Honourable Charles Doherty Gonthier* (Markham, ON: LexisNexis Canada, 2012) 51.

35 E.g. McLachlin J's dissent rate decreased over time. This was true also of Laskin J. Other judges show other patterns. Again, this makes visible simply that different time slices make visible different tensions and patterns of disagreement. See Belleau et al, 'Les décisions de la juge McLachlin'].

36 In the Wilson biography, Lamer J comments that the judges did not really bother talking to Bertha because they thought her mind was made up in any event. See Ellen Anderson, *Judging Bertha Wilson: Law as Large as Life* (Toronto: Osgoode Society for Canadian Legal History, 2001) at 152–5, 415, n 11, 12. We find ourselves here reflecting on Simone de Beauvoir's argument in *The Second Sex* (New York: Vintage Books, 1989 [1952]) that woman is not born, she is made. In the context of Wilson J's practices of dissent, is it possible to argue that her dissents are the production of colleagues who had already constructed her as outside the ordinary practices of collaborative work, in effect bringing her dissenting opinions into existence?

VII *Dissent may play an important part in the process of decision making in ways that are not necessarily visible in the outputs (written reasons) of judicial work. This is perhaps as true of judging at the trial level as it is for judges at the appellate courts and the Supreme Court of Canada*

In their contribution, Hogg and Amaranth remind us of the important insight that an unpublished dissent (that is, a draft dissenting opinion circulated among judges) may become a majority judgment. We also know that it is possible for an unpublished majority to end up as a dissent. In each case, there are active currents and movements involved in the work done by appellate judges as they struggle to work with their colleagues to produce the best possible judgment. Steele J's use of the language of 'invisible dissent' serves as an important reminder of the need to think about dissent not only as an outcome or product but also as being deeply implicated in the process of decision making.

Dissenting voices may operate behind the scenes in ways that are not completely visible in the 'final product' of a case. Indeed, the dissenting voice may have an impact on the outcome in ways that are hard to capture or predict. While it is rare for the outsider to be able to see into that process, we have occasional glimpses into the complex world of judging. One interesting example can be found in Robert Sharpe and Kent Roach's biography of Justice Brian Dickson in a discussion of *Tremblay v Daigle*.[37] In this case, a man had been awarded an injunction to prevent his former girlfriend from having an abortion. Dickson J had moved with uncommon speed, taking the unusual step of re-convening the Court during the summer on an emergency basis, recalling judges from abroad. On the morning of the hearing, Daigle's lawyer had to inform the Court that his client had taken matters into her own hands and had crossed the border to obtain an abortion. Dickson J was, we are told, furious. One can certainly understand how he would have felt betrayed that Daigle had, unbeknownst even to her own lawyer, accomplished the act that the Court was trying to rule on. The anecdote makes visible his frustration and the possibility not only that the case could have been rendered moot but also that Daigle could have been found in contempt of court. Sharpe and Roach go on to tell us that a comment by McLachlin J seems to have changed Dickson's mindset:

> She suggested that the Court put themselves 'in Daigle's shoes.' Daigle's pregnancy was already past three months. She was a desperate woman who did not want to have the child of the man who had abused her. Daigle had no idea

37 [1989] 2 SCR 530. For a full discussion of this case, see Sharpe & Roach, *Brian Dickson*, supra note 5 at 392–5.

when she might have an answer from the Court . . . Could she really be blamed for going to the United States to have her abortion? McLachlin's plea carried the day: 'I thought I could almost see [Dickson's] face change, I don't want to attribute this to my eloquence. There was nothing eloquent to my comment, but he was seeing it from her point of view.'[38]

This story opens a window into the process, making visible the importance of multiple viewpoints being brought into interaction with each other. One may or may not think of these discussions as strictly speaking 'dissents,' but they do make visible the relational dimensions of decision making. We often focus on dissent only as an output, but it can also be understood as a process, operating behind the scenes, one in which arguments are heard, accepted, rejected, and adapted. Dissenting energies may be invisible, or their traces may be visible in unexpected ways.[39] In some cases, for example, a dissenting opinion may seem so small and contained that one might wonder why the judge bothered. It may be that those reasons started as much richer text but that their major concerns were taken up into another opinion, leaving a smaller text behind. The original dissenting energies may have changed, transformed, and, hopefully, made the resulting texts better, tighter, and stronger. Different metaphors make different aspects of this process visible. One can think of ideas being borrowed, incorporated, or modified or of a dance, where ideas are put into movement, or of a game where drafts are tossed back and forth and changed in the process. These shifts and moves can be so strong that a dissent may be largely eviscerated, being reduced to almost nothing. It may also be that a dissent largely vanishes because the majority has changed its views.[40] Either way, the collegiality of the judges is put to the test as judges make good on their obligations to really listen to the ideas expressed in dissent, rather than just dodge them. The end result of this process is not necessarily consensus, but the texts that ultimately result are often themselves the product of the processes of dissenting practice.

38 Ibid at 395.

39 McCormick attends to just such 'traces' in his exploration of dissenting or concurring opinions that seem to have started off as majority judgments. What his work makes visible are the robust practices off dialogue and discussion in which dissenting threads play multiple and crucial roles in shaping the eventual written judgments. See Peter McCormick, '"Was It Something I Said?": Losing the Majority on the Modern Supreme Court of Canada, 1984–2011' (2012) 50 Osgoode Hall LJ 93.

40 E.g. Sharpe & Roach, *Brian Dickson*, supra note 5 at 405, suggest that the unanimous decision of the Court in the *Ogg-Moss* case started its life as a dissent. See *R v Ogg-Moss*, [1984] 2 SCR 174 (the case concerned the use of supposedly 'corrective' force against an adult living with mental a disability).

VIII *Dissent may play itself out in different ways for trial, appellate, and supreme court justices, but the currents of dissenting thought are important to the business of judging in all three locations*

Hogg and Amarnath point out that judges on the appellate courts dissent less than do judges on the Supreme Court of Canada. There is something to be learned through looking at how the structures of our institutions are related both to practices of dissent and to the different horizons confronted by judges within those institutions. When a judge dissents in our three-person appellate courts, he or she is always dissenting alone. An appellate judge, sitting on a bench of three, only needs to convince one colleague to form a majority. At the Supreme Court of Canada, a judge needs to persuade four colleagues on a bench of nine, three on a bench of seven, and two on a five-judge formation. There are certainly dissents that sound and feel like majority decisions because they are so close to being majority decisions. In some cases, it is only a matter of convincing one more judge to join. Lone dissents often have a different feel.

We have given many presentations on our work to trial judges and have been struck by the number of judges who approached us to say that they often felt themselves in the space of dissent even when sitting alone. These judges, bound by the rules of precedent, understood themselves as drawing on traditions of dissent when they refused to follow the decision that supposedly bound them. In this refusal, we wondered about the extent to which the judges were feeling the currents of theory that we articulated earlier. Judges, like the rest of us, find themselves pulled between the currents of stability and change, attempting to do justice, both for the parties and for the legal order around them. The judge sitting alone is still grappling with the concept of dissent. The trial judge, using the language of precedent, is often in the same position, taking seriously their job of both working with, and against, the law and of dissenting against that law in the context of their solo decision making.

IX *Dissent is an important form of legal pedagogy, both in the law school classroom and in the arena of public discourse. There is much to be learned about law through exploring the practices of disagreement captured in dissent*

As law professors, we often find ourselves thinking about dissent in the space of the classroom. In teaching first-year law, one of the challenges is the presumption shared by many students that the law found is primarily in the result, not in the reasons. Students often default to a practice of memorizing rules or outcomes rather than focusing on the reasoning.

Thus, in the rush to prepare for exams, students too often take the position that dissents can largely be ignored. It is sometimes a challenge to disrupt the belief that the dissent is tangential to 'the law,' that law is most properly captured in its outputs rather than in its relations, in its rigidities rather than in its uncertainties. Certainly, one can appreciate this desire for certainty, since taking a relational approach to dissent as a phenomenon can feel a bit like trying to grasp the space in between two moving objects. However, invoking again the concept of the noetic space, those interstices are exactly what opens the realm of possibilities to what the law might be to the various concerns that emerge at moments of legal decision making.

Further, there is much to be learned by exploring the practices of disagreement that are modelled in majority and dissenting opinions. It matters how the judges (in the majority and in the dissent) understand themselves as speaking to litigants, the legal profession, or the public more generally. Perhaps it also matters how 'we' (as litigants, the legal profession, or the public more generally) listen when judges speak. Discussions about the importance of dialogue tend to focus more on the speaking, than on the listening, side of the equation. Dissent offers occasions for us to work on the skill of listening, to approach the dissenting opinions with a tasting mind rather than only a judging mind.[41] Maybe part of the goal is for the profession and the public to be more engaged in our consideration of dissent: to see dissents not necessarily as spaces of uncertainty or foreclosed possibility but, rather, as important sites for ongoing discussion.[42] How we disagree matters, and it is important that disagreement be modelled well.[43] It also matters that we learn from how those disagreements are structured and how they play out.

These questions of pedagogy have been at the front of our minds as we have been thinking about the work of the Truth and Reconciliation Commission (TRC), with its emphasis on the need for increased attention to Indigenous legal orders and Indigenous law. There is work that lies ahead as those legal traditions are revitalized and given space for their own practice. The TRC's Recommendation no 27 (directed to law societies) and

41 JK Gibson-Graham, *Postcapitalist Politics* (Minneapolis: University of Minnesota Press, 2006) at xxvii.

42 And if one were to take a page from Cree scholar Tracy Lindberg's novel, *Birdie* (New York: Harper Collins, 2015), it might be to think about other ways to work through conflict. Whether or not a dissenting opinion 'gets it right,' the very fact of the dissent signals that we are in a space where what is required is care and attention.

43 Val Napoleon, 'Demanding More of Ourselves: Indigenous Incivility' (forthcoming). Here, she builds on Charles Taylor, 'Crises of Democracy' (Keynote address delivered at Civic Freedom in an Age of Diversity: James Tully's Public Philosophy, April 2014, Montreal, QC).

Recommendation no 28 (directed to law schools) speak to the need for legal professionals to have skills-based training in conflict resolution.[44] The recommendations indicate that the legal profession needs to have a better understanding of what it means to collaborate, what it means to be collegial, and what it means to articulate disagreement. As both lawyers and judges begin to grapple with the increased intercultural competencies required of us, and with the intersections of settler and Indigenous laws, it will be increasingly important to attend to practices of dissent and disagreement and the ways that law can enable space for those who see things otherwise to have their reasons articulated, even where this means holding in abeyance the drive for certainty and closure.

X *There is room in discussions about dissent to talk about the role of the reader. It is worth thinking about the ways lawyers might attend to dissenting threads in their work and the ways that dissenting currents might form a more robust part of larger societal discussions about law*

Lawyers too must consciously engage in the work of imagining alternate possibilities and ways of seeing and in providing judges with arguments that will enable the exploration of alternate threads in the tapestry of justice. As we find ourselves reflecting on dissent more generally, we ask what are the implications of dissent for those of us who are not called upon to act in the role of judges but, rather, are the witnesses to judgment? Members of 'the jury,' if you will.[45] What can we say about the obligations of those who fill this role? In their article, Hogg and Amaranth note that judges are communicating with a number of different audiences when they dissent. They are speaking to judges on their own court, they are speaking to higher and lower courts, and they are also speaking to international courts. Perhaps it goes without saying that judges are also speaking to the people, but it may be worth pausing to reflect more on this dimension of the judges' work. We do focus on the place of reasons in the work of judging. The judge seeks to articulate not only an outcome but also the rationale. The rationales are sometimes principle based, process based, or accuracy based. And the judges are speaking generally in the language of law. But, in this language, judges

44 See *Truth and Reconciliation Commission of Canada: Calls to Action*, online: Truth and Reconciliation Commission of Canada <http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf>.

45 For the classic articulation of the ways in which viewers/readers are positioned as 'the jury,' see Carol J Clover, 'Law and the Order of Popular Culture' in Austin Sarat & Thomas R Kearns, eds, *Law in the Domains of Culture* (Ann Arbor: University of Michigan Press, 1998) 97.

are trying to articulate some dimension of justice. And in the divided judgments, judges are sketching out for their readers a number of options, a number of paths for understanding a particular challenge of justice. And it is here that we think the discussion of dissent can usefully be turned to ask about the role of the reader.

If judges have a responsibility to dissent, what does this suggest about our responsibilities, either in the legal profession or as citizens of a nation, to grapple with that space of dissent? It seems to us that there is more than simply the virtues of transparency and individual responsibility in judging. There is something in the articulation of dissent that is important for how we understand the place of justice in our society. Perhaps it matters not just that these divergent views are 'articulated' but also that they are 'heard.' Thus, whether or not people engage in the practice of dissent, it matters both how we think about it and how we nourish it.

This is a place where lawyers, law professors, and the public more generally might begin to use the concept of dissent to think about ways that our system of justice operates, renews itself, and changes. The space of dissent allows for the articulation of possibilities in law and in other spheres of society. The articulation of alternative imaginaries of justice need not be feared. But it does need articulation and exploration, and it does need to be argued before judges in ways that allow judges to draw new ideas and new concerns into the frame of discussions. Alternative imaginaries of justice may also emerge not only in the courts but also in civil society. It may also require us, as readers and listeners, to hear judges who dissent and to read and listen generously in order to better understand the various threads that are operating in law and in order to better value the place of ambiguity and possibility in law. It may require us also to better read for absence, listen for silence, and become aware of invisibility.

By this suggestion, we do not mean simply criticizing judges for the things they have not said. Rather, we mean asking about the ways in which law's articulations of justice may be lagging behind our social experiences of justice in society. At the end of the day, the judges are indeed in conversation with the rest of us. We close then with the words of James Boyd White:

> The lawyer and judge live constantly at the end of language, the edge of meaning, where the world can be, must be, imagined anew; to do this well is an enormous achievement; to do it badly, a disaster of real importance, not only for the lawyer or judge but for the social world of which they are a part, including the particular people whose lives they affect.[46]

46 James Boyd White, *The Edge of Meaning* (Chicago: University of Chicago Press, 2001) at 223.