“COMMON SENSE” AND LEGAL JUDGMENT: COMMUNITY KNOWLEDGE, POLITICAL POWER AND RHETORICAL PRACTICE

by

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Abstract

This dissertation is a critical, interdisciplinary assessment of "common sense." More specifically, "common sense" is located in relation to practices of legal judgment that have the potential to address injustices occasioned by poverty and inequality. Taking methodological guidance from the work of Ludwig Wittgenstein, augmented by feminist theory, my goal is to construct a "perspicuous representation" of "common sense" in legal judgment.

I engage with the writings of three major thinkers who use the language of "common sense" to communicate their ideas: 18th century Scottish philosopher Thomas Reid, Italian Marxist political thinker and activist Antonio Gramsci, and political theorist Hannah Arendt. I place their writings in conversation with Canadian Supreme Court jurisprudence in which judges invoke the phrase "common sense," including cases about the admissibility of expert evidence, the justification of breaches of the *Canadian Charter of Rights and Freedoms*, and the definition of judicial impartiality. Special attention is paid to the case of *Gosselin v. Quebec*, in which the Court prominently relies on "common sense" to uphold the constitutionality of social assistance regulations that placed young adults in dire poverty.

The meaning and consequences of "common sense" in legal judgment are more complex than might be anticipated. Unreflective reliance on common sense poses a significant threat to the quality and legitimacy of legal judgment. Common sense is rhetorically powerful and can be self-justifying. Yet, when different aspects of common sense are explored with careful critical attention, its democratic, egalitarian and community-sustaining components are also brought to light. This is very important in cases involving poverty and social marginalization, where the invocation of "common sense" strikes at the heart of many issues raised by the three theorists, including the value of quotidian and non-expert knowledges, the boundaries of reasonable debate, the significance of political history and social relations of inequality, and the way common sense claims both reflect and create communities.

This dissertation offers some criteria to guide the use of common sense in practices of legal judgment, and generates new ways of thinking about and using common sense as a part of rigorously reflective and politically accountable legal judgment.

Preface

This dissertation is original, unpublished, independent work by the author, Patricia Cochran.

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Chapter 1 – Introduction

In the late 18th century, when the phrase "common sense" began to appear in the works of some of his fellow philosophers, Immanuel Kant famously wrote the following scathing comments:

> It is indeed a great gift of God to possess right or (as they now call it) plain common sense. But this common sense must be shown in action by well-considered and reasonable thoughts and words, not by appealing to it as an oracle when no rational justification for one's position can be advanced. To appeal to common sense when insight and discovery fail, and no sooner – this is one of the subtile discoveries of modern times by which the most superficial ranter can safely enter the ranks of the most thorough thinkers and hold his own. But as long as one particle of insight remains, no one would think of having recourse to this subterfuge. Seen clearly, it is but an appeal to the opinion of the multitude, of whose applause the philosopher is ashamed, while the popular charlatan glories and boasts in it.[1]

Some two hundred years later, Lord Reid, Scottish Law Lord, addressed the Society of Public Teachers of Law on the topic of "The Judge as Lawmaker." During this speech, he said:

> We should, I think, have regard to common sense, legal principle and public policy in that order. We are here to serve the public, the common ordinary reasonable man...Sometimes the law has got out of step with common sense. We do not want to have people saying: 'If the law says that the law is an ass'.[2]

These two quotations, while apparently opposed in terms of their direct argument about the value of common sense, come together in their illustration of some of the most important aspects of "common sense" as a part of human judgment and discourse. In the conversation about "common sense," the cast of characters includes "the most thorough thinker," "the

1 Quoted in Noah Lemos, *Common Sense: A Contemporary Defense* (Cambridge: Cambridge University Press, 2004) at 64.

2 Quoted in FKH Maher, "Common Sense and Law" (1971) 8 Melb U L Rev 587 at 600.

philosopher," and the "common ordinary reasonable man." We also encounter the "superficial ranter," the "popular charlatan," and the "people saying...the law is an ass." The character of Queen Common Sense herself appears as an embattled monarch in a farce called *Pasquin,* written in 1736 by English playwright and satirist Henry Fielding.[3] In that play, Queen Common Sense readies herself for battle with the invading Queen Ignorance, only to meet an untimely death at the hands of traitorous advisors, who are none other than "Law," "Physick" and "Firebrand." A whole host of personalities circulates around the idea of common sense. And it becomes clear that "common sense," either as pseudo-philosophical subterfuge, the fundamental basis for the common law, or a symbol of popular political will, carries with it an undeniable rhetorical power.

Given all of this, when a judge in a court of law uses the language of "common sense" to explain her or his reasons for judgment, which character is she or he inhabiting? The philosopher? The charlatan? The common ordinary reasonable man? Further, who is the "public," who are the "people," who constitutes the "multitude" for a legal judgment? In the following pages, I interrogate many of these characters who speak of "common sense," not directly but by the way they occupy the work of thinkers and judges. I reflect on how their words and actions relate to practices of good legal judgment.

When Kant wrote the passage quoted above, his worries were mostly about the capacity of

3 Henry Fielding, *Pasquin: A Dramatick Satire on the Times: Being the Rehearsal of Two Plays, viz. A Comdy call'd The Election; And a Tragedy call'd, The Life and Death of Common-Sense* (Cambridge: Chadwick-Healey, 1997).

"common sense" to interfere with the quality of philosophical discourse, and thereby impede the search for truth. My concerns are different. While I am also interested in questions about communication and rhetoric, my central concerns are not about the practices of philosophy, but rather about practices of legal judgment and questions about justice in a society characterized by diversity and inequality. Indeed, this dissertation is animated by the claim that the existence and persistence of poverty, and the discrimination, marginalization and oppression that accompany it, are some of the most urgent challenges for justice in contemporary Canadian society. This dissertation shows that "common sense" is a powerful concept, and that when invoked in legal judgment without adequate reflection, it can harbour stereotypes, reproduce unjust power relations, and silence marginalized people. When legal judgment engages with the deep injustices of poverty, inequality and social marginalization, unreflective reliance on common sense poses a significant threat to the quality and legitimacy of legal judgment. Yet, at the same time, "common sense" carries with it multiple intellectual and political histories, and when different aspects of common sense are explored with careful critical attention, its democratic, egalitarian and community-sustaining components are also brought to light. This dissertation offers a critical account of "common sense" in legal judgment, and seeks to generate new ways of thinking about and using common sense as a part of fully reflective and accountable legal judgment.

Questions about the role of common sense in legal judgment acquire much of their significance from our understanding of justice and the criteria for good legal judgment. The words "common sense" invoke claims about knowledge, about community, and about the value of

different modes of reasoning; all of these relate directly to the value and legitimacy of our practices of legal judgment and their capacity to effect justice. Common sense is importantly related to practices of judgment.

The social context that characterizes contemporary Canadian society gives all of these issues further significance. Claims about "common sense" in contemporary society are set in a social context characterized, not only by commonality, but also by marginality and inequality. It is a context characterized, not only by the obvious or the self-evident, but also by deep disagreements about what is known, and what should be known, by impartial legal judges. How can a legal judge[4] use his or her "common sense" when this knowledge may not be held in common with the individuals and communities who are subjected to the law? From the perspective of justice and good legal judgment, the use of "common sense" in legal judgment is problematic on its face. To investigate this problem most fully, I explore "common sense" in a context that dramatically challenges the boundaries of common sense's claims: the injustices of poverty. Here, "common sense" is not only problematic and easily misused, it is operating where people are already denied access to essential resources and political participation, where people cannot withstand further injustice. Here, there can be no tolerance for practices of legal judgment that further silence people already marginalized in public life.

This dissertation is grounded in feminist and anti-poverty political commitments and theoretical

4 In this dissertation, I discuss legal judgment as a form of the larger human practice of judgment. To reflect this approach, when referring to judges in a court of law, I sometimes use the (unconventional) term "legal judge," to distinguish this person from other kinds of judges who are making judgments, for example, about art or politics. Further discussion of this choice of language is at p. 52.

frameworks. I adopt an approach to "justice" that seeks equality throughout collective life, including in economic distribution, cultural status and political participation.[5] Following on this, I suggest that the best practices of legal judgment are those that are most able to respond to the demands of this broad understanding of justice in a diverse and unequal world. Good legal judgment should effect just outcomes.

However, in this dissertation, I take a largely procedural approach to the question of legal judgment: I am interested in *practices* of judgment and ideas that can be used to make those practices better. I focus on the ways in which feminist and anti-poverty approaches generate criteria for assessing practices of judgment as such. These approaches demand attention to power, attention to social context, and critical self-reflection.[6] In response to these demands, when evaluating practices of legal judgment, I prioritize notions of equality and social inclusion, and refer to criteria such as transparency, accountability and reflexivity. From a feminist and anti-poverty perspective, the issues raised by thinking about "common sense" – about knowledge, about community, about difference, and about reasoning and persuasion – are absolutely central to practices of good legal judgment.

All of these questions about the role of "common sense" in legal judgment converge with the

5 My understanding of justice is significantly informed by the work of Nancy Fraser. See: Nancy Fraser, Scales of Justice: Reimagining Political Space in a Globalizing World (Columbia University Press, 2009) ["Scales of Justice"]; Nancy Fraser & Axel Honneth, Redistribution or Recognition?: A Political-Philosophical Exchange (London: Verso, 2003) [Redistribution or Recognition"]; Nancy Fraser, "What's Critical about Critical Theory?: The Case of Habermas and Gender" in *Feminism as Critique* (Minneapolis: University of Minnesota Press, 1987) 31 ["What's Critical"]; Nancy Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy" in Craig Calhoun, ed, Habermas and the Public Sphere (Cambridge: MIT Press, 1992) 119 ["Rethinking the Public Sphere"]. See further discussion below at page 57.

6 These approaches and their consequences are discussed more fully in chapter 2.

Supreme Court of Canada's 2002 decision in the case of *Gosselin v Quebec*.[7] This case is significant in this dissertation for a number of reasons. It is an example of how the legal system continues to struggle with how best to address the injustices of poverty. It is an example of just how important questions of knowledge, community and rhetoric can be when talking about the quality of legal judgment. And it is a provocative example of the use of "common sense" in legal judgment. In *Gosselin,* the Court was asked to determine the constitutionality of certain aspects of the social assistance regime that operated in Quebec during the 1980s. The claimant alleged that the legislation was unjust and discriminatory in the way it left some young adults to subsist on a meagre $170 per month.[8] In upholding the legislation, the judgment of the majority of justices prominently invokes "common sense."[9] In the context of this case, which dealt with the politically charged question of welfare programs, involved complex and disputed social scientific evidence,[10] and included the deeply troubling testimony of Ms. Gosselin herself,[11] the use of the language of "common sense" is remarkable and provocative. Indeed, this language has been the subject of comment from anti-poverty activists and scholars, and served as the catalyst for much academic work, including this dissertation.

The *Gosselin* case engendered a range of responses.[12] Some responses, adopting a view along the lines of Kant's, accused the Court of pandering to a kind of shallow majoritarianism and of

7 *Gosselin v Quebec (Procureur general)*, 2002 SCC 84, [2002] 4 SCR 429 ["*Gosselin*"].
8 *Ibid*, para 7.
9 *Ibid*, paras 27, 44, 56.
10 For example, both sides of the dispute cited evidence showing that young adults in Quebec had a very high rate of unemployment. The claimant relied on this evidence to demonstrate the vulnerability of young adults to unemployment and poverty. In contrast, the government relied on this evidence to as the basis for its legislative response which, it said, was aimed at providing incentives to help young people find employment. See *Ibid*, paras 39–40, 235, 240.
11 See *Gosselin v Quebec (Procureur general)*, 2002 SCC 84, [2002] 4 SCR 429 (Factum of the Intervenor National Association of Women and the Law).
12 Some of these will be described in more detail below, beginning at p. 20.

endorsing stereotypes of people living in poverty; an "appeal to the opinion of the multitude."[13] Others, with Lord Reid, argued that the Court was merely applying a kind of sensible reasonableness to legal claims that threatened to lose touch with reality or get "out of touch with common sense."[14] And yet throughout this conversation it seems that not all of the characters mentioned at the beginning of this chapter are represented. Where is the "philosopher"? Where is the "thorough thinker"? Where is the "servant to the public"? Do we see the rhetorical elements of ranting, shame, boasting, glory? The *Gosselin* case illustrates the need to subject "common sense" to more expansive critical scrutiny, to broaden the range of perspectives we take to assess the meaning and role of "common sense" for legal judgment. Without this scrutiny, we lose opportunities to understand the nature of legal judgment, especially when the injustices of poverty and inequality are at issue.

When taking into account the problems of poverty, inequality and social marginalization, some of the ways in which common sense is problematic for legal judgment are made particularly acute, in part because we are challenged to raise the critical question: "common to *whom?*" Further, "common sense" has a particular salience in political and legal discourses about poverty, where it often operates in the service of conservatism or populism or majoritarianism, all of which pose problems for a vision of law that seeks to transform unjust social relations.[15] For these reasons and others, it is crucial to identify the ways in which invocation of "common

13 Quoted in Lemos, *supra* note 1 at 64.
14 Quoted in Maher, *supra* note 2 at 600.
15 One striking example was the famous (or infamous) invocation of "common sense" by Conservative Ontario Premier Mike Harris, who characterized his political platform as the "Common Sense Revolution" when he ran for office in the 1990s. Harris called on "common sense" in opposition to government spending on social welfare programs. Progressive Conservative Party of Ontario, "The Common Sense Revolution," online: <http:http://www.scribd.com/doc/57099326/Common-Sense-Revolution>.

sense" constitutes significant challenges to good legal judgment. At the same time, critical scholars and anti-poverty activists would be remiss to ignore or reject the idea of "common sense" as a part of progressive political and legal discourse about poverty and justice.[16] To do so is to relinquish "common sense" to a specific, dominant political ideology. In the process, other aspects of this concept are obscured and we might lose important resources for talking about what it means to exercise good judgment in the context of complex social life. Rather than abandoning the concept as merely an artifact of dominant claims about universal knowledge, this dissertation seeks to investigate "common sense" in a robust and reflective manner, in order to open the possibilities for subjecting this concept to critical and feminist analysis. I want to discover whether, in addition to being worthy of critical analysis, "common sense" can also be a tool for making legal judgment more fully reflective and responsive to the needs of diverse communities.

To investigate the potential for "common sense" to infuse legal judgment with critical engagement, it is necessary to explore the complex and diverse aspects of the concept that may not be immediately evident without sustained consideration. "Common sense" is a phrase with a great deal of rhetorical effect, and it has a way of resisting critical scrutiny. To access those aspects of common sense that speak to questions about legal judgment and social justice, we need access to ways of thinking about and using common sense that allow for meaningful engagement and critical reflection. In this dissertation, I seek insight about common sense from

16 In this dissertation, I use the word "justice" to describe the benchmark for my normative evaluations. In my view, the concept of "justice" includes elements having to do with material wellbeing and the distribution of economic and society resources in society. Where I wish to draw attention to these elements of justice, I also use the phrase "social justice." For further discussion of the meaning of "justice" for this dissertation, see p. 57.

different sources: from three major thinkers from different disciplines who have engaged with "common sense" centrally in their work – Thomas Reid, Antonio Gramsci, and Hannah Arendt – and from the judgments of Supreme Court justices who have used the words "common sense" to explain their findings. I read these texts against criteria for good legal judgment, with particular attention to justice concerns arising from poverty, inequality and social marginalization. By looking carefully at different aspects of "common sense" that become visible in scholarly texts and in written legal judgments, I work to open up this concept to critical view, and create space for "common sense" to fulfill its potential as a part of critical and reflective legal judgment.

In the remaining parts of this introduction, I will describe in more detail the problem of common sense in legal judgment, in which common sense appears to be both obvious and obscured. I will describe how "common sense" has been used in Canadian legal judgments, and how the invocation of "common sense" has particular salience when used in the context of legal issues concerning poverty and social marginalization. I will locate "common sense" as an object of scholarly inquiry, and briefly introduce the methodological tools I draw on in my own investigation. Finally, I will outline the remaining chapters of the dissertation.

Common sense: self evident and inscrutable

"Common sense" is both self-evident and inscrutable. On one hand, common sense describes that which is simple, straightforward and obvious. We use the phrase "common sense" to

describe what "everybody knows," or judgments that are readily apparent from the practice of daily life and require no special expertise to be known and understood. Common sense judgements therefore require no further explanation or justification; common sense is self-evident.

On the other hand, the *meaning* of the phrase "common sense" is actually complex and dynamic; it means different things in different historical, social and discursive contexts. For example, sometimes we use "common sense" to refer to a basic kind of reasoning or good judgment that almost everyone possesses, grounded in our daily life experiences ("just use your common sense"). At other times, we use the phrase "common sense" to mean the content of judgments or knowledge or facts that one arrives at by using the faculty of common sense ("it's a matter of common sense"). Further, the phrase "common sense" naturally provokes questions about community ("common to whom?"). However, any complexity in the phrase, or questions that might be asked, tend to be obscured by the way common sense claims present themselves as self-evident. Even as it bears a host of different meanings, "common sense" carries with it the rhetorical force of the self-evident, that which requires no justification and marks the boundaries of possible debate. In this way, investigation of "common sense" is often thwarted from the start or caught in a circle of reasoning; it is inscrutable. Anthropologist Clifford Geertz aptly captures this phenomenon in his influential essay "Common Sense as Cultural System:"

> [I]t is an inherent characteristic of common-sense thought ... to affirm that its tenets are immediate deliverances of experience, not deliberated reflections upon it….Religion rests its case on revelation, science on method, ideology on moral passion; but common sense rests its case on the assertion that it is not a case at

all, just life in a nutshell. The world is its authority.[17]

Thus, "common sense," like the two-faced god Janus, looks in two directions at once: towards the simple and self-evident, and towards the complex and obscure. This tension, nested in the term, has a particular salience when considering common sense in the context of law and legal judgment. When a judge uses the term "common sense" to articulate his or her judgment, what does this mean? Is "common sense" a type of evidence that can support a legal argument? Is it a type of reasoning? Is it justified by its reference to community consensus? Consensus in what community? These questions are important for many aspects of the legitimacy of legal judgment and the justice of legal conclusions. But because of the apparent simplicity and self-evidence of "common sense," these questions are rarely answered or even acknowledged in written reasons for judgment. In legal judgment, as elsewhere, "common sense" is much more often invoked than explained.[18] Thus, the two-faced nature of common sense makes its way into legal judgment. Self-evident and inscrutable.

Legal judgment is importantly related to justice. Thus the nature of the practices we engage in when undertaking legal judgment are worthy of scrutiny: we need concepts and criteria for determining what will count as *good* legal judgment.[19] Many concepts help to serve this function in common law jurisdictions. Some are oriented to the content of legal decisions: a judge must have knowledge of the law, and an understanding of the role of the judiciary in a

17 Clifford Geertz, "Common Sense as a Cultural System" in *Local Knowledge* (Basic Books, 1983) 73 at 75.

18 Herman Parret, "Common Sense in Philosophy" in *Common Sense: The Foundations for Social Science* (VI: University Press of America, 1987) 17 at 17–32.

19 Throughout this dissertation, I approach legal judgment as one form of a larger human practice of judgment. This approach understands legal, political and aesthetic judgment to share certain characteristics, even as they differ in important ways. See Jennifer Nedelsky, "Communities of Judgment and Human Rights" (2000) 1 Theor Inq L 245 ["Communities of Judgment"]. This approach also explains why I talk about "judgment" rather than "adjudication" or "decision-making." See further discussion at page 52.

democratic society. Other criteria for good legal judgment are oriented directly to the *practices* of legal judgment, such as the requirement for judicial impartiality, the obligation to provide reasons for decisions, and the rules of evidence.[20] Judges must decide impartially, transparently, and with reliance on the right knowledge. Core concepts like judicial impartiality are articulated in jurisprudence but are also elaborated through professional conduct guidelines like those published by the Canadian Judicial Council.[21] In the document "Ethical Principles for Judges," the CJC identifies as essential the principles of judicial independence, integrity, diligence, equality and impartiality. These concepts describe how judges should approach the task before them, and how we can evaluate judging practices in relation to the overarching purposes of legal judgment. The CJC notes the connections between procedure and substance in part of its discussion of the principle of "equality:"

> Equality according to law is not only fundamental to justice, but is strongly linked to judicial impartiality. A judge who, for example, reaches a correct result but engages in stereotyping does so at the expense of the judge's impartiality, actual or perceived.[22]

In this dissertation, I take seriously all of these potential criteria for good legal judgment. At the same time, all of the normative arguments offered here are ultimately grounded in a specific understanding of justice that presents challenges to any straightforward assessment of legal judgment. Contemporary society is characterized by fundamental political and moral disagreement, as well as relations of unequal power. Assessment of judging practices has to

20 Questions of "form" and "substance" overlap for legal judgment, but in this dissertation I address the issue of good judgment from a practice or procedural perspective. For an example of how theorists can explore legal principles like impartiality as general criteria for practices of good legal judgment, see Christine Boyle & Marilyn MacCrimmon, "To Serve the Cause of Justice: Disciplining Fact Determination" (2001) 20 Windsor YB Access Just 55.

21 Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa), online: <http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf>.

22 *Ibid*., principle 5 comment 2.

take place against this context: we need to understand "impartiality," for example, so that it makes judgment better *in our diverse and unequal society.* Moreover, my approach to justice recognizes that (indeed, insists that) no universal or conceptually unified approach to evaluating judgment can be meaningfully proposed under conditions of radical social diversity and inequality. However, it is still possible to talk about better and worse practices of judgment – practices that bring us closer or push us away from the ways of thinking and acting that reflect the demands of good judgment and the demands of justice.[23] The broad and multi-faceted understanding of justice that grounds this dissertation places particular importance on practices of judgment that have the potential to recognize power imbalances, generate critical reflection and open the judging process to voices that might otherwise remain unheard.

"Common sense" has an ambiguous relationship with criteria for good legal judgment. On one hand, "common sense," understood as the practice of sensible judgment, surely seems like a good candidate for inclusion as a part of good judgment in general and legal judgment in particular. As noted by Lord Reid the beginning of this chapter, "common sense" also seems to relate to the common law tradition in particular, in which connections to the local community are valued as part of legal reasoning.[24] At the same time, the particular requirements of legal judgment sit uneasily with some characteristics of "common sense." For example, common law legal judgment is supposed to be grounded in facts that have been proven at trial according to the rules of evidence.[25] "Common sense" knowledge is unlikely to fall into this category and,

23 Jeremy Webber, "A Judicial Ethic for a Pluralistic Age" in Omid A Payrow Shabani, ed, *Multiculturalism and Law: A Critical Debate* (University of Wales Press, 2007) 67.

24 Ronald A Allen, "Common Sense, Rationality, and the Legal Process" (2000) 22 Cardozo L Rev 1417; Maher, *supra* note 2; William Renwick Riddell, "Common Law and Common Sense" (1918) 27:8 Yale LJ 993.

25 This idea is widely discussed from many perspectives. For three different approaches see: Peter Carter, "Do courts decide according to the evidence?" (1988) 22 UBC L Rev 351; Marilyn T MacCrimmon, "Fact

indeed, may be impossible to "prove" in this manner.

Further, unexamined appeal to "common sense" in a legal judgment allows the tension between the self-evident and the inscrutable to operate freely, leaving unanswered or unacknowledged questions about evidence, reasoning, and consensus. This creates the potential for partial, illegitimate or non-transparent judgment. Indeed, this potential is particularly likely to be realized in those areas of law where the commonality of "common" sense is most in question. This is precisely what can happen when legal judgment encounters poverty and social marginalization. In this context, unreflective reliance on "common sense" is not only most likely to degrade our practices of legal judgment, acts of poor judgment have the potential to cause the most damage. When legal judgment is stressed by the social and legal challenges of poverty and social marginalization, it is especially urgent that we attend to the adequacy of our judging practices.

Common sense in Canadian law and the case of *Gosselin v. Quebec*

Judges do use the language of "common sense" to explain their reasons in a variety of contexts, and with a variety of rhetorical effects. Indeed, one empirical study in the United States found that "common sense" was the single most commonly cited authority for legal argument.[26] In Canadian judgments, this phrase tends to appear frequently in the law of evidence, in which

Determination: Common Sense Knowledge, Judicial Notice and Social Science" in *The Judicial Role in Criminal Proceedings* (Oxford: Hart Publishing, 2000); Adrian AS Zuckerman, "Law, Fact or Justice?" (1986) 66 Boston U L Rev 487.

26 Cited in Allen, *supra* note 24 at 1428.

"common sense" is understood as a foil for expert evidence.[27] The phrase "common sense" is also used to describe the concept of "reasonable doubt" in criminal law[28] as well as the concept of negligence.[29] "Common sense" also appears notably in constitutional law,[30] including as a way to describe the type of proof that must be offered to establish whether something is consistent with the "principles of fundamental justice" under s. 7 of the *Canadian Charter of Rights and Freedoms*,[31] or to justify the breach of a right under s. 1 of the *Charter*.[32] Certain specific propositions have also been accepted as matters of "common sense" at various times, including the idea that "children of tender years" should live with their mothers,[33] and the principle that one intends the consequences of one's physical actions.[34]

The language of "common sense" was notably and provocatively invoked in the constitutional case *Gosselin v. Quebec*, introduced above. In *Gosselin*, the Supreme Court of Canada reviewed Louise Gosselin's claims that her rights to equality and security of the person were compromised by her treatment under provincial welfare laws. The impugned law was a regulation that paid individuals receiving social assistance who were under the age of 30 a much lower amount than those 30 or over, unless the younger individuals were able to participate in certain training programs. Without such participation, the amount available to people under 30 was approximately $170 per month. Ms. Gosselin was a young woman who had attempted to

27 *R v DD*, 2000 SCC 43, [2000] 2 SCR 275, 2000 ["*D.D.*"].
28 *R v Lifchus*, [1997] 3 SCR 320, 150 DLR (4th) 733.
29 *Snell v Farrell*, [1990] 2 SCR 311, 72 DLR (4th) 289.
30 David Schneiderman, "Common sense and the Charter" (2009) 45 Sup Ct L Rev 3 ["Common sense and the Charter"]. In this piece, Schneiderman explores the role that the invocation of "common sense" has played in judicial interpretation of the Charter of Rights and Freedoms. He argues that "common sense" often has the function of "conferring legitimacy on dominant accounts of the social world." (at 13).
31 *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791 ["*Chaoulli*"].
32 *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199, 127 DLR (4th) 1.
33 *MacDonald v MacDonald*, [1976] 2 SCR 259, 1975 CanLII 28 (SCC).
34 *R v Walle,* 2012 SCC 41, [2012] 2 SCR 438.

survive on this amount, and she argued that the regulation in question violated ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*.[35] The Supreme Court of Canada judgments in this case were divided in complex ways.[36] However, the majority of justices found that the regulation was constitutional.

On the application of s. 15 equality rights, the majority judgment, authored by Chief Justice McLachlin, found that that Ms. Gosselin's experience under the legislation did not constitute discrimination because it did not offend Ms. Gosselin's dignity.[37] McLachlin C.J. accepted the government's assertion that the purpose of the law was to provide an incentive for young people to leave welfare in favour of paid employment.[38] She found that this supported rather than harmed the dignity of young adults because it communicated a favourable expectation of their potential.[39] McLachlin C.J. found that a reasonable person in Ms. Gosselin's position would take this into account, and thereby experience no injury to her dignity.[40]

The *Gosselin* case discloses a series of different pictures of the world. It is very hard to reconcile the picture presented by Ms. Gosselin's evidence, which describes significant infringements on her physical and psychological integrity such as hunger, extreme stress, and

35 *Gosselin*, *supra* note 7, para 9. S. 7 of the *Charter* reads: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." S. 15(1) reads: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 ["*Charter*"]

36 For a detailed description of the various judgments, see: Gwen Brodsky, "Gosselin v. Quebec: Autonomy with a Vengeance" (2003) 15 CJWL 194 ["Autonomy with a Vengeance"].

37 *Gosselin*, *supra* note 7, para 19.

38 *Ibid*, paras 26, 27, 41, 42.

39 *Ibid*, paras 42, 44.

40 *Ibid*, para 44.

degrading survival strategies,[41] and Chief Justice McLachlin's picture in which Ms. Gosselin should have understood her experiences in light of the government's well-meaning objectives. Ms. Gosselin's experience was one of fundamental disempowerment, and yet the majority essentially claims that she should have experienced this disempowerment as empowerment. The majority and dissenting judges each express incredulity at the other's representation of the situation.[42]

In this context of deeply contested understandings of the impugned law and its effects, it is striking that at several crucial points, Chief Justice McLachlin uses the language of "common sense" to articulate her findings. The phrase appears in three significant passages in the judgment, which I will be returning to throughout this dissertation.[43]

First, while addressing the role of the purpose of the law in assessing its impact, McLachlin C.J.C. finds:

> *As a matter of common sense*, if a law is designed to promote the claimant's long-term autonomy and self-sufficiency, a reasonable person in the claimant's position would be less likely to view it as an assault on her inherent human dignity.[44]

On the question of whether the law properly responded to the claimant's actual circumstances, she writes:

> Even if one does not agree with the reasoning of the legislature or with its priorities, one cannot argue based on this record that the legislature's purpose lacked sufficient foundation in reality and *common sense* to fall within the bounds

41 See National Association of Women and the Law, *supra* note 11.

42 L'Heureux-Dube J. writes: "I cannot imagine how it can be maintained that Ms. Gosselin's physical integrity was not breached." *Gosselin*, *supra* note 7, para 130..

43 As a matter of constitutional doctrine, it is noteworthy that all of these passages relate to the analysis of s. 15 equality rights.

44 *Gosselin*, *supra* note 7, para 27. [emphasis added]

> of permissible discretion in establishing and fine-tuning a complex social assistance scheme. Logic and *common sense* support the legislature's decision to structure its social assistance programs to give young people, who have a greater potential for long-term insertion into the work force than older people, the incentive to participate in programs specifically designed to provide them with training and experience.[45]

And in addressing the critique raised by the dissent that the regulation failed to respond to those circumstances:

> [W]e cannot infer disparity between the purpose and effect of the scheme and the situation of those affected, from the mere failure of the government to prove that the assumptions upon which it proceeded were correct. Bastarache J. argues that the distinction between people under 30 and older people lacks a "rational basis" because it is "[b]ased on the unverifiable presumption that people under 30 had better chances of employment and lower needs" (para. 248). This seems to place on the legislator the duty to verify all its assumptions empirically, even where these assumptions are reasonably grounded in everyday experience and *common sense*. With respect, this standard is too high…The legislator is entitled to proceed on informed general assumptions without running afoul of s. 15… provided these assumptions are not based on arbitrary and demeaning stereotypes.[46]

These passages show that common sense plays a significant role in the judgment, particularly in grounding the majority's resistance to the idea that an inappropriate government response to poverty might violate constitutionally protected rights. It also provides a lens for the assessment of evidence. At the same time, there is no definition or explanation of common sense, nor any reflection on its role.

This explicit and frequent use of the term "common sense" makes *Gosselin* exceptional among poverty-related cases at the Supreme Court of Canada.[47] *Gosselin* is also exceptional in that it is

45 *Ibid*, para 44. [emphasis added]
46 *Ibid*, para 56. [emphasis added]
47 Other important Supreme Court of Canada judgments that engage with the problem of poverty include: *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, 151 DLR (4th) 577; *Baker v Canada*,

one of only a handful of cases in which the Supreme Court of Canada has reviewed the content of a provincial welfare regime, and it is the only case in which the adequacy of welfare payments or programs has been assessed under the *Charter of Rights and Freedoms*.[48] The *Gosselin* case is useful for a study of common sense in legal judgment, not because it is representative of a class of cases, but because its treatment of poverty themes and its invocation of common sense provide insight on the role of common sense in legal judgment. Further, the *Gosselin* case is worthy of detailed scrutiny because of the way it fits with a larger jurisprudence on poverty issues.[49] In some respects, the use of "common sense" in *Gosselin* brings to the surface issues that pervade legal judgments on poverty and equality issues, such as questions of community, access to justice, and the legitimacy of the varied forms of knowledge relied upon by courts. Finally, *Gosselin* is useful for a study of common sense in legal judgment because it compels the asking of questions about the exceptionality of this case. If the Supreme Court rarely invokes "common sense" when talking about social justice, why is this the case? What would happen if the Supreme Court explicitly invoked "common sense" in other cases where

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[1999] 2 SCR 817, 174 DLR (4th) 193; *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46, 177 DLR (4th) 124; *Lovelace v Ontario*, 2000 SCC 37, [2000] 1 SCR 950.

48 Other cases in which the SCC has addressed some aspect of a provincial welfare regime are: *Alden v Gaglardi et al*, [1973] SCR 199, 1972 CanLII 140 (SCC) (exclusion of individuals whose need is as a result of a strike or lockout) and *Finlay v Canada (Minister of Finance)*, [1993] 1 SCR 1080, 101 DLR (4th) 567 (deduction from social assistance payments to recover overpayments). Other cases dealing with the legal context of welfare regimes include *Tranchemontagne v Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 SCR 513(jurisdiction of social assistance tribunal to consider human rights issues) and *Québec (Attorney General) v Canada*, 2011 SCC 11, [2011] 1 SCR 368 (obligation of federal government to share costs of programs).

49 There is a broader problem with the application of oppressive dominant norms and stereotyping in cases dealing with poverty. See Martha Jackman, "Reality Checks: Presuming Innocence and Proving Guilt in Charter Welfare Cases" in Margot Young et al, eds, *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2007) 23; Janet Mosher, "The Shrinking of the Public and Private Spaces of the Poor" in *Disorderly People: Law and the Politics of Exclusion* (Halifax: Fernwood, 2002) 41; Janet Mosher, "Managing the Disentitlement of Women: Glorified Markets, the Idealized Family, and the Undeserving Other" in *Restructuring Caring Labour* (Toronto: Oxford University Press, 2000) 30; Mary Jane Mossman, "Choices and Commitments for Women: Challenging the Supreme Court of Canada in the Context of Social Assistance" (2004) 42 Osgoode Hall LJ 615; Margot Young, "Rights, the Homeless and Social Change: Reflection on Victoria (City) v. Adams (BCSC)" (2009):164 BC Studies: The British Columbian Quarterly 103.

social justice is at stake?

The *Gosselin* decision was met with considerable criticism.[50] For example, Gwen Brodsky critiques the majority's assessment of the evidence on the grounds that the judgment accepted the negative stereotypes of young people on social assistance that had framed the legislation in the first place.[51] Brodsky argues that mischaracterization of the facts in the case allows the majority to endorse idealized and formal notions of autonomy and freedom, which are, in reality, not realizable without adequate support to meet basic needs. In this way, the majority undermines rather than enhances the equality and autonomy of poor women and other marginalized people.[52]

Other commentators specifically focus on the majority's use of the phrase "common sense" in their critique of the decision. David Schneiderman argues that the Court's reliance on "common sense" signals the Court's willingness to adopt dominant views about poverty and welfare in its understanding of evidence in constitutional cases.[53] He argues that, when faced with contentious social issues (such as the relationship between poverty and constitutional rights), the Supreme Court of Canada is more likely to follow established "common sense" than to act as a leader in forming or reforming Canada's constitutional culture.[54] Schneiderman points to mainstream

50 Brodsky, "Autonomy with a Vengeance," *supra* note 36; David Schneiderman, "Social Rights and 'Common Sense': Gosselin Through a Media Lens" in Margot Young et al, eds, *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: U.B.C. Press, 2007) 57 ["Social Rights and 'Common Sense'"]; Jackman, supra note 49; Natasha Kim & Tina Piper, "Gosselin v. Quebec: Back to the Poorhouse ..." (2003) 48 McGill LJ 749; Sheila McIntyre, "The Supreme Court and Section 15: A Thin and Impoverished Notion of Judicial Review" (2006) 31 Queen's LJ 731 ["Supreme Court and Section 15"].

51 Brodsky, "Autonomy with a Vengeance," *supra* note 36.

52 *Ibid* at 213–214.

53 Schneiderman, "Social Rights and 'Common Sense'," *supra* note 50.

54 *Ibid*.

media reports on the case as sources of common sense, and argues that these indicate a fairly wide social consensus about poverty and social welfare programs that disposes society against the claims of anti-poverty litigants.[55]

In her critique of *Gosselin*, Sheila McIntyre also argues that the majority justices demonstrate a willingness to uncritically accept dominant notions of the world. Further, McIntyre specifically ties this practice to the requirements of legitimate legal judgment, and argues that, through their reliance on "common sense," the majority justices have essentially abdicated their responsibility to judge, and have instead relied on stereotypes. She writes that "judicial complacency in invoking or accepting 'common sense' notions about historically marginalized, stigmatized or stereotyped groups amounts to bad judging."[56] McIntyre argues that legitimate practices of legal judgment, particularly in the context of constitutional review, cannot tolerate reliance on stereotypes or "privileged innocence" about the experiences of marginalized people, and that resort to "common sense" precipitates precisely these problems.[57]

In a similar vein, Natasha Kim and Tina Piper argue that "one of the hallmarks of systemic discrimination is the ability to cloak itself in 'common sense' and to erase the realities of those suffering from discrimination."[58] And in response to *Gosselin,* the Victoria Anti-Poverty Coalition stated: "This truly bizarre "common sense" economic insight on the part of Canada's Supreme Court will no doubt come as a tremendous shock to...many thousands of Canadians."[59]

55 *Ibid* at 68.
56 McIntyre, "Supreme Court and Section 15," *supra* note 50 at 764.
57 Sheila McIntyre, "Studied Ignorance and Privileged Innocence: Keeping Equity Academic" (2000) 12 CJWL 147 ["Keeping Equity Academic"].
58 Kim & Piper, *supra* note 50 at 780.
59 Victoria Anti-Poverty Coalition, Press Release, "The Gosselin Decision: Canada's Supreme Court is out of touch with economic, environmental and poverty realties," online: <http://www.povnet.org/node/1135>.

These comments are all directed at slightly different theoretical and doctrinal targets, and reveal different approaches to "common sense" and law. However, there is a general sense in which all of these critiques of the *Gosselin* case direct their analyses of judicial invocation of "common sense" to the question of whether the purported "common sense" is in fact "common," and, if so, common to whom.

The question "common to whom?" is an essential one and plays a central role in this dissertation. However, it also leaves many issues unaddressed. For example, in relation to *Gosselin*, I agree with Schneiderman that the case and the media reports about it reveal a partial (and problematic) social consensus around poverty and rights in Canada. However, I also think that the court's invocation of common sense is more than an indicator of the role of this consensus. Further, I question whether the use of common sense necessarily restricts judges to dominant knowledges. In this context and others, important questions remain unanswered. What is the relationship between common sense and good judgment? *How* is common sense connected to specific communities? What is the measure of the "commonality" of common sense? What *effects* do claims about common sense have in social discourses, including legal discourse? Further, the framework for debate appears to make it difficult to even *ask* these questions. In this way, the claims that common sense makes about itself – that it is self-justifying – effectively serve to insulate it from critical scrutiny.

To address this dilemma of insulation and self-justification, I have turned to the work of Ludwig Wittgenstein, which provides a useful framework for thinking about theoretical problems

characterized by contradiction, paradox, or circular reasoning. Confronted with this kind of problem, Ludwig Wittgenstein uses the language of "captivity" to describe our inability to break out of one way of thinking in a satisfactory way. In this dissertation, I draw on Wittgenstein's proposals for a theoretical methodology to find a way to open "common sense" to more adequate scrutiny.

Wittgenstein argues that our way of thinking about a concept (such as "common sense") can become "captive" to a particular "picture," and thereby lose its usefulness as a way for us to understand ourselves. I think that debate about "common sense" is often constrained in this way. To break free of this captivity and to reclaim the creativity and productivity of our language, Wittgenstein argues that we should try to look at a concept from new perspectives, and to use theoretical approaches that can generate this opportunity. He argues that it is useful to learn how to see more than one "aspect" of a concept, which he calls creating a "perspicuous representation" of a concept. In this dissertation I rely on Wittgenstein's ideas of "captivity," "aspect" and "perspicuous representation" to structure my argument. I explain this methodology in detail in chapter 2. This methodological approach allows me to talk about the dilemmas of common sense in a much more specific and concrete manner, providing the framework for the subsequent chapters on common sense in the writings of Thomas Reid, Antonio Gramsci and Hannah Arendt.

Poverty and the consequences of the paradox of common sense

When our understanding and use of "common sense" are constrained ("held captive") in a framework that limits the scope of our questions, the quality of our judgment suffers. This dilemma takes on a particular significance in the context of poverty and social marginalization. There are two main reasons for this. First, the issues surrounding poverty in Canada raise major justice concerns. The persistence of poverty and the discriminatory patterns associated with deep or ongoing poverty in specific communities raise questions that strike at the heart of a constitutional democracy that values political participation and equality before the law. The questions raised in this dissertation about the role of common sense in legal judgment gain much of their significance when they are placed against the backdrop of the realities of poverty in Canada, and the ways in which the experiences of poverty and social marginalization constitute injustice.

In this dissertation, I use the term "poverty" to indicate a broad range of injustices in which there is a material component, including material hardship, economic inequality and class marginalization.[60] It is useful to refer to the definition of "poverty" developed by the United Nations Committee on Economic, Social and Cultural Rights, which describes it as

> a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights.[61]

60 There are underlying political-theoretical questions surrounding the use of this term – please see chapter 2, below, p. 103.

61 Poverty and the International Covenant on Economic, Social and Cultural Rights, Committee on Economic, Social and Cultural Rights, 25th Sess. 10/05/2001, UN Doc. E/C.12/2001/10, online: <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/E.C.12.2001.10.En?Opendocument>.

Thus, poverty is not simply about lack of income or material deprivation; it is also about exclusion, anxiety, oppression and marginalization. Although Canada does not have an official "poverty line," by most measures millions of people of all ages live in poverty.[62] The non-profit advocacy organization Canada Without Poverty describes this experience in the following terms:

> To live in poverty in Canada is to live with insufficient and often poor quality food. It is to sleep in poor quality housing, in homeless shelters, or on city streets. It is on a daily basis to have to make difficult and painful decisions involving trade-offs, such as whether to "pay the rent or feed the kids," pay the electric bill or go to the dentist, buy a new monthly bus pass or forego inviting friends over for dinner. No Canadian should have to suffer such anxiety.
>
> To live in poverty in Canada is to be at much greater risk of poor health, violence and a shorter lifespan. It is to be unable to participate fully in one's community and greater society. And it is to suffer great depths of anxiety and emotional pain, borne by young and old alike.[63]

Nor is the risk of poverty shared equally among Canadians. Aboriginal people, people with disabilities, single mothers and recent immigrants are among the groups that are at higher risk of becoming poor.[64] Thus the experience of poverty relates not only to deprivation but also discrimination and colonialism.[65] Poverty is a gendered phenomenon, in which girls and women

62 Statistics Canada's Low-Income Cut-Offs indicate those households who spend about 20% more of their income meeting their basic needs than the average household. The Market Basic Measure identifies households whose income is insufficient to purchase a certain collection of goods. By both types of measures, about 10% of Canadians are low-income. See: Canadian Council on Social Development, "Economic Security Fact Sheet #2: Poverty," online: CCSD <http://www.ccsd.ca/factsheets/economic_security/poverty/index.htm>; Human Resources and Skills Development Canada, "Low Income in Canada: 2000-2006 Using the Market Basket Measure," (2008), online: HRSCD <http://www.hrsdc.gc.ca/eng/publications_resources/research/categories/inclusion/2008/sp-864-10-2008/page01.shtml>.

63 Canada Without Poverty, online: <http://www.cwp-csp.ca>.

64 For example, a study from the Canadian Centre for Policy Alternatives found that approximately 40% of aboriginal children in Canada are poor: "Poverty or Prosperity", online: CCPA <http://www.policyalternatives.ca/publications/reports/poverty-or-prosperity>; Canadian Council on Social Development, *supra* note 62. For more statistics and discussion see: Margot E Young, "Introduction" in Margot Young et al, eds, *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: U.B.C. Press, 2007) 1.

65 The poverty experienced by indigenous individuals and communities in Canada is complex and goes far beyond questions of legal judgment as practiced by Canadian state courts; it relates to practices of colonialism

are significantly more likely to experience poverty during their lifetimes.[66] Moreover, the experience of poverty in Canada is shaped by gendered aspects of social life such as unequal benefit from paid employment,[67] disproportionate responsibility for caregiving labour[68] and vulnerability to intimate violence.[69]

Thus, it becomes clear that when judges must assess the rights of individuals living in poverty, practices of legal judgment are tied to very high stakes. For individuals and communities living in poverty, interaction with the law may be part of what determines their access to basic necessities like food, medical care or housing, their ability to provide for their families and their opportunity to participate in community life. Legal judgments about those issues might address things such as the equality rights of women receiving social assistance,[70] the appropriate sentences for impoverished and marginalized women who commit crimes,[71] or the constitutional status of panhandling.[72] While all kinds of legal judgments can carry important consequences for litigants and for society as a whole, it is not an exaggeration to say that, in some cases, poverty and law interact in relation to life and death matters.[73] The quality of our practices of

including dispossession of land, disruption of traditional economies and discriminatory treatment by the state. See Part 6 of the volume: Martin J Cannon & Lina Sunseri, eds, *Racism, Colonialism, and Indigeneity in Canada: A Reader* (Don Mills, ON: Oxford University Press, 2011).

66 Canadian Centre for Policy Alternatives, "Fact Sheets on Women's Poverty", online: CCPA <http://www.policyalternatives.ca/publications/commentary/fact-sheets-womens-poverty-recession>.

67 Canadian Centre for Policy Alternatives, "Closing Canada's Gender Gap", online: CCPA <http://www.policyalternatives.ca/publications/reports/closing-canadas-gender-gap>.

68 Gwen Brodsky et al, "Human Rights Denied: Single Mothers on Social Assistance in British Columbia" (West Coast LEAF, 2006).

69 In one study, women within three years of leaving an abusive relationship were 20 times more likely to access food banks than the general population: CCPA, *supra* note 67 at 6.

70 *Falkiner v Ontario (Director of Income Maintenance, Ministry of Community & Social Services)* (2002), 212 DLR (4th) 633, 59 OR (3d) 481 (ON CA).

71 *R v Hamilton* (2003), 8 CR (6th) 215, 172 CCC (3d) 114 (ON Sup Ct J).

72 *R v Banks* (2007), 275 DLR (4th) 640, 84 OR (3d) 1 (ON CA); *Federated Anti-Poverty Groups of BC v Vancouver (City)*, 2002 BCSC 105, 40 Admin LR (3d) 159.

73 That legal regimes and outcomes can have an affect in survival situations was tragically made evident in the case of Kimberly Rogers, a woman who was found dead in her apartment in Sudbury, Ontario on August 9, 2001. At the time of her death, Ms Rogers was 8 months pregnant and confined to her residence following a

legal judgment in this context is of great significance.

The second way in which the dilemma of "common sense" in legal judgment carries special significance in the context of poverty is that poverty tends to complicate our understanding of legal judgment. For example, judgments about poverty bring into sharp relief the question of judicial subjectivity.[74] Legal questions about poverty are particularly likely to highlight the demographic differences between low income Canadians and Canadians sitting on the bench. Judges in Canada are overwhelmingly white and middle- or upper-class.[75] About two-thirds of judges are men.[76] The likelihood of a judge carrying with him or her direct personal experience of living in poverty is especially low, and thus the commonality of "common sense" becomes particularly suspect.

Judgments about poverty also have the potential to raise broader questions about the relationship between "poverty" and "law" in a constitutional democracy. There are rich bodies of literature

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conviction for welfare fraud, relating to her receipt of student loans while on welfare. Her conviction had also resulted in an automatic suspension of her welfare benefits. For a detailed collection of inquest documents and media reports surrounding this case see the organization Justice with Dignity: http://dawn.thot.net/Kimberly_Rogers/kria.html.

74 For general discussion of the significance of a representative judiciary, see: Richard F Devlin, A Wayne MacKay & Natasha Kim, "Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards a 'Triple P' Judiciary" (2000) 38:3 Alta L Rev 734; Regina Graycar, "The Gender of Judgments: Some Reflections on Bias" (1998) 32 UBC L Rev 1; Jennifer Nedelsky, "Judgment, Diversity, and Relational Autonomy" in Judgment, Imagination and Politics: Themes from Kant and Arendt (Lanham, Maryland: Rowman & Littlefield, 2001) 103 ["Judgment, Diversity and Relational Autonomy"]; Bertha Wilson, "Will Women Judges Really Make a Difference?" (1990) 28 Osgoode Hall LJ 507.

75 Maryka Omatsu, "The Fiction of Judicial Impartiality" (1997) 9 CJWL 1. Of the 100 appointed by the federal government between 2010 and 2012, 98 were white: Kirk Makin, "Of 100 new federally appointed judges 98 are white, Globe finds", *Globe and Mail* (17 April 2012), online: <http://www.theglobeandmail.com/news/politics/of-100-new-federally-appointed-judges-98-are-white-globe-finds/article2405888/,%20http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm04-11-01-eng.asp>.

76 As of 2013, of the 1,180 judges of all Canadian courts, there are 364 women (approximately 31 per cent): Krystyle Gill & Alycia Shaw, "Representing Canada on the Bench: On Gender Balance, Equality and Judicial Appointments" (Canadian Bar Association, 2013), online: CBA <http://www.cba.org/CBA/conf_women/Women_Newsletters2013/bench.aspx>.

addressing this subject and a whole constellation of concerns and approaches.[77] These literatures include discussion of rights discourse,[78] the relationship between judicial and legislative lawmaking for social justice,[79] the capacity of the *Canadian Charter and Rights and Freedoms* to respond to the challenges of poverty and inequality,[80] the institutional capacity of the court,[81] and the ways in which poverty impacts other axes of injustice such as sexism, racism, and colonialism.[82]

This dissertation does not address these questions. However, scholarship on law and poverty provides the context for my examination of common sense, and helps determine what is important in my assessment of the adequacy of practices of legal judgment. This literature does inform my overall approach, and on occasion I pull it in to highlight the significance of "common sense" for legal judgment. At a general level, I adopt a broad view of legal judgment, in which attention to poverty and social justice is appropriate or even essential. While actions addressing the injustices of poverty and social marginalization also and importantly take place

77 For recent explorations in the Canadian context, see the essays in the volumes Margot Young et al, eds, *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: U.B.C. Press, 2007); Sanda Rodgers & Sheila McIntyre, eds, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham, ON; Dayton, Ohio: LexisNexis, 2010).

78 Stuart Scheingold, *The Politics of Rights: Lawyers, Public Policy and Political Change* (Ann Arbor: University of Michigan Press, 2004); Patricia Williams, *The Alchemy of Race and Rights* (Cambridge: Harvard University Press, 1991).

79 Joel Bakan, Just Words: Constitutional Rights and Social Wrongs (Toronto: University of Toronto Press, 1997).

80 Martha Jackman, "The Protection of Welfare Rights Under the Charter" (1988) 20 Ottawa Law Review 257; Andrew Petter, "Wealthcare: The Politics of the Charter Re-visited" in *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005).

81 Louise Arbour, "LaFontaine-Baldwin Symposium 2005 Lecture" (2005), online: <internal-pdf://arbour_speech_2005-0690414336/arbour_speech_2005.pdf>; David Wiseman, "Competence Concerns in Charter Adjudication: Countering the Anti-Poverty Incompetence Argument" (2005) 51 McGill LJ 503; Angus Gibbon, "Social Rights, Money Matters and Institutional Capacity" (2003) 14 NJCL 353; David Wiseman, "The Charter and Poverty: Beyond Injusticiability" (2001) 51 UTLJ 425.

82 Fay Faraday, Margaret Ann Denike & M Kate Stephenson, *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto, ON: Irwin Law, 2006); Shelley Gavigan, "Poverty Law, Theory, and Practice: The Place of Gender and Class in Access to Justice" in *Locating Law: Race/Class/Gender Connections* (Halifax: Fernwood Press, 1999) 208; Mosher, *supra* note 49; Enakshi Dua & Angela Robertson, eds, *Scratching the Surface: Canadian Anti-Racist Feminist Thought* (Toronto: Women's Press, 2000).

outside the courtroom, I suggest that these issues are properly part of judicial, as well as legislative lawmaking. That is, material circumstances and economic inequality are not merely the context for the assertion of legal claims and the resolution of disputes, but rather a central problem faced by any social institution that has "justice" as one of its organizing principles. This underscores how issues about poverty and social marginalization relate to concerns about the quality of legal judgment, and its relationship to communities.

Common sense as a subject of scholarly inquiry

Common sense is much more often invoked than explained,[83] and, further, the claim that something is a matter of "common sense" has a way of being self-justifying. However, even cursory reflection reveals that "common sense" is a rich and dynamic phrase, with shifting meanings and functions, even in everyday life. For example, "common sense" is often used to describe a body of facts that are known by almost everyone in a community. One might say: "Everyone knows that if you go for a walk in the rain, you'll get wet. It's just common sense." There is no need to look up such information in a book, nor could most people recall a specific moment in which they learned it.

At the same time, "common sense" is also used to describe, not a body of knowledge, but a type of judgment or sensibility.[84] Thus, one might say: "She went out in the rain without her umbrella. She may be smart, but she really has no common sense." In this context, the speaker

83 Parret, *supra* note 18.

84 In this vein, some writers argue that "common sense" does not have any particular content, but rather describes a kind of naïve realism about the world: Lynd Forguson, *Common Sense* (London: Routledge, 1989); Allen, *supra* note 24.

is not saying that the person lacks any particular piece of *knowledge* (such as "if you go for a walk in the rain, you'll get wet,") but rather that she lacks good *judgment* in relation to everyday affairs.[85]

This seemingly banal example about umbrellas demonstrates the inherent particularity of any piece of common sense; it impossible to give examples of common sense without drawing on particular background assumptions and cultural references. What about people who live in places where umbrellas are not a usual piece of personal technology? What about places where rain is understood as a rare blessing? What about people who prefer to travel light at the risk of getting wet? What about people who cannot afford an umbrella? Do the people in these further examples simply exhibit poor judgment? Surely not. Thus, even an apparently non-controversial example raises questions about the relationship between particular communities, particular knowledges, and the normative, judgmental component of common sense.

Despite these questions that lie beneath the surface of "common sense," there is no sustained historical scholarly conversation on "common sense" in the same way that there is about other related concepts such as "knowledge." Rather, "common sense" has appeared at different moments, in different contexts, to serve different intellectual and political purposes for scholarly writers.[86] For Aristotle, the term usually translated as "common sense" meant a human faculty

85 Tracing the intellectual history of "common sense" in the natural law tradition, Fritz van Holthoom describes how these two strands of common sense come together in that tradition. Fritz van Holthoom, "Common Sense and Natural Law: From Thomas Aquinas to Thomas Reid" in *Common Sense: The Foundations for Social Science* (VI: University Press of America, 1987) 99. It is also essential to note how these two aspects are related: Marilyn T MacCrimmon, "What is 'Common' About Common Sense: Cautionary Tales for Travelers Crossing Interdisciplinary Boundaries" (2001) 22 Cardozo L Rev 1433 ["What is 'Common' About Common Sense"].

86 For helpful overviews of common sense in philosophy, see Sophia A Rosenfeld, *Common Sense: A Political History* (Cambridge, Mass: Harvard University Press, 2011); Fritz van Holthoom & David R Olson, "Common

that could coordinate sensory information; the common sense is the "sense" that allows me to appreciate that the apple I can see is the same object as the apple I can smell.[87] The "common" aspect of common sense indicated a coordinating capacity, and was essential for the ability to make judgments.

When "common sense" is used by Roman writers such as Vico, and in subsequent conversations in the rhetorical tradition, it refers to knowledge that is shared in a community. "Common sense" is what is known or believed by everyone in the community, and helps form the boundaries of that community.[88] For later enlightenment thinkers such as Locke, "common sense" had come to mean not a specific body of shared knowledge, but rather any kind of knowledge that could be understood by non-experts, or knowledge that was properly the domain of everyday people.[89]

In her writing on the political history of "common sense," Sophia Rosenfeld describes how all three of these elements of common sense came together. She writes:

> At the start of the eighteenth century, with the revival of all of these sources, common sense came also to mean, in English, those plain, self-evident truths or conventional wisdom that one needed no sophistication to grasp and no proof to accept precisely because they accorded so well with the basic (common sense) intellectual capacities and experiences of the whole social body.[90]

Rosenfeld argues that the increasing centrality of "common sense" in western political discourse

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Sense: An Introduction" in *Common Sense: The Foundations for Social Science* (VI: University Press of America, 1987) 1; Parret, *supra* note 18.

87 Rosenfeld, *supra* note 86 at 23.

88 *Ibid*.

89 *Ibid*.

90 *Ibid*.

is part of a shift in the meaning of politics itself. In contemporary democratic society, "[p]olitics has been recast...as the domain of simple, quotidian determinations and basic moral precepts, of truths that should be self-evident to all."[91] Rosenfeld argues, persuasively, that "common sense" as a part of political discourse has an ambiguous relationship with democracy, both upholding it and subverting it in different historical moments.[92]

In the context of law and jurisprudence, "common sense" also draws on this composite intellectual history.[93] Just as "common sense" in politics has an ambiguous relationship with democracy, "common sense" in law has an ambiguous relationship with justice. In legal scholarship, the phrase "common sense" has rarely served as the primary object of scholarly inquiry, compared with the extensive conversation among lawyers and legal academics about related concepts such as "ideology,"[94] "discourse,"[95] or "knowledge."[96] Those writers who do turn their attention directly to the relationship between "common sense" and law can be placed in three general categories. Although these categories do not constitute "schools of thought" and individual thinkers may engage with issues falling into more than one category, these three broad strands still provide a useful way to think about the literature on "common sense" and law.

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91 *Ibid* at 3.

92 *Ibid* at 9.

93 Fritz van Holthoom argues that the natural law tradition has incorporated many aspects of "common sense:" van Holthoom, *supra* note 85.

94 Susan B Boyd, "Some Postmodernist Challenges to Feminist Analyses of Law, Family and State: Ideology and Discourse in Child Custody Law" (1991) 10 Can J Fam L 79; Alan Hunt, "The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law" (1985) 19 Law & Society Rev 11.

95 Trevor Purvis & Alan Hunt, "Discourse, Ideology, Discourse, Ideology, Discourse, Ideology..." (1993) 44:3 Brit J Soc 473.

96 Mariana Valverde, *Law's Dream of a Common Knowledge* (Princeton: Princeton University Press, 2003).

First, “common sense” is sometimes invoked by writers interested in the history or meaning of the common law tradition (as distinct from the civil law or other traditions). From some perspectives, the common law, properly understood, is actually the embodiment of the “common sense” of a given community. Speaking in 1918, William Renwick Riddell of the Supreme Court of Ontario claimed that the reason Upper Canadians, in contrast to some other colonial settlers, were strongly attached to the common law, was its historical and ongoing connection to their “common sense.” He wrote:

> Is not the real reason [for this attachment to the common law] to be found in the belief that the common law is the perfection of human reason-in a word, that *the common law is common sense*? What we call "common sense" is not the old metaphysical common sense, nor is it the sentiment which might be conceived to flow from lofty and altruistic philosophy; but it consists in the application of the rules of justice and honesty to the things of this work-a-day world, so full of anomalies and of fallible, imperfect, human beings.[97]

He also wrote:

> The common sense of the judge was not far away from the common sense of the mass of the people-and the *dicta* of the judge recommended themselves to the people because they were much the same as they would themselves have uttered had they been articulate.[98]

Law and psychology scholar Norman Finkel also connects common sense with common law legal judgment, and focuses on the ways in which legal judgment is hindered or precluded by legal rules that are excessively technical or rational.[99] Finkel argues that human judgment, including legal judgment, is always imbued with subjective factors, and that these subjective factors help form the basis of real justice, which he calls “commonsense justice.” Finkel argues that “commonsense justice” is the home of these essential human elements of

97 Riddell, *supra* note 24 at 998. [emphasis added]
98 *Ibid* at 996.
99 Norman J Finkel, *Commonsense Justice: Jurors’ Notions of the Law* (Cambridge: Harvard University Press, 1995).

judgment, and that these human elements find their way into the law through concepts like "intent." He argues that legal doctrines that try to exclude these subjective elements (such as strict liability or objective tests) can therefore be contrary to "commonsense justice." He writes:

> [M]ost [people] see the law as a distinctly human creation pertaining to human actions, thoughts, feelings, and motives. Expressed in the law's penumbra or subtext is a psychology of human nature. When that human nature stops being human, or ceases to have anything but a cardboard similarity to the real thing, it fails the community test.[100]

In a similar vein, contemporary evidence scholar Ronald Allen argues that the common law emerges from common sense, and indeed that the ongoing existence of the common law demonstrates its consistency with common sense. He writes:

> The law provides a web of regulation that surrounds virtually all of life in these [contemporary common law] societies. If that web were not generated largely from and consistent with the conventional interactions of individuals, it would not survive.[101]

Allen also argues that the law of evidence does a service to the law by protecting space for the free operation of common sense in legal judgment:

> The body of law governing evidence may be the strongest bastion against sudden assaults on common sense. I would add that resisting sudden assaults on common sense may be one of the most important guarantors of the continuing progression of civilization.[102]

These writers invoke "common sense" as the basis for law, and even argue that if the law departed from such shared knowledge it would not survive. From this perspective, the common

100 *Ibid* at 95.
101 Allen, *supra* note 24 at 1426.
102 *Ibid* at 1431.

law is evidence of the content of common sense. We can see in these claims many of the intellectual strands of "common sense" identified by Rosenfeld, including common sense as shared knowledge and common sense as the knowledge of ordinary people.

The second broad category of writing on "common sense" and law includes legal scholars who have taken up "common sense," not as a basis for defending the content of the law, but for critiquing it and the ground upon which it stands. For example, in his book *The Death of Common Sense: How Law is Suffocating America*, lawyer Phillip Howard argues that the legal system is not based on common sense, but is rather the product of its abandonment. He argues that contemporary law (particularly administrative law) is directed so much at achieving certainty that it forecloses the exercise of judgment, both by those who are governed by the law and by those charged with enforcing it.[103] He writes that "[i]n the decades since World War II, we have constructed a system of regulatory law that basically outlaws common sense. Modern law, in an effort to be 'self-executing,' has shut out our humanity."[104] To support his argument, Howard offers a series of purportedly outrageous anecdotes of state officials (like building inspectors and environmental regulators) adhering to "the letter of the law" in cases where a broader and more pragmatic exercise of discretion would clearly (in his view) have resulted in better regulation or a more just outcome. Howard stresses that "common sense" is closely linked to the genuine exercise of judgment, in contrast to unreasonable deference to rules, and on this basis he uses "common sense" to critique the content of law. However, he does not turn his critical attention to "common sense" itself.

103 Philip K Howard, *The Death of Common Sense: How Law is Suffocating America* (Random House, 1994).
104 *Ibid* at 11.

Indeed, Howard communicates very few hesitations about the scope or content of common sense knowledge and its ability to ground good legal judgment. Concerned as he is with defending common sense against *rules*, he devotes little attention to the question of whether common sense knowledge itself might be disputed or problematic in ways that are directly relevant to legal judgment. Howard's book does address some issues relating to social diversity, but he is quite unrestrained in his use of sweeping generalizations, as well as his association of common sense with majoritarianism and against minority groups: nonsense is what is opposed to "us." For example, he critiques the concept of "rights" particularly as employed by people with disabilities, because it results in use of public resources that "comes out of everybody else's hide...."[105]

In contrast, other thinkers put the legitimacy of "common sense" itself at the centre of the analysis. For example, in an article that is in part a critique of Allen's approach, feminist evidence scholar Marilyn MacCrimmon argues that not all common sense knowledge is a legitimate part of legal judgment. Indeed, "common sense" knowledge can be racist, sexist or otherwise imbued with discrimination and unjust partiality.[106] For example, she catalogues the range of racist sayings and proverbs about aboriginal people that find their home in North American "common sense."[107] MacCrimmon argues that the laws of evidence exist, not to protect and promote the exercise of common sense, but to contest and regulate it.[108] MacCrimmon points to several legal concepts that work to regulate common sense in the interests of legitimate, impartial legal judgment, including by structuring the generalizations that

105 *Ibid* at 118.
106 MacCrimmon, "What is 'Common' About Common Sense," *supra* note 85 at 1444.
107 *Ibid* at 1442.
108 *Ibid* at 1443–4.

can be used to link evidence and facts.[109] In MacCrimmon's approach, we hear echoes of those intellectual traditions addressing "common sense" as a part of the process of judgment, as well as "common sense" as the knowledge of the community. However, unlike Howard, MacCrimmon is concerned to ask to *which* community the knowledge attaches, and to test "common sense" against *other* criteria for legitimate legal judgment.

A third category of writing on the relationship between "common sense" and law (which often overlaps with the others above), creates a contrast between "common sense" on one hand, and legal "theory" or "expertise" on the other. F.K.H. Mayer, in an article reviewing the role of common sense in legal judgment, argues that resort must be had to both modes of thought when making decisions.[110] Other writers clearly privilege one way of thinking, or type of knowledge, over the other. For example, legal scholar Michael Salter addresses his critique to the tendency he sees in legal practitioners to unduly reject the value of "theory" for legal judgment, due to an uncritical acceptance of "common sense."[111] He describes common sense as a latent and "self-concealing" mode of thought that resists the critical attention that law deserves. Like MacCrimmon, Salter argues that the adequate exercise of legal judgment requires not that we adopt or exercise common sense, but that we scrutinize and constrain it. This third approach, which contrasts common sense with "theory," reflects those intellectual strains in which "common sense" is understood as the knowledge or thinking of ordinary people, rather than the knowledge of experts.

109 *Ibid* at 1446.
110 Maher, *supra* note 2.
111 Michael Salter, "Common Sense and the Resistance to Legal Theory" (1992) 5:2 Ratio Juris 212 at 213.

While these three general categories reflect different priorities and focus on different aspects of law, there is a sense in which all of them present either a critical or a sympathetic view of "common sense." Sometimes this can be seen just as much in the language and tone of the writing as in the argument itself. For example, Maher quotes a 1972 speech by Lord Reid (set out at the beginning of this chapter), in which Reid says:

> We should, I think, have regard to common sense, legal principle and public policy in that order. We are here to serve the public, the common ordinary reasonable man . . . Sometimes the law has got out of step with common sense. We do not want to have people saying: 'If the law says that the law is an ass'.[112]

This kind of language sets us up to think that surely common sense is properly part of legal judgment. In contrast, Salter talks about the use of "common sense" as obstinately unreflective. He writes:

> My primary contention is that our possibilities for authentic legal understanding, interpretation and thus thought, can be shown to be retarded to the extent that lawyers - theorists as well as students and practitioners - remain under the unseen dominion of common sense.[113]

This language is much less likely to make us embrace common sense reasoning when thinking about criteria for legal judgment. Some legal writers seem to be defensively attacking those who are unwilling to take the time to understand legal theory. Others accuse lawyers and legal academics of slinging jargon and ignoring the meaning of the law for everyone in the real world. Note that both sides are implying that their opponents are ignorant of something important, and are unable or unwilling to see what is *really* going on. "Common sense" in both camps is a rhetorical tool relating to legitimacy and the connections between legal judgment and the rest of the world. Once again, the paradox of common sense (self-evident and inscrutable) makes an

112 Maher, *supra* note 2 at 600.
113 Salter, *supra* note 111 at 212.

appearance.

This dissertation is situated one step removed from these literatures on "common sense" and law because I want to step back and remain open to observing as many aspects of "common sense" as possible; what is missing from the conversation on "common sense" is an approach that allows us to do more than simply accept or reject "common sense" as a part of good legal judgment. Like MacCrimmon, I start from a critique of the inequality and marginalization that can come into play when "common sense" is invoked in legal judgment, and I too see the urgent need to scrutinize the discriminatory and oppressive content and consequences of common sense. However, noting the complex and even contradictory nature of "common sense," I insist on the need to remain open to the multiple meanings and consequences of "common sense." Those writers who advocate or even privilege the role of common sense also reveal important aspects of the concept that should not be rejected out of hand, but rather subjected to careful scrutiny against the criteria for legal judgment that can respond to the demands of justice.

Outline of chapters

Motivated by an appreciation of the political and theoretical consequences of abandoning "common sense" to theoretical captivity or to the proponents of a conservative majoritarianism, the following chapters seek to generate new ways of thinking about common sense in legal judgment.

Chapter 2 will describe in detail the research methodology that underlies my substantive arguments. I adopt the methodology Wittgenstein calls "perspicuous representation," but understood and modified by the feminist and anti-poverty political commitments that motivate this research. In each of the subsequent substantive three chapters, I will present the work of a single theorist of common sense, and argue that their work allows us to see a particular *aspect* of common sense. In each chapter I argue that when this aspect of common sense is considered in the context of legal judgment, we learn something specific about legal judgment, and particularly about the relationship between legal judgment and poverty and social justice. This assists us in challenging our captivity to a picture of common sense that is of limited usefulness. Once debate is opened up in this way, we can generate alternative criteria for the use of common sense in legal judgment that are oriented towards the democratic and emancipatory potential of law.

Chapter 3 engages with the work of 18th century Scottish philosopher Thomas Reid. Reid's perspective on common sense describes it as a form of knowledge that is based in daily life, and equally accessible to everyone. He argues that the knowledge that people use to ground their judgments in daily life is the same knowledge that grounds other kinds of judgment, such as philosophical judgment. Reid also argues that common sense knowledge is what we use to determine the boundaries of rational debate. Placed in the context of legal judgment, the aspect of "common sense" that we see in Reid, including the valuation of universality and everyday life, is both helpful and problematic. To explore how this aspect of common sense operates in legal judgment, I read his theory against legal judgments in which judges use the language of

"common sense" to describe how judges and juries should assess the credibility of witnesses. This is one area of Canadian law in which "common sense" is frequently invoked, and in which the themes raised by Reid are also at work. As in Reid, this body of law tends to place "common sense" in opposition to expertise or technical knowledge, and raises many of the same questions about universality, the legitimacy of everyday judgment, and the proper relationship between common knowledge and specialized expertise. When issues of poverty and social marginalization arise, these questions about "common sense" take on a special importance because of the ways in which "common" knowledge can be inadequate to the task of judging in this context. Reid's writings bring our attention to how common knowledge and expert knowledge should be approached in legal judgment, as well as how important it is to understand what criteria are used to stake out the boundaries of legitimate debate in law.

Chapter 4 is about the work of Antonio Gramsci, the Marxist theorist and political actor who wrote about common sense while imprisoned in Italy in the 1930s. For Gramsci, "common sense" is a shared conception of the world, constructed through historical experience and relations of social and economic power. Gramsci argues that common sense knowledge has specific, class-contingent content, and is an important component of the political hegemony of dominant classes. At the same time, common sense knowledge helps constitute communities and can be transformed, through critical reflection, into "good sense," which can serve to ground progressive social change. The aspect of common sense we see by reading Gramsci concerns its historically contingent nature, the role of political power, as well as the potential and limitations of critical reflection. I explore these themes in legal judgments in which the

court describes whether and how "common sense" can be used to justify the infringement of a constitutionally protected right. These judgments are also concerned with questions of power, marginalization, what will count as "evidence," and the strengths and weaknesses of critical reflection as a judging practice.

Chapter 5 engages with the complex writings of political theorist Hannah Arendt, whose theory of human judgment relies importantly on her idea of common sense. Arendt's approach to "common sense" describes it as a part of the practice of judgment, in which a judging person imaginatively references the collective views of her or his community when coming to a judgment. The common sense of a community is what enables judgment to become valid beyond an individual, to have legitimate meaning for a community. Arendt also argues that engagement with common sense not only reflects the boundaries of existing communities, but also works to create those communities in the first place. This aspect of common sense shifts attention away from epistemology and bodies of community knowledge, and towards communicability and persuasion. In this context, I engage with legal judgments about how the "common sense" of individual judges can or should relate to the legal requirements for judicial impartiality. I look specifically at the way judicial subjectivity and the human practice of judgment relate to "common sense" and to the criteria for legitimate legal judgment.

In chapter 6, the conclusion, I reflect on how these different "aspects" of common sense allow us to see "common sense" in new light. Following Wittgenstein, I draw these reflections together to create a "perspicuous representation" of the concept that takes some steps towards

freeing us from the intellectual "captivity" created by common sense and its self-referential and self-justifying characteristics. Legal judgment, particularly in the context of economic and social inequality, benefits from these new ways of thinking about common sense and that this engagement helps to generate useful criteria for legitimate and critical invocation of "common sense" in legal judgment. Common sense, properly invoked, has the potential to open our practices of legal judgment to the complexities of our diverse, unequal society and thereby make legal judgment more responsive to the demands of justice.

Chapter 2 – Methodology

We enter Haymarket Theatre in London[114] *on March 5, 1736, to see the opening performance of Henry Fielding's satire* Pasquin. *As we make our way through the boisterous crowd, we are joined by the philosopher Ludwig Wittgenstein, arrived from 20th century Europe. Wittgenstein takes a seat but emits a kind of energetic intensity that makes him seem constantly in motion. The play begins, and the conspiracy to murder Queen Common-Sense, enacted by Law, Physick and Firebrand, unfolds. The traitorous advisors complain about the erosion of their power in the face of common sense. Wittgenstein's eyebrows prick up when Lord Law addresses the power of language to shape the relationship between law, reason, and society*[115].

> *Law.*
> Thou know'st, my Lord of *Physick*, I had long
> Been privileg'd by Custom immemorial,
> In Tongues unknown, or rather none at all,
> My Edicts to deliver thro' the Land;
> When this proud Queen, this *Common-Sense*, abridg'd
> My Power, and made me understood by all.
>
> *Phys.*
> My Lord, there goes a Rumour thro' the Court,
> That you descended from a Family
> Related to the Queen; Reason is said
> T' have been the mighty Founder of your House.
>
> *Law.*
> Perhaps so; but we have rais'd our selves so high,
> And shook this Founder from us off so far,
> We hardly deign to own from whence we came.[116]

At the conclusion of the play, Wittgenstein pulls out a notebook and records a few thoughts before venturing into the crowd to find Fielding himself.

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114 Haymarket Theatre is in London, England. Built in 1720, it is one of the oldest London playhouses still in use. "Haymarket Theatre," Wikipedia, the free encyclopedia (2013), online: <http://en.wikipedia.org/wiki/Haymarket_Theatre> accessed 28 July, 2013.

115 Here, and at the beginning of the following chapters on Thomas Reid, Antonio Gramsci and Hannah Arendt, I offer a short fictional vignette in which each of these thinkers attends a performance of Henry Fielding's satire on the life and death of Queen Common-Sense. These imaginative exercises speculate about what these thinkers might have thought or felt or done while watching this production. Their purpose is to invite the reader to begin to play with the notion of perspective, and the idea of looking at one thing from multiple points of view. This idea is at the heart of the methodology described in this chapter, and employed in the following chapters. I hope these vignettes also provoke the reader to think critically about whether such acts of imagination are legitimate or fruitful, and if so, in what way.

116 Fielding, *supra* note 3 at IV.1.

Introduction

The methodology of a research project is the framework adopted for asking and answering questions. It includes the methods used for investigating – the "how" of the research. Methodology describes how sources are chosen, what criteria are used for making assessments, and what concepts are used to organize the project. "Methodology" also refers to the "why" of a research project. It describes the researcher's motivations, how the researcher is situated in relation to the content, and how the researcher will engage with her or his own social situation, value judgments, and political commitments. The "how" and "why" of a project are necessarily intertwined.[117] That is, the motivations for a study will help structure how that study is conducted; similarly, certain methods of research are amenable to answering some kinds of questions and not others.

In my view, it is imperative to be as transparent as possible about the "why" and the "how" of research, and about the specific way they relate in any given piece of work. This approach generates a very demanding approach to "methodology;" in the context of complex social phenomena like poverty, justice and legal judgment, this is entirely appropriate. In this chapter I set out the methodological and theoretical tools I rely on to explore "common sense" and legal judgment, as well as the political choices that ground my value judgments throughout the dissertation.

117 The interconnection of these issues is nowhere more apparent than in the history of the study of indigenous peoples by non-indigenous peoples. See: Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (London & New York: Zed Books, 2005).

Nancy Fraser offers the following definitions of a critical, feminist theory:

> [T]here is no philosophically interesting difference between a critical theory of society and an uncritical one. But there is a political difference....A critical social theory frames its research programme and its conceptual framework with an eye to the aims and activities of those oppositional frameworks with which it has a partisan though not uncritical identification. The questions it asks and the models it designs are informed by that identification and interest.....one of the standards for assessing a critical theory once it had been subjected to all the usual tests of empirical adequacy, would be: how well does it theorize the situation and prospects of the feminist movement? To what extent does it serve the self-clarification of the struggles and wishes of contemporary women?[118]

My works seeks characterization as "critical" and "feminist." I take lessons from Fraser's approach, especially the basic notion that critical feminist research is ultimately accountable, not only for its theoretical consequences but for its political consequences, and its ability to assist in the self-knowledge and political work of social movements seeking justice. However, unlike Fraser's work on the meaning of justice and gender equality, this dissertation does not directly address the "situation and prospects" of the feminist movement, or the questions of justice that surround the persistence of poverty. Rather, these substantive concerns form the motivation for my study, and in that role, structure my overall project and provide the criteria for determining its value. On this foundation built with concepts from critical and feminist theory, I work to explore "common sense" in relation to what it means to practice good legal judgment in a world of marginalization and inequality.

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118 Fraser, "What's Critical," *supra* note 5 at 31. Fraser's views on this matter have evolved.. For a more contemporary statement, see Fraser, "Scales of Justice," *supra* note 5 at 144. There, she says: "Perhaps I could summarize [the role of the critical theorist] like this: a situated thinker, with determinate partisan identifications, who nevertheless cultivates the practice of relatively distanced reflection aimed and disclosing, and fostering, possible links between existing social struggle and historically emergent possibilities for emancipation."

The problem of common sense in legal judgment is entangled in questions about the relationship between knowledge and power, the relationship between communities of people and the law that governs them, and the political consequences of engaging in different kinds of judging practices. The dilemmas of common sense reach into many aspects of individual and community life. Therefore, the problem of "common sense" in legal judgment must be addressed with methodological tools that can take account of this complexity, including the influence of history, context and power.

Further, the question of common sense in legal judgment compels consideration of a number of issues that are somehow slippery or circular or difficult to pin down definitionally. For example, in the introductory chapter above I sketched out the idea of "common sense" as both self-evident and inscrutable. "Common sense" is a phrase containing multiple layers of self-reference. The word "judgment" is also used in multiple and overlapping ways throughout this dissertation and in the works I engage with. At the same time, I rely quite heavily on the notion of self-reflection as a way to negotiate power imbalances and the boundary between expert and non-expert knowledges. Therefore, it is necessary to have access to theoretical frameworks that can respond to these instances of slippage and self-reference in a productive way. The greatest strength of the methodological approach I adopt here is that it is oriented towards a broad and open analysis, allowing different kinds of questions to be asked without constricting their form or substance from the outset. Such an approach may not provide any clear answers (or indeed any answers at all) to the questions it makes possible, but instead seeks simply to identify and articulate a greater diversity of questions. My methodological task is to resist the tendency for

common sense to be self-justifying, and instead break open the discussion and allow new approaches to common sense to emerge.

The purpose of this opening, of finding ways to articulate new questions about common sense, is to find new ways of thinking about and using common sense that can improve the quality of legal judgment when poverty, equality and marginalization are at issue. Because of this substantive concern with poverty and justice, the methodology I rely on must also provide the criteria for determining when common sense works to ameliorate good legal judgment, and when it works to impede it. I need ways to articulate and justify my assessment of different understandings of "common sense" and different practices of legal judgment.

To respond to these requirements, this dissertation draws on methodological tools from three main sources, each of which I will address in detail in this chapter. First, I view the whole problem of common sense in legal judgment through lenses I have acquired from feminist theorists. Feminist and other critical insights about law, politics and justice structure not only how I investigate this problem, but also why I identify it as a problem in the first place. A feminist approach to law and justice provides me with the substantive notion of justice that motivates this study, and generates the criteria that I use to assess the adequacy of our practices of legal judgment. Feminist and other critical thinkers also provide guidance on the interpretation of texts, and shape my interpretation of other thinkers.

Second, in order to address the particular capacity of "common sense" to insulate itself from scrutiny, I turn to a methodology described by Ludwig Wittgenstein. This approach, "perspicuous representation," is an apt one for my study of "common sense" because it is oriented towards breaking out of entrenched ways of thinking, and generating new ways of using language in our social practices. Wittgenstein argues that when we are presented with theoretical difficulties, this is sometimes because we are being held "captive" to a particular "picture."[119] He argues that it is useful to approach problematic concepts in a manner that allows us to see something about the concept that we had been missing before, and he describes this as coming to see a new "aspect" of the concept. I make use of all of these concepts, and adopt this method of "perspicuous representation" as the overall framework for this dissertation. In each of the chapters addressing Thomas Reid, Antonio Gramsci and Hannah Arendt, a different "aspect" of common sense comes to light, as I work to generate a "perspicuous representation" of common sense in legal judgment.

Third, in my investigation of each "aspect" of common sense, I place the writings of the three theorists (Reid, Gramsci, and Arendt) in conversation with legal judgments of the Supreme Court of Canada. Throughout, my approach is very much directed to my own questions and concerns about poverty and about practices of legal judgment. In this respect, it is worth noticing that in addition to its primary connections to Wittgenstein and feminism, my methodology also has some similarities to the approaches employed in the hermeneutical tradition of interpretation as exemplified in the work of Hans-Georg Gadamer[120] and Charles

119 See discussion beginning at p. 62 below.
120 Hans-Georg Gadamer, *Truth and Method*, 2nd, rev. ed. (London; New York: Continuum, 2004).

Taylor.[121] In the course of each chapter, I approach the theoretical texts (by Reid, Gramsci and Arendt) from more than one direction. On one hand, I take the theorist's approach to common sense as I understand it, and see how it fares as a way to understand common sense in legal judgment. Does it help us think of good practices of legal judgment? What does it explain or fail to explain about legal judgment? On the other hand, I also take what is learned in this discussion and use it to critique or describe the limitations of the theorist's approach, or past interpretations of that approach. Thus, while taking seriously the social and discursive context from which each thinker's idea of common sense emerges, I interpret and develop each approach to common sense in light of my own, feminist, concerns about equality in contemporary Canadian law and society.

The remaining parts of this chapter will do the following. First, I make two brief comments about the words "common sense" and "judgment" and the way I use them in this dissertation. Second, I describe in more detail the feminist approaches and concepts that motivate and structure my research. Third, I re-articulate my research problem in terms of Wittgenstein's concepts of "pictures" to which we might be held "captive." And, finally, I will set out the components of the method of "perspicuous representation" as I pursue it in this dissertation, including some challenges, elaborations and extensions grounded in feminist theory.

121 Charles Taylor, "Gadamer and the Human Sciences" in Robert J Dostal, ed, *The Cambridge Companion to Gadamer* (Cambridge University Press, 2002) 126 ["Gadamer"].

A note on language

For reasons that I address below, careful attention to the exact words of a text is important for my methodological approach. Exploration of the multiple meanings and uses of words forms the content of this project as a whole and will be addressed in detail in terms of both methodology and the substance of this project. The key phrases "common sense" and "judgment" are used in different ways in various contexts and by different writers. Thus, even before embarking on this journey, a few introductory comments about these phrases are in order.

"Common sense"

The primary source material for this dissertation consists of scholarly writings and legal judgments that explicitly invoke the phrase "common sense." In English, the words "commonsense" and "commonsensical" also appear, and I have treated these words as intimately related forms of the phrase "common sense." For example, when Norman Finkel discusses "commonsense justice," I have allowed this to count towards the discussion of "common sense."[122] Thomas Reid (discussed in chapter 4), writing in English, uses the exact phrase "common sense."

The work of Antonio Gramsci (discussed in chapter 5) was translated into English from the

122 Finkel, *supra* note 99.

original Italian by Quentin Hoare and Geoffrey Nowell Smith.[123] In translation, Gramsci uses the phrase "common sense" as well as the phrase "good sense."[124] In chapter 5, I explore Gramsci's treatment of both "common sense" and "good sense" as aspects of the phrase "common sense."

In chapter 6, I engage with the work of Hannah Arendt. Arendt writes in English, and uses the exact phrase "common sense." However, Arendt is tracing a different intellectual trajectory of the concept, invoking the Latin phrase *sensus communis*, which she sometimes calls "common sense"[125] and other times calls "community sense,"[126] when she wants to focus attention on the special meaning she attributes to it.

"Judgment," "judging" and "judges"

This dissertation takes a broad approach to the task of understanding legal judgment. In my view, it is useful to understand legal judgment as one form of a larger human practice, which would also include political judgment, moral judgment and aesthetic judgment. I discuss the

123 Antonio Gramsci, *Selections from the Prison Notebooks*, translated by Quentin Hoare & Geoffrey Nowell Smith (New York: International Publishers, 1971).

124 In the introduction to the chapter on the "Study of Philosophy," Hoare and Nowell Smith write: "Essential to Gramsci's approach is the notion that an intellectual revolution is not performed by simply confronting one philosophy with another. It is not just the ideas that require to be confronted but the social forces behind them and, more directly, the ideology these forces have generated and which has become part of of what Gramsci calls 'common sense.' This last term is used by Gramsci to mean the uncritical and largely unconscious way of perceiving and understanding the world that has become "common" in any given epoch. (Correspondingly he uses the phrase 'good sense' to mean the practical, but not necessarily rational or scientific attitude that in English is usually called common sense.)" *Ibid* at 322.

125 Hannah Arendt, *Lectures on Kant's Political Philosophy* (Chicago: University of Chicago Press, 1982) at 66 ["*Lectures*"].

126 *Ibid* at 70–1.

substantive consequences of adopting this view in other parts of the dissertation, especially chapter 5 on Hannah Arendt. But for now, I want to draw the reader's attention to the way this approach affects my choice of language to describe legal decision-making.

First, the decision to understand legal judgment as a form of a larger human practice of judgment means that I use the language of "judgment" and "judgments" rather than other related terms such as "adjudication," "decisions," or "findings," when describing what judges in a court of law do and how it may relate to common sense. This invites certain slippage between the noun "judgment" (which in legal parlance can be used to refer to the written reasons of a court in a given case), and the noun "judgment," meaning the practice of judging in general. A similar slippage can occur between the verb "to judge," meaning to engage in the act of judgment, and the noun "judge," meaning a person who judges. I think these potential slippages and overlapping meanings are productive because they provoke reflection on what legal judgment is all about.

Second, talking about "judgment" as a general human practice means that when I want to talk specifically about what happens in a court of law, I talk about "legal judgment," or sometimes about a "legal judge." This is a way of making my claims narrower and more specific. At the same time, I continue to use very general language about "judgment" no matter what kind of decision-making is going on in a legal case. For example, I describe it as an act of "judgment" when judges make findings of fact, when they offer interpretations of laws, and when they make rulings on the outcome of disputes. All of these forms of reasoning could be mapped differently in relation to other kinds of judgment (such as, for example, moral judgment). However, I argue

that they all engage this larger practice of judgment, which is about the evaluation of a particular fact, law or situation. And depending on the circumstances, they may all engage with "common sense." Therefore, in this investigation of "common sense" in legal judgment, it is useful to adopt this very broad view to see the various points at which common sense comes into play, and how this affects how legal judgment works.

Finally, taking a broad view of "judgment" has methodological implications by the way legal judgment is set alongside other forms of judgment. Understanding judgment as a human practice that transcends the boundaries of subject-matter provides opportunities for interdisciplinarity – when literature from other areas may help illuminate the meaning of judgment in law. Throughout this dissertation, I rely on theorists from a wide range of disciplines, both methodologically and substantively.

Feminist theory and criteria for judgment

Feminist theory is the project of theorizing the experiences of women and the inequalities and oppressions women experience through the operation of overlapping social phenomena including gender, race, class, indigeneity, ability and sexuality.[127] Feminist theory aims to

127 Within feminist theory there are large literatures dealing with the question of how best to understand the relationship between different social categories and different forms of oppression. Influential concepts developed for grappling with these issues include the notion of "intersectionality" (Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43:6 Stan L Rev 1241. I take the general approach that no form of oppression can be understood in isolation from the others. See: Davina Cooper, *Challenging Diversity: Rethinking Equality and the Value of Difference* (Cambridge: Cambridge University Press, 2004); Dua & Robertson, *supra* note 82; Fraser, "Scales of Justice," *supra* note 5; Vanessa E Munro, "Resemblances of Identity: Ludwig Wittgenstein and Contemporary Feminist Legal Theory" (2006) 12:2 Res Publica 137; Iris Marion Young, *Intersecting Voices: Dilemmas of Gender,*

provide theoretical resources that are useful in the work of social movements.[128] Drawing on diverse theoretical frameworks, social experiences and political orientations, feminist theorists ask questions about gender and inequality in relation to a host of issues, critiquing and deconstructing existing intellectual traditions as well as offering reconstructed alternative ways of thinking and knowing.[129] Feminist concepts and issues of gender are not my explicit subject matter, but they form the underlying framework that affects how I think about my research problem as well as the methodology I use to explore my research materials. Thus, although this dissertation is not substantively "about" questions of gender and sexism, it is imbued with normative judgments, political priorities and theoretical attitudes that find their home in feminism.

The category of "feminism" is a very broad one, encompassing a large range of theoretical perspectives and political priorities. My own specific feminism highly values theoretical perspectives that include a commitment to equality, attention to the intersection of different axes of inequality, respect for social difference without oppression, and a skeptical attitude towards the certainty or homogeneity of social categories.[130] The feminist theorists that I rely on this dissertation represent a diverse set of approaches and are invoked for different purposes throughout the work, as explained below. All of them assist me, in some way, in attending to these feminist values and their consequences for practices of legal judgment.

Political Philosophy, and Policy (Princeton, N.J.: Princeton University Press, 1997).

128 See Fraser, "What's Critical," *supra* note 5.

129 For a sense of the range of perspectives in feminist political theory, see Şeyla Benhabib & Drucilla Cornell, *Feminism As Critique: On the Politics of Gender* (Minneapolis: University of Minnesota Press, 1987).

130 Examples of different kinds of feminist legal scholarship that embody these judgments and values include Cooper, *ibid*; Williams, *supra* note 78.

As mentioned in the introductory chapter, feminist and anti-poverty political commitments and theoretical frameworks provide the framework against which common sense emerges as a problem for legal judgment and for justice. This Ph.D. project as a whole arose out of my (feminist) reactions to the *Gosselin* case, and a sense that the case was symptomatic of as well as contributing to injustices of poverty and discrimination in Canada. The *Gosselin* case showed the failure and culpability of our public institutions in relation to the injustices of deprivation and exclusion visited on young women living in poverty in our wealthy and democratic society.

Feminist theories are directly concerned with questions of gender and of sexism, and these questions are an essential aspect of my discussion of justice. But in order to address gender oppression, it is necessary to investigate the ways in which gender oppression manifests in social life; in my view, feminism necessarily engages with poverty when it addresses gender. Consider, for example, the way women disproportionately experience poverty and experience gendered harms arising from poverty. Thus, "poverty" is about more than income, it is also about gender. Moreover, "feminism" is about more than gender, it is also about challenging poverty and injustice in general. My reflections on the *Gosselin* case, on practices of legal judgment in general, and the role of "common sense," rest on a form of feminism in which all of these issues – gender discrimination, poverty, exclusion – are relevant for thinking about justice.

Specifically, I rely on the multi-faceted concept of "justice" developed by critical feminist political theorist Nancy Fraser.[131] Fraser argues that justice requires equality across three

131 Fraser, "Scales of Justice," *supra* note 5; Fraser & Honneth, "Redistribution or Recognition," *supra* note 5; Fraser, "Rethinking the Public Sphere," *supra* note 5; Nancy Fraser, "Mapping the Feminist Imagination: From

aspects of collective life: justice requires economic redistribution, cultural recognition and political representation. This concept of justice is useful for thinking about the injustices of poverty specifically because it can identify the many ways that experiences of poverty can relate to criteria for justice. For example, a young woman living on social assistance in Quebec in the 1980s would experience an unjust distribution of resources, given her context in a wealthy society. Justice calls for redistribution. As evidenced by the debates around the *Gosselin* case, she would also experience stereotyping about the laziness of youth on welfare, and the moral blameworthiness of women who are "dependent" on the state.[132] A young woman in these circumstances might also experience social exclusion and barriers to social participation (it is not possible to go to the movies, or invite friends for lunch, or attend events requiring childcare, when there is no money to pay for these things). Justice calls for changes in cultural recognition, respect and social status. Finally, a young woman in Ms. Gosselin's circumstances might experience inequality in political participation through her marginalization in public life and the invisibility of her perspective in the political institutions that claim to represent her. Justice calls for parity of political participation and representation in public life.[133]

It is against this multi-faceted understanding of justice that the invocation of "common sense" in legal judgment acquires its significance as a subject for investigation. This understanding of justice also provides the ultimate justification for the normative judgments I make about legal

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Redistribution to Recognition to Representation" (2005) 12:3 Constellations: An International Journal of Critical & Democratic Theory 295.

132 For a compelling geneaology of the concept of "dependency," particularly in the U.S. context, see: Nancy Fraser & Linda Gordon, "'Dependency' Demystified: Inscriptions of Power in a Keyword of the Welfare State" (1994) 1 Social Politics 4.

133 Other critical, feminist and social justice theorists take issue with Fraser's approach. For example, see: Fraser & Honneth, "Redistribution or Recognition," *supra* note 5.

judgment: good legal judgment is a condition of just outcomes. However, my approach to the question of legal judgment is primarily a procedural one. I focus on the ways in which feminist theory provides criteria for evaluating *practices* of judgment in and of themselves. The concepts I use to make judgments about what constitutes good legal judgment arise from the feminist framework that motivates my research. In addition to the understanding of justice described above, three basic concepts are especially important in this regard: the importance of practice, the value of inclusivity, and attention to the relationship between knowledge, power, and social context. I address each of these briefly below.

First, feminist approaches are oriented to practice.[134] The idea of practice has different meanings and plays different roles for different feminist approaches.[135] Here, I use the term in a very general way to describe the orientation towards lived experience as both the subject and goal of feminist theorizing. This includes the approach advocated by Fraser, above, in which theoretical projects ultimately find their measure in their capacity to support the work of actual social movements; they are directed to social practice. Some feminist theorists are also interested in "practice" in a more quotidian way, as describing the daily practices that make up individual and social life. For example, in her analysis of the relationship between equality and diversity, feminist legal scholar Davina Cooper argues that for transformative politics to take effect, egalitarian concepts must not only compel critical reflection, but also must take root in the unreflective practices we are always engaged in; to generate "counter-normative community

134 See, for example, Dorothy E Smith, *The Everyday World As Problematic: A Feminist Sociology* (Toronto, ON: University of Toronto Press, 1987).

135 The concept of practice or "praxis" also appears with its specifically Marxist connotations in the work of Antonio Gramsci, considered in chapter 4.

pathways."[136] The need to think about daily life practices is a feminist concern, and helps to show why "common sense" is worthy of critical attention.

The second general concept from feminist theory that informs this dissertation is that of inclusion, and the need to challenge political and conceptual categories that make claims about universality. Some of the characteristics of "common sense" as a concept – its purported universality, its ability to make both factual and normative claims about knowledge, its rhetorical power – are of central concern to feminist thinkers wanting to address the relationship between our ways of thinking and the injustices we experience and observe in the world. In particular, feminist thinkers from various disciplines have crucially identified how claims about universality and commonality – claims that sit at the heart of "common sense" as an idea – can actually function to exclude and marginalize. For example, in her compelling and influential critique of the notions of impartiality, reason and public life as traditionally understood in Western political philosophy, feminist political theorist Iris Marion Young argues that the claims of universality contained in these concepts have been an important part of the theoretical and practical exclusion of some groups, including women, from public life.[137] The idea of the transcendent, unified public sphere attains this unity because it excludes certain aspects of our lives (our embodied, affective selves), as well as the concrete exclusion of certain groups.[138] She argues that "an emancipatory conception of public life can best ensure the inclusion of all

136 Cooper, *supra* note 127. Legal theorist Boaventura de Sousa Santos also frames some of his arguments about how to approach legal pluralism as a project to create a "new legal common sense." Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization And Emancipation* (London: Butterworths, 2002).

137 Iris Marion Young, "Impartiality and the Civic Public: Some Implications of Feminist Critiques of Moral and Political Theory" in *Feminism as Critique: On the Politics of Gender* (Minneapolis: University of Minnesota Press, 1987) 57.

138 *Ibid* at 76.

persons and groups not by claiming a unified universality, but by explicitly promoting heterogeneity in public."[139] Young's critique of "impartiality" gives a sense of why a feminist lens provides me with both political and conceptual reasons to be critical of "common sense" as a part of legal judgment, and provides criteria for inclusiveness that can be used in relation to many substantive issues.

The third general concept from feminist theoretical literatures that plays an important role in structuring this dissertation is that idea of power.[140] Feminist theorists have engaged with different conceptions of "power," with different theoretical and political consequences.[141] The concept of "power" is not a key analytical category that I explore in detail. Rather, I retain the term in order to find a way to talk about social and political relations of inequality, particularly in relation to claims of knowledge. Feminists thinkers have shown how claims about knowledge can be intimately related to questions of power, social hierarchy and group interests.[142] Following from this basic insight, feminist thinkers have generated a range of compelling theoretical concepts, two of which play an important role in my methodology. I rely on the notion of "reflexivity" or the idea that it is possible to bring critical reflection to bear on one's own social location and relative power, and thereby to make more transparent the

139 *Ibid* at 59. For a different but related view, see: Seyla Benhabib, *Democracy and Difference* (Princeton: Princeton University Press, 1996); Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton: Princeton University Press, 2002).

140 For a wide-ranging discussion of different conceptions of "power" and the relationship to politics, see Steven L Winter, "The 'Power' Thing" (1996) 82:5 Va L Rev 721.

141 For a descriptive overview of feminist approaches to the concept of power, see: Amy Allen, "Feminist Perspectives on Power" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, Spring 2013 ed (2013), online: <http://plato.stanford.edu/archives/spr2013/entries/feminist-power/>.

142 Sandra Harding, *Discovering Reality: Feminist Perspectives on Epistemology, Metaphysics, Methodology, and Philosophy of Science*, 2nd ed. ed (Dordrecht [Netherlands]; Boston Mass.: Kluwer Academic Publishers, 2003).

relationship between power and knowledge in any given context.[143] Critical reflection is important for this dissertation as a matter of methodology, and as a substantial part of the arguments I make about "common sense" in legal judgment. Attention to power also relates to the way the topic of "common sense" itself is related to social power relations. "Common sense" tends to take up space (or claims to take up space) right in the centre of social knowledge. Therefore, examining "common sense" requires methodological tools that can attend to questions about knowledge that is either "inside" or "outside" the realm of dominant norms. For this purpose, I engage with the notion of "marginality" as developed by feminist and critical race theorists.[144]

Notably, each of these feminist concepts or themes has a particular, nascent link to "common sense," once again tracing the origins of my research project. Each of these concepts guides my judgment throughout the dissertation, including my judgments about choosing and interpreting sources; thus, these concepts have both a substantive and a methodological role. Taken together, these concepts describe the lens that I use to evaluate legal judgment, to assess scholarly and legal texts throughout the dissertation, as well as the lens that I ultimately use to assess the success of my own project.

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143 For two very different but compelling example of theorists rigorously working through the demands of critical self reflection, see: Brenda Cossman, "Turning the Gaze Back on Itself: Comparative law, Feminist legal studies, and the Postcolonial Project" (1997) 2 Utah L Rev 525; Jennifer Nedelsky, "Dilemmas of Passion, Privilege and Isolation: Reflections on Mothering in a White, Middle Class Nuclear Family" in Julia E Hanigsberg & Sara Ruddick, eds, *Mother Troubles: Rethinking Contemporary Maternal Dilemmas* (Beacon Press, 1999).

144 See discussion at page 94 and following. Patricia Hill Collins, "Learning from the Outsider Within: The Sociological Significance of Black Feminist Thought" in Mary Margaret Fonow & Judith A Cook, eds, *Beyond Methodology: Feminist Scholarship as Lived Research* (Bloomington: Indiana University Press, 1991) 35; bell hooks, "Choosing the Margin as a Space of Radical Openness" in Ann Garry, ed, *Women, Knowledge, and Reality: Explorations in Feminist Philosophy*, 2nd ed. ed (New York: Routledge, 1996) 48; Williams, *supra* note 78.

The problem of common sense in Wittgensteinian terms

The task of this dissertation is to open "common sense" to the critical scrutiny required by the feminist and anti-poverty approaches described above, including reference to inclusion, power, and the realities of daily living. Given the aims of my project, encountering Ludwig Wittgenstein's methodology of "perspicuous representation" proved to be a serendipitous discovery. Wittgenstein's approach (with some modifications) serves me well methodologically because it is directed at precisely the kind of impasse that can occur when talking about "common sense." This approach also requires constant attention to the relationship between meaning and context, and the role of political choice in grounding judgment. These connections are essential for my research, and Wittgenstein provides a way to articulate how and why they should be explored.

In this section, I will explain the Wittgensteinian concepts I adopt to characterize the problem of "common sense," including the notions of "pictures" to which we might be held "captive," and seeing things from a new "aspect." I argue that we are, to some extent, held "captive" by a "picture" of "common sense," and that this constrains our understanding of "common sense" in a manner that undermines the quality of practices of legal judgment. In the following sections, I re-cast the dilemma of "common sense" (self-evident and inscrutable) in Wittgensteinian terms and show how this shapes the methodological structure of my dissertation and the kind of response I provide to challenge our captivity.

"Captivity" to a "picture"

Wittgenstein's ideas of "pictures" and "captivity" are developed in the context of his philosophy of language. In his earlier writings, Wittgenstein developed a philosophical "system" for thinking about language that is grounded in an underlying commitment to formal logical analysis. According to this system, in order to have meaning, language must conform to the constraints of logic and it must refer to something in the world. Language is a system of signs in which meaning comes from the correspondence of a word or proposition with the thing it signifies.[145]

Later in life, Wittgenstein radically changed his view about the usefulness of this perspective on language. He came to think that understanding language as a system of signs actually works to impede, rather than facilitate, understanding of important aspects of human life. In later works such as *On Certainty*[146] and *Philosophical Investigations*,[147] Wittgenstein argues that philosophers' view of language is actually counter-productive in relation to the real questions of philosophy.[148]

In this later work, Wittgenstein turns his attention to the problem of intellectual questions that seem to be caught up in contradictions, or in a repeating loop of justification that no longer satisfies. He argues that these problems are the ones that are the most philosophically pressing,

145 See Anat Biletzki & Anat Matar, "Ludwig Wittgenstein," *The Stanford Encyclopedia of Philosophy,* Summer 2011 ed., online: <http://plato.stanford.edu/archives/sum2011/entries/wittgenstein/>.
146 Ludwig Wittgenstein, *On Certainty* (Maldon, MA Blackwell Publishing, 1975) ["OC"].
147 Ludwig Wittgenstein, *Philosophical Investigations* (Malden, MA: Blackwell Publishing, 1953) ["PI"].
148 *Ibid*, sec 38.

but, ironically, are also the ones that we are least capable of exploring using a model of language as a system of signs. But, he says, we often seem to be unable to get away from this language model. To describe this problem, Wittgenstein uses the language of "captivity" to a "picture." We are held captive to a picture of language as a system of signs. Further, this "picture" itself is embedded in our language, and since we use language to explain our thoughts, getting outside it is difficult or impossible:

> A *picture* held us captive. And we could not get outside it, for it lay in our language and language seemed to repeat it to us inexorably.[149]

In this passage, Wittgenstein is talking about the "picture" of language that many people (including philosophers) hold, in which language is understood as a system of signs or symbols, and it is this "picture" (a "picture" of *language*) that Wittgenstein is interested in exploring and challenging.[150] Thus, in his later works, Wittgenstein starts anew with a different understanding of language in which meaning is based in use and context, and he argues that this approach can go further in understanding why contradictions or repeating loops occur, why they are troubling, and ultimately why they cannot (and need not) be resolved in order for philosophical questions to be addressed. This is the heart of Wittgenstein's enduring contribution to philosophy of language.

However, the concept of "pictures" and the possibility of being held "captive" are important ideas in their own right, useful not only in the context of language and meaning, but in any question about social life. For example, political philosopher James Tully argues that we are

149 *Ibid*, sec 115.

150 See Hanna Fenichel Pitkin, *Wittgenstein and Justice: On the Significance of Ludwig Wittgenstein for Social and Political Thought* (Berkeley: University of California Press, 1972) ["Wittgenstein and Justice"].

held captive to a picture of political life in which "our way of political life is free and rational only if it is founded on some form or other of critical reflection."[151] In order to challenge our captivity to this picture, Tully explores two possible candidates for this foundational critical reflection: the justificational form advanced by Jurgen Habermas, and the interpretive form advanced by Charles Taylor. Tully writes that this exploration, using Wittgenstein's methodological approach, allows us to see "that *no* form of critical reflection can (or need) play the [foundational] role presupposed for it in this discussion." The discussion challenges our captivity to the picture.

Feminist political theorist Linda Zerilli also invokes the concepts of "pictures" and "captivity" in her assessment of feminist critiques of "the category of women." Zerilli argues that such critiques are held captive to a picture of politics in which it is possible to make political claims that correspond to the empirical reality of differences, and that never exclude. Zerilli argues that taking a Wittgensteinian approach demonstrates that

> Politics consists precisely in the making of claims, which, being claims, are inevitably partial and thus exclusive.....That the claim "we women demand x" excludes some women turns not on the theoretical insight (in the philosophers's study) into the exclusionary character of the category of women but rather on the political character of making claims (in a public space.)[152]

Zerilli's Wittgensteinian exploration of the system of sex differences and the nature of political action in context challenges our captivity to a certain picture of politics.

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151 James Tully, "Wittgenstein and Political Philosophy: Understanding Practices of Critical Reflection" in Cressida Heyes, ed. *The Grammar of Politics: Wittgenstein and Political Philosophy* (Ithaca: Cornell University Press, 2003) at 17 ["Wittgenstein and Political Philosophy"].

152 Linda M G Zerilli, "Doing without Knowing: Feminism's Politics of the Ordinary" in Cressida Heyes, ed, *The Grammar of Politics: Wittgenstein and Political Philosophy* (Ithaca: Cornell University Press, 2003) at 148 ["Doing without Knowing"].

A further example of using Wittgenstein's concepts of "pictures" and "captivity" to generate a theoretical methodology can be found in the work of feminist philosopher Cressida Heyes. In her work on the relationship between the body and the self, Heyes argues that we are held "captive" to related "pictures" of power and of the body that "mark significant constraints on our ability to imagine alternative ways of caring for ourselves and others, hence on our self-government, and ultimately on our freedom."[153] Heyes draws on Wittgenstein and also Foucault to challenge this captivity.[154]

Like Tully, Zerilli and Heyes, I adopt Wittgenstein's notions of "pictures" and "captivity," taking these concepts away from the question of language in order to apply them in a different context. This dissertation touches upon different "pictures" of the world, including pictures of poverty and pictures of legal judgment. However, my direct subject is our picture of "common sense," and the usefulness of this picture for making judgments about law and social justice. I am taking Wittgenstein's concept of captivity to a picture and applying it to the question of common sense.

For Wittgenstein, a "picture" of something is a system of inherited judgments about that thing. It is a system that we are always already enmeshed in, and guides our subsequent judgments.[155] In addition to a picture of language, Wittgenstein also discusses other examples of "pictures,"

153 Cressida J Heyes, *Self Transformations* (Oxford University Press US, 2007) at 15 ["Self Transformations"].

154 Heyes writes: "Both Wittgenstein and Foucault urge upon us ways of thinking ourselves differently, in part because, they each believe (in rather different contexts), our current habitual perspectives make us contingently unfree." *Ibid* at 17.

155 "We do not learn the practice of making empirical judgments by learning rules: we are taught judgments and their connexion with other judgments. A totality of judgments is made plausible to us." Wittgenstein, "PI," *supra* note 147, sec 140.

including a scientific picture of knowledge as well-supported hypotheses, and a picture of human societies as occupying positions on an evolutionary scale of development.[156] He also talks about "*the picture* of the earth as a ball floating free in space and not altering essentially in a hundred years..."[157] Our ways of talking and thinking are structured and given meaning by the pictures we hold.

Wittgenstein's use of a visual metaphor is significant here; by describing it as a "picture," Wittgenstein helps us see how a system of judgments can form a total backdrop to our thinking about something, and how our inherited beliefs are a necessary context for everything we say and do. Talking about "pictures" also reinforces the sense that the context for judgment is a kind of construct, rather than, for example, some kind of unmediated "reality."

According to Wittgenstein, "pictures" are inherited through our language. Pictures are embedded in our grammar, analogies and metaphors.[158] As such, pictures form the background against which we think and act, but we are often unconscious of them. The way we think, talk and act is structured and constrained by the "picture" that forms the context for our practices.[159]

However, a picture is not only a *constraint* on the exercise of judgment. Rather, a picture forms

156 David Owen, "Geneaology as Perspicuous Representation" in Cressida Heyes, ed, *The Grammar of Politics: Wittgenstein and Political Philosophy* (Ithaca: Cornell University Press, 2003) 82 at 83.

157 Wittgenstein, "OC," *supra* note 146, sec 146–7. See also Owen, *supra* note 156 at 83.

158 An exploration of the role of metaphor in relation to language, thought and action is undertaken in George Lakoff and Mark Johnson, *Metaphors We Live By* (Chicago: University of Chicago Press, 1980).

159 Note that "pictures" have many relationships to judgment. Pictures are made up of inherited judgments about something. At the same time, pictures provide the context against which we make other judgments. For Wittgenstein, judgments are always based on other judgments.

the context in which thinking and arguing become possible, and is thereby *enabling* of judgment. A picture is the background against which thinking and talking make sense at all. Wittgenstein writes:

> All testing, all confirmation and disconfirmation of a hypothesis takes place already within a system. And this system is not a more or less arbitrary and doubtful point of departure for all our arguments: no, it belongs to the essence of what we call an argument. The system is not so much the point of departure, as the element in which arguments have their life.[160]

In social or political terms, a picture of the world acquires its significance by creating the possibility for judgment and communication, as well as the limitations of judgment and communication. Political philosopher David Owen relates this to a kind of agency or self-government. He argues that acquiring a picture of the world "enables us to make sense of (and hence to experience) ourselves as agents in the ways that matter to us."[161]

However, the enabling potential of "pictures" is compromised when we find ourselves unable to reflect on or revise the picture we have. It may become so embedded in our analogies, metaphors and other ways of thinking that we lose sight of the fact that it is, indeed, a "picture" rather than direct experience of an objective world.[162] We lose sight of the fact that the picture itself can be subject to evaluation and revision.[163] In these circumstances, the constraints of a picture appear difficult or impossible to overcome. Here, we not only *have* a picture, a system of inherited judgment about something, we are held *captive* to that picture.

160 Wittgenstein, "OC," *supra* note 146, sec 105.
161 Owen, *supra* note 156.
162 *Ibid* at 85.
163 *Ibid* at 84–85.

In Wittgenstein's own work, he was concerned with our captivity to a picture of language as a system of signs, in which meaning can be found by determining the correct link between a word and the thing that it signals. Wittgenstein argues that most people have this "picture" of language. However, most people also notice that the meaning of words and phrases changes according to context, and that most of the time this causes no problem for understanding and communication. If language is a system of signs, this should not be the case; experience contradicts the picture. But the picture is held so deeply that instead of rejecting it, we try to accommodate the diverse meanings we encounter in practice by creating definitions with inherent and unresolvable internal tensions or contradictions. Eventually, these definitions no longer address the problems that led us to ask the question in the first place. We are not satisfied, but we do not know how to move forward – we are held captive by our picture of language as a system of signs.

Captivity to a picture results in our being able to see only one *aspect* of something (some commentators thus use the language of "aspectival" captivity)[164]. Wittgenstein again uses visual metaphors to explain his concept of an aspect.[165] He talks about "seeing-as," "aspect blindness," and "the dawning of an aspect."[166] He also uses visual imagery and diagrams to illustrate, including a figure known as the "duck-rabbit," a drawing that can be "seen as" either a duck or a rabbit.[167]

164 Owen, *supra* note 156.
165 Wittgenstein's concept of "aspect" is discussed further below at p. 85 and following.
166 Jonathan Havercroft, "On Seeing Liberty As" in *The Grammar of Politics: Wittgenstein and Political Philosophy* (Ithaca: Cornell University Press, 2003).
167 The image reproduced here appears in the Philosophical Investigations at Part II, p. xi (Wittgenstein, "PI," *supra* note 147). For an interesting overview of the history of this image and similar ones, see: John Kihlstrom, "Joseph Jastrow and His Duck -- Or Is It a Rabbit?", online: <http://ist-socrates.berkeley.edu/~kihlstrm/JastrowDuck.htm>.

PHILOSOPHICAL INVESTIGATIONS II

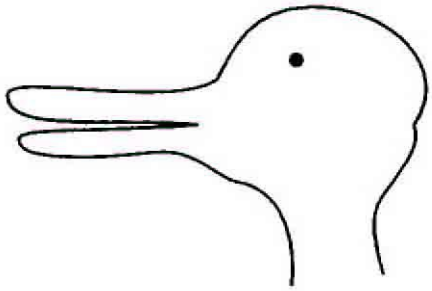

Illustration 1: Duck-rabbit

When we are held captive by a picture, we are unable to see more than one aspect. Philosopher Gordon Baker argues that providing a methodology for breaking free of this captivity is at the heart of Wittgenstein's philosophy. He writes:

> When we are held captive by a picture...'embedded in our language', we are unable to see something in more than one way...Our position is comparable to that of someone who *continuously* sees a single aspect in the duck-rabbit diagram.[168]

To illustrate the concept of "captivity," Wittgenstein describes a hypothetical situation of a person imprisoned in a room, whose "picture" of a door is such that doors can only open outwards: "Someone is *imprisoned* in a room if the door is unlocked, opens inwards; but it doesn't occur to him to *pull*, rather than push against it"[169] In this example, the physical constraints of the room serve as analogies for the mental constraints of a "picture" to which we are held captive. Owen writes:

> Imagine: entranced by a picture of doors as opening outward, Wittgenstein's man

168 Gordon P Baker, "Philosophical Investigations s. 122: Neglected Aspects" in Gordon P Baker & Katherine J Morris, eds, *Wittgenstein's Method: Neglected Aspects* (Malden, MA: Blackwell Publishing, 2004) at 35.
169 Cited in Owen, *supra* note 156 at 85.

> pushes and pushes with increasing frustration, with an increasing sense of powerlessness – and so experiences himself as imprisoned, as subject to external constraints on his capacity for agency, precisely because the idea that doors only open outward is taken as prior to judgment, as a principle of judgment rather than as subject to judgment. The problem here is not simply that this man has a particular picture of doors that guides his judgment and actions in infelicitious ways, it is that he is captivated by this picture and, thus, is incapable of calling it into question.[170]

Captivity to a picture is important politically because it constitutes a constraint on the capacity for self-understanding and thus on the capacity for judgment and self-government.[171] Captivity to a picture affects judgment because it causes us to see certain conclusions, perspectives or assumptions as necessary or inevitable. Feminist philosopher and Wittgenstein scholar Naomi Scheman analogizes these apparently necessary conclusions to "forced moves" in a game like chess.[172] Trying to make judgments under these constraints, when our judgment seems "forced," can generate tension between our experiences of the world and the pictures we use to understand it. As Owen says: "a disjunction may emerge between our ways of making sense of ourselves, on the one hand, and our cares and commitments, on the other."[173]

In many cases, when this disjunction arises, we can reassess the value of the picture and revise it as necessary. But when we are held "captive" to the picture, we seem unable to do this and our questions remain unanswered. The tension between experience and the possibilities of judgment begins to constrain and confound our ability to make judgments and to act on them, compromising our self-knowledge and self-government. The person imprisoned in the room

170 *Ibid* at 85–6.
171 *Ibid* at 82.
172 Naomi Scheman, "Introduction" in Naomi Scheman & Peg O'Connor, eds, *Feminist Interpretations of Ludwig Wittgenstein* (University Park, Pennsylvania: Penn State Press, 2002) 1 at 16 ["Introduction"].
173 Owen, *supra* note 156 at 85.

wants to find a way out, political theorists see the importance of critical reflection, and feminists care about political exclusion through gender identity claims. But they are each "held captive" by "pictures" that prevent the full exercise of judgment and agency in relation to these issues. Heyes writes:

> Although some picture is an inevitable feature of judging, and can be valuable if it enables us to make sense of ourselves, being *held captive* by a picture implies that one cannot reorient one's reflection and is thus profoundly unfree.[174]

Scheman also notes that "forced moves depend for their force on our understanding them from inside a particular practice."[175] Thus, a key part of challenging our captivity to a picture is to identify those questions and answers that appear to be necessary, the "forced moves," and to locate them in relation to the social practices that give them meaning. Challenging the picture itself assists us in identifying it *as* a picture, as rooted in particular social practices and therefore contingent on those practices.

Wittgenstein's comments on language and our captivity to a picture of language do provide some methodological guidance for this dissertation.[176] However, the main subject for consideration is our picture of "common sense." Debates about "common sense" are, to some extent, held captive by a particular picture of that concept, in which common sense is primarily a kind of knowledge. As illustrated by the various uses of the term "common sense" outlined in the introduction, captivity to any one picture of "common sense" is less complete than captivity to the picture of language that Wittgenstein describes. However, whether theorists want to

174 Heyes, "Self Transformations," *supra* note 153 at 18.
175 Scheman, "Introduction," *supra* note 172 at 16.
176 See especially "Seeking new examples," below beginning at p. 94.

critique, celebrate or deny the role of "common sense" in legal judgment, there is a frequent return to the idea that the legitimacy of "common sense" relates to the potential universality of some form or other of common knowledge. Our captivity to this picture prevents full debate on the way common sense relates to legal judgment, and thereby impedes our ability to make judgments about the value of "common sense" and its potential as a resource for good legal judgment.

The dominance of this picture of common sense as a type of common knowledge is also evident in the context of legal judgments touching on poverty and inequality specifically (as, for example, in much of the scholarly comment on the use of "common sense" by the majority justices in *Gosselin*). In many respects, this picture of common sense – as a form of knowledge – is extremely useful in this context because it allows us to ask the crucial question: "common to whom?" For example, in the *Gosselin* case, the majority justices used the language of "common sense" to ground certain conclusions. By asking whose knowledge grounds those claims, it becomes possible to scrutinize the justice of invoking common sense in that context. Within the framework provided by the picture of common sense as a type of knowledge, it is possible to see, as Schneiderman points out, that in *Gosselin* "common sense" seems associated with a dominant cultural consensus about welfare and justice.[177]

However, this area of law also tends to provoke other questions and concerns that seem unanswered or unanswerable from within the framework provided by the picture of common

177 Schneiderman, "Social Rights and 'Common Sense'," *supra* note 50.

sense as a type of knowledge. For example, writing in dissent in *Gosselin*, Justice L'Heureux-Dubé could also have claimed that her judgment was based on her "common sense," *but she did not*. Why not? Is it just a matter of social consensus, or is there a substantive match between the political ideology espoused by the Quebec government in that case and the idea of "common sense"? Is there a link between "common sense" and the economic class of political elites, or of judges? What do we make of the rhetorical choice to invoke, or refrain from invoking, "common sense" in written reasons? Thinking about common sense as a type of knowledge gives at best, an incomplete answer to these questions, and does not provide a framework to fully address what seems to be at stake.

Using Wittgenstein's language of "captivity" to a "picture" to characterize a problem needing theoretical attention has similarities to other methodological approaches. There are, after all, numerous rich theoretical traditions that grapple with the question of how the exercise of judgment is affected by the social background that frames the issue to be judged.[178] One might interpret Plato's allegory of the cave[179] in this way, for example, or Antonio Gramsci's notion of hegemony explored in chapter 4.

Wittgenstein's idea of a "picture" to which we can become "captive" thus sits with a number of other approaches that see social context as constituting a framework for judgment and a possible constraint on its exercise. However, Wittgenstein's approach differs in that he is not especially

178 Pitkin, "Wittgenstein and Justice," *supra* note 150 at 336.
179 Plato, "Republic" in John M Cooper ed. *Complete Works,* (Indianapolis; Cambridge: Hackett Publishing Company, 1997) 971, at 514a.

concerned with the truth value of the "picture," but rather with the problem of "captivity" *per se*. In his description of what distinguishes Wittgenstein's idea of captivity, Owen contrasts "ideological" with "aspectival" captivity.[180] In the case of ideological captivity, we become captivated by false beliefs that constrain our ways of thinking. Further, these false beliefs acquire some of their power because of their capacity to legitimize certain practices or institutions and obscure the truth about social relations.[181] This is the focus of some critiques in the Marxist tradition, for example. What is required in order to liberate ourselves from ideological captivity is a kind of critical self-reflection that can assist in dispelling ideas that obscure the reality of social relations, and move towards "truth" or "truths," however understood.[182]

In the case of "aspectival" captivity, we are in thrall to a certain "picture" that allows us to see only one "aspect" of something. Unlike "ideological" captivity, "aspectival" captivity can exist independently of the truth or falsehood of the beliefs that make up the picture. We are not able to exercise judgment if we are unable to reflect on the value of a picture we hold, or to think any other way; it is our *captivity* that is significant, not the truth value of the picture.[183] Owen writes:

> [R]eflection on ideological captivity addresses that aspect of self-government that concerns the fact that our judgments are guided by beliefs that can be true or false, while reflection on being held captive by a picture attends to that aspect of self-government that concerns the fact that our judgments are situated in systems of judgment that can be of greater or lesser value in terms of their capacity for

180 Owen, *supra* note 156 at 88.
181 Heyes, "Self Transformations," *supra* note 153 at 18–19.
182 An example of work that is aimed at freeing from ideological captivity is the critical theory of the Frankfurt School: Owen, *supra* note 156 at 90.
183 Owen argues that the work of Foucault can be characterized as addressing aspectival captivity: *Ibid*.

enabling us to make sense of ourselves as agents in ways that matter to us.[184]

While critics from any tradition might be interested in both the fact of our captivity and the substance of the pictures to which we are held captive, it is useful to distinguish these analytically because they require different methodological solutions. Wittgenstein argues that when we find ourselves held captive to a picture – aspectival captivity – it results in our being able to see only one "aspect" of something. In this dissertation I argue that many debates about common sense and law allow us to see only one "aspect" of "common sense." Writers with a wide variety of interests and commitments trying to engage with the relationship between "common sense" and legal judgment can address some of their questions from within this framework; the picture is valuable for some purposes. But other questions that seem important for understanding legal judgment, like the roles of power and persuasion, are difficult or impossible to address in a satisfying way.

Moreover, in the literature there is little consideration of the value *of the picture itself.* I think this is an example of a time when we find ourselves held *captive* to a picture; when some way of thinking is no longer satisfying, but it is unclear how to move forward. Like the man with the picture of "doors" that can only open outwards, there are times when the picture fulfills its purposes perfectly adequately: there are times when doors do open outwards. But as soon as doors fail to work in this way, the man encounters difficulties in forming judgments and acting in accordance with his own self-understanding and agency. Faced with this tension, the man needs to be able to reflect on and assess the adequacy of his picture of doors, and revise it

184 *Ibid* at 91.

accordingly. But if he is *held captive* to his picture of doors as opening outwards, the man in the room will be unable to do this, sustaining his physical captivity as well.

I argue that the questions we ask about common sense, and the answers that make sense to us, are incomplete. The "picture" of common sense as a type of knowledge is not fully satisfying, and leaves us with lingering doubts and critiques. To the extent that we are held captive by this picture about common sense, we are unable to fully make sense of how it relates to legal judgment or the demands of justice. In Wittgenstein's terms, we are in need of philosophical "therapy" to help us experience new "aspects" of "common sense." The therapy Wittgenstein prescribes is a methodology he calls "perspicuous representation." To respond to the problem of captivity, I build a "perspicuous representation" of common sense that releases us to think about and to use common sense in different ways.

Captivity and common sense

Before describing this methodology in detail, I want to make three general comments about the relationship between the methodology and subject matters of this dissertation. First, the substantive issues I address – common sense, legal judgment and poverty as a justice concern – are things that are subject, to some degree, to *both* ideological and aspectival captivity. Indeed, the content of the "pictures" that dominate understanding of poverty is a primary motivating factor for this research. I would argue that many of the pictures that frame our discussions on

these issues contain ideas that are in some manner mistaken or wrong, such as the inevitability of widespread poverty, the moral blameworthiness of low income people, or the impossibility of addressing poverty within a rights framework. But this dissertation is not a direct critique of the ideological content of our "pictures" of poverty, legal judgment or common sense. Rather, the framework for my project as a whole is addressed to aspectival captivity, and the *usefulness* of our "pictures" towards achieving specific goals, rather than their inherent value or truthfulness. These goals have to do with assessing the adequacy of practices of legal judgment and creating new criteria for good legal judgment, measured against the demands of a broad understanding of justice.

Second, I suggest that Wittgenstein's methodology is particularly apt for demonstrating the significance of *common sense* in legal judgment because it helps crack open the self-justifying nature of common sense. The tendency of common sense to present itself as unmediated reality (as Geertz says, "just life in a nutshell"[185]), means that captivity and inability to reflect on the picture seem particularly likely in relation to the concept of "common sense." Wittgenstein's concerns about paradox, circular reasoning, or questions that are difficult to articulate are all at work in the case of "common sense," and therefore an investigation of "common sense" has much to gain from exploring his approach. There is also a further *prima facie* connection between "common sense" and a Wittgensteinian approach. Indeed, one might say that "common sense" *is* a "picture of the world," in the sense that it could be understood as a set of inherited judgments, against which all other judgments are measured. Thus, Wittgenstein's insights about captivity and pictures of the world serve primarily as the basis of my

185 Geertz, *supra* note 17 at 75.

methodology, but his writings also relate to understanding "common sense" as such.

The third general comment about the relationship between my substantive and methodological arguments returns to the political frameworks that motivate this research. The notion of aspectival captivity directs attention to the question of whether a picture of the world is continuing to be useful towards its purpose. In his discussion, Owen describes this purpose in general terms as the capacity for self-understanding; a picture is useful to the extent that it allows us to make sense of ourselves and our circumstances and thereby supports our ability to make judgments. But beyond this, it becomes necessary to identify specifically the purpose that the picture should be measured against. In the context of legal judgment involving poverty, I evaluate our "picture" of "common sense" against criteria about justice and equality.[186]

Assessing the adequacy of a picture (here, of common sense) requires something like an act of will or the exercise of choice. I argue that the picture of common sense as a type of knowledge is inadequate for developing practices of legal judgment that fully respond to the demands of justice and equality, and therefore that it is valuable to address our captivity to this picture and generate new ways of thinking about common sense. Clearly, the judgments that identify the appropriate criteria for assessing the usefulness of our picture of common sense have political content. Some of these judgments relate to established legal principles, such as the right to equality as enshrined in s. 15 of the *Charter*. But they nevertheless involve chosen commitments that privilege some values over others. These products of choice or political will

186 See above p. 54.

determine whether a "picture" of something is problematic or not. Thus, Wittgenstein's approach requires attention not only to knowledge, truth, or information, but also to politics, culture and other aspects of human judgment.

Writing about this aspect of judgment, in which a picture of the world is more than a matter of "knowledge," Wittgenstein says:

> What stands fast does so, not because it is intrinsically obvious or convincing; it is rather held fast by what lies around it.[187]

Thus, pictures of the world, what "lies around" our judgments, are made up not only of the content of our knowledge and beliefs, but also more broadly of our cultural, social and psychological commitments that secure the legitimacy of those judgments. Wittgenstein writes:

> I did not get my picture of the world by satisfying myself of its correctness; nor do I have it because I am satisfied of its correctness. No: it is the inherited background against which I distinguish between true and false.[188]

Wittgenstein also argues more explicitly that what lies at the bottom of judgments is not ultimately a matter of knowledge, but of something else: grammar, practice, community agreement and indeed choice.[189] The legitimacy of our judgments is also secured by acts of agency. Wittgenstein says:

> If someone says that he will recognize no experience as proof of the opposite, that is after all a *decision*. It is possible that he will act against it.[190]

187 Wittgenstein, "OC," *supra* note 146, sec 144.
188 *Ibid*, sec 94.
189 Wittgenstein, "PI," *supra* note 147, sec 241.
190 Wittgenstein, "OC," *supra* note 146, sec 368.

One way that Wittgenstein approaches this issue of how our judgments are shaped by things other than "knowledge," is to explore the ways in which a picture of something affects the burden of proof applied to different claims. For Wittgenstein, our pictures of the world affect not only the content of our beliefs, but which "certainties" we defend with greater passion, and what "facts" we find it difficult or impossible to accept, regardless of the evidence.[191] Our pictures of the world help us figure out what kinds of things are subject to doubt, and which are beyond proof.[192]

In his own work, Wittgenstein did not explicitly consider questions of power.[193] When he talks about the limitations of a given picture of the world, he is talking about our capacity for self-understanding, in contrast with mistake or nonsense. He is not directly addressing the possibility of *competing* pictures of the world, or of *resistance* to a picture.[194] However, the notion of competing pictures of the world, with competing social and political frameworks, does create a kind of subtext for some of Wittgenstein's arguments. For example, in *On Certainty*, Wittgenstein is in part offering a critique of G.E. Moore's influential essay, "A Defense of Common Sense," in which Moore claims that he can be "certain" of some common sense propositions.[195] Wittgenstein takes issue with Moore's "certainty" in a number of ways, including by showing the links between what seems "certain" to us and our (specific, embodied) experiences of the world. This allows Wittgenstein to point out, for example, that what makes

191 *Ibid*, sec 368, 381.
192 *Ibid*, sec 37, 150.
193 Sarah Lucia Hoagland, "Making Mistakes, Rendering Nonsense, and Moving Toward Uncertainty" in Naomi Scheman & Peg O'Connor, eds, *Feminist interpretations of Ludwig Wittgenstein* (University Park, Pennsylvania: Penn State Press, 2002) 119 at 128.
194 *Ibid*.
195 GE Moore, "A Defense of Common Sense" in *Philosophical Papers* (London: George Allen & Unwin Ltd., 1925) 32.

sense to him, or to Moore, and what makes sense to people in non-European cultures, may be different.[196] Wittgenstein is insisting that the specific context of a claim – including its political and cultural context as situated within a particular practice – is important for assessing meaning.

For present purposes, the most useful interpretations and elaborations of Wittgenstein's approach are those that extend this subtext and more explicitly attend to questions of power. When pictures of the world and the judgments that are enabled and constrained by them are understood as consisting of more than knowledge, it becomes possible to see the interests, commitments and desires that also play a role. At this juncture, the usefulness of feminist interpretations of Wittgenstein, and indeed other feminist theories, becomes very evident. These theorists help understand the *political* elements of how we form pictures of the world, and how we become captive to them.

One example of employing Wittgenstein's insights to feminist concerns can be found in Sarah Lucia Hoagland's analysis of the relationship between feminist theory and epistemology. Hoagland argues that, for feminist theorists to invest time in trying to convince others that they are "mistaken," is itself mistaken because it lends credibility to a framework in which feminist claims are not wrong, but nonsensical.[197] Rather, Hoagland argues, feminist theorists should orient their attention to changing society's forms of life, transforming social practices in a manner that would give meaning to women's understandings: not an epistemological shift but a

196 Wittgenstein, "OC," *supra* note 146, sec 609.
197 Hoagland, *supra* note 193 at 127, 129.

"moral revolution."[198] In some respects, this dissertation does not leave the traditional arena of debate, in the sense that I am concerned with persuading with words rather than taking practical actions. However, I do think these two forms of engagement – criticism and activism – are necessarily related. Moreover, I take Hoagland's insight seriously in that this dissertation is primarily concerned with creating openings for new ways of thinking and acting, rather than demonstrating the truth or falsity of particular claims.

Zerilli also draws on Wittgenstein's approach to address feminist concerns. In her essay called "Doing Without Knowing: Feminism's Politics of the Ordinary," introduced above, she uses Wittgenstein to explore feminist debates about the category "women."[199] Recall that Zerilli suggests that feminists may be held "captive" to a "picture" of political life in which it is possible for political claims to be grounded on an empirical reality. As an example of this captivity, Zerilli points to the way feminist theorists return, again and again, to debate the scope and significance of the category "women."[200] She argues that in so doing, feminists miss the opportunity to examine the usefulness of the "picture" of political life itself, and the way it affects important questions of agency and activism. She writes:

> Feminists who attack and defend foundation both unwittingly accept that what what grounds certain claims is a "foundation" that could be exposed as wrong or defended as rational, rather than simply a frame....[201]

Thus, by debating the merits of some foundational claim, we miss the opportunity to challenge the picture (or here, "frame") that tells us we can and should look for a defensible "foundation"

198 *Ibid* at 135.
199 Zerilli, "Doing without Knowing" *supra* note 152.
200 *Ibid* at 142.
201 *Ibid*.

for political claims. Zerilli argues that this picture of political life, in which an empirical foundation is possible, prevents us from understanding other aspects of the problem, other ways in which our claims are not really based on "knowledge" at all. For example, she writes:

> To treat our certainty in a system of reference (like the sex/gender system) as a failure of critical thinking is to misunderstand what is involved...Rather, the difficulty is a problem of the will.[202]

Zerilli demonstrates how a narrow focus on epistemology can fail to assist us in understanding the relationship between certain concepts (such as sex difference) and their role in political discourse.[203] The nature of political claims and political judgments requires that we attend to more than knowledge, and the ways in which our frames and categories can be evaluated and modified.

Captivity to a picture goes beyond a problem of "knowledge," and can reach into many aspects of individual and community life. The theoretical problem of aspectival captivity must therefore be addressed with methodological tools that can take account of history, context and power. Our picture of "common sense" in legal judgment should be assessed and, if necessary, revised, with all of these axes in mind.

Methodology to challenge captivity: Perspicuous representation

Wittgenstein argues that when we find ourselves held captive to a picture – when some way of thinking is no longer satisfying us and we don't know how to move forward – we are in need of

202 *Ibid* at 143.
203 *Ibid* at 152.

philosophical therapy, to help us experience new aspects. And the therapy Wittgenstein prescribes is a methodology he calls "perspicuous representation."[204] Wittgenstein addresses this idea directly in s. 122 of the *Philosophical Investigations*:

> A main source of our failure to understand is that we do not *command a clear view* of the use of our words. – Our grammar is lacking in this sort of perspicuity. A perspicuous representation produces just that understanding which consists in 'seeing connexions'. Hence the importance of finding and inventing *intermediate cases*.
>
> The concept of a perspicuous representation is of fundamental significance for us. It earmarks the form of account we give, the way we look at things. (Is this a 'Weltanschauung'?)[205]

This passage contains a number of complex notions important for Wittgenstein. It is the notion of perspicuous representation and its special kind of clarity that will be explored here. Perspicuous representation is an attempt to bring clarity to a concept, not by attempting to discover a clear or certain meaning, but rather by stepping back and illustrating how that concept works in a variety of contexts ("command a clear view"). The idea is that by looking at something in several different contexts, from several different perspectives, (finding "intermediate cases") we can come to understand that our previous puzzlement was occurring as a result of our captivity to one perspective and indeed our inability to see that we had a perspective at all. The methodology of perspicuous representation aims to shed some light on the pictures of the world that we rely on, in order that we might have the opportunity to examine and revise them when the need arises.

I have adapted Wittgenstein's method of perspicuous representation to serve as the methodological framework for my investigation of common sense in legal judgment. I create a

204 Wittgenstein, "PI," *supra* note 147, sec 122.
205 *Ibid*.

"perspicuous representation" of the concept of "common sense," by exploring the different aspects of this concept that come to light when we observe its invocation in different legal and scholarly texts. By examining "common sense" as situated in different historical, political, legal and discursive contexts, our captivity to a picture of common sense as knowledge begins to fall away, and new questions can be asked about the role of "common sense" in practices of legal judgment.

In the following sections, I describe four components of the methodology of "perspicuous representation" as I interpret and develop it. They are as follows:

1. *Clarity through juxtaposition.* Perspicuous representation seeks to create a particular kind of clarity by allowing us to see more than one aspect of a concept;
2. *"Look and see."* The method asks that we suspend any definitions from the outset in order to observe how a concept functions in context;
3. *Seeking new examples.* The task of perspicuous representation is to find new examples from which to generalize. The examples chosen to generate the change of aspect will affect how and why our picture of common sense is challenged; I rely on the feminist concept of marginality to articulate criteria for these choices;
4. *Reflexivity and political accountability.* The method of perspicuous representation makes clear the ways in which theoretical study is connected with social practices, and provides ways for taking responsibility for the political consequences of our pictures of the world.

Clarity through juxtaposition

Like countless other philosophers, Wittgenstein sees *clarity* as his goal, and develops a specific approach to achieving it.[206] What is distinctive about perspicuous representation is *how* clarity is to be achieved. A representation of a concept is not "perspicuous" because of its objectivity,

206 For exploration of how Wittgenstein's concept of clarity relates to other thinkers, see Newton Garver, *Wittgenstein and Approaches to Clarity* (Amherst NY: Humanity Books, 2006).

completeness, certainty or broad scope.[207] Rather, a representation is perspicuous because of its role in generating a change in aspect.[208] This understanding of perspicuous representation follows the interpretation offered by Wittgenstein scholar Gordon Baker,[209] and applied to political questions by political philosophers such as David Owen[210] and Cressida Heyes.[211]

The heart of the concept of perspicuous representation lies in the idea that, in a quest to free ourselves from captivity to one picture of the world, it is useful to uncover and describe alternative pictures, and place them side by side.[212] The purpose of this juxtaposition is to generate a change in aspect; a discovery akin to "experiencing a word in a new way."[213]

The example of the duck-rabbit drawing can be used to help understand what Wittgenstein means by a change in aspect.[214] A change in aspect is not, or not only, about acquiring new information. Rather, it is about an experience. If someone first sees the diagram as a duck, and

207 Baker, *supra* note 168; Phil Hutchinson & Rupert Read, "Toward a Perspicuous Presentation of 'Perspicuous Presentation'" (2008) 31:2 Philosophical Investigations 141. Wittgenstein says that " 'Knowledge' and 'certainty' belong to different *categories*...." Wittgenstein, "OC," *supra* note 146, sec 308.

208 Baker, *supra* note 168 at 36, 42.

209 Baker, *supra* note 168. In scholarship on Wittgenstein, there are contrasting views about what perspicuous representation entails. For an overview of various approaches, see Hutchinson & Read, *supra* note 207.

210 Owen, *supra* note 156.

211 Heyes, "Self Transformations," *supra* note 153; Cressida J Heyes, "'Back to the Rough Ground!': Wittgenstein, Essentialism, and Feminist Methods" in Naomi Scheman & Peg O'Connor, eds, *Feminist interpretations of Ludwig Wittgenstein* (University Park, Pennsylvania: Penn State Press, 2002) 195 ["Back to the Rough Ground"].

212 In this respect, Wittgenstein's approach has much in common with other approaches that seek to relativize practices, including Foucault and Geertz. In relation to common sense specifically, Geertz writes: "This analytical dissolution of the unspoken premise from which common sense draws its authority - that it presents reality neat - is not intended to undermine that authority but to relocate it. If common sense is as much an interpretation of the immediacies of experience, a gloss on them, as are myth, painting, epistemology, or whatever, then it is, like them, historically constructed and, like them, subjected to historically defined standards of judgment. It can be questioned, disputed, affirmed, developed, formalized, contemplated, even taught, and it can vary dramatically from one people to the next." Geertz, *supra* note 17 at 76.

213 Havercroft, *supra* note 166 at 150.

214 See image above at p. 70.

then someone points out the rabbit, that person may say something like: "oh! now I see it!" The person has not just learned something, he or she has had a new kind of experience in relation to the image. It is not just that the person has seen the image "as" a duck and now "as" a rabbit, but that after noticing the new aspect, he or she can no longer experience the image as presenting only one meaning. Importantly, this experience has a paradoxical nature, in which "we see the image differently, *but* we also see that the image has not changed."[215] Wittgenstein writes:

> I contemplate a face, and then suddenly notice its likeness to another. I *see* that it has not changed; and yet I see it differently. I call this experience "noticing an aspect."[216]

The role of juxtaposition in perspicuous representation thus orients this methodology towards comparison and the generation of examples and counter-examples. In order to break free of captivity to a picture, we need to experience a change of aspect: we need to see that other pictures exist. In order to evaluate the value of an existing picture, we need to be able to perceive, and assess the value of, other, alternative pictures.[217]

Thus, perspicuous representation requires the exploration of alternative examples to place beside our current understanding. These alternative examples will be found where a piece of language appears in the context of different practices, and might be historical, based in alternative cultures, or purely hypothetical. The *source* of the examples is less significant than their usefulness in shaking off captivity to an existing picture; alternative examples are judged by

215 Havercroft, *supra* note 166 at 151.
216 Wittgenstein, "PI," *supra* note 147, sec 165.
217 "The tyranny of a system of expression is to be broken and the problems dissolved by our effecting a change of *aspect* through juxtaposing with our language other systems of expression." Baker, *supra* note 168 at 33. [italics in original]

their capacity to provoke a change in aspect. Noticing a new aspect opens up the possibility of gaining some insight into the "pictures" we hold and their usefulness for judgment.

In Wittgenstein's own work, which was directed at addressing what he saw as unproductive practices in philosophy, the examples are often simply drawn from everyday uses of words. In this way, Wittgenstein shares some similarities with so-called "ordinary language philosophers," such as J.L. Austin.[218] For scholars who are concerned with questions about social and political life, the examples drawn to juxtapose to our existing picture consist of case studies and historical geneaologies.[219]

The significance of examples and counter-examples in the methodology of perspicuous representation structures my treatment of both legal and scholarly texts. Unlike in a doctrinal legal study, I am not purporting to conduct a full survey into the meaning of "common sense" in legal judgment, nor are my cases selected because they *represent* "the law on common sense" in Canada. Rather, the cases are *examples* for comparison, and the criterion used to select them is their usefulness in illuminating some aspect of common sense, thereby contributing to a perspicuous representation of the concept.

The cases I discuss are all judgments of the Supreme Court of Canada, not judgments of trial

218 J L Austin, *How to Do Things with Words* (Oxford: Clarendon Press, 1962). Wittgenstein's approach, though, was not simply to appeal to common or ordinary beliefs, but rather to the "regularities in our language." Thus, his was not a conservative defense of ordinary beliefs. See Pitkin, "Wittgenstein and Justice," *supra* note 150 at 19.

219 See the authors in the volume: Cressida Heyes, ed. *The Grammar of Politics: Wittgenstein and Political Philosophy* (Ithaca: Cornell University Press, 2003).

courts or other appellate courts. This is in part simply to limit the scope of my study, but also because the language of the Supreme Court is adopted and repeated by other courts, thus making their invocation of "common sense" significant for the legal system as a whole. But beyond this choice to privilege the Supreme Court, I engage with the legal judgments without (at least at the outset) particular regard for the doctrinal context that might render some examples more significant than others. For example, in Chapter 3, I discuss the Court's judgment in *Vetrovec v. The Queen*,[220] which, although a landmark case, has been modified by subsequent jurisprudence and would no longer be cited on its own to support submissions on the law of corroboration.[221] Similarly, although I attribute various judgments to the individual judges who authored them, I do not seek to make claims about the views of any one judge. For example, Chief Justice Beverley McLachlin is the author of several of the judgments I address, including *Gosselin*. However, I do not attempt to reconcile the judgments or claim to discover her "real" views on common sense. Instead, I approach each judgment as a textual artifact of "common sense," and try to attend carefully to what each text says on its face.[222]

Similarly, my choice of scholarly texts reflects the goal of locating contrasting examples, and is grounded in this task rather than in any empirical claim to represent treatment of the concept of "common sense" comprehensively. The goal of opening "common sense" *in relation to law*, shapes the choice of texts; each of the scholars I engage with provides an approach to common sense that speaks in some way to the concerns that arise about the concept in the particular

220 *Vetrovec v The Queen*, [1982] 1 SCR 811, 136 DLR (3d) 89 ["*Vetrovec*"].
221 *R v Khela*, 2009 SCC 4, [2009] 1 SCR 104.
222 Charles Taylor argues that broader understanding arises "in comparisons or contrasts, which let the other be." Charles Taylor, "Comparison, History, Truth" in *Philosophical Arguments*, (Cambridge MA: Harvard University Press, 1997) 146 at 152 ["Comparison, History, Truth"].

social and discursive context of legal judgment.

"Look and see"

As a matter of methodology, Wittgenstein advises us to resist the temptation to rely on abstract definitions and generalizations, and, instead, to "look and see" how a concept functions in context.[223] The task is to examine how a concept acquires and deploys meaning as it is located within specific uses of language and is embedded in specific social practices. I "look and see" how the term "common sense" functions in the context of scholarly writing of Reid, Gramsci and Arendt, and practices of legal judgment engaged in by the Supreme Court of Canada.

Wittgenstein's recommendation to "look and see" has strong affinities with the methodologies employed by Michel Foucault.[224] Foucault's insistence on examining the local and the particular rather than the over-arching or abstract, and his interest in privileging the question "how" over questions of "what" and "why," both resonate with what Wittgenstein has to say.[225] Both Wittgenstein and Foucault challenge us to examine concepts in context as real parts of human language and activity, what Wittgenstein called the "rough ground" of practice.[226]

One important implication of this approach, guided by the call to "look and see," is that it allows

223 Wittgenstein, "PI," *supra* note 147, sec 66.

224 For an example of work drawing on both Foucault and Wittgenstein for methodology, see Heyes, "Self Transformations," *supra* note 153.

225 Michel Foucault, "The Subject and Power" in Hubert Dreyfus, ed, Michel Foucault, *Beyond Structuralism and Hermeneutics* (Chicago: University of Chicago Press, 1982) ["The Subject and Power"]; Michel Foucault, *The History of Sexuality, Volume I : An Introduction*, (New York: Random House, 1990) ["History of Sexuality"].

226 Wittgenstein writes: "Back to the rough ground!" Wittgenstein, "PI," *supra* note 147, sec 107.

us to investigate a concept without assuming, from the beginning, that the concept carries with it a kind of wholeness or unity.[227] Foucault relies on this idea to open up his study of "power." He writes:

> To put it bluntly, I would say that to begin the analysis with a "how" is to suggest that power as such does not exist. At the very least it is to ask oneself what contents one has in mind when using this all-embracing and reifying term; it is to suspect that an extremely complex configuration of realities is allowed to escape when one treads endlessly in the double question: What is power? and Where does power come from? The little question, "What happens?" although flat and empirical, once it is scrutinized is seen to avoid accusing a metaphysics or an ontology of power of being fraudulent; rather it attempts a critical investigation into the thematics of power.[228]

Thus, Foucault argues that it is useful to suspend any consideration of abstract or general definitions at the outset of a study (e.g. to say that "power" does not "exist" per se and instead to look at what is actually going on around this concept). Focusing on context orients questions towards particular examples of a concept in practice, and away from abstract generalizations. I carry this idea – about suspending abstract definitions in order to "look and see" – into my study of "common sense."[229] The idea of looking to see what happens in context has important consequences for the way I choose and read texts.

Most pointedly, in relation to legal judgments, it means that I focus on judgments in which the phrase "common sense" actually appears. In another kind of study, it could make sense to

227 Foucault, "The Subject and Power" *supra* note 225 at 217.
228 *Ibid*.
229 There are ways in which the concept of "common sense" itself tends to resist definition in the abstract, and this can be seen in the way "common sense" is defined (or not) in the works of the three theorists studied in this dissertation. For example, although Thomas Reid uses the term "common sense" throughout his works, he does not offer a definition until hundreds of pages into his second book. For a discussion of Reid's methodological reasons for delaying his definition of common sense, see Louise Marcil-Lacoste, *Claude Buffier and Thomas Reid, Two Common Sense Philosophers* (Kingston: McGill-Queen's University Press, 1982) at 76.

explore the ways in which judges rely on their common sense without actually invoking that language explicitly. For example, if I were to define "common sense" as "shared background knowledge," I could look for cases in which judges seem to rely in some way on shared background knowledge. But this would require a pre-existing conceptualization that could foreclose certain aspects of this phrase that might otherwise appear – what aspects of "common sense" are not captured if we think if it as "shared background knowledge?" It would be to risk remaining captive to the picture of common sense that so often foils thorough scrutiny of the concept. Instead, Wittgenstein and Foucault both stress the need to look at how language actually functions in context, and not to prematurely attribute meaning.

The call to "look and see" also relates to the idea (reflected in Wittgenstein, Foucault and also in some feminist theories) that it can be useful to conduct analysis that stays on the "surface" of language, once again declining to attribute general definitions or grounding relationships from the outset.[230] I try to see what can be learned by reading the words of a legal judgment on their face.[231] I "look and see" in an effort to learn something new, to effect a change of aspect, and to avoid adopting perspectives that foreclose meaningful possibilities by sustaining captivity.

Taking this kind of approach necessarily orients attention to the context of language. Some theorists, such as Quentin Skinner and those inspired by his approach, take a very deeply contextualized and historical approach to the study of texts.[232] Skinner argues that it is

230 Naomi Scheman describes the "serious superficiality of feminist critique": Scheman, "Introduction," *supra* note 172.

231 James Tully describes this as an attempt to "survey" a subject matter: Tully, "Wittgenstein and Political Philosophy," *supra* note 151.

232 For example, see James Tully, "The Pen is a Mighty Sword: Quentin Skinner's Analysis of Politics" in

important to ask not only what the text means, but also what the text *does*, or what the author was doing when she or he created it. Thus, in order to understand a text, it is necessary to investigate not only the historical context, but also the discursive context of the text. To what political problems and philosophical conversations was the text addressed?

I do not conduct the kind of richly contextual approach that Skinner advocates. However, the idea that it is important to pay attention to context does influence this research. Specifically, when I bring scholarly writings and legal judgments into conversation with each other, the first step will always be to try and understand a theorist's perspective on common sense on that theorist's own terms. Thus, when I read Reid, Gramsci and Arendt on "common sense," my first task is to gain an understanding of what those thinkers meant when they wrote those words, and what role "common sense" plays in their writings as a whole. But having gained some understanding of a thinker's approach to "common sense," my next step is to take that "aspect" of common sense, and place it in an entirely new context: the context of legal judgment and a set of political commitments about equality and social justice. I take into account the institutional and conceptual frameworks that shape the specific practices of legal judgment under consideration (such as, for example, the assessment of witness credibility). Ultimately I bring all of these approaches together to create a "perspicuous representation."

This is the element of my methodology that has some affinities with the hermeneutical tradition, especially as articulated by Gadamer and Taylor.[233] For example, by taking a theoretical

Meaning and Context: Quentin Skinner and his Critics (Princeton: Princeton University Press, 1989).
233 Gadamer, *supra* note 120.

discussion from a different historical and discursive context and reading it against my own concerns and priorities about equality and poverty, I engage the same issues that surround Gadamer's notions of "prejudice" and the "fusion of horizons."[234] However, while noticing these affinities, I have found that Wittgenstein's methodology of "perspicuous representation" also provides concepts that can help to articulate and explain the legitimacy of my approach. The first step – of understanding a text in its own context, on its own terms, relates to the invocation to "look and see." And the second step – of understanding a text by introducing a new context and different criteria for assessment – relates to the task of breaking out of our captivity to a picture by introducing new examples for juxtaposition. I explore this second step further in the following sections.

Seeking new examples

Wittgenstein's ideas about our picture of language are important for this dissertation, not necessarily in a substantive way, but for the methodological insights that these ideas engender. Specifically, Wittgenstein's writings on language explain why it is useful to seek out alternative examples of a concept, and how the way those alternative examples are chosen relates to underlying political and theoretical goals.

In his later work, Wittgenstein argues that it is useful to think of language, not as a system of signs, but rather as a human activity that always takes place in particular contexts. From this

234 Taylor, "Gadamer" *supra* note 121; Taylor, "Comparison, History, Truth," *supra* note 222.

perspective, the meaning of language is closely related to its use.[235] Language is a social activity that involves specific participants, goals and background assumptions, all of which vary according to the circumstances. And for Wittgenstein, these features of language are essentially interconnected with meaning.

Wittgenstein describes an approach to language in which meaning is generated through instances of use.[236] Since the meaning of a word is created in part through its use in a variety of different contexts, this meaning will contain a variety of different elements. Some aspects of the concept will be emphasized in some uses, and other aspects in different uses.

This picture of language leads to the idea that the variety of meanings (or "aspects") that inhabit a word or concept do not necessarily indicate confusion. Rather, as Hanna Pitkin writes:

> If language is seen as human activity rather than as a collection of labels for categories of phenomena, then we will no longer be surprised to find systematic inconsistencies in it – not as a fault or liability, but as essential to its functions. And that will provide new ways of working on problems that arise in any abstract, conceptual thinking, problems that have been central in traditional philosophy but that occur as often in political or social theory and other fields.[237]

In this way, Wittgenstein moves from his picture of language as generated through practice to a methodology for theoretical inquiry. If we try to take all the different uses of a term from all its different contexts in order to develop a unified, abstract definition, we will always be including numerous different and potentially contradictory elements of meaning. This creates definitions

235 Pitkin, "Wittgenstein and Justice," *supra* note 150 at 85.
236 It is interested to note that Wittgenstein's overall approach to meaning as generated through use has affinities with the way meaning is generated in the common law. See *Ibid* at 60.
237 *Ibid* at 4.

with inherent and unresolvable internal tensions. And this can lead to what Wittgenstein calls "conceptual puzzlement."

Conceptual puzzlement describes what happens when we encounter some theoretical dilemma that seems intractable. It may seem that we are forced to choose between two problematic alternatives. Or, it may seem that, somehow, both sides in a debate are right, although they are logically incompatible.[238] It may seem that the answers we come up with no longer assist us in addressing the problems that led us to ask the question in the first place. We are not satisfied, but we do not know how to move forward. Conceptual puzzlement is what happens when we try to address a philosophical problem, but we are "held captive" by our picture of language as a system of signs.

Examples of conceptual puzzlement can be found where theorists are attempting to find one true definition for a complex concept. In the field of law, the question "what is law?" has led to debates that are illuminating but are also characterized by conceptual puzzlement.[239] In the field of feminist theory, the question: "what is a woman?" has yielded debates that are similarly of pressing importance but also full of frustrating paradoxes.[240]

Abstract inquiry encourages us to generalize from only one type of context, thus stretching one

238 *Ibid* at 6.

239 HLA Hart, *The Concept of Law* (London: Oxford University Press, 1961); Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964); Lon Fuller, "Positivism and Fidelity to Law - A Reply to Professor Hart" (1957) 71:4 Harv L Rev 630.

240 See Heyes, "Back to the Rough Ground," *supra* note 211; Munro, *supra* note 127.

meaning of a concept into other contexts where it actually needs to shift or transform in order to make sense. What is happening in cases of conceptual puzzlement is not exactly that we are mistaken in some way, but rather that we are generalizing from only one type of example.[241] So methodologically, rather than directing our energies towards determining the true meaning of a concept, we need to broaden the types of examples we look to in order to learn about the range of meanings that the concept can hold. Therefore, in this dissertation, what I seek in legal and scholarly texts are new examples of the invocation of "common sense," situated in different kinds of discursive and legal practices, and suggestive of different "aspects" of common sense.

Faced with the task of choosing examples for comparison, it becomes essential to explain *on what basis* I choose my examples. The way examples are chosen and interpreted matters a great deal.[242] For Wittgenstein, the only necessary criterion for a useful example is its capacity to generate a change of aspect. Like ordinary language philosophers, Wittgenstein seeks examples from the everyday use of language. The approach to perspicuous representation I employ in this dissertation contains a further complicating component because I argue, with feminist theorists, that the systems of judgment that give rise to our pictures of the world must be understood as imbued with the effects of power and inequality. This means that I must ask not only how an example is new or different as compared with our existing picture of the world, but also how the example relates to the social relations that structure our existing picture. Like Wittgenstein, I argue that the criterion for selecting an example for perspicuous representation is its capacity to generate a change of aspect. However, I draw on feminist and postcolonial scholarship that tells

241 Pitkin, "Wittgenstein and Justice," *supra* note 150 at 91.
242 Taylor, "Comparison, History, Truth," *supra* note 222.

us that there are connections between pictures of the world and power relations, and we will learn *different things* if we choose our examples from the centre or from the margins of social life.

Feminist theorists have, in different ways, demonstrated the epistemological and political value of attention to marginalized or excluded perspectives. This arises from feminist insights about the need to listen to voices that may otherwise be unheard by researchers, in part because of the way different social experiences generate access to different kinds of knowledge.[243] Feminist writing on methodology demonstrates the importance of attention to new, different, alternative or subaltern ways of determining what questions need to be asked.[244]

In addressing the political and epistemological significance of social location, some feminist theorists have usefully engaged with the concept of *marginality*. The idea of looking at something from the margins relates both to the need to include oppressed or excluded points of view, and the need to provide alternative perspectives on what makes up the "centre." A position on the margin may be neither "inside" nor "out;" it is on the *margin*, the line that divides one thing from another. Alternatively, it may be *both* "inside" and "out." And therefore perspectives from the margins can be very useful in thinking about both dominant and non-dominant perspectives. Some of the most nuanced articulations of the concept of the margin appear in the work of feminist and critical race theorists bell hooks, Patricia Hill Collins and

243 Nancy C M Hartsock, "The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism" in Sandra Harding, ed, *Feminism and Methodology: Social Science Issues* (Bloomington: Indiana University Press; Open University Press, 1987) 157.
244 Hill Collins, *supra* note 144.

Patricia Williams.

In one of her influential texts on marginality, bell hooks describes her childhood in a small Kentucky town. She writes: "Living as we did – on the edge – we developed a particular way of seeing reality. We looked both from the outside in and from the inside out. We focused our attention on the center as well as on the margin. We understood both."[245] For hooks, the margins are not only a place of knowledge but also of creativity and resistance, a place of "radical openness:" "Marginality [is] the site of radical possibility, a space of resistance....It offers to one the possibility of radical perspective from which to see and create, to imagine alternatives, new worlds."[246]

Patricia Hill Collins uses the language of the "outsider within" to describe the experience of sitting on the margins of a social practice, reflecting on how it affects not only one's understanding of others but also one's self understanding.[247] Hill Collins argues that Black women's experiences as "outsiders within" academia provide an opportunity for knowledge and creativity that rebounds to affect a variety of individuals and communities who experience discomfort with dominant assumptions. She argues that understanding one's position on the margin is a transformative experience that is bound to create tension, but that taking seriously one's own biographical experiences as a source of knowledge and critique encourages diversity and strengthens scholarship as a whole.[248]

245 hooks, *supra* note 144 at 51–52.
246 *Ibid* at 52.
247 Hill Collins, *supra* note 144.
248 *Ibid* at 55.

Speaking directly to the context of the legal academy, Patricia Williams advocates for a form of scholarship that takes seriously the complexity of life (which becomes so acutely apparent for those on the margins in this sense, who are both insider and outsider). She writes: "That life is complicated is a fact of great analytic importance."[249] Williams articulates this more fully in her call for a "multivalent way of seeing" as a methodology. When summarizing the task of critical theory, Williams writes:

> …the perspective we need to acquire…is a perspective that exists on all three levels and eighty-five more besides – simultaneously. It is this perspective, the ambivalent, multivalent way of seeing, that is at the core of what is called critical theory, feminist theory, and much of the minority critique of law. It has to do with a fluid positioning that sees back and forth across boundary, which acknowledges that I can be black and good and black and bad, and that I can also be black and white, male and female, yin and yang, love and hate.[250]

Here, the approach Williams advocates bears some similarity to Wittgenstein's "perspicuous representation." Indeed, Scheman notes that the fact that feminist interpreters of Wittgenstein are drawn to Williams is no coincidence, and arises from a shared interest in finding approaches that help to understand social phenomena (such as law) as practiced within particular social contexts.[251]

Drawing on this literature on marginality, Naomi Scheman argues that the concept of marginality also assists in understanding the potential of Wittgenstein's philosophy for feminist scholarship.[252] Scheman argues that feminists in the academy occupy a "privileged marginality"

249 Williams, *supra* note 78 at 10.

250 *Ibid* at 130. Matsuda argues for a similar approach to the task of feminist, anti-racist legal judgment: Mari J Matsuda, "When the First Quail Calls: Multiple Consciousness as Jurisprudential Method" (1989) 11 Women's Rts L Rep 7.

251 Scheman, "Introduction," *supra* note 172 at 16.

252 Naomi Scheman, "Forms of Life: Mapping the Rough Ground" in Hans Sluga & David G Stern, eds, *The Cambridge Companion to Wittgenstein* (Cambridge: Cambridge University Press, 1996) 383 ["Forms of Life"].

that can be used as a resource for knowledge and creativity. Further, Scheman argues that the concept of marginality provides a way to understand how Wittgenstein's methodology can be used to move past debates about the foundations of knowledge. She argues that

> [T]he epistemic resources of variously marginal subject positions provide the ground for a critique of "what we do" that rejects both the possibility of transcending human practice and the fatalism of being determined by it, but that those resources are not available to someone who is unwilling or unable to stand on that ground. ... For complex reasons...Wittgenstein himself was so unwilling or unable.[253]

Scheman argues that this shared commitment to exploring what can be learned from practice, in a way that acknowledges both agency and social constraint in meaning, is a strong point of similarity between Wittgenstein and feminist theorists. By taking up Wittgenstein to explore the importance of marginality in generating insight, feminist theorists are fulfilling some of Wittgenstein's most important ideas. Indeed, she writes, "Wittgenstein's truest philosophical heirs and most faithful interpreters might well be found among people he would never have acknowledged as allies."[254]

This dissertation exists in tension with some of these insights about marginality. Indeed, in addition to my personal membership in communities of privilege, this dissertation is concerned with concepts and practices that lie very close to the centre of powerful institutions and communities: the words of judges, the interpretation of state law, and the notion of legal rights as a significant part of justice in a liberal democracy. The very notion of "common sense" itself claims to take up space, not at the margins, but right in the middle of community knowledge and

253 *Ibid* at 387–8.
254 Scheman, "Introduction," *supra* note 172 at 20.

practice.

However, my research is structured by these feminist insights about centre and margins in two essential ways. First, theorizing the value of the margins, ironically, (but crucially), reinforces the need to attend to the "centre" as a subject of inquiry, not because all value or explanation can be found there, but because it is useful to scrutinize things that are usually assumed. For example, in his work on postcolonial theory, Dipesh Chakrabary calls this "provincializing Europe": the practice of questioning and subjecting to research those parts of life that play a central, stable, or historical role in relation to the social questions at hand.[255] This approach has played a large role in motivating my study of "common sense" which often functions precisely to identify knowledge that lies outside the realm of critical scrutiny, right at the centre. I study something from the "centre," not to reinforce its significance, but to reveal its particularity, its contingency, and its relationship to other social practices.

Second, although I may have access to the "privileged marginality" of a feminist in the academic world, I do not purport to conduct the kind of analysis that Williams, hooks and Hill Collins do when they speak about race and scholarship. However, I do adopt methodological concepts that are informed by feminist insights on marginality. At the most fundamental level, the literature on marginality demonstrates that whether something exists at the centre or at the margins of public life *matters,* both politically, conceptually and epistemologically. Further, things that exist on the boundary between "inside" and "out," things that trouble the boundary

255 Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton: Princeton University Press, 2000).

itself, are often especially interesting and potentially valuable. I suggest that "common sense" is one such thing. Most importantly, literature on marginality demonstrates the need to adopt a multivalent, complex perspective when investigating social phenomena; to hesitate before establishing abstract definitions and certain judgments. On the basis of these feminist insights, I highlight these elements in my interpretation of what it means to create a "perspicuous representation."

Reflexivity and political accountability

"Perspicuous representation" is a particularly apt methodology in the context of "common sense" and legal judgment because of the way it can help articulate the relationships between meaning and politics. As noted above, Wittgenstein's approach provides a way of thinking about meaning that goes beyond knowledge or information; inherited "pictures" also involve political and psychological habits and commitments. This means that there are things "we have a stake in not knowing."[256] Those who benefit from unequal social relationships can have an interest in maintaining a "studied ignorance and privileged innocence" when it comes to questions about justice.[257] Indeed, as can be seen from the problematic nature of "common sense" itself, people may be especially certain of things that are, in fact, most worthy of challenge.

256 Pitkin, "Wittgenstein and Justice," *supra* note 150 at ix.

257 For discussions of this phenomena by legal scholars, see for example: Bruce Feldthusen, "The Gender Wars: 'Where the Boys Are'" (1990) 4 CJWL 66; McIntyre, "Keeping Equity Academic," *supra* note 57.

In response to this dilemma, I draw on feminist theory to articulate the need for reflexivity in thought and attention to the situated life of the researcher. This challenges me to ask questions about the relationship between my own background and the subject of my research.[258] As an individual and a member of numerous communities, I too have pictures of the world grounded in systems of judgment, and it is part of my methodology to reflect on this in relation to my subject matter. Without this step the therapeutic effect of perspicuous representation would be compromised. What about my own common sense? Here, it is important to note that my interest in the injustices of poverty arises from a certain political perspective but not from personal experience of living in poverty. As a middle class white woman, my life path has brought me into contact with various kinds of inequality and oppression, including some periods of low-income status as a university student, but I have not yet experienced anything like the kind of economic hardship or insecurity that is generally understood to count as "poverty" in Canada, and my life is such that this possibility does not loom large in my imagined future. I parent my children in a heterosexual partnership and secure in my expectation that I will be able to provide for them. I read through a lens of privilege, created on several axes including race and class. This is important because of the way that "research" can be related to power.[259]

In this respect, my choice of the term "poverty" to describe my subject matter is worthy of elaboration. When speaking about poverty, I aim to address a range of issues about injustice, when that injustice is rooted in or entangled with class, economic inequality, and/or material

258 Sandra Harding & Kathryn Norberg, "New Feminist Approaches to Social Science Methodologies: An Introduction" (2005) 30:4 Signs: Journal of Women in Culture and Society 2009.

259 Chakrabarty, *supra* note 255; Cossman, *supra* note 143; Williams, *supra* note 78; Smith, *supra* note 117; Neil Gotanda, "The 'Common Sense' of Race" (2010) 83 S Cal L Rev 441.

deprivation. I argue that poverty, while always having a material component, engages with all three axes of justice described by Fraser: distribution, recognition and representation. Among anti-poverty advocates and low-income communities, there is ongoing debate about the term "poverty," and particularly whether people wish to describe themselves as "poor" rather than, for example, "low-income." The term "poverty" carries with it a history of judgment and exclusion and can operate as a strong moral label. I have chosen to use the term "poverty" because I feel that it captures a broader range of issues including inequality and marginalization, that may not be included by "low income." I am mindful that the right and capacity of communities to describe themselves is directly related to my research on common sense and communities.[260]

Thus, the method of "perspicuous representation" assists in understanding the relationship between meaning and politics because it can take account of the way judgments – such as my decision to use the word "poverty" in this dissertation – are related not only to knowledge but also to interests, social context, and political will. It makes more transparent the process of holding to account – both politically and conceptually – for the judgments made here and in the context of legal judgment. And it reinforces once again the importance of maintaining a methodological attitude of openness and multiplicity and an openness to revision when necessary.

The methodology of perspicuous representation acquires its political force because of the ways

260 Charles Taylor also argues that adequately reflective judgment can be liberating both to the "self" and "other:" Taylor, "Comparison, History, Truth," *supra* note 222 at 164.

in which we create meaning, in part, through our choices and actions.[261] This is particularly fruitful for this study, which is concerned with "common sense" (a concept constantly shifting between categories of "knowledge" and "practice") and with the adequacy of legal judgment measured against the demands of feminist, anti-poverty politics. This theme of practice and action as the home of meaning hearkens back to Wittgenstein's characterization of the method of perspicuous representation as a form of therapy. Perspicuous representation aims to challenge captivity by generating a change of aspect, an *experience* that alters a person's relationship to an idea and the way it is used. It requires attention not only to information but also to social context and to broader epistemological, political and psychological commitments.[262] In this context, the value of juxtaposition, of seeing new aspects and alternative pictures of the world becomes more clear: when we break free of captivity to a given picture, we become able to change and modify that picture. And thereby we change and modify our relationship to practices and social life.

Wittgenstein argues that when we consider alternative pictures of the world, the important question is how these alternative pictures relate to alternative ways of life. The real question about challenging captivity to a picture is: "what difference does it make?"[263] That is, if we break free from our captivity, and change the content of the system of beliefs that frames our judgment, how does this affect the specific social practices that form the context for the picture? What difference does it make to our lives, our ability to get out of locked rooms, our practices of

261 Wittgenstein, "OC," *supra* note 146, sec 204.

262 The therapeutic effect of perspicuous representation is that it generates a change in aspect. The experience of this change might be an unpleasant one. In this research, I am particularly mindful of the risk that recognition of privilege can be unpleasant for the privileged person, and that the hurt feelings of a privileged person can operate to shut down discussion and reinforce oppression. See Williams, *supra* note 78.

263 Havercroft, *supra* note 166 at 157.

legal judgment? For feminist and critical social theorists, these different ways of living are subject to evaluation against political criteria, including the question of what community is the relevant point of reference. Here, the real question is: "what difference does it make, *to us, in ways that matter to us?"*[264]

Thus for feminist scholarship, including this dissertation, it is political and social inequality that serves as the motivation for challenging of aspectival captivity. The problem with the way many questions are posed and addressed is not just that they result in philosophically unsatisfying answers, but that they fail to provide knowledge or analysis that is useful for understanding and thus challenging oppression and inequality.[265] What is at stake in our captivity is our capacity to envision and realize alternative, more just, pictures of the world.[266]

The methodology of perspicuous representation also carries with it the challenge to take responsibility for the political and moral choices that ground meaning. Acts of judgment come to an end, not with some foundational knowledge, but with the practices we engage in. Making this point in relation to political claims invoking the category "women," Zerilli argues:

> To say that every claim to the category of women inevitably excludes the very individuals it is supposed to unite and thus inevitably generates refusals to accept the category is to miss the whole point of politics. Politics consists precisely in the making of claims, which, being claims, are inevitably partial and thus exclusive. Acting politically is about testing the limits of every claim to community; it is about positing agreement and discovering what happens when that agreement breaks down or simply fails to materialize in the first place. That

264 Owen, *supra* note 156 at 84–5.
265 Fraser, "What's Critical," *supra* note 5 at 31.
266 For another discussion of "what is at stake," see Charles Taylor, "Overcoming Epistemology" in Philosophical Arguments, (Cambridge MA: Harvard University Press, 1997) 1.

> the claim "we women demand x" excludes some women turns not on the theoretical insight (in the philosopher's study) into the exclusionary character of the category of women but rather on the political character of making claims (in a public space.)[267]

Thus, claims about what pictures require challenge and revision are ultimately grounded in political judgment, and must be held on political, as well as epistemological, grounds. Because the methodology of perspicuous representation is oriented towards better understanding of the questions we ask about social life, rather than resolving those questions, it requires us to take responsibility for the inherently political ways in which our queries ultimately end.

In the context of legal judgment, challenging the "picture" that shapes our understanding of common sense opens the door to thinking about and using common sense in new ways, leading to better practices of legal judgment. In this way, this dissertation resists Wittgenstein's insistence that perspicuous representation functions *purely* to achieve clarity, for its own sake; to dispel theoretical problems plaguing philosophers. At the same time, my approach to perspicuous representation does take seriously Wittgenstein's insistence that concepts acquire their meaning in particular contexts, and that perspicuous representation is a tool, not to find some transcendent meaning, but to address a particular form of aspectival captivity. In this study, feminist and anti-poverty critiques provide the social and discursive motivation for challenging the ways in which our picture of common sense is not satisfying our need to fully make sense of judgment, including legal judgment. And these critiques also provide the political criteria for determining whether an attempt to free ourselves from captivity to that

267 Zerilli, "Doing without Knowing," *supra* note 152 at 148.

picture has succeeded.

Chapter 3 – Thomas Reid's common sense: Accountability for judgment and the boundaries of debate

We jostle for seats at London's Haymarket Theatre, circa 1736. We find ourselves sitting beside Thomas Reid, a philosopher and Presbyterian minister arrived from Aberdeen, twenty years into the future. Our neighbour observes most of the proceedings with a serious expression, but breaks into raucous laughter at the biting satire. One character tries to awaken the sleeping Queen Common-Sense by describing how Common Sense protects against all kinds of nonsense and deceit. Reid nods his head wryly.

> Awake, great *Common Sense*, and sleep no more,
> .... for while thou art on Earth,
> The Convocation will not meet again.
> The Lawyers cannot rob Men of their Rights;
> Physicians cannot dose away their Souls:
> A Courtier's Promise will not be believ'd;
> Nor broken Citizens again be trusted.
> A thousand News-papers cannot subsist,
> In which there is not any News at all.
> Play-houses cannot flourish, while they dare
> To Nonsense give an Entertainment's Name.[268]

And as the play concludes, Common-Sense now dead, Reid applauds the final speech of the Ghost of Queen Common-Sense:

> And all the Friends of Ignorance shall find,
> My Ghost, at least, they cannot banish hence.
> And all henceforth, who murder Common-Sense,
> Learn from these Scenes that tho' Success you boast,
> You shall at last be haunted with her Ghost.[269]

268 Fielding, *supra* note 3 at IV.2.
269 *Ibid* at V.1.

Introduction

This chapter begins the task of building a "perspicuous representation" of common sense in legal judgment. Here, I explore the "aspect" of common sense that becomes visible when looking at common sense from the perspective of the 18th century Scottish philosopher Thomas Reid, whose writings are central in the political and intellectual history of common sense. Reid uses the phrase "common sense" to mean a body of shared knowledge based in daily life and possessed by most everyone. Reid argues that this practical common sense knowledge is a form of knowledge no less true or meaningful than the structured knowledges of experts, including philosophers. In some respects, his perspective on common sense shares a great deal with the general view on common sense that tends to capture discourse on law. For example, there is the notion of common sense as a body of shared knowledge, and an egalitarian impulse that sometimes manifests itself in the form of exasperation at elite or technical knowledges. But Reid is also interested in how common sense relates to the exercise of independent and accountable judgment, and how it rhetorically shapes the boundaries of legitimate debate. Thus, when we take seriously the methodological exhortation to "look and see," Reid's approach turns out to be nuanced in interesting ways that begin to complicate the "picture" of common sense that tends to dominate debates on common sense and legal judgment.

Reid's "aspect" of common sense – that is, common sense as a body of common knowledge – brings attention to accountability, expertise and the boundaries of debate. Reid's approach places a high value on non-expert knowledge and the experiences of daily life, which can help

generate criteria for good legal judgment in the context of diversity and inequality. Said another way, adopting Reid's approach would call on judges who invoke "common sense" to value the common knowledge of ordinary people. In addition, Reid calls for close attention to the roles of language and rhetoric in legal judgment, allowing us to see how "common sense" can set the boundaries of legal debate.

Yet the encounter between Reid's approach and the use of common sense in legal judgment also provides a framework for critical consideration of Reid's writings. Thinking about common sense in *legal* judgment, in particular, shows that his arguments rely on broad generalizations across social groups, and view human knowledge and conduct as transparently linked. These elements of Reid's approach allow "common sense" to fall too easily into uncritical majoritarianism, and provide little assistance in the quest to make legal judgment more reflective. Reid's approach as a problematic as it is helpful.

This chapter has two parts. In the first part, I describe in more detail the "aspect" of common sense that becomes visible when reading Reid. I focus on three themes. First, I describe how Reid relates common sense to the practice of judgment. Reid argues that common sense, rather than rules or expertise, necessarily grounds the exercise of judgment, and that common sense facilitates accountability for judgment. Second, I explore Reid's claim that common sense knowledge is, in some senses, universal, and the ways in which this has the effect of setting the boundaries of legitimate debate. Third, I discuss some of the rhetorical effects of common sense language and Reid's qualified advocacy of ridicule as a rhetorical strategy.

In the second part of this chapter, I investigate how Reid's aspect of common sense – that is, the understanding of common sense as a body of shared knowledge that frames our judgment – speaks to legal judgment specifically. What happens to our understanding of legal judgment if we think of "common sense" in *this* way, or *from this aspect*? In this part, I discuss the Supreme Court of Canada's decisions in *Vetrovec v. The Queen*[270] and *R. v. D.(D.)*,[271] in which the Court appeals to "common sense" to explain the basis on which judges and juries should assess the credibility of witnesses. In these cases, "common sense" is used in contradistinction to expert evidence and to legal rules. I also return to the case of *Gosselin*, to explore the invocation of "common sense" in that case, against this discussion of common knowledge and the assessment of credibility. Reid's approach focuses attention on the nature of judgment, and how it is structured or constrained by systems of rules, and specific bodies of knowledge. It also focuses attention on the criteria we use to assess accountability for judgment, and the boundaries of legitimate legal debate. All of these issues are important when thinking about how to make "common sense" a part of fully reflective legal judgment that can address the injustices of poverty and social marginalization.

This chapter will show that Reid's approach contains an inherent tension that is important for legal judgment. On one hand, Reid is committed to a kind of democratic epistemology, in which everyone shares equally in common sense. On the other hand, his works reveal a nascent discomfort with what to do about purported common sense claims that may be misled by error or limited by unduly insular social discourse. Reid recognized that even his own understanding

270 *Vetrovec*, *supra* note 220.
271 *D.D.*, *supra* note 27.

could be so limited.[272] And yet the power of his notion of common sense comes from its claims to be universal and communal. This tension is what allows this first "aspect" of "common sense" to begin to shake free our captivity to an unsatisfying understanding of common sense, freeing us to develop one that is more complex and ultimately more useful for legal judgment.

Thomas Reid on common sense

Judgment and accountability

Thomas Reid (1710-1796) was a philosopher and Presbyterian minister whose work is central in the intellectual history of common sense, and who was one of the founders of the Scottish School of Common Sense Philosophy.[273] Reid spent the earlier part of his life in the small northern city of Aberdeen, which provided a very particular context for his intellectual work. Aberdeen in the 18th century, like the larger urban centres of Edinburgh and Glasgow, was part of the intellectual and social phenomenon known as the Scottish Enlightenment.[274] However, Aberdeen was more isolated both politically and economically, with strong connections to traditional, agricultural ways of life and to the institutions of the Presbyterian Church. In some ways, Aberdeen was a parochial and conservative place. At the same time, Aberdeen was also relatively free of some of the social and political conflicts of larger cities, which helped generate

272 Thomas Reid, *Essays on the Intellectual Powers of Man* (Edinburgh: Edinburgh University Press, 2002) at 46 ["Essays"].

273 For general information about Reid's life and work see: Gideon Yaffe & Ryan Nichols, "Thomas Reid" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, Winter 2009 ed (2009), online: <http://plato.stanford.edu/archives/win2009/entries/reid/>.

274 Alexander Broadie, *The Scottish Enlightenment: An Anthology* (Edinburgh: Canongate Classics, 1997).

a kind of intellectual tolerance and a commitment to freedom of inquiry.[275] And it was in this context of strong social traditions and relatively unfettered intellectual inquiry that Reid helped found the Philosophical Society of Aberdeen in 1758 (known as the "Wise Club").[276] The members of this society met to discuss a wide range of topics, with the goal of self-improvement as well as the advancement of society generally.[277] Particularly important to the group were questions about evidence and proof, and the way people came to know things.[278] Reid and his colleagues were critical of epistemological skepticism, including that of their Scottish contemporary Hume, and they thought that skepticism undermined both intellectual inquiry and moral and community life.[279] The members of the Wise Club, including Reid, thought that truly free "scientific" thought led, not to skepticism, but to common sense. In the doctrine of common sense, Reid and his colleagues found a way to ground both their traditional religious and moral beliefs and practices, and their commitment to unconstrained, autonomous thinking.[280]

Reid's most important writings on "common sense" are contained in the two books *An Inquiry into the Human Mind on the Principles of Common Sense* (1764)[281] and *Essays on the Intellectual Powers of Man* (1785).[282] Reid employs the term "common sense" throughout his work.[283] However, his explicit discussion and definition of the term "common sense" appear in

275 Rosenfeld, *supra* note 86 at 63.
276 *Ibid* at 65.
277 *Ibid* at 65–66.
278 *Ibid* at 67.
279 *Ibid*.
280 *Ibid* at 67–69.
281 Thomas Reid, An Inquiry into the Human Mind on the Principles of Common Sense (Edinburgh: Edinburgh University Press, 1997) ["Inquiry"].
282 Reid, "Essays," *supra* note 272.
283 For commentary on Reid's philosophy of common sense, see Stephen Boulter, *The Rediscovery of Common Sense Philosophy* (New York: Palgrave Macmillan, 2007); John Coates, *The Claims of Common Sense: Moore, Wittgenstein, Keynes and the Social Sciences* (Cambridge: Cambridge University Press, 1996); J Houston,

Chapter VI of the *Essays*, which is called "Of Judgment."[284] Reflecting an interest in common language that is both substantive and methodological, Reid defines "common sense" according to how he understands it being used in the common language he hears around him. Reid notes that for philosophers, the word "sense" often means "the power by which we receive certain ideas or impressions from objects."[285] But Reid thinks that the phrase "common sense" means more than this, and he points out that in common language, "sense" implies not only the receipt of sensory information, but also some *evaluation* of that information.[286] From this perspective, "common sense" is necessarily bound up with assessments of what we perceive, that is, with *judgment*. Reid writes:

> [I]n common language, sense always implies judgment. A man of sense is a man of judgment. Good sense is good judgment. Nonsense is what is evidently contrary to right judgment. Common sense is that degree of judgment which is common to men with whom we can converse and transact business.[287]

Reid argues that there is no good reason for departing from common language in this case, and, on this basis, pursues his discussion of "common sense" on the basis that it is intertwined with judgment and evaluation.[288]

Reid's idea of common sense emerges in the context of his ideas about the task of a philosopher,

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Thomas Reid: Context, Influence and Significance (Edinburgh: Dunedin Academic, 2004); Lemos, *supra* note 1; Marcil-Lacoste, *supra* note 229; Nicholas Wolterstorff, *Thomas Reid and the Story of Epistemology* (Cambridge, U.K: Cambridge University Press, 2001); Nicholas Wolterstorff, "Reid on Common Sense" in *The Cambridge Companion to Reid* (Cambridge: Cambridge University Press, 2004) 77 ["Reid on Common Sense"].

284 There are interesting methodological issues arising from Reid's choice to defer an explicit definition of this key term until far into his second book. Philosopher Louise Marcil-Lacost argues that Reid was not so much *describing* a common-sense philosophy as *demonstrating* how one would work: Marcil-Lacoste, *supra* note 229 at 76–79.

285 Reid, "Essays," *supra* note 272 at 423.

286 *Ibid*.

287 *Ibid* at 424.

288 Reid's ideas about the connection between common language and common sense greatly influenced later thinkers: Austin, *supra* note 218; Moore, *supra* note 195.

and what it means to engage in philosophical thinking.[289] Specifically, Reid turns to "common sense" as a way to respond to the claims of philosophical skepticism.[290] Reid argues that common sense forms the background against which we assess other claims, including philosophical claims.[291] Against both idealist and empiricist versions of epistemological skepticism (which would value only reason or raw sense data as determinative of truth), Reid defends "common sense" as a legitimate basis for testing philosophical claims.[292] For example, Reid argues that common sense knowledge leads us to have faith in the reliability of our senses. As a legitimate framework for assessing truth, this common sense knowledge provides us with good reason to be very wary of the claims of skeptical philosophers who insist that our senses are fallacious, or that we must assume that our sensory perceptions are meaningless for the purposes of real knowledge.[293]

Reid also argues that common sense necessarily plays a role in the actual practice of philosophy.[294] Turning again to the example of the common sense belief that we can rely on our

289 Wolterstorff, "Reid on Common Sense," *supra* note 283 at 77.

290 "The skeptic who preoccupied Reid was a foundationalist of the classically modern sort who tried to lay on the philosopher the obligation to use the deliverances of reason and of introspection to assess the reliability of all other belief-forming faculties. To fail to devote oneself to this task of critique is to defect from the high calling of the philosopher to live the life of reason; it is to live as the herd lives." Nicholas Wolterstorff, "Reid on Common Sense, with Wittgenstein's Assistance" 74:3 American Catholic Philosophical Quarterly at 216 ["With Wittgenstein's Assistance"].

291 Lemos, *supra* note 1 at 5.

292 There are two strands of thought about "common sense" in Reid. Nicholas Wolterstorff describes the two strands in these terms: "Sometimes he thinks of the principles of common sense as first principles of our reasoning; at other times he thinks of them as things taken for granted in the living of our everyday lives.": Wolterstorff, "Reid on Common Sense," *supra* note 283 at 82. Noah Lemos writes that sometimes Reid appears to be saying that common sense knowledge has "positive epistemic value," and other times that it is merely "irresistible:" Lemos, *supra* note 1 at 16, 22. The distinction between these two strands in Reid does not play a role in this chapter, because both strands speak to "common sense" as a part of judgment. I discuss the ways in which Reid's writings address both normative and empirical commonality for common sense knowledge in the following section.

293 Reid, "Essays," *supra* note 272 at 480.

294 Reid's description of the task and social role of the philosopher has quite radical elements, in the sense that he rejects the "high calling" of the philosopher in favour of the idea that philosophers base their thinking on exactly the same common sense beliefs that ground everyone's everyday activity: Wolterstorff, "Reid on

senses, he argues that even those philosophers who claim to doubt their senses in their philosophical work never actually doubt them in their daily lives. In characteristically witty form, Reid writes that he "never heard that any sceptic run his head against a post, or stepped into a kennel, because he did not believe his eyes."[295] It is significant for Reid that the philosopher who professes to doubt his or her senses is an actual human being, one and the same as the person who, in fact, relies on those senses. And he insists that philosophizing, just like walking, is an inherently human activity which should not be understood as divorced from other parts of life.

Reid argues that the daily life judgment that prevents one from walking into a post, and the philosophical judgment one practices in reflective thinking, are *both* grounded in common sense. Philosopher and religious scholar Nicholas Wolterstorff writes that according to Reid, "[p]hilosophers are related to the principles of common sense in the same way everybody else is - and in the same way that he, the philosopher, is related when not engaged in philosophy." [296] Further, for Reid, this common sense background is not only inevitable but also valuable. Disconnected from common sense, philosophy loses its ability to meaningfully speak to human life. Reid says:

> Philosophy...has no other root but the principles of Common Sense; it grows out of them, and draws its nourishment from them. Severed from this root, its honours wither, its sap is dried up, it dies and rots.[297]

At the same time, Reid's idea of common sense knowledge does not describe it as infallible, and

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Common Sense," *supra* note 283.
295 Reid, "Essays," *supra* note 272 at 46.
296 Wolterstorff, "Reid on Common Sense," *supra* note 283 at 96.
297 Reid, "Inquiry," *supra* note 281 at 19.

he is interested in exploring the boundaries of the usefulness of common sense. In his writings, he notes our tendency to over-value authority[298] and to interpret new things in light of things we are already familiar with.[299] The best way to approach these realities of human judgment is not to use them as the basis for rejecting everything about our common ways of thinking, but rather to address them as part of a larger whole with strengths and weaknesses.

The function of Reid's common sense knowledge in judgment is to provide a kind of background against which we assess things. We use common sense to decide whether to affirm or deny the plausibility of some other claim. When something seems to defy common sense, we are less likely to judge it true or meaningful. In this way, common sense knowledge creates a kind of burden of proof that other claims must meet.[300] This means that rather than forming a body of positive knowledge, common sense tends to remain invisible until challenged.[301] When challenged (for example, by the views of epistemological skeptics who argue that we cannot trust our senses), common sense knowledge comes into view and forms the basis of a judgment (here, a judgment that tends to reject those skeptical claims).

Reid argues that common sense knowledge is made visible not by our ability to state it in general or abstract terms, but through our practical reliance on it in daily life. For Reid, the "inner conviction" evidenced by a person's actions reveals a judgment.[302] Reid argues that a

298 Reid, "Essays," *supra* note 272 at 528.
299 *Ibid* at 529.
300 This idea of a burden of proof is often invoked by philosophers defending common sense. See Lemos, *supra* note 1; Moore, *supra* note 195; Boulter, *supra* note 283.
301 Reid, "Essays," *supra* note 272 at 41.
302 *Ibid* at 409. Note that here Reid is relying on a notion of "belief" in which there is a fairly transparent correspondence between one's beliefs and one's actions. This contrasts with the views of other theorists who appear in this dissertation, especially Gramsci and Wittgenstein.

person who demonstrates faith in his or her senses has made a *judgment* that his or her senses are worthy of this credit:

> When a man in the common course of his life gives credit to the testimony of his senses, his memory, or his reason, he does not put the question to himself, whether these faculties may deceive him; yet the trust he reposes in them supposes an inward conviction, that, in that instance at least, they do not deceive him.[303]

Thus, Reid's common sense is related to the practices of daily life because it is in daily life that common sense develops, and it is through daily life that common sense becomes visible.

The practical and quotidian nature of common sense knowledge also means that, unlike science or abstract philosophy, which rely more on certainty and clarity for their usefulness, common sense works well even though it is uncertain. If asked, few people could identify the contents of their "common sense" precisely in advance. Reid argues that the ways in which common sense knowledge is ill-defined do not work against common sense as true or meaningful, but actually supports its usefulness in context. In a passage foreshadowing Wittgenstein, Reid argues that the unclear boundaries of common sense do not pose a problem when understood in the right context:

> What the precise limits are which divide common judgment from what is beyond it on the one hand, and from what falls short of it on the other, may be difficult to determine; and men may agree in the meaning of the word who have different opinions about those limits, or who even never thought of fixing them. This is as intelligible as, that all Englishmen should mean the same thing by the county of York, though perhaps not a hundredth part of them can point out its precise limits.[304]

In this way, the vagueness and ill-defined boundaries of common sense knowledge do not

303 *Ibid* at 482.
304 *Ibid* at 427.

detract from its value; rather, these moments of vagueness and imprecision speak to the practical usefulness of the common sense.[305]

Although undefined in advance, once challenged, common sense knowledge is revealed as self-evident.[306] This means that we generally accept common sense knowledge as obviously true. Common sense beliefs are self-evident in the sense that we do not generally have reasons for believing them, nor do we usually think that such reasons are required. For example, if challenged, I would say that I believe that my senses provide me with accurate information about the world. This belief comes from my daily life experiences. I did not arrive at this belief by acquiring reasons to support it (such as, for example, learning information about how nerves function). I cannot fully explain or justify why I have such confidence in my senses, other than to point to my ongoing reliance on this belief in my life. Further, Reid argues, if we attempt to locate the reasons for our common sense beliefs or try to justify them on the basis of logic, we find the reasons themselves are not as convincing as the original belief.[307] Thus, all the reasons I can find in support of my belief in the reliability of my senses (ranging from neuroscience to metaphysics) are, in themselves, less certain to me than my original belief. In this way, common sense beliefs come to form the "first principles" of other kinds of knowledge.[308]

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305 Coates, *supra* note 283.

306 *Ibid* at 15; Reid, "Essays," *supra* note 272 at 452.

307 Reid, "Inquiry," *supra* note 281 at 18.

308 As noted earlier, Reid scholars sometimes note two strands in Reid's writings about the possible epistemic value of common sense propositions (i.e. whether we can say that common sense is really "true," or whether we simply have no option but to believe it). This distinction, whether it appears in Reid or his interpreters, does not play a role in this dissertation because the connections to judgment and daily life remain the same. Philosopher Noah Lemos argues that the strand in Reid that identifies some positive epistemic value for common sense beliefs is what distinguishes Reid from Wittgenstein, who is not interested in claiming that common sense is "true" in that way. Lemos, *supra* note 1 at 1, 6, 16, 20, 21.

The fact that common sense beliefs are not held on the basis of reasons means that the content of common sense knowledge has to be approached differently and more carefully than other kinds of knowledge. Reid writes:

> There are ways by which the evidence of first principles may be made more apparent when they are brought into dispute; but they require to be handled in a way peculiar to themselves. Their evidence is not demonstrative, but intuitive. They require not proof, but to be placed in a proper point of view.[309]

Reid argues that the mistake of some philosophers, such as his skeptical contemporaries, is to confuse the boundary between self-evident, common sense propositions and the propositions of reason and philosophy that can be built upon them. Thus, these philosophers have tried to seek *reasons* in support of common sense knowledge, and, finding no adequate ones, declare common sense knowledge invalid.[310] This is to misunderstand the notion of common sense.

Reid argues that if we refuse to acknowledge the role of common sense in all kinds of judgments and instead attempt to set it aside, we are not led to pure rationality, as some philosophers might have it. Rather, Reid says, we are led to absurdity. Skeptical philosophers mistakenly attempt to replace common sense with a philosophical "system" divorced from the reality of human practice. The attempt to build philosophical knowledge on such an ungrounded structure renders the resulting philosophy of little use.[311]

But, for Reid, the more serious problem arising from this approach is that, in effect, it precludes

309 Reid, "Essays," *supra* note 272 at 41. Note again an interesting foreshadowing of Wittgenstein; indeed, what Reid is proposing here might be similar to the method of "perspicuous representation" I am pursuing.

310 *Ibid*. In rejecting this line of reasoning, Reid shares something with many thinkers, many of whom might roughly be described as anti-foundationalist (including Wittgenstein), who take some version of the view that our beliefs and actions are not ultimately grounded on some rationally defensible belief, but rather on practices and ways of life.

311 See Wolterstorff, "With Wittgenstein's Assistance," *supra* note 290 at 216.

the practice of good judgment. Judgment requires the assessment of something as it appears in life. When philosophers attempt to build knowledge solely on the basis of logic, they claim to withhold judgment on questions that logic cannot satisfactorily resolve. (Logic cannot, for example, establish with certainty the reliability of our senses.) By claiming that we have no reliable basis on which to judge these questions, philosophers are, in fact, not judging at all.[312] They are not assessing the value of a particular claim, they are deferring this responsibility to an artificial system of rules.

This abdication of judgment permits the mistaken rejections of an important part of human life. Reid argues:

> In all matters belonging to our cognisance, every man must be determined by his own final judgment, otherwise he does not act the part of a rational being. Authority may add weight to one scale; but the man holds the balance, and judges what weight he ought to allow to authority. If a man should even claim infallibility, we must judge of his title to that prerogative. If a man pretend to be an Ambassador from heaven, we must judge of his credentials. No claim can deprive us of this right or excuse us for neglecting to exercise it.[313]

Failure to exercise judgment leads to errors and, moreover, a failure to fulfill important parts of being human. Further, it is our genuine judgments for which we can be held to account; by failing to judge, we avoid taking responsibility for their consequences.

312 Reid, "Essays," *supra* note 272 at 528–9.

313 *Ibid* at 528. On the obligation to seek out the truth rather than defer to others, Reid also writes: "....there are many more who may be called mere beggars with regard to their opinions. Through laziness and indifference about truth, they leave to others the drudgery of digging for this commodity...." *Ibid* at 529.

Normative and empirical commonality

Reid's common sense knowledge is a type of knowledge that is shared by almost everyone; for most purposes, it is universal. All people (or at least all sane adults[314]) share in common sense knowledge. Those excluded are those who lack the "degree of reason...that makes a man capable of managing his own affairs, and answerable for his conduct towards others."[315] Reid's claims about the universality of common sense knowledge have two important consequences. First, if common sense is universal, it can be used to ground claims about what everyone knows and what everyone should know. And second, the content of common sense knowledge must be severely limited (otherwise it could not possibly be held universally).

Common sense knowledge is not only possessed by virtually everyone, but is possessed equally by everyone. When it comes to matters of common sense, "every man is a competent judge."[316] Moreover, the content of common sense knowledge is *the same* for everyone: "the learned and the unlearned, the Philosopher and the day-labourer, are upon a level, and will pass the same judgment."[317] This last point comes with an important caveat though. Reid always maintains the possibility that people can be mistaken about their common sense.[318] The full passage says:

> To judge of first principles, requires no more than a sound mind free from prejudice, and a distinct conception of the question. The learned and the unlearned, the Philosopher and the day-labourer, are upon a level, and will pass the same judgment, when they are not misled by some bias, or taught to renounce

314 Reid, "Essays," *supra* note 272 at 426.
315 *Ibid* at 433.
316 *Ibid* at 461.
317 *Ibid*.
318 Rosenfeld argues that this caveat is related to Reid's religious views and his need to preserve the particular tenets of his faith: Rosenfeld, *supra* note 86 at 80.

their understanding from some mistaken religious principle.[319]

There is a strong, even radical, egalitarianism inherent in this argument; Reid insists that common sense is indeed *common*. In her account of the political history of common sense, Rosenfeld argues that the democratic political consequences of Reid's views on common sense were largely unintended, but, in the hands of Reid and his colleagues, common sense epistemology helped propel a "democratic ethos into the realm of public judgment."[320]

This picture of common sense knowledge as self-evident to virtually all human beings has the consequence of setting the boundaries of what can constitute rational debate. Reid argues that opinions contrary to common sense knowledge "are not only false, but absurd."[321] Common sense knowledge consists of things that all rational people cannot help but believe; anything contrary to common sense knowledge is nonsense, not worthy of rational consideration. Common sense knowledge thus helps set the boundaries of reasoned debate because of its normative claim to universality: Reid's common sense knowledge consists of those things that every rational person *should* believe.

Reid also argues that common sense knowledge is "common" in the sense that it is empirically *shared*, and this is a large part of why common sense is valuable. Reid argues that "before men can reason together, they must agree in first principles; and it is impossible to reason with a man

319 Reid, "Essays," *supra* note 272 at 461.
320 Rosenfeld, *supra* note 86 at 61.
321 Reid, "Essays," *supra* note 272 at 462. This relates to the strand in Reid in which "common sense" principles are those things that we must necessarily rely on in daily life: "...when an opinion is so necessary in the conduct of life, that without the belief of it, a man must be led into a thousand absurdities in practice, such an opinion, when we can give no other reason for it, may safely be taken for a first principle." *Ibid* at 467.

who has no principles in common with you."[322] Reid also talks about common sense forming the shared ground upon which people might "converse" or "transact business."[323] Reid sees this type of common knowledge as essential in order for people to understand one another, and therefore essential for community and for developing other forms of knowledge.[324]

From this perspective, Reid's notion of common sense becomes more sensitive to the distinction between "common sense knowledge" and beliefs that are merely commonly held. If knowledge is not, in fact, actually shared among individuals, it fails to fulfill its role as a creator of common ground or facilitator of conversation and business. Like the "common sense" invoked by Hannah Arendt to demonstrate the communal character of human judgment (discussed later in chapter 5), Reid's common sense must be linked to a real community. Reid understands common sense knowledge to be useful in large part precisely because it facilitates our communal lives, which he values highly.[325] When speaking in defence of the "common sense principle" that gives credit to our senses, he points to our belief in each others' existence as central to human life and all kinds of meaningful communication: "It is evident that we can have no communication, no correspondence or society with any created being, but by means of our senses."[326] Further, he writes:

> When I consider myself as speaking to men who hear me, and can judge of what I say, I feel that respect which is due to such an audience. I feel an enjoyment in a reciprocal communication of sentiments with candid and ingenious friends, and my soul blesses the Author of my being, who has made me capable of this manly

322 *Ibid* at 39.
323 *Ibid* at 424.
324 The social or intersubjective elements of Reid's philosophy in general have many implications for thinking about law. See Thomas Roberts, "Legal Positivism and Scottish Common Sense Philosophy" (2005) 18 Can JL & Jur 277.
325 Rosenfeld, *supra* note 86 at 63–67.
326 Reid, "Essays," *supra* note 272 at 477.

> and rational entertainment.[327]

Reid's concern that common sense knowledge be *actually*, as well as normatively, shared requires him to grapple with the question of how contradictory versions of common sense knowledge co-exist. For Reid, this is a question of *error* – when common sense contradicts itself, this indicates that a mistake has been made about whether something can properly count as common sense knowledge. While Reid argues that common sense knowledge is real, meaningful knowledge that we can and should rely on, common sense knowledge is not infallible.

> But is it not possible, that men who really love truth, and are open to conviction, may differ about first principles? I think it is possible, and that it cannot, without great want to charity, be denied to be possible.[328]

It will always be necessary to take certain things for granted. But, when dealing with taken-for-granted principles, we should treat our judgments, even our common sense ones, as open to scrutiny. Drawing, interestingly enough, on a legal metaphor, Reid writes:

> We do not pretend, that those things that are laid down as first principles may not be examined, and that we ought not to have our ears open to what may be pleaded against their being admitted as such. Let us deal with them, as an upright judge does with a witness who has a fair character. He pays a regard to the testimony of such a witness, while his character is unimpeached. But if it can be shown that he is suborned, or that he is influenced by malice or partial favour, his testimony loses all its credit, and is justly rejected.[329]

In this way, Reid treats common sense as properly benefitting from a *presumption* of reliability, and any proposition that goes against common sense, as properly bearing the burden of proof. Common sense knowledge remains primarily invisible until challenged. And when challenged,

327 *Ibid*.
328 *Ibid* at 460.
329 *Ibid* at 47.

real common sense knowledge will seem self-evident. But on other occasions, the challenge can provoke reflection on our opinions, leading to the rejection of something that had previously been harboured with our common sense.

Reid argues that we can be led astray by "prejudices," which are the causes of errors in relation to the principles of common sense. While it is not our natural way to be led into error, there are times when this happens, just as good health can be corrupted by disease.[330] Reid enumerates a number of different kinds of prejudices, which he thinks might affect our proper judgment and our common sense. Two of these are particularly relevant for present purposes because they relate to the problems of knowledge and marginality that are posed when legal judgment speaks to poverty.

First, Reid argues that "[m]en are prone to be led too much by authority in their opinions."[331] While Reid notes that deference to authority and expertise can be useful and indeed essential in some contexts, people have a natural tendency to over-value authorities of various kinds (including legal, scientific and religious authorities), and that doing so abdicates their responsibility to determine their own judgments. Reid clearly disdains the notion that one might follow the "authority" of one's social group, or that one's judgments might be determined by one's circumstances.[332] Reid argues that it is essential for people to determine their own judgments and not to defer to authorities without careful consideration.[333] Thus, he argues:

> [A]uthority...ought to have more or less weight, in proportion to the evidence on

330 *Ibid* at 527.
331 *Ibid* at 528.
332 *Ibid* at 529.
333 *Ibid* at 528.

> which our own judgment rests, and the opinion we have of the judgment and candour of those who differ from us, or agree with us.[334]

Here, the egalitarian and potentially democratic consequences of Reid's approach become clear. Reid's doctrine of common sense as a form of common knowledge provides a justification for valuing the knowledge of ordinary people, and the capacity of ordinary people to exercise good judgment within the realm of common sense. Reid's approach, like that of Antonio Gramsci (explored in chapter 4), explains why ordinary individuals have the capacity, the right, and even the obligation, to scrutinize and challenge what is accepted as "knowledge." If some knowledge claim – either purported common sense or part of something more formalized – contradicts my "common sense," I have the right and capacity to examine that part of my common sense and come to a judgment about whether or not it has stood up to the test. If my common sense belief seems to stand up, I can use it to assess the validity of the other claims I encounter. Regardless of what I hear from "authorities" like experts or the commonly held beliefs in my community, I can and should consider the situation myself and come to an independent judgment. Moreover, everyone else has this same right and obligation to exercise their judgment.

Second, Reid identifies the tendency to reason by analogy as a possible prejudice that might skew our appreciation of common sense principles. Reid accepts that, like reliance on authority, analogical reasoning is an essential tool. However, it carries with it certain kinds of risks:

> It would be absurd to lay aside this kind of reasoning altogether, and it is difficult to judge how far we may venture upon it. The bias of human nature is to judge from too slight analogies.[335]

It is natural and somewhat inevitable that we judge new things in terms of things we already

334 *Ibid*.
335 *Ibid* at 529.

know, but this way of thinking can also cause us to misjudge. To address this problem, Reid argues that opinions contrary to (true) common sense are made vulnerable by our exposure to a more diverse social context. In particular, the prejudices that result from our tendency to understand new things in terms of things we already know can be moderated if we test our beliefs against a wider group of others. Reid writes:

> Men judge other men by themselves, or by the small circle of their acquaintance.....It is commonly taken for granted, that this narrow way of judging of men is to be cured only by an extensive intercourse with men of different ranks, professions, and nations; and that the man whose acquaintance has been confined within a narrow circle, must have many prejudices and narrow notions, which a more extensive intercourse would have cured.[336]

This approach to the problem of over-reliance on analogy and the risks of insular communities has notable connections to the views of Hannah Arendt, explored in chapter 5. The aspect of common sense that comes to light by reading Arendt is essentially focused on this process of "acquaintance" and "intercourse" that shapes one's judgment; Arendt calls this process "enlargement of mind" and for her it is at the very heart of discovering and developing a community's common sense. For Reid, the practice of human conversation and exchange is not so much the very essence of common sense as a corrective practice that can help identify those anomalous moments when errors or prejudices are masquerading as common sense.

It is also important to note that Reid's claims about the virtual universality of common sense lead him to describe the province of common sense as quite circumscribed. Since something can count as a common sense belief only if it is self-evident, shared and not generated by prejudices, the range of common sense knowledge is fairly narrow. Examples of things Reid

336 *Ibid* at 530.

thinks have a "just claim" to the character of "common sense" are: "that I *think*, that I *remember,* that I *reason*, and, in general, that I really perform all those operations of mind of which I am conscious," and "by consciousness we know certainly the existence of our present thoughts and passions; so we know the past by remembrance."[337] Reid also counts among his "first principles" the idea of self-identity. This highlights once again the connection between common sense, everyday experience, philosophy, and appropriate modes of reasoning:

> I take it for granted that all the thoughts I am conscious of, or remember, are the thoughts of one and the same thinking principle, which I call *myself*, or my *mind*. Every man has an immediate and irresistible conviction, not only of his present existence, but of his continued existence and identity, as far back as he can remember. If any man should think fit to demand a proof that the thoughts he is successively conscious of belong to one and the same thinking principle. If he should demand a proof that he is the same person today as he was yesterday, or a year ago, I know no proof that can be given him: He must be left to himself, either as a man that is lunatic, or as one who denies first principles, and is not to be reasoned with.[338]

On the question of the value of shared knowledge, Reid also argues that the fact that some belief is widely shared is, by itself, some reason to think it is a reliable belief. He argues that when a piece of knowledge is held in common across places and times, this speaks in favour of its value as legitimate knowledge: "[t]he consent of ages and nations, of the learned and unlearned, ought to have great authority with regard to first principles."[339] Theorists who engage more directly with history and political power (such as Antonio Gramsci), may see the fact that a belief is very widely shared as as a sign of its embeddedness in a dominant cultural view or its relation to specific historical conditions. For Gramsci, the dominance of a belief is a red flag, calling for particular scrutiny. In contrast, Reid sees the fact of a belief's widespread presence as evidence

337 *Ibid* at 42.
338 *Ibid* at 42–3.
339 *Ibid* at 464.

of its usefulness and reliability for large groups of people, and this speaks to its value as common sense knowledge.[340] Gramsci agrees that a widespread belief is "useful" for a large group of people, but his socialist and egalitarian politics lead him to ask "useful for what?" and "use to whom?" Reid's form of egalitarianism takes him in a different direction: he argues that for an "expert" or a philosopher to doubt a widespread belief without good reason (for example, by insisting that it be proven rather than demonstrating it to be false) reveals a kind of arrogance or hubris that devalues the lived experiences of all of the people who rely on that belief in their daily lives. To engage in this approach is to lose opportunities to develop our knowledge. He writes:

> But if, in spite of Nature, we resolve to go deeper, and not to trust our faculties, without a reason to shew that they cannot be fallacious, I am afraid, that seeking to become wise, and to be as gods, we shall become foolish, and being unsatisfied with the lot of humanity, we shall throw off common sense.[341]

Ridicule and debate

When we are presented with apparent conflicts in the content of common sense knowledge, Reid says that we are at a "peculiar disadvantage" because we do not have recourse to our usual way of resolving such disputes – we cannot point to reasons to decide which belief should count as common sense knowledge.[342] Since common sense knowledge forms the "first principles" of other kinds of knowledge, we cannot resolve controversies about common sense with resort to first principles. However, Reid argues, there are other, compensating

340 *Ibid*.
341 *Ibid* at 497.
342 *Ibid* at 461.

characteristics about disagreements on common sense that make it possible to engage in meaningful debate. To begin, although disputes about common sense cannot generally be resolved with recourse to rational argument, there are some forms of logical reasoning that are still effective, such as tests of internal consistency.[343] Moreover, Reid argues, logical reasoning does not exhaust the resources available for assessing knowledge. In particular, Reid points to the "emotion of ridicule" as an aspect of the human disposition that equips us to deal with debates about common sense.[344]

Reid's defence of ridicule as a rhetorical strategy is provocative because of the way ridicule so often functions to exclude, not the grandiose claims of high status people like philosophers, but the claims of marginalized people who challenge more powerful groups in society. For example, Mary Wollenstonecraft's argument that women should be understood as equal with men in a liberal polity was met with ridicule in many communities.[345] Women advancing essentially the same liberal arguments about women's participation in contemporary politics are also met with derision and dismissal. Even powerful women whose actual political views fit very neatly with dominant perspectives find it impossible to participate in politics without facing ridicule about their appearance, sexuality and femininity.[346] There is good reason to be concerned about Reid's advocacy of ridicule as a way to support legitimate knowledge in

343 *Ibid* at 463.

344 For a discussion of Reid's style and rhetoric, including his use of ridicule and analogy, see Houston, *supra* note 283.

345 Mary Wollstonecraft, *A Vindication of the Rights of Woman: With Strictures on Political and Moral Subjects* (Unwin, 1891). For a general overview of the reception of the text, including satire and ridicule (as well as critical acclaim), see: "A Vindication of the Rights of Woman," Wikipedia, the free encyclopedia (2013), online: <http://en.wikipedia.org/w/index.php?title=A_Vindication_of_the_Rights_of_Woman&oldid=563855483> accessed 28 July 2013.

346 Consider the media treatment of prominent US and Australian political leaders Hillary Clinton and Julia Gillard: Anne Summers, "The Sexual Politics of Power" online: <http://meanjin.com.au/articles/post/the-sexual-politics-of-power/> accessed 28 July 2013. For a general discussion, see Heather MacIvor, *Women and Politics in Canada* (University of Toronto Press, 1996).

society.

At the same time, the methodology I am working with points back to the text and careful attention to what Reid actually says about ridicule. The strategy of "look and see" yields some interesting results: while the caution about the capacity of ridicule as a tool for the powerful still stands, Reid's defence of ridicule as a rhetorical strategy also has links to the democratic and egalitarian character of his common sense.

Reid argues that opinions that contradict common sense are not only false, but also absurd or nonsensical, and thus vulnerable to ridicule. While acknowledging that ridicule, like rational argument, can be abused, Reid writes:

> This weapon, when properly applied, cuts with as keen an edge as argument. Nature hath furnished us with the first to expose absurdity; as with the last to refute error. Both are well fitted for their several offices, and are equally friendly to truth when properly used."[347]

Reid's explicit defence of ridicule as a rhetorical device (and indeed his own employment of the *reductio ad risum*) corresponds to his argument that common sense knowledge is made up of self-evident things that we believe without reasons. Reid writes:

> All men that have common understanding agree in such principles, and consider a man as lunatic or destitute of common sense, who denies, or calls them in question. Thus, if any man were found of so strange a turn as not to believe his own eyes; to put no trust in his senses, nor have the least regard to their testimony; would any man think it worth while to reason gravely with such a person, and, by argument, to convince him of his error? Surely no wise man would. For before men can reason together, they must agree in first principles; and it is impossible to reason with a man who has no principles in common with you.[348]

347 Reid, "Essays," *supra* note 272 at 462.
348 *Ibid* at 39.

Ridicule has the effect, not necessarily of persuading the person whose words are ridiculed that they are wrong, but of helping to draw the boundaries around legitimate argument. Ridicule communicates that the person's perspective is not worthy of consideration. Further, the evaluative character of common sense means that ridiculing a belief on the grounds that it is contrary to common sense can also communicate the unworthiness of the speaker, since common sense knowledge is what every rational person can't help but believe.

Reid acknowledges the potential weaknesses of ridicule as a rhetorical strategy. He notes that it can be stifled by the competing emotion he calls "sanctity," in which people unreasonably insulate some particular belief from scrutiny.[349] Reid also acknowledges that ridicule, just like reasoned argument, can be "abused to serve the cause of error."[350] However, Reid argues that when we are not blinded by prejudices, ridicule can be effective to uncover absurdities for what they are, leaving them to dissolve on their own and true common sense knowledge to "gain rather than lose ground among mankind."[351] The ridiculousness of a belief is a clue that it is wrong, and ridicule can help make this evident in a way that reasoned argument never can.[352]

Reid wants to endorse the capacity of ordinary people to hear a philosophical claim (such as the idea that we have no way to know whether our senses are reliable), and to judge it from within the framework of knowledge that they use in their daily lives; to say "that is ridiculous" and to rely on that judgment. Further, he argues that philosophers should pay heed to such judgments and to abandon views that turn out to be absurd or ridiculous when judged against real common

349 *Ibid* at 462.
350 *Ibid*.
351 *Ibid* at 463.
352 Coates, *supra* note 283 at 17.

sense. This is the egalitarian component of common sense judgment, and it can be served by ridicule.

Reid is attentive, to some extent, to the prejudices potentially associated with authority and insular society. However, Reid gives no real consideration to the risk that ridicule can serve to silence marginal, alternative or non-traditional views, not because they are necessarily *wrong*, but for other, potentially illegitimate or unjust, reasons. Reid's commitment to egalitarianism and to the common sense of his community thus carries with it the risk of entrenching knowledge that is linked to injustice. With this complexity in mind, I turn in the next sections to the task of placing Reid's common sense in conversation with the requirements of legal judgment.

Reid's common sense in legal judgment: expertise, accountability and credibility

In Reid's writings, common sense and judgment are often contrasted with the practice of reaching a decision with unthinking reference to a set of technical rules, or deference to the opinions of experts. For Reid, the failure to exercise judgment leads us into error. In law, the failure to exercise real judgment leads not only to errors, but to the failure to meet some of the basic demands of the legal system. The obligation of the judge and/or jury to decide, to *judge*, is more than a matter of good epistemology, but also a matter of justice. In this section, I read Reid's theory of common sense in conjunction with legal judgments that invoke the term

"common sense."[353] In particular, I explore Reid's approach to common sense in the context of Supreme Court of Canada judgments on the assessment of witness credibility, which is an area of law in which the phrase "common sense" is repeated and endorsed by the Court. As the remainder of this chapter will show, these cases and Reid's writings on common sense reveal overlapping concerns about judgment, accountability, and the reliability of common knowledge.

The challenge of assessing the credibility of witnesses is a complex one, which judges and juries must undertake in almost every legal proceeding. Assessing credibility is challenging, a task described by the Supreme Court of Canada as a "notoriously difficult problem."[354] When a witness testifies in a court of law, the finder of fact must decide to what extent that person is trustworthy and reliable.[355] There is little doubt that this is one area where common sense knowledge plays a major role. According to socio-legal scholar Richard Thompson:

> The concept of "credibility" is the legal curtain behind which common sense lurks...Determining what is plausible or worthy of belief requires a context of interpretation, a context that is itself not open to belief or tests of plausibility because it determines same. This context is the system of common sense, and when a judge rules that a witness's testimony lacks credibility, she is saying, without of course actually saying, that such testimony goes against or doesn't square with common sense.[356]

Thus, legal judgments about credibility assessment are a fruitful place to explore the meaning of "common sense" in law.

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353 For more general discussions of how Reid's philosophy might be applied to legal theory, see Roberts, *supra* note 324; *Ibid*; van Holthoom, *supra* note 85.

354 *R v Marquard*, [1993] 4 SCR 223, 108 DLR (4th) 47, para 49.

355 For a general discussion of the complexity of credibility assessment, see Barry R Morrison & Warren Comeau, "Judging Credibility of Witnesses" (2001) 25 Advocates' Q 411. For more critical perspectives on the task of credibility assessment and fact-determination in general, see Boyle & MacCrimmon, *supra* note 20; Richard H Thompson, "Common Sense and Fact-Finding: Cultural Reason in Judicial Decisions" (1995) 19 Legal Stud F 119.

356 Thompson, *supra* note 355 at 124. Thompson provides a nuanced discussion of the role of common sense in judicial assessments of credibility at the trial level.

Vetrovec

The case of V*etrovec v. The Queen*,[357] is a landmark decision about the assessment of witness credibility. In *Vetrovec*, the Court made some fundamental changes to the law on "corroboration," or the rules of evidence concerning how the testimony of "suspect" or "unsavoury" witnesses (such as accomplices) should be treated. Prior to *Vetrovec*, a rule of law had developed that required judges to issue a specific kind of instruction to juries, warning them not to convict an accused person by relying solely on the testimony of an accomplice, unless that testimony was "corroborated" in the required manner. A complex body of law had grown up in order to answer questions about who counted as an "accomplice," what counted as "corroborating evidence" and what, exactly, that evidence had to corroborate.[358] This set of rules was born out of the concern that juries might not fully appreciate just how compromised the testimony of an accomplice might be, and that unjust convictions could result. These rules on corroboration were intended to provide some structure for juries, and also to allow juries to benefit from the expertise of trial judges, whose experience in the courtroom purportedly gave them special knowledge about credibility and about accomplices.[359] Many critics, including a report from the Law Commission of Canada, alleged that the jury instructions emerging from these rules were excessively technical and rather than assisting juries in the task of assessing credibility, distracted them with legal terms of art.[360] In *Vetrovec,* Dickson J. addressed this problem head-on when he wrote:

> The result [of the current rules] is that what was originally a simple, *common sense proposition* — an accomplice's testimony should be viewed with caution

357 *Vetrovec*, *supra* note 220.
358 *Ibid* at 818, 824.
359 *Ibid* at 822, 831.
360 Canada, *Report on Evidence* (Ottawa: Canada Law Reform Commission, 1975).

> — becomes transformed into a difficult and highly technical area of law. Whether this "enormous superstructure" (to use the description of the Law Reform Commission) has any meaningful relationship with the task performed by the jury is unknown.[361]

Here, as it is in Reid's writings, common sense knowledge is invoked in opposition to a body of determinative rules. A body of rules may lead to a conclusion, but it does not assist in the practice of *judgment*. Indeed, a set of rules may actively hinder the genuine exercise of judgment. In *Vetrovec,* the Supreme Court of Canada rejected the idea that the trial judge had a duty to describe a complex set of rules to the jury. Instead, following on the "common sense proposition" noted above, Dickson J. articulated a discretion to warn the jury, in general terms, about the potential problems with relying on uncorroborated evidence from a suspect witness like an accomplice.[362] In Dickson J.'s judgment, one can see something like Reid's distinction between genuine, human judgment on one side, and unreflective adherence to rules on the other, with "common sense" firmly located on the side of judgment.

A more complex picture emerges when considering the question of the content of common sense knowledge itself. Recall that Reid, in his own work, is careful to circumscribe what will count as common sense knowledge. Although the boundaries of common sense knowledge are unclear in advance, there is a definite boundary delineating those things that are the proper subject of common sense, and those that are not. Further, by identifying possible prejudices that might lead us to harbour *wrong* beliefs under the auspices of common sense, Reid calls on us to exercise our considered judgment when identifying common sense knowledge.

361 *Vetrovec*, *supra* note 220 at 826. [emphasis added]
362 *Ibid* at 831–2.

Similarly, Dickson J. does not advocate for reliance on totally unstructured resort to common sense knowledge for the assessment of credibility in a legal case. Rather, he argues that this exercise must be bound by the particular requirements of judgment *in the context of legal judgment.* This reflects a concern about boundaries, context and difference that is always relevant to common sense knowledge, but is made particularly acute in the case of law because of the way fact-finding is related to the requirements of legitimate legal judgment. In legal judgment, we care not only that the judgment be epistemologically correct, but that it be just. If a jury assessing the credibility of a witness relies on something that purports to be a matter of common sense but is actually a result of mistake or prejudice, injustice results. Further, in a way not fully accounted for by Reid, this problem becomes especially acute when we try to apply the justice values of the legal system, such as equality and the rule of law, in a context involving the marginalization of certain social groups. In this context, common sense is especially likely to overstep its jurisdiction because the knowledge in question may not be shared between majority and minority groups. And so it is here that injustice is especially likely to be unnoticed, reified or reinforced. Thus, while Reid's approach supports the idea that the genuine exercise of judgment is related to common sense, not to rules, it also supports the idea that, in legal judgment especially, attention must be paid to the boundaries of common sense knowledge.

Dickson J. appears to be seeking a middle ground, between unstructured reliance on common sense and imposition of technical rules. He notes the tension inherent in trying to establish guidelines for exercising legal judgment:

> All this takes one back to the beginning and that is the search for the impossible: a rule which embodies and codifies common sense....[363]

In some respects, Dickson J.'s words in *Vetrovec* reflect the idea that the common sense of a judge or jury can only play a positive role in *legal* judgment once common sense has been structured, to some degree, by an understanding of the relevant legal principles and standards. The Court's findings in that case, like Reid's arguments on common sense, are not motivated by opposition to rules *per se*, but rather by the search for good judgment. In the context of law, some kinds of formal rules are necessarily part of judging practice.

Reid's approach is useful in negotiating the relationship between formal rules and common sense because of the way "common sense" and judgment are linked to *accountability*. Deference to rules also allows abdication of responsibility; when we exercise judgment, we can be held to account for our decisions. Part of Reid's argument about the strength of common sense knowledge as a basis for judgment is that it facilitates our exercise of independent judgment and, in so doing, facilitates accountability for the choices we make.[364] Advocates of common sense such as Finkel[365] and Howard[366] (described above in the introduction), both follow this line of argument into the legal realm, showing how excessively detailed rules allow us to forgo making difficult choices and thereby to avoid our responsibilities as citizens or as adjudicators.[367] However, these writers stop before asking the

363 *Ibid* at 832.

364 Reid says that anyone who is competent enough to be "held to account for his actions" is capable of exercising common sense judgment. Further, Reid identifies an obligation to exercise such judgment. Reid, "Essays," *supra* note 272 at 426, 528.

365 Finkel, *supra* note 99.

366 Howard, *supra* note 103.

367 In a compelling example, Finkel cites studies showing people find it much easier to say they are in favour of the death penalty than to actually impose one in an individual case. Finkel, *supra* note 99 at 39.

critical questions: accountability *for what*, and *to whom?* If we adopt Reid's perspective that common sense is valuable in part because of its close ties to the genuine exercise of human judgment, including accountability for that judgment, then these questions are of major significance. Common sense advocates like Howard and Finkel take the first part of this argument, but stop before reaching the pressing questions about what is really meant by "accountability."

In the context of legal judgment that aims to address problems of inequality, a more nuanced account of the relationship between formal rules and accountable judgment is needed. One such account can be found in the work of feminist and critical race legal scholar Patricia Williams.[368] Williams' approach is useful here because it provides a way to think through the relationships between rules, judgment and accountability that directly addresses questions of oppression and inequality. It also speaks to the question of what "accountability" for judgment might look like in the context of the complex diversity and inequality that characterize our public life.

Williams' work is a much larger project about the relationship between race and rights in the United States. Here, I am interested in how her approach speaks to a narrower question about the best role in legal judgment for formal structures of rules on the one hand, and "common sense" on the other. As part of her discussion of the role of "rights" (which I count here as falling on the side of legal "rules"), Williams provides a compelling alternative model of how formal rules and accountability might work together in legal judgment.

368 Williams, *supra* note 78.

Williams argues that one's orientation to the formality of legal rules, laws, and rights is grounded in part on one's personal experiences and social location. In particular, "one's sense of empowerment defines one's relation to the law."[369] People whose social experiences confirm the legitimacy of their needs may be less concerned about dispensing with formal rules, and in favour of organizing social relations less formally, such as through acts of trust and friendship.[370] In contrast, those with a history of engagement with law that threatens or actively denies their entitlement (even to the extent of denying their personhood) may have an entirely different perspective on rights discourse.[371] Thus, Williams argues that "[a]lthough rights may not be ends in themselves, rights rhetoric has been and continues to be an effective form of discourse for blacks."[372] Williams argues that the value of rights language comes in part from its rhetorical role in public debate. Rights can be understood as publicly identified political and moral commitments: "rights are to law what conscious commitments are to the psyche."[373]

Williams' defence of the significance of formal rights (both as the basis of legal action and as a form of political discourse) suggests that, when the social reality of inequality and oppression is taken into account, good legal judgment cannot afford to dispense with rules in favour of "common sense." To do so would be to set aside an important tool for identifying and challenging inequality. Does this mean that legal judgment is doomed to operate with unreflective formality, foresaking the independent exercise of human judgment, unconnected to

369 *Ibid* at 148.
370 *Ibid* at 147.
371 *Ibid* at 149.
372 *Ibid*. This conclusion is reached by different means by other writers, including Scheingold: *supra* note 78.
373 Williams, *supra* note 78 at 159.

common sense of any kind, as Howard seems to imply (the "death of common sense")? Williams' approach, I suggest, tells us this is not the case.

Williams describes an approach to legal judgment in which our subjectivity as particular, contextualized human beings is actively engaged. Williams challenges us to develop an approach to law and legal judgment in which we learn to engage with our own subjectivity, and with legal constructs such as "rights," in a more complex manner. She writes: "What is needed, therefore, is not the abandonment of rights language for all purposes, but an attempt to become multilingual in the semantics of evaluating rights."[374] We need to be able to see and express more than one way of engaging with rights. Moreover, this approach to social and legal analysis, which allows us to adequately take into account questions of subjectivity and social context, will have the consequence of generating "a more nuanced sense of legal and social responsibility."[375] I suggest that this approach can be used to generate a more nuanced understanding of the accountability that Reid hoped would follow from basing judgment in common sense. While Reid himself did not go down this path, his interest in having criteria for independent and genuine judgment, linked to accountability, provides an opening for taking his thought in this direction.

D.D.

In *Vetrovec*, Dickson J. begins to address the balance between judgment and rules by insisting

374 *Ibid* at 149.
375 *Ibid* at 11.

that "common sense" knowledge must be understood in relation to certain kinds of legal principles.[376] In the following section, I further explore the relationship between common sense and judgment by engaging with the case of *R. v. D.D.* In this case, "common sense" is understood, not just in opposition to technical rules, but in possible opposition to other forms of knowledge such as scientific expertise, or in opposition to itself, with multiple bodies of "common sense" knowledge existing together.

Central to Reid's account is the idea that common sense is normatively universal, and thus works to shape the boundaries of legitimate debate. If common sense consists of everything that everyone should already know, then nothing is gained by exchanging reasons or discussion on those points. The challenge of delineating the proper scope for debate, or the proper range of things for which we should demand reasons, also emerges in legal judgments concerning witness credibility.

The case of *D.D.* provides an instructive case for discussion of this issue.[377] In that case, the Supreme Court of Canada was asked to decide on the admissibility of expert evidence on the issue of the credibility of child witnesses in criminal trials. The accused was charged with the sexual assault of a child, who testified during the trial. During the case, the accused argued that the child's delay in disclosing the abuse took away from the credibility of her testimony, and that this was simply a matter of "common sense."[378] In response, the Crown offered the evidence of

376 In jurisprudence subsequent to *Vetrovec,* the Supreme Court of Canada has continued to work out the balance of legal rules and common sense for the assessment of credibility and the law on corroboration. See *Khela*, *supra* note 221.
377 *D.D.*, supra note 27.
378 *Ibid,* para 18.

a psychologist, who testified that in his expert opinion, the timing of a child's disclosure of abuse had no relationship to the question of whether the abuse in fact occurred.[379] The Supreme Court of Canada was asked to determine whether the trial judge had properly admitted this expert opinion evidence.[380]

Speaking for the majority, Major J. found that the expert evidence was inadmissible because the issue could be fully dealt with by a direct instruction to the jury; no expertise was needed to support the "undeniable" concept that a delay in reporting has no effect on credibility.[381] The dissenting judgment authored by McLachlin C.J. did find that the expert evidence was necessary, and therefore admissible.[382]

The phrase "common sense" appears in several paragraphs of this dissenting judgment. McLachlin C.J. begins by describing "common sense" as one way of determining the "facts" of a situation, which can be counterposed to the evidence of experts. Specifically, in addressing the defence argument that the expert evidence was unnecessary, McLachlin C.J. rejects the idea that "common sense" involves "inferences" that need only be offered, rather than "facts" that must be proven. She finds that factual claims, whether made through inferences supported by common sense or expert evidence, must all meet the necessary legal criteria. She writes:

> It is argued that the relevance requirement is not met because the "fact in issue" –

379 *Ibid*, paras 4–7.

380 For one perspective on how common sense and expert evidence relate for the assessment of credibility, see John Norris & Marlys Edwardh, "Myths, Hidden Facts and Common Sense: Expert Opinion Evidence and the Assessment of Credibility" (1995) 38 Crim LQ 73. For an excellent critical assessment of the Supreme Court of Canada's resort to expert evidence for this purpose and others, see 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.

381 *D.D.*, *supra* note 27, paras 65–66.

382 *Ibid*, paras 24, 42.

> that a child's delay in reporting suggests the events did not occur – is not a fact but a common sense inference. This argument is not persuasive. How the inference is made does not affect whether there is an issue of fact at stake. Issues of fact include both facts and the logical inferences which may (or may not) be drawn therefrom. At trial, defence counsel made an issue of the reason for the delayed allegation, cross-examining the child and asking the jury to infer from the delay that the events did not occur. For the purposes of determining relevance, it does not matter whether the inference is made by counsel, drawing on "*common sense*", or with the assistance of expert evidence. Either way, what is at issue is a factual proposition put by the defence -- namely, that a child's delay in reporting abuse makes it more likely that the abuse did not occur.[383]

Following on this, McLachlin C.J. argues that the expert evidence was necessary, in part because it could provide jurors with the information they might need to critically examine the content of their own common sense knowledge. The expert evidence was necessary, not because the claim in question was contestable, but because it was necessary for jurors to understand the *reasons* underlying it.[384] She writes:

> Dr. Marshall testified, in essence, that contrary to what the ordinary juror might assume, there is no "normal" child response. Some abused children complain immediately, others wait for a period of time, and some never disclose the abuse. Thus the timing of the complaint, he testified, does not help to diagnose whether it is true or fabricated. He also outlined the factors that may lead to delay in disclosure, such as fear of reprisal, lack of understanding, fear of disrupting the family, the nature of the child's relationship with the abuser, and the nature of the abuse. *Some of these explanations might have occurred to ordinary jurors as a matter of experience and common sense, but some might not have been apparent to them without expert assistance*. Having heard on the *voir dire* what Dr. Marshall proposed to say, it was open to the trial judge to conclude that his evidence would assist the jurors by giving them an understanding of the issue of delay in reporting that their ordinary knowledge and experience might not provide.[385]

Thinking about these passages from the dissent in *D.D.* in light of Reid's understanding of common sense shows both the explanatory power and the limitations of Reid's approach.

383 *Ibid*, para 18.
384 *Ibid*, para 31. [emphasis added]
385 *Ibid*, para 25. [emphasis added]

McLachlin C.J.'s invocation of "common sense" here overlaps with Reid's understanding of common sense knowledge in the way Reid places "common sense" in opposition to expertise as a possible framework for judgment. On first glance, it seems that McLachlin C.J. departs from Reid's approach insofar as she endorses expertise, rather than common sense, as the basis for good judgment in this case. However, Reid might simply agree with McLachlin C.J. that the proposition at hand – that the timing of a child's disclosure of abuse has no relationship to whether the abuse occurred – is *not* within the province of common sense and rightly the subject of expertise.[386]

This approach is fully available to Reid, who is quite careful to circumscribe his own claims about the content of common sense knowledge.[387] Reid's justification of the universality of common sense knowledge lies with the fact that he includes *only* those beliefs that appear as self-evident to all rational people. If we stick faithfully to this restriction, the content of common sense knowledge is actually quite sparse, including things such as the "judgment" that we can rely on our senses, and other things without which we start to lose our ability to think about how we live our daily lives. However, unlike Reid, many of those who invoke the normative universality of common sense are not so circumspect. Indeed, as we see in the *D.D.* case, claims about common sense extend far beyond this to include things that are, in fact, deeply contested.

Reid could also argue that in this context, purported "common sense" suffers from certain

386 Reid, "Essays," *supra* note 272 at 433. Reid also says: "When judgment is ripe, there are many things in which we are incompetent judges. In such matters, it is most reasonable to rely upon the judgment of those whom we believe to be competent and disinterested." *Ibid* at 528.

387 See for example the way Reid frames the "first principles" of his own work. *Ibid* at 41.

prejudices, such as reasoning from improper analogy, and should be challenged. As noted in the previous section, Reid was committed to the idea that we are obligated to exercise our judgment in a reflective manner. However, Reid's theory suggests that it will usually be quite easy to determine whether or not something can count as common sense; once challenged, common sense propositions will appear self-evident. For Reid, the issue of potentially "incorrect" common sense is one about *error*. When common sense knowledge turns out to be wrong, we have simply made a mistake about something, and this error can be corrected with reference to the transparent, actual state of affairs. For Reid, true common sense knowledge is self-evident, so we need only refer to it to say "aha, now I see how I was misled before." So Reid does allow for the possibility of purported "common sense knowledge" that is, in fact, wrong. But Reid's insistence that we can resolve the question of whether something should or should not count as common sense knowledge in a very straightforward way lays bare his underlying (problematic) assumptions about the relationship between thought and behaviour and the relative independence of judgment from social relations.

Not addressed directly by McLachlin C.J. (and also not by Reid) are the ways in which these disputes about the meaning of a child's conduct in disclosing or not disclosing abuse are set in a context of inequality and the exercise of political power. Children who disclose abuse by an adult face a variety of stereotypes and misconceptions that are best understood, not (just) as *errors*, but as consequences of a social structure that systematically devalues the testimony of victims of sexual abuse.[388] Those aspects of Reid's approach that focus on self-evidence and

388 Nicholas Bala, "Double Victims: Child Sexual Abuse and the Canadian Criminal Justice System" (1990) 15 Queen's LJ 3. For a discussion of "racial common sense" as a non-expert method of fact-determination, and how this buttresses white privilege in the law, see Gotanda, *supra* note 259.

non-expertise appear to be of little assistance here.

The juxtaposition of Reid's theory of common sense with the invocation of "common sense" in *D.D.* also highlights the relationship between common sense knowledge, daily life, and reasoning. Reid argues that the rootedness of a belief in the everyday life of groups of people gives that belief the benefit of a presumption of reliability. He argues that to think otherwise, or to structure a system of argument from a different starting point, is not just mistaken but also fundamentally disrespectful of those people. People and communities, as well as "experts," are the sources of real knowledge and this should be taken seriously by thinkers of all kinds. I suggest that Reid's opposition of common sense knowledge and expertise works to generate a normative expectation that everyday knowledge should benefit from a presumption of reliability, with countervailing "expertise" carrying a burden of proof. In the context of legal judgment, this actually corresponds quite well with the doctrinal requirement that expert opinions must be "necessary" before they should be admitted as evidence.[389]

Recall that for Reid, anything that is properly the subject of common sense judgment will appear as self-evident, and not amenable to proof or disproof via rational reasons. Following from this, Reid argues that access to common sense does not improve with expertise.[390] However, McLachlin C.J.'s approach in the *D.D.* case contemplates precisely this possibility: that the non-expert framework that judges and jurors use to assess credibility may, in this context, be inaccurate, misleading or incomplete, and that these deficiencies can be remedied with reference to scientific expertise. Further, the dissenting judges appear to acknowledge that many people

389 *R v Mohan*, [1994] 2 SCR 9, 114 DLR (4th) 419.
390 Reid, "Essays," *supra* note 272 at 453.

will need *reasons* to displace the presumption of reliability they habitually place in their common sense knowledge. This sits uneasily with Reid, who insists that we hold our common sense views because of our daily life experiences, *not* because we hold convincing reasons to support them. Reid does consider that our daily lives (such as the diversity of our social experiences) can affect the quality of our common sense knowledge. But he does not consider that *those things we believe without reasons* might be structured, not just by their reliability in daily living, but by their reliability as parts of a structure of inequality. He does not consider how social inequalities might produce particular patterns of inadequate "common sense knowledge." These questions are of primary concern to Gramsci, whose "aspect" of common sense is considered in the following chapter, and whose perspective becomes increasingly essential when legal judgment is placed in its real life context characterized by social and political inequalities.

These reflections show some of the shortcomings of Reid's approach as a way to understand common sense in legal judgment. However, Reid's interest in the rhetorical value of common sense does offer a constructive way to think about common sense and legal judgment, set in a context of inequality. Reid argues that part of the value of common sense knowledge is its ability to set the terms of reasonable debate. Reid argues that since common sense knowledge consists of those things we believe, not on the basis of reasons but on the basis of our everyday experience, we can reasonably debate only those things lying *outside* the jurisdiction of common sense. But for things that are properly contained within common sense knowledge, debate is inappropriate. Most times, we cannot offer reasons for our common sense beliefs, but for Reid, this just demonstrates the nature of the belief as rooted in practice, which speaks to its *value,* not

to any problem with its epistemological credentials. Thus, when claims arise that are counter to common sense knowledge, the appropriate response is not reasonable debate (which may indeed be impossible), but something else entirely,[391] such as questions about the speaker's membership in the community of rational people, or questions about whether the belief is rooted in a "prejudice" such as undue deference to authority. Perhaps the appropriate response is simply ridicule.

These reflections about the rhetorical effects of common sense claims are worthy of particular scrutiny in the context of legal judgment. Written legal judgments in a common law jurisdiction have particular rhetorical purposes of their own, including the task of persuading readers that a just result has been reached in a particular case, providing an example of the proper functioning of the legal system, and contributing in a general way to the legitimacy of the judicial process.[392] For the Supreme Court of Canada, these rhetorical tasks are also directed at multiple audiences: lawyers and judges who must interpret and apply the law in the future, the parties to the litigation who should feel that the process has been fair, and the general Canadian public for whom the judgment is also a symbolic statement about justice.

The language of "common sense" plays a complex role in such a context. Reid describes the rhetorical strategy of ridicule as a way to dissolve nonsensical claims. But even without the more extreme form of ridicule, it is true that almost any claim about common sense has rhetorical effects that are related to ridicule. In particular, it is significant that claims invoking

391 This recalls Wittgenstein's insistence that judgments are always built on judgments and practices (the "rough ground"), not grounded in an epistemically defensible foundation.

392 Benjamin L Berger, "Trial by Metaphor: Rhetoric, Innovation, and the Juridical Text" (2002) Court Review: The Journal of the American Judges Association.

common sense are more strongly polemical than persuasive.[393] When presented with a claim that something is a matter of common sense knowledge, those who have a contrary view may not be persuaded to change their minds, or even to re-consider their view, if the claim is presented as obvious truth that any rational person can't help but believe. Addressing the role of common sense rhetoric in the constitutional law of the United States, Terry Maroney writes: "asserting that one's own view is commonsensical never will persuade someone to whom it appears otherwise, but it will instead come across as maddening, wrongheaded, even insulting."[394]

Further, the power of the normative universality of common sense claims can still work even when the "knowledge" in question is wrongly counted as a part of common sense knowledge. By invoking "common sense" as the basis for his argument, the accused in *D.D.* relies on this language to make the underlying claim that any other assertions are so wrongheaded so as not to merit consideration. In the context of a debate about the admissibility of expert evidence, the defence argument appeals to the idea that this question can and should be decided on the basis of existing everyday knowledge, and that scientific expertise will only distract or mislead. This rhetorical move poses enormous risks to the legitimacy of legal judgment. Put starkly, the defence argument appeals to a powerful prejudice against children to foreclose debate on the credibility of the child's testimony.

For the dissenting judges in *D.D.*, it was necessary to directly confront the rhetorical impact of the claim that "common sense" impelled an inference against the credibility of the child witness,

393 Rosenfeld, *supra* note 86 at 15.
394 Terry A Maroney, "Emotional Common Sense as Constitutional Law" (2009) 62 Vand L Rev 851 at 914.

by drawing the issue back into the realm of reasoned debate. By contrasting purported common sense knowledge with the knowledge offered by the expert witnesses, McLachlin C.J. frames the question as one which did indeed merit rational scrutiny, and opens opportunities to expose the limits of dominant views on sexual abuse and child witnesses.[395]

The majority judgment in *D.D.* does not use the language of "common sense," and so it does not speak directly to the rhetorical value of this phrase. However, because the majority and minority judgments are framed against each other, and are explicitly addressing the defence arguments about common sense, Major J.'s judgment does provide the opportunity for some reflection on this point. I argue that by rejecting the need for expert evidence the majority justices were, in essence, claiming that common sense, *for the purpose of legal judgment*, does contain the "knowledge" that the timing of a child's complaint about abuse has no relation to its credibility. Major J. does draw a line around the reasoned debate that might happen in this case, and places this issue firmly outside its bounds. This is, essentially, to make the legal and normative claim that a juror, exercising proper legal judgment, *should* accept this fact, and that no argumentation on this question is necessary. That children should be disbelieved when they delay reporting sexual abuse is not a *logical* absurdity. But perhaps it is something that the law should label as a *normative* absurdity, something outside the realm of good legal judgment. Not (just) on the basis of empirical information, but on the basis of the normative claim that justice, and thus good legal judgment, require the judge to reject any association between the timing and credibility of abuse complaints.

395 The contrast between common sense knowledge and expertise in this judgment also speaks to the ways in other frameworks for evaluation (such as science), while they may also be problematic, tend to provide more openings for challenge than does common sense because they contemplate questions and answers rather than single assertions. See Maroney, *supra* note 394.

According to Reid, one rhetorical consequence of common sense claims, and indeed, the whole purpose of engaging in ridicule, is to foreclose debate on certain points. This serves the purpose of clarifying the boundaries of what can be justified with reference to reasons, and what must be justified on other grounds. But in legal judgment, particularly on a matter that has been pursued all the way to the Supreme Court of Canada, we are dealing with questions on which people clearly disagree. To invoke common sense in this context can undercut the rhetorical purpose of a judgment relating to fair process, because it may appear that debate has been unfairly constrained or precluded from the outset. At the same time, the foreclosure of debate on certain points can be used to transparently establish the normative values that will ground fact-determination for legal judgment; certain things are simply not up for discussion in a court of law, and this might serve either progressive or oppressive ends, depending on the context.

When we consider legal cases involving complex social issues and the problems of inequality, the risks and benefits of common sense claims as rhetorical devices are shown in particularly sharp relief. This is in part because, in Reid's terms, the risk of our common sense knowledge being corrupted by "prejudices" is particularly high. When dealing with issues arising from social marginalization, there is a greater risk that common sense knowledge will reflect undue deference to authority (especially to dominant or majority views) or the tendency to decide on the basis of "too slight analogies." If these prejudices operate without constraint in legal judgment, we risk undermining substantive legal principles such as equality. Thus, the rhetorical power of "common sense" should be invoked with caution and diligent attention to equality.

Gosselin

In the first, introductory chapter of this dissertation, I quoted those passages from the *Gosselin* case that invoke "common sense." In this section, I return to these passages and read them specifically in light of Reid's approach to common sense. As with *Vetrovec* and *D.D.*, I read *Gosselin* here in order to ask what is learned about legal judgment by looking at "common sense" from Reid's perspective.

In one passage, in which she addresses how the purported purpose of the law can affect its impact, Chief Justice McLachlin writes:

> As a matter of common sense, if a law is designed to promote the claimant's long-term autonomy and self-sufficiency, a reasonable person in the claimant's position would be less likely to view it as an assault on her inherent human dignity.[396]

This passage overlaps with many of the themes raised by Reid in his discussion of common sense. McLachlin CJ. frames a modified subjective test (i.e. "what would a reasonable person in the claimant's position believe?") in terms of common sense. With Reid's picture of common sense in mind, framing this analysis in terms of common sense transforms it into a question about what any reasonable person *should* believe. Rhetorically, it places anyone who sees things differently outside the realm of rational debate. Anyone exercising judgment on the basis of common sense knowledge would find that the law in question did not infringe their human dignity. Ms. Gosselin, who specifically claims that she did, in fact, view the law as an assault on her human dignity, is excluded from the rational community to whom the legal judgment is addressed.

396 *Gosselin*, *supra* note 7, para 27.

Another passage from *Gosselin* deals with the defence of common sense as a source of legitimate and reliable knowledge. McLachlin C.J. writes:

> Even if one does not agree with the reasoning of the legislature or with its priorities, one cannot argue based on this record that the legislature's purpose lacked sufficient foundation in reality and *common sense* to fall within the bounds of permissible discretion in establishing and fine-tuning a complex social assistance scheme. Logic and *common sense* support the legislature's decision to structure its social assistance programs to give young people, who have a greater potential for long-term insertion into the work force than older people, the incentive to participate in programs specifically designed to provide them with training and experience.[397]

And, at a later passage:

> [W]e cannot infer disparity between the purpose and effect of the scheme and the situation of those affected, from the mere failure of the government to prove that the assumptions upon which it proceeded were correct. Bastarache J. argues that the distinction between people under 30 and older people lacks a "rational basis" because it is "[b]ased on the unverifiable presumption that people under 30 had better chances of employment and lower needs" (para. 248). This seems to place on the legislator the duty to verify all its assumptions empirically, even where these assumptions are reasonably grounded in everyday experience and *common sense*. With respect, this standard is too high…The legislator is entitled to proceed on informed general assumptions without running afoul of s. 15… provided these assumptions are not based on arbitrary and demeaning stereotypes.[398]

In these passages, McLachlin C.J. is asserting in part that we *can* draw conclusions in law based on knowledge we hold as non-experts; we don't always need "empirical" information to base our judgments. Reid would endorse this general view of common sense knowledge as a legitimate resource for judgment. This is a crucial step in defending the capacity and indeed obligation of individuals to render their own judgments, without undue deference to authority (which might appear here in the form of some kind of social scientific data). On the other hand, Reid's picture of common sense also invites consideration of whether the beliefs in question are

397 *Ibid*, para 44.
398 *Ibid*, para 56. [emphasis added]

actually shared in some relevant way. In the context of the *Gosselin* case, the "common sense knowledge" invoked by McLachlin C.J. is clearly not universal. Further, it sits on a dividing line that has a great deal of social and legal significance, bearing markers of class, gender and age. Common sense knowledge, mistakenly claimed across these communities, does not provide common ground but rather functions to imply a consensus where there is none.[399] "Common sense" as invoked in *Gosselin* takes common sense beyond Reid's narrower claims about things we can't help but believe, and heeds none of his cautions about the boundaries of common sense knowledge.

The consequences of attributing a false consensus in this context are not just to paper over *difference*, but also to reiterate inequality and hierarchy. While Reid's aim is to have common sense form the basis for a practice of judging that is empowered, pragmatic and accountable, this accountability evaporates when the opinions of a dominant group come to be equated with common sense. In this context, claims about common sense knowledge can subvert rather than support practices of good legal judgment.

Invoking the language of common sense in a legal judgment can also pose challenges for one of the main rhetorical functions of written judgment: persuading the people who are bound by the law, including the litigants who have lost their case, that justice has been done. In *Gosselin,* the rhetorical consequences of "common sense" include the exclusion of Ms. Gosselin, and many other Canadians living in poverty, from the community of rational people to whom the courts owe a duty of justification. It also has the effect of erasing many kinds of experiences from the

399 Maroney, *supra* note 394.

constitutional imagination: "common sense" does *not* tell us that poverty affects dignity, security or equality. Insofar as they have any legal value at all, the experiences of Ms. Gosselin and others in her position are not "common" or matters of common sense.[400]

One way to respond to this problem from a perspective inspired by Reid, (aside from simply saying that this knowledge lies outside the province of common sense) is to say that such a practice of judgment has not fully taken into account the requirements of common sense knowledge. In particular, the invocation of common sense knowledge in *Gosselin* does not adequately reflect a judging practice that takes responsibility for the *rhetorical* consequences of common sense, including drawing the scope of legitimate debate. In the context of legal judgment, reliance on common sense knowledge should be justified, not only as a basis for judgment in opposition to technical rules or scientific evidence, but also on the basis of the rhetorical consequences flowing from its use. Said another way, judges should justify their resort to common sense on the basis of the boundaries that it draws: the boundaries of legally and constitutionally appropriate debate, and the boundaries of the communities that they will speak to in their judgments. Taking insight from Williams' nuanced account of judgment and accountability, our approach to common sense requires attention to context and politics in order to make it a valuable resource for legal judgment.

These reflections on *Gosselin* show that the aspect of common sense that we see by reading Reid helps confront some of the challenges of common sense in legal judgment, but leaves others unaddressed. Reid's perspective provides a way to talk about judgment and

400 In chapter 5, I will engage with the work of political theorist Hannah Arendt to say more about how common sense works to identify and create communities.

accountability, and the way common sense sets out the boundaries of debate. When McLachlin C.J. says "everyday experience and common sense," she is counterposing common sense with "empirical" or social scientific data, and we can use Reid's approach to make sense of this aspect of common sense. But this phrase is set in the context of a legal finding about the kind of evidence the state must produce to explain and justify a law that might breach the rights of citizens. What does it mean for the *legislature* to rely on its common sense? Whose common sense can or should prevail here, where the law in question – the interpretation of s. 15 of the *Charter* – is precisely addressed at the need to protect marginalized people from majority rule? Looking at common sense from Reid's perspective provides few resources for addressing these kinds of questions because it lacks a sufficiently nuanced understanding of how common sense is affected by history and power. To address these I turn in chapter 4 to the work of Antonio Gramsci.

In relation to the rhetorical effects of common sense, Reid's approach provides rich fodder for debate about rhetoric, ridicule, and the boundaries of rational debate. There are ways in which Reid's theory is very useful when assessing the consequences of invoking "common sense" in legal judgment. However, in addition to delineating the boundaries of rational debate, it is also the rhetorical function of a legal judgment to make a statement about the content of the law, to made a discursive contribution to the building of the legal system. From this perspective, claims about common sense are not (or not just) persuasive, they are normative statements about law and the communities for whom the law exists. Reid's approach helps us to see why the use of "common sense" in the majority's judgment in *Gosselin* might be construed as discriminatory or offensive to many people living in poverty because of the way it articulated the scope of debate.

However, Reid's approach, focused as it is on the possibility of near-universal common knowledge, provides little assistance when we try to draw the boundaries of community on the basis of political or legal principles. In constitutional equality law, whose common sense is most legally appropriate as the reference point for knowledge? What *should* the law treat as beyond dispute? To answer questions such as these, I turn in chapter 5 to the work of Hannah Arendt.

Conclusion

For Reid, the function of common sense knowledge is to provide a stable ground upon which we can collectively conduct the work of human life, from everyday conversation to philosophical analysis. When the language of common sense is improperly extended, instead of a stable ground we end up with an unstable edifice of some sort, which at once constrains our exercise of judgment and precludes us from seeing what is really at stake in our debates, and so we lose our ability to meaningfully communicate. The ongoing challenge is to find some middle ground between transforming too much into undoubtable first principles (as he thought Ancient philosophers did), and making everything subject to doubt (as he thought his skeptical contemporaries did).[401] For Reid, this challenge has to do with discovering truth. For this dissertation, this challenge is about identifying the proper boundaries of debate *for the purpose of legal judgment*.

401 Reid, "Essays," *supra* note 272 at 518.

Reid understands common sense knowledge as the framework for good judgment, the reference point for meaningful debate and the condition of social life. In legal judgment, all of these aspects of common sense knowledge are important, and common sense knowledge is a necessary and inevitable part of legal judgment. I conclude that, when examined in the context of legal judgments, the "aspect" of common sense that describes it as a form of shared knowledge has many pitfalls when assessed from the perspective of justice. Reid's "common sense knowledge" carries a strong risk of partiality and error, and when invoked can imply false consensus and impose not a "common" understanding but a dominant or majoritarian one. Reid's common sense lacks a sufficiently complex approach to social relations to fully respond to challenges about inequality and the relationship between power and knowledge.

However, those with an interest in seeking out criteria for good legal judgment ignore "common sense as shared knowledge" at their peril. The power of common sense claims to generate normative boundaries around legal debate and various communities must be attended to, not only because of the attendant risks of exclusion and marginalization, but also because of its potential to be invoked in the service of actively chosen principles of equality and access to justice. For example, a judge who invokes common sense can choose, on the basis of equality, to circumscribe debate in a manner that removes from marginalized litigants the burden of "proving" "facts" that are in fact fundamental to the legal system, disallowing challenges based in oppressive beliefs or stereotypes. Further, claims about common sense, as understood by Reid, are characterized by normative commitments to respect for non-expert knowledge and for the experiences of daily life.

The “aspect” of common sense revealed by Reid is undoubtedly at work in legal judgment, and is most constructively understood as an opportunity for critical reflection on legal knowledge, rhetoric, and the criteria for good judgment in law. Although Reid's approach shares much with the dominant view of common sense that tends to hold us “captive,” a close look at what Reid actually says about common sense starts to dislodge some of the assumptions that hold that picture in place. Even for Reid, there are cracks in the “universal” and “self-evident” common sense knowledge arising from reasoning prejudices, and Reid calls on everyone to exercise their independent judgment in a full and meaningful way. But the “aspect” of common sense explored here – as a form of shared knowledge – is unable to address all of the implications of these dilemmas. If common sense benefits from a burden of proof because it is shared, how can those who do not share it challenge its legitimacy? If common sense is rooted in the fundamental reality and equal legitimacy of daily life knowledge, what happens when peoples' daily lives differ dramatically? These important issues arise from questions about power and community, made significant by my focus on poverty and social justice in legal judgment. Thus, in my search for a perspicuous representation of common sense, it is necessary to shift perspective in order to see a new aspect.

Chapter 4 – Antonio Gramsci's common sense: History, power and our "conception of the world"

Haymarket Theatre. This time, our theatre companion is the socialist thinker and political activist Antonio Gramsci, arrived from Italy, circa 1923. Gramsci glances around at the patrons gathered in the seats and galleries, and those watching from the floor. In Act 4, Queen Common-Sense debates Queen Ignorance, and declares herself the protector of wisdom:

> Could Common-Sense bear universal Sway,
> No Fool could ever possibly be great.[402]

Gramsci mutters in exasperation. But at other points, he nods in agreement, as when Queen Common-Sense chastises Law for injustices brought upon poor citizens and the unfair conduct of lawyers who act in their own private interest:

> *Q. C. S.*
> My Lord of *Law*, I sent for you this Morning;
> I have a strange Petition given to me;
> Two Men, it seems, have lately been at Law
> For an Estate, which both of them have lost,
> And their Attorneys now divide between them.
>
> *Law.*
> Madam, these things will happen in the Law.
>
> *Q. C. S.*
> Will they, my Lord? then better we had none:
> But I have also heard a sweet Bird sing,
> That Men, unable to discharge their Debts
> At a short Warning, being sued for them,
> Have, with both Power and Will their Debts to pay,
> Lain all their Lives in Prison for their Costs.
>
> *Law.*
> That may perhaps be some poor Person's Case,
> Too mean to entertain your Royal Ear.
>
> *Q. C. S.*
> My Lord, while I am Queen I shall not think
> One Man too mean, or poor, to be redress'd;[403]

His inherited spinal condition causing him pain, Gramsci shifts uncomfortably in his seat. At the conclusion of the play, he makes his way into the crowd to hear the audience members debate the production.

402 Fielding, *supra* note 3 at V.1.
403 *Ibid* at IV.1.

Introduction

In this chapter, I persevere with the task of creating a "perspicuous representation" of common sense in legal judgment by juxtaposing multiple "aspects" of common sense. This chapter explores the "aspect" of common sense that we come to see by reading the work of Antonio Gramsci. Gramsci's writings on cultural hegemony (with common sense playing an important role) are some of the most influential socialist writings of the 20th century.

In the last chapter, I addressed the "aspect" of common sense provided by Thomas Reid: common sense as a form of shared knowledge. Focusing on this aspect of common sense proved to be quite useful when thinking about legal judgment: it helps direct attention to everyday knowledge, accountability for judgment, and the way common sense works to set the boundaries of debate. Attention to these things reveals both the strengths and weaknesses of Reid's approach as a way to generate criteria for using "common sense" in legal judgment. Although Reid's approach overlaps considerably with the way "common sense" is most often used and understood in relation to legal judgment, when we "look and see" at what Reid has to say, this starts to loosen the constricted conversation that sometimes holds us captive. For example, Reid endorses common sense knowledge as real and legitimate. However, he is very careful to limit the contents of common sense knowledge. Moreover, he is alive to the possibility of prejudice and our tendency to judge using unreliable analogies. At the same time, there are nascent or emergent questions about common sense in legal judgment that seem difficult to address or even formulate clearly within Reid's paradigm. For example, if common

sense is what best grounds acts of accountable judgment, what is the best way to approach judgments where there is a significant stretch between the daily life knowledge of the judge, and that of some broader community? What about the worry that a very widely held view might not be "common" but just dominant in some way? Studying common sense from Reid's perspective has shaken free some new issues that require attention in order to take further steps towards perspicuous representation of common sense. In this chapter, I shift perspective to look at the aspect of common sense that comes to light in the work of Antonio Gramsci. For Gramsci, "common sense" is a shared conception of the world, historically constructed and related to power.

Antonio Gramsci's theory of common sense emerges in the context of his evaluations of (and exhortations for) Italian socialism. Gramsci was born in 1891 on the island of Sardinia in the southern part of Italy, an area of widespread poverty among the peasants and miners who lived and worked there.[404] Gramsci attended university in Turin, where he grew both as an intellectual and as a political leader. Gramsci was very active as a writer and political educator, working for various socialist newspapers and helping to organize workers' councils. In the 1920s he helped found the Communist Part of Italy, and was elected to the national legislature in 1924. In 1926, the fascist government of Benito Mussolini arrested Gramsci as part of an attempt to repress opposition parties. The prosecutor at his trial famously said of Gramsci that "we must stop this brain from working for twenty years!"[405] Gramsci was imprisoned and his health, compromised by pre-existing problems including a spinal condition, deteriorated. He was

404 Gramsci, *supra* note 123.
405 *Ibid* at xviii.

released to a hospital in 1934, but never recovered from his time in prison and he died in 1937 at the age of 46. The prosecutor's success in convicting Gramsci resulted in his lengthy imprisonment, but manifestly failed to stop his brain from functioning; during his imprisonment Gramsci wrote thousands of pages of notes and essays which have been collected and translated as the *Prison Notebooks.*[406] These writings contain Gramsci's thoughts on a wide range of subjects relating to the role of Marxism in contemporary Italy, the history of the region, the social and cultural context of Italian socialism, and theoretical perspectives on politics, education, history and culture.

"Common sense" plays a central role in Gramsci's analysis of social change and his exhortations for political action. Unlike Reid, for whom common sense knowledge is primarily an epistemological concept, Gramsci's notion of common sense is aimed directly at specific political goals and the emancipation of oppressed peoples. Gramsci argues that common sense must be subjected to critique in order for people to develop an understanding of the ways in which common sense beliefs can stifle change and buttress the social dominance of certain groups. This critique is possible because common sense is heterogeneous and unstable, and susceptible to transformation through critical reflection.

Invoking Wittgenstein's language, the "aspect" of "common sense" that comes to light by engaging with Gramsci sees common sense as more than a body of shared knowledge; common sense is a shared conception of the world that frames what we think and do. Gramsci's notion of

406 Gramsci, *supra* note 123.

common sense is also centrally concerned with power, and the ways that power operates at the level of beliefs and knowledge as well as action. To grapple with the complexity of power, a notion that extends beyond political or state power and reaches into culture and society more broadly, Gramsci develops the concept of "hegemony," which explains how dominant social groups maintain their power not only through direct force and economic domination, but also through culture and civil society.[407] "Common sense" plays an important role in both the maintenance of, and resistance to, hegemonic world views.

Looking at common sense from Gramsci's perspective reveals how claims of common sense are connected to political power, in terms of both their origin and their consequences. In legal judgment, this means that a judge's "common sense" comes from her or his own social experiences (including, most often, a position of relative power). This connection to power also means that the invocation of "common sense" in a legal judgment affects how the judgment will relate to collective knowledge and practices in the future. This "aspect" of common sense – as a conception of the world inherently connected to power – presents huge challenges to legal judgment. It shows the potential for power, through common sense, to undermine legal values such as impartiality and the rule of law.

At the same time, Gramsci's vision of common sense presents opportunities for developing valuable criteria for legal judgment, because it reveals the benefits and limitations of practices of critical reflection. Critical reflection relates quite directly to the practices and principles that

407 *Ibid* at 12.

might guide judicial engagement with common sense, such as the way judges negotiate the relationship between "common sense" and "evidence." In the context of poverty, inequality and marginalization, it is very valuable to understand the potential of such practices for the assessment and transformation of the use of "common sense" in legal judgment.

This chapter has two parts, parallel to the structure of the previous chapter on Thomas Reid. In the first part, I describe the aspect of common sense that emerges from Gramsci's writings in the *Prison Notebooks*. I focus on three themes: first, I describe how Gramsci's common sense is constituted through a process of sedimentation, as knowledge and experiences gradually create the way people perceive and interpret the world. For Gramsci, this process is inherently tied to social relationships of power, which makes "common sense" highly problematic as a source of knowledge or as the basis of action. Second, I address the ways in which Gramsci nonetheless finds value in common sense, including its capacity to form collective consciousness, and the kernels of "good sense" that are contained in "common sense." Third, I describe Gramsci's assessment of critical reflection as a way to evaluate and transform common sense. Gramsci argues that the transformative potential of critical reflection is highly dependant on a set of enabling political conditions, and the practice of what he calls the "philosophy of praxis."

In the second part, I take this "aspect" of common sense (that is, common sense understood as a conception of the world that is related to political power), and examine it in the context of legal judgment. I allow the scholarly and legal texts each to shed light on the other. Against the backdrop of feminist and anti-poverty political values, what is learned about legal judgment by

thinking about common sense in this way? Further, what does the context of legal judgment reveal about Gramsci's approach? In this part, I discuss *Chaoulli v. Quebec (Attorney General)*[408] and *Sauvé v. Canada (Chief Electoral Officer)*,[409] decisions of the Supreme Court of Canada dealing with the question of what governments must do to justify the infringement of a constitutionally-protected right. In these cases, "common sense" appears as a possible way for this justification to take place. I also return to the case of *Gosselin,*[410] to re-read this case in light of the aspect of common sense we see in Gramsci. All of these cases provide opportunities to evaluate Gramsci's approach to common sense in the context of the institutions, values and discourses of legal judgment. Further, all of these cases provide opportunities to interrogate how courts rely on "common sense" when negotiating the relationship between group and individual rights and interests. Sometimes the legal issue at hand deals with questions that concerned Gramsci quite directly, such as class inequality and poverty. Others are about marginalization more broadly understood and involve a wide range of issues including gender and age discrimination, access to welfare, criminalization, democratic participation and access to health care.

For legal judgment, the value of looking at common sense through the lens provided by Gramsci is that this approach requires sustained attention to power and social context. Adopting the perspective and priorities highlighted by this "aspect" of common sense makes mandatory the consideration of how relations of power affect all forms of judgment and knowledge, from practices of daily living to the structured decision making of legal adjudication. Reading legal

408 *Chaoulli*, supra note 31.
409 *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 SCR 519 ["*Sauvé*"].
410 *Gosselin*, supra note 7.

judgments from this perspective illustrates the explanatory potential of Gramsci's approach as well as the enormous challenges posed by understanding common sense in this manner. Gramsci's perspective also points to the potential and limitations of critical reflection as a way to scrutinize and transform the common sense that underlies judgment, thereby transforming judgment itself.

Gramsci on common sense

Hegemony and historical residue

Gramsci begins his reflections on the "Study of Philosophy" by saying that it is not just professional philosophers or an elite group of intellectuals who have a "philosophy" that guides their interpretation of the world.[411] Instead, "everyone is a philosopher."[412] Everyone carries with them a specific "conception of the world."[413] All kinds of people are intellectually and politically active in this sense.[414] Gramsci writes:

> Each man, finally, outside his professional activity, carries on some form of intellectual activity, that is, he is a "philosopher", an artist, a man of taste, he participates in a particular conception of the world, has a conscious line of moral conduct, and therefore contributes to sustain a conception of the world or to modify it, that is, to bring into being new modes of thought.[415]

411 Gramsci, *supra* note 123 at 9, 323.
412 *Ibid* at 323. Gramsci also writes that there is a sense in which "[a]ll men are intellectuals..." *Ibid* at 9.
413 Gramsci, *supra* note 123 at 323. Like Reid, Gramsci argues that "common sense" is possessed virtually universally: "...it is not possible to conceive of any man who is not also a philosopher, who doesn't think, because thought is proper to man as such, or at least to any man who is not a pathological cretin." *Ibid* at 347.
414 Andrew Robinson, "Towards an Intellectual Reformation: The Critique of Common Sense and the Forgotten Revolutionary Project of Gramscian Theory" (2005) 8:4 Critical Review of International Social and Political Philosophy 469 at 472.
415 Gramsci, *supra* note 123 at 9.

The conception of the world held by most people is contained, not in a structured theory, but in "common sense."[416] In Gramsci's view, we develop our common sense throughout our lives, as we absorb knowledge and philosophies from various teachings and experiences. Gramsci argues that social events and philosophical movements all leave behind layers of historical "sedimentation" that build up in the collective consciousness of different groups of people; this is what comes to be known as "common sense."[417] Gramsci writes:

> Every social stratum has its own 'common sense' and its own 'good sense,' which are basically the most widespread conception of life and of man. Every philosophical current leaves behind a sedimentation of 'common sense': this is the document of its historical effectiveness. Common sense is not something rigid and immobile, but is continually transforming itself, enriching itself with scientific ideas and with philosophical opinions which have entered ordinary life. 'Common sense' is the folklore of philosophy, and is always half-way between folklore properly speaking and the philosophy, science, and economics of the specialists. Common sense creates the folklore of the future, that is as a relatively rigid phase of popular knowledge at a given place and time.[418]

Thus, Gramsci's common sense is connected to social context in a very immediate way. It emerges from our very specific life experiences and our responses to them: "[o]ne's conception of the world is a response to certain specific problems posed by reality, which are quite specific and 'original' in their immediate relevance."[419] But it is not only individual life experiences that shape the content of common sense. Rather, common sense (like almost all other kinds of knowledge and philosophy) is a *social* phenomenon, and therefore related to one's membership in social groups. Gramsci argues that all of our beliefs and approaches, including our common sense, are related to our membership in different groups:

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416 *Ibid* at 323.
417 *Ibid* at 326.
418 *Ibid* at 326.
419 *Ibid* at 324.

> [I]n acquiring one's conception of the world one always belongs to a particular grouping which is that of all the social elements which share the same mode of thinking and acting. We are all conformists of some conformism or other, always man-in-the-mass or collective man.[420]

Arising from its social character, common sense should be understood not as universal or transcendent, but as highly contingent and adaptable. Gramsci writes that "common sense is a collective noun, like religion: there is not just one common sense, for that too is a product of history and a part of the historical process."[421] At any given time, with any given constellation of social relations, the content of what is called "common sense" will differ. Further, all of the "common senses" that are at work in a society are related to the different histories and political contexts of the people in that society. But for all of these social groups, there is something called "common sense" that forms the "conception of the world" that most people have to guide their beliefs and actions.

In Gramsci's writings, the social and historical nature of common sense means that common sense is inherently related to power and power struggles between groups.[422] Gramsci was specifically concerned with the oppressive content of the "common sense" that dominated in his society, and the ability of this "common sense" to impede progressive political transformation of his society.[423] In this regard, Gramsci's understanding of common sense overlaps in significant

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420 *Ibid* at 324.
421 *Ibid* at 325.
422 *Ibid* at 324.
423 Gramsci's comments are therefore addressed to the concrete political context of his time, and "common sense" in a 20th century capitalist society. At the same time, Gramsci's arguments about "common sense" encourage us to think more broadly about the connections between politics and knowledge, and thus have important commonalities with arguments by Foucault. Michel Foucault, Power/Knowledge: Selected Interviews and Other Writings 1972 - 1977 (New York: Pantheon Press, 1980) ["Power/Knowledge"].

ways with his notion of "hegemony."[424] Gramsci's concept of hegemony is complex and has been the subject of political and scholarly engagement in numerous disciplines.[425] At its heart is the idea that relations of domination cannot be explained only by reference to physical force or direct coercion. Rather, power relations affect all areas of human life including culture, philosophy, and common sense.[426] A world view is hegemonic when it extends into and dominates in all these areas. Similarly, a social group[427] can dominate in a society in part because it is able to make its views hegemonic.[428] This approach to social relations contrasts strongly with a mechanical or "economistic" Marxism, in which economic arrangements are fully determinative of social and cultural phenomena.[429] Offering this richer and more nuanced perspective on the relationship between economic relations and other forms of human thought and practice is one of Gramsci's most important theoretical contributions, one which has found a role in many socialist and postmodernist literatures.[430]

424 For a detailed discussion of Gramsci's theory of hegemony, see Joseph V Femia, *Gramsci's Political Thought: Hegemony, Consciousness, and the Revolutionary Process* (Clarendon Press, 1981) ["Gramsci's Political Thought"].

425 Examples of engagement with the concept of "hegemony" in law include: Hunt, *supra* note 94; Mindie Lazarus-Black & Susan F Hirsch, *Contested States: Law, Hegemony, and Resistance* (Routledge, 1994); Douglas Litowitz, "Gramsci, Hegemony, and the Law" 2000:2 Crit L Studies 515.

426 Gramsci, *supra* note 123 at 12.

427 Translators Hoare and Nowell Smith point out that in these works, Gramsci treated many traditional Marxist terms with "substitution or circumlocution" in order to avoid drawing the attention of prison censors. Thus, the word "class" never appears in the *Prison Notebooks*. Instead Gramsci refers to "social groups," "dominant" groups and "subaltern" groups. *Ibid* at xi–xiv. In some contexts it is clear that Gramsci is really talking about economic classes in a Marxist sense. However, Gramsci's approach as a whole, including his approach to "common sense," is nuanced and creative, and therefore amenable to extension into analysis of other kinds of social categories and forms of inequality.

428 Gramsci saw around him the hegemony of oppressive capitalist ideas, and he was centrally concerned with examining and challenging such ideas. Gramsci also envisioned that progressive or liberating ideas (such as communist ideas heralding a classless society) could possibly become hegemonic through political change. Therefore, in a way, the hegemony of certain ideas can either be liberating or oppressive, depending on the content of the ideas and their relationship to existing political conditions. However, Gramsci's approach to the philosophy of praxis demonstrates that he did not envision that liberation would come simply by reversing the position of dominant and subaltern groups; he sought *transformation* of common sense and of political life: Mark Rupert, "Globalising Common Sense: A Marxian-Gramscian (Re-)vision of the Politics of Governance/Resistance" (2003) 29: Supplement S1 Rev Int'l Studies 181 at 186.

429 See Joseph Femia, "Hegemony and Consciousness in the Thought of Antonio Gramsci" (1975) 23:1 Political Studies 29.

430 For example, Gramsci's idea of hegemony and the internalization of unjust social relations informed the work

Gramsci's notion of common sense is related to power and domination, but not in a straightforward or obvious way.[431] The idea of hegemony describes how less powerful groups come to embrace the world views of others, and "common sense" is a central part of this process. In unequal, capitalist societies, this means that less powerful groups come to participate in the cultural systems that contribute to their own oppression. "Common sense" is importantly related to hegemony because common sense is one of the main ways the views of dominant groups come to be understood as natural and universal.[432] Sharing in common sense is part of how certain beliefs and perspectives come to feel like "ours," rather than alien or imposed, regardless of whether that common sense succeeds or fails to explain our own experiences, and regardless of whether it buttresses the privileges of others. The beliefs and experiences of dominant social groups come to be universalized in the "common sense" that is held not only by those groups but by others as well.[433]

However, the hegemony of any one common sense is never complete. Dominant common sense reflects and naturalizes the interests and perspectives of dominant groups, but the content of common sense does not *merely* follow behind economic relations or patterns of political domination.[434] Common sense *also* contains aspects that arise "organically." This kind of common sense is not handed down from more powerful groups, but emerges from actual life

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of the Frankfurt School. See Femia, ["Gramsci's Political Thought"] *supra* note 424 at 35. Litowitz further points out that "[m]any of the ideas associated with Gramsci and the Frankfurt School found their way into the writings of thinkers associated with the Critical Legal Studies movement." Litowitz, *supra* note 425 at 532.

431 Rupert, *supra* note 428 at 185.

432 Litowitz, *supra* note 425 at 515. Litowitz also quotes Terry Eagleton, who writes: "How do we combat a power which has become the 'common sense' of a whole social order, rather than one which is widely perceived as alien and oppressive." *Ibid* at 542.

433 Gramsci, *supra* note 123 at 326–7.

434 Rupert, *supra* note 428 at 185.

experiences. It is more meaningfully "ours," and reflects community consciousness. Gramsci argues that we tend to *act* on the basis of these ideas that make sense in context (what Gramsci sometimes calls "organic" philosophy)[435], but at the same time consciously affirm the ideas of another group because of the dominance of that group.[436] For example, I may believe that capitalist markets reward workers on the basis of merit and hard work, but find that my own hard work goes relatively unrewarded.

Gramsci argues that this produces contradictions between the different parts of our common sense (the "organic" parts that forms the basis for action, and the parts absorbed from dominant groups that is what we *think* we believe in):

> [A contrast between thought and action] signifies that the social group in question may indeed have its own conception of the world, even if only embryonic; a conception which manifests itself in action, but occasionally and in flashes - when, that is, the group is acting as an organic totality. But this same group has, for reasons of submission and intellectual subordination, adopted a conception which is not its own but is borrowed from another group; and it affirms this conception verbally and believes itself to be following it....[437]

Moreover, no single version of common sense is completely hegemonic in 20th century capitalist societies.[438] Therefore, some groups, more than others, find their experiences reflected in and meaningfully interpreted through the dominant common sense. A person located in a position of social privilege will find many of their experiences reflected in and explained by common sense, but a person in a marginalized position will not. Most people will come to experience at least some degree of conflict between what they think or believe, and how they actually act in

435 For example, see Gramsci, *supra* note 123 at 330.
436 *Ibid* at 326. See also: *Ibid* at 419.
437 Gramsci, *supra* note 123 at 327.
438 Rupert, *supra* note 428 at 185.

practice. Foreshadowing complex debates on concepts like "consciousness-raising" or "false consciousness,"[439] Gramsci argues that the conflicts that arise between what we think, what we experience in practice, and what informs our actions, are not merely a matter of self-deception (although in a few cases they may be). Rather, "in these cases the contrast between thought and action cannot but be the expression of profounder contrasts of a social historical order."[440] That is, conflicts between thought and action arise because the hegemonic norms that purport to explain the world actually serve the specific interests of dominant groups, including by falsely universalizing those very interests.

Discussion of the potentially contradictory nature of common sense provides a significant point of comparison between Gramsci and Thomas Reid. Reid agrees with Gramsci that the content of common sense emerges from one's practical experiences in daily life. Further, both thinkers argue that daily life experiences provide a kind of evidence of one's genuine or "organic" beliefs, in contrast to beliefs held superficially or which one (merely) claims to hold.[441] For Reid, a conflict between one's explicitly held beliefs and the beliefs that must underlie one's actions has to do with *error*: when I claim to believe one thing, but by my conduct demonstrate that I believe its opposite, I have made a mistake. Further, Reid argues that this kind of error occurs when we become too deferential to authority, whether it be the authority of philosophers, religious dogmas, or our fellow members of social and cultural communities.[442] This kind of

439 For a nuanced discussion of the idea of false consciousness in the context of feminist scholarship, poverty and law, see: Mari J Matsuda, "Pragmatism Modified and the False Consciousness Problem" (1989) 63 S Cal L Rev 1763.

440 Gramsci, *supra* note 123 at 327.

441 *Ibid* at 333; Reid, "Essays," *supra* note 272 at 46.

442 Reid explicitly thought that patterns of common sense beliefs among social groups was evidence of prejudices and a failure of individuals to think for themselves. Reid, "Essays," *supra* note 272 at 528.

error demonstrates a failure to exercise good judgment, and this stands in the way of our fully understanding ourselves and the world around us.

Gramsci's focus on the role of power in shaping common sense points to consequences of this conflict – between our consciously held beliefs and the beliefs that underlie our actions – that reach far beyond questions of epistemological error. Indeed, he argues that the lack of a coherent and meaningful world view is part of what makes less powerful groups vulnerable to domination, and also constitutes one of the more damaging consequences of that domination.[443] Gramsci argues that when conflicts arise between one's practice of living and one's consciously affirmed view of the world, this diminishes one's ability to act as an intellectual and political agent: "the contradictory state of consciousness does not permit of any action, any decision or any choice, and produces a condition of moral and political passivity."[444]

Thus, "common sense" is always partly, but never completely, captured by dominant perspectives. This leads to one of the key characteristics that Gramsci ascribes to common sense: fragmentariness. Common sense may affirm one thing and then its opposite. Gramsci writes:

> Common sense is not a single unique conception, identical in time and space. It is the "folklore" of philosophy, and, like folklore, it takes countless different forms. Its most fundamental characteristic is that it is a conception which, even in the brain of one individual, is fragmentary, incoherent and inconsequential, in conformity with the social and cultural position of those masses whose

443 Gramsci, *supra* note 123 at 324; Peter Ives, *Language and Hegemony in Gramsci* (Pluto Press, 2004) at 79; Robinson, *supra* note 414 at 472.
444 Gramsci, *supra* note 123 at 333.

philosophy it is.[445]

Thus, to rely on common sense for one's philosophy or "conception" of the world results in a conception that is "disjointed" and "episodic," rather than "coherent" or "critical."[446] For example, Gramsci points out that dominant common sense in his political context was strongly religious in content, but also materialist and "realistic."[447] In some respects this notion of "common sense" bears some similarities to Wittgenstein's idea of words defined through their use, or Reid's discussion of the limits of the county of York:[448] common sense cannot be assigned a unified or coherent definition in advance. However, while Wittgenstein and Reid both suggest that the lack of unity or coherence is not a problem for the value of "common sense," Gramsci argues that a disjointed or incoherent common sense or "conception of the world" does pose problems for people in understanding their lives and exercising political agency.

One of the consequences of the fragmentariness of common sense is that it is vulnerable to instrumental use in judgment.[449] That is, "common sense" can be used to support all kinds of claims, even contradictory ones. Gramsci argues that because of the compound and often contradictory content of common sense, it does not make sense to refer to common sense as evidence for the truth of any given proposition: "Common sense is a chaotic aggregate of disparate conceptions, and one can find there anything that one likes."[450] Further:

445 *Ibid* at 419.
446 *Ibid* at 324.
447 *Ibid* at 420.
448 See p. 120 above.
449 Maroney, *supra* note 394.
450 Gramsci, *supra* note 123 at 422.

> What was said above does not mean that there are no truths in common sense. It means rather that common sense is an ambiguous, contradictory and multiform concept and that to refer to common sense a confirmation of truth is a nonsense. It is possible to state correctly that a certain truth has become part of common sense in order to indicate that it has spread beyond the confines of intellectual groups, but all one is doing is making a historical observation..."[451]

When placed in a social context of unequal power relations, the fragmentary and incoherent nature of common sense is made even more problematic. Gramsci argues that fragmentary common sense makes people vulnerable, not just to instrumental reliance on common sense *per se.* The fragmentariness of common sense also makes people vulnerable to manipulation by authoritarian exploitation of common sense for specific, oppressive ends.[452] Authority figures can appeal to "common sense" to create the illusion of unity between thought and action. In this way, "common sense" functions to disguise the real social conflicts that are happening in society, and to blunt the ability of oppressed groups to understand their own situation. This can happen through the directly manipulative conduct of authority figures like employers or local religious figures. It can also happen when a hegemonic ideology extends its power through control of public institutions such as the media, schools and religious institutions. Gramsci argues that a limited "unity" of theory and practice has been achieved through authoritarian means by the Catholic Church, which enforced its view through strict dogmas and "by imposing an iron discipline on the intellectuals."[453]

Thus, the fragmentary character of common sense means not only that it cannot serve as evidence for a truth claim, but also that it can facilitate the subordination of some groups by

451 *Ibid* at 423.
452 *Ibid* at 323; Robinson, *supra* note 414 at 477.
453 Gramsci, *supra* note 123 at 331.

others, limiting peoples' ability to make sense of their experiences and to act as political agents.[454] The fragmentary nature of common sense, linked to the political power of dominant groups, prevents some people from understanding and pursuing their own interests.

Collective consciousness and "good sense"

Gramsci understood a *critique* of common sense as being a primary task for progressive political action. At the same time, the most compelling interpretations of Gramsci are ones that also recognize his notion of common sense as something with possible democratic value. This question of the possible positive value of "common sense" as Gramsci understands it is the subject of debate among interpreters of Gramsci.

For example, Andrew Robinson argues that Gramsci's comprehensive critique of common sense has been neglected or misunderstood in the literature, and that this has weakened the force of Gramsci's revolutionary message.[455] Robinson argues that those writers who understand "common sense" to be a neutral field of political debate,[456] or who give common sense positive political significance,[457] are misreading Gramsci, a mistake that "blunts the critical edge of Gramsci's remarks on common sense."[458] On Robinson's view, Gramsci's *critique* of common sense is what connects to his interest in everyday life, and to his insistence that systemic

454 See Ives, *supra* note 443 at 79.
455 Robinson, *supra* note 414 at 469–70.
456 *Ibid* at 470.
457 *Ibid*.
458 *Ibid*.

changes in political organization must be accompanied by, or even prefaced by, the transformation of everyday life and thought. Gramsci referred to this as "intellectual and moral reformation" and by this phrase, Robinson argues:

> [Gramsci] has in mind a thoroughgoing transformation and development of people's ways of thinking and acting in everyday life, a transformation fundamental enough to break the grip of bourgeois ideological formations and to transform the subaltern strata from a passive mass into an active historical force.[459]

At the heart of this reformation is the critique of common sense. In essence, Robinson argues that Gramsci's commitment to taking everyday life seriously requires us to see the ways in which "common sense" constrains political change, and to subject it to scrutiny. We cannot transform politics without transforming common sense.

José Nun argues that Gramsci's interest in the significance of everyday life and everyday thinking supports not only a *critique* of common sense, but also a recognition of the *value* that common sense has as a necessary part of everyone's thinking and practice.[460] Nun argues that Gramsci's writings on common sense reflect an underlying tension in his thought between a rationalist commitment to Marxism as a universally valid interpretive framework, and a commitment to a more historicist view in which any philosophical claim must make sense of its particular social, economic and cultural context.[461] Nun places Gramsci's writings on "common sense" in the context of his interest in the second, historicist approach to philosophizing, and analyses the resulting tension in his work.[462] Common sense is oriented towards specific social

459 *Ibid* at 470.
460 José Nun, "Elements for a Theory of Democracy: Gramsci and Common Sense" (1986) 14:3 boundary 2 197.
461 *Ibid* at 204.
462 *Ibid*.

contexts and the non-unitary, heterogeneous practices of daily life. This means that Gramsci's interest in valuing or preserving common sense (at least in some form) entails valuing some kinds of thinking that are not universal or purely rational.[463] Common sense must be subjected to critique, but, thus transformed, it also forms the basis of future social change because it is how people develop a meaningful "conception of the world" to ground their action.

Nun writes:

> Gramsci – like no other Marxist thinker of his time – is sensitive to the enormous resistances opposed by common sense to the progress of a rational logic; but he does not question, in the end, the very possibility of its access to philosophical reason, to 'a coherent and unitary conception of the world.'...Common sense is 'the folklore of philosophy,' but also the antecedent to the true philosophy which will be embodied in the masses.[464]

Common sense is heterogenous, even fragmentary, because it contains elements drawn from dominant perspectives and from organic experience; these contradictions arise from the political contradictions of capitalist society. However, common sense is also heterogenous for reasons that might survive socialist political transformations; it is tied to everyday life, to the sedimentary way we build a "conception of the world" over a lifetime, and to forms of reasoning beyond the purely rational. People are by nature dynamic and heterogenous, and our common sense reflects this.[465] This suggests that we will *always* need to apply our critical attention to common sense, regardless of its specific content or our particular historical context. At the same time, we will always have access to common sense to help ground our communities and political movements. Gramsci writes:

463 *Ibid* at 207.
464 *Ibid*.
465 See comments about human nature as "process" and "becoming": Gramsci, *supra* note 123 at 355–9.

> There is...implicit in [Marx's writings on common sense] an assertion of the necessity for new popular beliefs, that is to say a new common sense and with it a new culture and a new philosophy which will be rooted in the popular consciousness with the same solidity and imperative quality as traditional beliefs.[466]

Thus, I suggest that the radical nature of Gramsci's critique is complicated, rather than blunted, by the recognition that "common sense" may have some progressive political value.[467] I take up this theme in the second part of this chapter, where I explore the potential to transform "common sense" through critical reflection, in the context of legal judgment.

The value that Gramsci attributes to common sense can be understood in a number of ways. First, returning to the dominant general characteristic of common sense, we have seen that the fragmentary and heterogeneous nature of common sense is part of what makes it problematic and potentially oppressive. However, this same characteristic can also be seen as a potential value of common sense, or at least something that leaves it open to challenge and transformation. Political scientist Mark Rupert writes:

> Popular common sense could become a ground of struggle because it is an amalgam of historically effective ideologies, scientific doctrines and social mythologies. Gramsci understood popular common sense not to be monolithic or univocal, nor was hegemony an unproblematically dominant ideology which simply shut out all alternative visions or political projects. Rather, common sense was understood to be a syncretic historical residue, fragmentary and contradictory, open to multiple interpretations and potentially supportive of very different kinds of social visions and political projects.[468]

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466 *Ibid* at 424.

467 I do not wish to overstate any disagreement between Robinson and Nun, both of whom take the fundamental position that Gramsci calls for a critique of common sense.

468 Rupert, *supra* note 428 at 185. This passage by Rupert is also reminiscent of how Michel Foucault conceives of power, which also supports the notion that "common sense" may have some positive or productive value in creating (alternative, subaltern) meaning. Foucault, "Power/Knowledge," *supra* note 423.

Thus, common sense can support dominant social groups and their hegemonic social status. But it can also be used in the service of other political visions and purposes.

In addition to the openness that common sense can present to multiple interpretations, Gramsci also argues that common sense has value because it contains seeds of valuable knowledge and discourse, a "healthy nucleus," which Gramsci refers to as "good sense."[469] "Good sense" can serve as hints towards the truth, or small pockets where common sense has gotten it right. An example of good sense is the general hostility that people can come to feel towards "bosses" and authority figures in their lives.[470] Such general antipathy to authority figures reflects a kind of nascent appreciation of unjust power relations. While standing in contrast to the rest of common sense, such pieces of good sense provide a starting point for developing alternative views of the world. Good sense is too fragmentary to provide a full basis for an alternative philosophy, but it does provide openings for critique and ways to make philosophical critiques comprehensible to the masses.[471]

Gramsci also finds "good sense" in the way common sense can identify basic principles of causation in the physical world.[472] Common sense is valuable in that it "does not let itself be distracted by fancy quibbles and pseudo-profound, pseudo-scientific mumbo-jumbo."[473] Like

469 Gramsci, *supra* note 123 at 328.
470 Robinson, *supra* note 414 at 479.
471 In their discussion of neoliberalism and Gramscian common sense, Stuart Hall and Alan O'Shea argue that engagement with "good sense" is essential in order to challenge the dominance of neoliberal discourses in contemporary society. Stuart Hall & Alan O'Shea, "Common-sense liberalism" in Stuart Hall, Doreen Massey & Michael Rustin, eds., *After Neoliberalism? The Kilburn Manifesto* (Lawrence & Wishart, 2013, online: http://www.lwbooks.co.uk/journals/soundings/manifesto.html).
472 Gramsci, *supra* note 123 at 348, 420.
473 *Ibid* at 348.

common sense resistance to "bosses," common sense resistance to "mumbo-jumbo" carries the seed of resistance to (unworthy or unjust) authority. On this theme, Gramsci expresses appreciation for the social context that motivated some common sense philosophers, including the 17th century thinkers of whom Reid was an important example. Gramsci writes:

> It was natural that 'common sense' should have been exalted in the seventeenth and eighteenth centuries, when there was a reaction against the principle of authority represented by Aristotle and the Bible. It was discovered indeed that in 'common sense' there was a certain measure of 'experimentalism' and direct observation of reality, though empirical and limited.[474]

Thus, Gramsci finds in common sense some potential for grounding a new and transformative "conception of the world." However, common sense, even the "good sense" that can be found at its "healthy nucleus," is never organized, critical or coherent enough to do this on its own.[475] Rather, it is necessary for us to subject common sense to criticism in order to change it into something that *can* form the basis for a coherent and meaningful conception of the world. "Good sense" is precisely that part of common sense that is worthy of our critical attention, which "deserves to be made more unitary and coherent."[476] The task before us is not to reject common sense wholly, but rather to scrutinize and transform it.

Critical reflection and its political conditions

Transformation of common sense takes place through a process of critical reflection, in which

474 *Ibid*.
475 *Ibid* at 331–3.
476 *Ibid* at 328.

people can come to a more explicit awareness of how their common sense ideas are related to history and to politics. Gramsci writes that:

> The starting-point of critical elaboration is the consciousness of what one really is, and is 'knowing thyself' as a product of the historical process to date which has deposited in you an infinity of traces, without leaving an inventory.[477]

Critical reflection makes it possible to understand the relationship between one's "conception of the world" and one's experiences of the world, and therefore to enable one to begin to make conscious choices about the content of one's conception. Gramsci says: "Hence the reason why philosophy cannot be divorced from politics. And one can show furthermore that the choice and the criticism of a conception of the world is also a political matter."[478]

That criticism is a political matter means that the process that would make it possible to critique one's own common sense, or to distinguish valuable good sense from oppressive, misleading dominant common sense, can only be conducted under certain *political* circumstances. It is a matter of grappling with hegemony – the mutually reinforcing patterns of political force and cultural domination. Gramsci places a great deal of significance on the freedom to seek and express knowledge, including how this relates to education and the media and the ability of institutions like schools and newspapers to help structure our understanding.[479] Gramsci himself was widely regarded as a journalist and worked on the editorial boards of socialist newspapers, which he thought were extremely important for the development of socialist thought.[480]

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477 *Ibid* at 324.
478 *Ibid* at 327.
479 Gramsci writes: "School is the instrument through which intellectuals of various levels are elaborated." *Ibid* at 10. See also: *Ibid* at 341, 350.
480 *Ibid* at 28.

Gramsci also wrote extensively about education, and the need for education to challenge traditional "common sense" not only by presenting alternative sources of knowledge, but also by closing the gap between the curriculum and the life experiences of the students.[481]

Further, students (and indeed all people) need to develop the confidence to exercise their own judgment. Gramsci points out that common sense is "dogmatic and eager for peremptory certainties," and that this simplistic way of thinking undermines our ability to take up the intellectual challenge of the kind of dialectical thinking that is actually necessary.[482] Like Reid, Gramsci challenges people to step up to meet the demands of real judgment. However, unlike Reid, Gramsci sees that a host of political and social conditions (such as free expression and adequate education) are prerequisites for this possibility.

Gramsci's notion of common sense, in part because of its association to dominant social groups, benefits from a powerful burden of proof. This is related to the fact that most people experience common sense as a kind of faith in the goodness or sensibility of their fellow community members: so many people could not be wrong, or at least not as radically wrong as is being proposed.[483] This means that conceptions counter to common sense must meet a particular burden of proof. Philosophies propounding such conceptions will need to repeat their arguments, and constantly work to improve the intellectual standing of their audiences.[484]. Gramsci argues that any new conception of the world will be highly unstable, and will need to

481 *Ibid* at 35–6.
482 *Ibid* at 435.
483 *Ibid* at 339.
484 *Ibid* at 340.

rely on robust freedom of expression in order to gain traction in public life.[485]

This issue of the burden of proof points to another point of contrast between Gramsci and Reid. For Reid, it is entirely appropriate and indeed beneficial that propositions contrary to common sense carry the burden of proof. We should never be quick to reject what so many people already believe. In contrast, for Gramsci, that so many people believe something is actually a sign that there is a problem: in an unequal society, hegemonic perspectives are linked to dominant social groups and the justification of their power, and this makes those perspectives *suspect*, not worthy of deference.

The transformation of "common sense" into a coherent conception of the world that can support political change, cannot be achieved simply by confronting one philosophy with another. It is not a matter of imposing "science" or "philosophy" (even Marxist science or philosophy) on the masses, or a doctrinaire critique of what people already think. Rather, it is a matter of making "critical" what is already known through practice. This can be achieved through what Gramsci called the "philosophy of praxis."[486]

The central characteristic of the philosophy of praxis is that it calls for scrutiny and critique of

485 *Ibid* at 339–40.

486 Peter Ives argues that Gramsci's approach to language, both in the substance of his arguments and his methodology, reveals an approach to meaning similar to that found in Wittgenstein's *Philosophical Investigations*. Further, Ives argues that this approach to language is important for Gramsci's political objectives. On Gramsci's refusal to coin new terms, he writes: "Just as he does not want rural peasants to adopt a language imposed on them from somewhere else, he does not want readers to adopt a new set of terms that are defined outside of their usage." Ives, *supra* note 443 at 65.

both the "philosophy" of the intellectuals, and the "philosophy" of common sense.[487] Indeed, the philosophy of praxis requires an ongoing relationship between intellectuals and the masses, such that the intellectuals find the problems that need to be addressed in philosophy in the experiences of the masses, and see it as their task to apply criticism and coherent structure to common sense.[488] At the same time, members of the masses must learn to subject their common sense knowledge to a heightened level of reflection and critique. Gramsci writes:

> The philosophy of praxis does not tend to leave the 'simple' in their primitive philosophy of common sense, but rather to lead them to a higher conception of life. If it affirms the need for contact between intellectuals and simple it is not in order to restrict scientific activity and preserve unity at the low level of the masses, but precisely in order to construct an intellectual-moral bloc which can make politically possible the intellectual progress of the mass and not only of small intellectual groups.[489]

The relationship between the "simple" and the "intellectuals" is likened to a student/teacher relationship, in which each party is both a student and a teacher.[490] Notably, Gramsci specifically contrasts this with a legal process. The progress of knowledge should *not* be conceived as a matter of prosecution and defense.[491] That is, philosophers should not think of their task as one of defending a particular view necessarily, but also of examining their own views in light of what they hear from others. Here, as in Reid, the theme of intellectual humility plays an important role.

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487 Gramsci, *supra* note 123 at 330–1.

488 *Ibid* at 330.

489 *Ibid* at 232–3. Note Gramsci's use of quotation marks around "simple."

490 Thinking about political transformation in pedagogical terms is central to Marxist discourse in general. For example, in the *Theses on Feuerbach* Marx writes: "The materialist doctrine that men are products of circumstances and upbringing, and that, therefore, changed men are products of changed circumstances and changed upbringing, forgets that it is men who change circumstances and that the educator must himself be educated. Hence this doctrine is bound to divide society into two parts, one of which is superior to society. The coincidence of the changing of circumstances and of human activity or self-change [Selbstveränderung] can be conceived and rationally understood only as revolutionary practice." Karl Marx & Friedrich Engels, *The German Ideology* (International Publishers Co, 1970) at 121. Also Gramsci, *supra* note 123 at 350.

491 Gramsci, *supra* note 123 at 351.

Moreover, Gramsci's discussion of the philosophy of praxis works to break down the distinction between "intellectuals" and the "masses" in the first place. As noted above, Gramsci argues that in a sense, everyone is an "intellectual": Everyone has a common sense "conception of the world."[492] Further, everyone's work contains some intellectual component. Gramsci writes that "in any physical work, even the most degraded and mechanical, there exists a minimum of technical qualification, that is, a minimum of creative intellectual activity."[493]

At the same time, Gramsci recognizes that some work and some social roles are more strongly "intellectual" in character, or are at least labeled that way by the dominant culture. Gramsci sets out two categories of "intellectuals." On one hand, there are "traditional intellectuals." These intellectuals are defined by their professions and social roles, and might include artists, scientists, professional philosophers and ecclesiastics.[494] On the other hand, there are "organic intellectuals." Organic intellectuals arise in every social group. They are the people who develop or elaborate or organize certain aspects of the intellectual activity that the social group engages in. This might include the capitalist entrepreneur (who understands certain aspects of economics and can instill confidence in investors), or the feudal lord (who has technical military knowledge).[495] Organic intellectuals emerge from social groups, and help provide the basis for that group's self-understanding.[496]

Because they experience a certain degree of historical continuity, "traditional intellectuals" often

492 *Ibid* at 9.
493 *Ibid* at 8.
494 *Ibid* at 7.
495 *Ibid* at 5–6.
496 *Ibid* at 5.

conceive of themselves as autonomous from any social group.[497] However, Gramsci argues, this independence or objectivity is largely illusory. In fact, traditional intellectuals are "conquered 'ideologically'" by the hegemonic perspectives of the dominant group.[498] For a hegemonic social group, "traditional" and "organic" intellectuals become "welded together."[499]

The philosopher of praxis is concerned with developing the organic intellectuals of subaltern social groups, both in terms of the number of people who have the opportunity to engage in critical reflection, as well as the quality of this intellectual engagement.[500] In terms of "common sense," the organic intellectuals arising from non-dominant social groups will embody the process of critical reflection that will allow those groups to challenge dominant "common sense" and to mobilize alternative conceptions of the world.[501] Organic intellectuals participate in the critique of hegemonic "common sense," and work to develop the "good sense" of their communities.

Organic intellectuals can play this role because they can develop the links between the world of the everyday experience of those groups – including manual labour – to the world of intellectual

497 *Ibid* at 7–8.

498 *Ibid* at 10. Gramsci writes at page 8: "[the philosopher] Croce in particular feels himself closely linked to Aristotle and Plato, but he does not conceal his links with senators Agnelli and Benni, and it is precisely here that one can discern the most significant character of Croce's philosophy."

499 *Ibid* at 13.

500 *Ibid* at 11.

501 Political philosopher Joseph Femia notes that Gramsci's ideas about organic intellectuals and other communist elites also help generate his views on the proper role for political parties. Femia writes: "Thus, Gramsci's concept of hegemony provides the basis for a theory of the revolutionary party. For it falls upon an organized elite of professional revolutionaries and communist intellectuals to instil in the masses the 'critical self-consciousness' which will enable them to overthrow the existing order and develop a morally integrated society based on proletarian, collective principles." Femia, "Gramsci's Political Thought," *supra* note 424 at 56.

elites and the practice of philosophical self-reflection.[502] Organic intellectuals also function to break down those binary distinctions (e.g. between "theory" and "practice" or between "common sense" and "philosophy"), so that all knowledges, practices and modes of thinking can receive the necessary critical scrutiny. In this respect, the concept of "organic intellectual" overlaps with the feminist notion of marginality explored above in chapter 2.[503] In both cases, intellectual work is understood as rooted in the experiences and political concerns of a particular social group, with critical attention paid to both "common" and "elite" understandings of the world.[504] Further, this critical attention is conducted with reference to the particular, situated knowledge of oppressed social groups, which has the potential not only to challenge hegemonic "common sense," but also to liberate those social groups and transform the political landscape as a whole.[505]

Thus, the role of an organic intellectual is about one's ability to reflect upon and make coherent one's own experiences, and the experiences of one's social group, through critical thought. But it also means playing a leadership role in organizing the social group towards self-understanding

502 Gramsci, *supra* note 123 at 9.

503 See above at p. 99.

504 Some of the feminist thinkers cited in chapter 2, such as Patricia Hill-Collins and bell hooks, could be understood as "organic intellectuals" because of the way their scholarly work maintains close connections to the concerns and experiences of Black women in the United States.

505 Gramsci's approach is situated in a Marxist tradition in which questions of epistemology are inherently linked to specific political structures and social location. For example, drawing on Hegel's master-slave dialectic, Marx argues in his early writings that the position of the proletariat is unique (they are the class in "radical chains"), and that their potential for insight arises from this particular political location. This approach is also important for feminist "standpoint" epistemology. Karl Marx, *Critique of Hegel's "Philosophy Of Right"* (Cambridge University Press, 1982) at 141; Hartsock, *supra* note 243. In this dissertation, I bracket the question of whether subaltern social groups are specially or uniquely positioned to possess certain kinds of knowledge. Instead, I focus on Gramsci's argument that social location and community are relevant (or even essential) for developing "common sense," and thus the common sense of different communities will be, indeed, different. Therefore, I suggest, the way we approach common sense will have political as well as epistemological consequences and we should be held to account for both kinds of of choices.

and therefore political transformation. In this connection, Gramsci sometimes calls the organic intellectuals of subaltern groups the "new" intellectuals, whose work will help to transform society. Thus:

> The mode of being of the new [organic] intellectual can no longer consist in eloquence, which is an exterior and momentary mover of feelings and passions, but in active participation in practical life, as constructor, organiser, "permanent persuader" and not just a simple orator...[506]

The critique of common sense and the development of "good sense" are essential parts of the philosophy of praxis. Looking at Gramsci's political analysis with particular attention to "common sense" focuses attention on complexity of this undertaking: it is not simply a matter of rejecting "common sense" in favour of "philosophy," or simply reversing the positions of dominant and oppressed groups. Critique and transformation of thought and action all called for on all fronts. Rupert writes:

> At the core of Gramsci's project was a critical pedagogy which took as its starting point the tensions and possibilities latent within popular common sense, and which sought to build out of the materials of popular common sense an emancipatory political culture and a social movement to enact it - not simply another hegemony rearranging occupants of a superior/subordinate social positions, but a *transformative* counter-hegemony.[507]

In the following sections, I place Gramsci's theory of "common sense" in a different context: the practice of legal judgment. The "aspect" of common sense that we come to see by reading Gramsci provokes a number of questions: are judges traditional intellectuals or are they ever "organic" ones? To what extent do judges uphold the hegemonic common sense that reinforces

506 Gramsci, *supra* note 123 at 10.
507 Rupert, *supra* note 428 at 186.

the privileges of dominant groups? And if the critique and transformation of common sense are essential to overcoming unjust power relations, what does it mean when common sense is invoked to articulate the judgment of a state court? What does this suggest about the process of generating evidence for courts? Whose testimonies and submissions are invited or welcomed?

Gramsci's common sense in legal judgments: justification, evidence and stereotypes

In this section, I explore Gramsci's "aspect" of common sense in the context of legal judgments concerning the justification of infringements of constitutional rights. This area of law is centrally concerned with questions about the relationship between individual and group rights as well as the possibility of questioning, justifying or transforming "common sense" on any given matter. Like the assessment of witness credibility (discussed in the previous chapter), the justification of infringements of constitutional rights, either under s. 7 or s. 1 of the *Charter,* is an area in which the judges of the Supreme Court of Canada have repeatedly employed the language of "common sense" to express their rulings and concerns.

In this context, the Court is often faced with a situation in which the government's justification of the law, including the purported "rational connection" between the government's objective and the legislation itself, is something that is not amenable to empirical proof.[508] In cases about the justification of the infringement of a right, "evidence" on the connection in question may be

508 Sujit Choudhry, "So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1" (2006) 34 Supreme Court Law Review 501.

conflicting or otherwise not convincing, or the connection may be something that is simply "difficult, if not impossible, to measure scientifically."[509] However, the validity of those connections turns on whether or not they can be "justified," not whether they can be measured scientifically. So, the Court has had to articulate the standards for justification more broadly, including in terms of "common sense."[510]

I argued in the previous chapter that, in the area of the assessment of witness credibility, the Supreme Court of Canada used the language of "common sense" to provide a counter-point to systems of rules or scientific expertise to which jurors might unduly defer their judgment. Here, I argue that "common sense" in the context of s. 1 or s. 7 justification is counter-posed, not so much to systems of rules, but to "evidence." This suggests that in this context, common sense is not only a kind of information, but also a way of interpreting information (in Gramsci's terms, a "conception of the world").

The prominence of the language of "common sense" in these cases is important. The justification of government action that infringes rights has to do with the way courts negotiate the relationship between individual and collective interests, and between the judiciary and other branches of government. Questions about "common sense" and justificatory evidence take on particular significance in the context of constitutional debates that engage the rights and

509 *Harper v Canada (Attorney General)*, 2004 SCC 33, [2004] 1 SCR 827, para 79. Examples include the connection between tobacco advertising and tobacco addiction (*RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199, 127 DLR (4th) 1, *supra* note 32.), the connection between pornography and violence against women (*R v Butler*, [1992] 1 SCR 452, 89 DLR (4th) 449), or the connection between the publication of election results and the behaviour of voters (*R v Bryan*, 2007 SCC 12, [2007] 1 SCR 527).

510 See Schneiderman, "Common sense and the Charter," *supra* note 30 at 7–8.

interests of marginalized individuals and communities. In the following passages I discuss three constitutional cases in which the language of "common sense" features prominently, and that bring up issues of class, poverty and marginalization. In *Chaoulli*,[511] which concerns the issue of private medical insurance, questions of class are quite central to the case. This is also true of *Gosselin,*[512] which deals with the adequacy of income assistance programs, and deals with poverty more directly. *Sauvé (No. 2)*[513] concerns the right to vote of federally incarcerated prisoners. Poverty and class arise only indirectly when considering *Sauvé*, but relevant questions about marginalization and stereotyping arise directly and in a way that clearly has implications for the meaning of "common sense."

Following Wittgenstein's exhortation to "look and see," I read these cases, not so much as sources for developing an accurate doctrinal picture (which is their most common role), but as *examples* of the use of the phrase "common sense." These tasks overlap of course, but the goal is different. I am reading these cases, not to discover "the law" on common sense or on the evidentiary requirements of ss. 1 and 7., but rather to explore how "common sense" (this time from Gramsci's perspective) is employed in legal judgment. I try to "look and see" what the text says on its face about the meaning and role of "common sense," and consider what it means for our broader understanding of legal judgment that common sense sometimes takes on that meaning and role.

511 *Chaoulli*, *supra* note 31.
512 *Gosselin*, *supra* note 7.
513 *Sauvé*, *supra* note 409.

Chaoulli

In the case *Chaoulli v. Quebec (Attorney General),*[514] the Supreme Court of Canada addresses questions about the validity of legislation in Quebec that prevented individuals from purchasing private medical insurance to cover medical services that were part of the public system.[515] The claimants in this case were Jacques Chaoulli, a doctor who was frustrated by regulatory limits on his ability to practice medicine privately, and George Zeliotis, a man with heart and hip conditions who had experienced delays in accessing treatment in the public system. Both men challenged legislation that prohibited private medical insurance on the grounds that it violated the rights of Quebeckers as protected by the *Canadian Charter of Rights and Freedoms* and the Quebec *Charter of Human Rights and Freedoms*.[516]

The claims of Dr. Chaoulli and Mr. Zeliotis were dismissed at trial and at the Quebec Court of Appeal. However, in a four-to-three decision, the majority of justices at the Supreme Court of Canada agreed with the appellants. All of the judges who addressed the *Canadian Charter of Rights and Freedoms* agreed that there were at least some circumstances in which some people would find their life or "security of the person" put at risk because of the prohibition on private medical insurance.[517] However, they were divided on the question of whether the legislation

514 *Chaoulli*, supra note 31.

515 *Ibid*, para 3.

516 Zeliotis and Chaoulli were found not to have sufficient interest in the issues at hand to undertake the litigation as private parties. However, they were granted public interests standing to proceed with the challenge. See *Ibid*, paras 186–9.

517 Deschamps J. did not address s. 7 of the *Charter*. McLachlin C.J. and Major J. found that both life and security of the person were engaged (para. 124). Binnie and LeBel JJ. found: "Like our colleagues McLachlin C.J. and Major J., we accept the trial judge's conclusion that in *some* circumstances *some* Quebeckers may have their life or "security of the person" put at risk by the prohibition against private health insurance" (para. 191).

was justified and therefore constitutional. The four majority judges found that the legislation was in violation of the Quebec *Charter of Human Rights and Freedoms*.[518] Three of those judges also found that the legislation was inconsistent with s. 7 and not justified under s. 1 of the *Canadian Charter of Rights and Freedoms*.[519] Three dissenting judges would have rejected the claims and upheld the constitutionality of the legislation.[520] Thus, the doctrinal result of the case was that the prohibition on private medical insurance was struck down in Quebec as contrary to the Quebec Charter. The status of similar legislation in other provinces is uncertain.[521]

The phrase "common sense" appears in *Chaoulli* in the context of debates about the evidentiary requirements of s. 7 of the *Charter of Rights and Freedoms.* Pursuant to s. 7, legislation will be found unconstitutional when it deprives someone of his or her life, liberty or security of the person, except in *accordance with the principles of fundamental justice.*[522] If an infringement of a s.7 right takes place in accordance with the principles of fundamental justice (by, for example, restricting the liberty of someone convicted of a crime after a fair trial), it is constitutional. If, however, the deprivation of the right breaches the principles of fundamental justice (by, for example, being arbitrary), the law in question will be struck down.

In *Chaoulli*, the claimants argued that the impugned provisions were *arbitrary*, and therefore that any infringement on their s. 7 rights was unconstitutional. In reply, the government argued

518 *Chaoulli*, *supra* note 31, paras 101–2.
519 *Ibid*, para 102.
520 *Ibid*, para 161.
521 Colleen Flood & Sujith Xavier, "Health Care Rights in Canada: The Chaoulli Legacy" (Rochester, NY: Social Science Research Network, 2008).
522 *Charter*, *supra* note 35. See *Chaoulli*, *supra* note 31, para 109.

that the prohibition on private medical insurance was not arbitrary, but meaningfully connected to the goals of the public medical system. One of the central issues for the Court was whether this connection (between the prohibition on private insurance and the goals of the public medical system) had been established in the appropriate way. In a number of instances, the phrase "common sense" appears when the justices are addressing this connection, and the issue of whether legislation can be justified or challenged by resort to "common sense."[523]

There are a host of important doctrinal questions raised in this context about the evidentiary requirements of *Charter* claims, including the justification of a rights breach.[524] (For example, when will the court demand to see social science evidence to support a government claim about "rational connection"? Is "common sense" a type of evidence? Can it stand on its own or must it work together with other sources of information or ways of reasoning?)

Turning now to the passages in *Chaoulli* in which the phrase "common sense" appears, I look first at the judgment of Chief Justice McLachlin and Justice Major (with Justice Bastarache concurring), who found that the legislation in question was not constitutional. To begin, McLachlin C.J. and Major J. use the phrase "common sense" in their characterization of the competing claims of the litigants.

> In support of [its position] the government called experts in health administration and policy. Their conclusions were based on the "common sense" proposition that the improvement of health services depends on exclusivity...They did not profess

523 *Chaoulli*, *supra* note 31, paras 136–9, 168, 214.

524 For an older, but still useful, discussion of these issues see Brian G Morgan, "Proof of Facts in Charter Litigation" in *Charter Litigation* (Toronto: Butterworths, 1987) 159. For a more recent analysis of the justification context in particular, see: Choudhry, *supra* note 508.

> expertise in waiting times for treatment. Nor did they present economic studies or rely on the experience of other countries. They simply assumed, as a matter of apparent logic, that insurance would make private health services more accessible and that this in turn would undermine the quality of services provided by the public health care system.
>
> The appellants, relying on other health experts, disagreed and offered their own conflicting "common sense" argument for the proposition that prohibiting private health insurance is neither necessary nor related to maintaining high quality in the public health care system. Quality public care, they argue, depends not on a monopoly, but on money and management. They testified that permitting people to buy private insurance would make alternative medical care more accessible and reduce the burden on the public system. The result, they assert, would be better care for all. The appellants reinforce this argument by pointing out that disallowing private insurance precludes the vast majority of Canadians (middle-income and low-income earners) from accessing additional care, while permitting it for the wealthy who can afford to travel abroad or pay for private care in Canada.[525]

The justices then go on to assess these claims against the evidentiary requirements of s. 7.

> To this point, we are confronted with competing but unproven "common sense" arguments, amounting to little more than assertions of belief. We are in the realm of theory. But as discussed above, a theoretically defensible limitation may be arbitrary if in fact the limit lacks a connection to the goal.
>
> This brings us to the evidence called by the appellants at trial on the experience of other developed countries with public health care systems which permit access to private health care. The experience of these countries suggests that there is no real connection in fact between prohibition of health insurance and the goal of a quality public health system.[526]

McLachlin C.J. and Major J. go on to argue that the evidence from other countries, presented by the appellants, represents the only real evidence or "facts" available for grounding a decision, and they find that "[w]hen we look to the evidence rather than to assumptions, the connection between prohibiting private insurance and maintaining quality public health care vanishes."[527]

525 *Chaoulli*, *supra* note 31, paras 136–7.
526 *Ibid*, paras 138–9.
527 *Ibid*, para 152.

Therefore, they find, the legislation is indeed arbitrary.

In the passages quoted above, McLachlin C.J. and Major J. characterize the disagreements between the litigants as a matter of competing and contradictory "common sense" beliefs. The case is decided not by evaluating the relative merits of these common sense beliefs, but by determining which set of beliefs also has "facts" or "evidence" on its side. These passages characterize "common sense" in opposition to "facts," "evidence," to what is "real," to what is the case "in fact." In contrast, "common sense" is aligned with "unproven...beliefs," with "assertions of belief," what is "assumed as a matter of apparent logic," or lies "in the realm of theory." McLachlin C.J. and Major J. specifically relate this approach to the obligations of the court in undertaking judicial review: "The task of the courts, on s. 7 issues as on others, is to evaluate the issue in the light, *not just of common sense or theory, but of the evidence*."[528]

Reading these passages through the lens provided by Gramsci's approach to common sense, a number of things stand out. First, the invocation of "common sense" in opposition to "evidence" is suggestive of Gramsci's view that common sense cannot stand as an adequate justification of any particular factual assertion; here, it is claimed on behalf of contrasting views and it is not fruitful to adjudicate between them on the basis of common sense alone. To say that something is confirmed by "common sense" leaves it still unproven. This approach makes sense in the context of Gramsci's worries about the incoherent and heterogenous nature of common sense, and the inherent potential for the instrumental use of common sense in

528 *Ibid*, para 150.[emphasis added]

argument. Unlike most other references to "common sense" by judges, McLachlin C.J. and Major J. explicitly problematize this phrase by putting quotation marks around it, which further suggests a skeptical posture towards its value in legal judgment, at least as a way to defeat the charge of arbitrariness.

McLachlin C.J. and Major J.'s invocation of "common sense" also overlaps with Gramsci's in the sense that they characterize common sense not only as a potential source of information (contrasted with "evidence,") but also as a way of looking at things, a type of logic or theory. The passages cited above suggest that "common sense" can be understood as a framework for seeing the world, or a "conception of the world" in Gramsci's language. The use of "common sense" in these passages suggests the idea that a "common sense" approach to the world will be *inadequate* to ground a government's justification without essential support from a more systematic and fact-based approach, informed by "evidence."

The dissenting judgment in *Chaoulli*, authored by Justices Binnie and LeBel with Justice Fish concurring, objects to McLachlin C.J. and Major J.'s characterization of the issue as a matter of competing claims of common sense, with nothing more than the appellant's evidence to distinguish them. Binne and LeBel J.J. write:

> Our colleagues the Chief Justice and Major J. write:
>
> > The task of the courts, on s. 7 issues as on others, is to evaluate the issue in the light, not just of common sense or theory, but of the evidence. [para.150]

> This, of course, is precisely what the learned trial judge did after weeks of listening to expert testimony and argument. In general, we agree with her conclusions. There is nothing in the evidence to justify our colleagues' disagreement with her conclusion that the general availability of health insurance will lead to a significant expansion of the private health sector to the detriment of the public health sector. [...][529]

In particular, Binnie and LeBel go on to defend the "evidentiary" quality of the government's submissions, primarily by reciting at length the expert credentials of the government witnesses, and call for deference to the trial judges' findings. They write:

> Our colleagues the Chief Justice and Major J. dismiss the experts accepted by the trial judge as relying on little more than "common sense". Although we agree that the experts offered "common sense", they offered a good deal more [....] The respondent's experts testified and were cross-examined. The trial judge found them to be credible and reliable. We owe deference to her findings in this respect.[530]

This argument, supporting the trial judge's conclusion that the legislation was not arbitrary, also has interesting implications for the meaning of "common sense." Binnie and LeBell J. accept, without quotation marks, that the government's assertions accord with common sense. Then,

529 *Ibid*, para 168.

530 *Ibid*, para 214. Between the two parts of the passage quoted here, this paragraph recites at length the expert credentials of government witnesses: "The experts heard by the trial court included Mr. Claude Castonguay, who was Quebec's Minister of Health in 1970 (the [translation] "father of Quebec health insurance") and who chaired the Commission of Inquiry on Health and Social Welfare, as well as a number of other public health experts, including Dr. Fernand Turcotte, a professor of medicine at Laval University, who holds degrees from the University of Montreal and Harvard and has been certified by the Royal College of Physicians and Surgeons of Canada as a specialist in community medicine; Dr. Howard Bergman, Chief of the Division of Geriatric Medicine at Montreal's Jewish General Hospital, Director of the Division of Geriatric Medicine and a professor in the departments of Internal Medicine and Family Medicine at McGill University, a fellow of the American Geriatrics Society and an associate professor at the University of Montreal in the department of health administration; Dr. Charles J. Wright, a physician specialized in surgery, Director of the Centre for Clinical Epidemiology & Evaluation at the Vancouver Hospital & Health Sciences Centre, and a faculty member of the University of British Columbia and of the British Columbia Office of Health Technology Assessment; Professor Jean-Louis Denis, a community health doctor of the University of Montreal's [translation] "health services organization"; Professor Theodore R. Marmor, a professor of public policy and management and of political science at Yale University, who holds a PhD from Harvard University in politics and history and is a graduate research fellow at Oxford; and Dr. J. Edwin Coffey, a graduate of McGill University in medicine who specializes in obstetrics and gynecology, a fellow of the Royal College of Physicians and Surgeons of Canada and of the American College of Obstetricians and Gynecologists, and a former associate professor in the McGill University Faculty of Medicine."

they go on to say that the government's arguments *also* have evidence in their favour. Thus, in some respects, both the majority and dissenting judgments affirm that "common sense" is something *other* than "evidence" when it comes to legal judgment.[531] And for the most part, both judgments agree that it is evidence that should ground the justification exercise.[532] However, in the judgment by Binnie and LeBel JJ. there is also some room for identifying "common sense" on a given matter and endorsing it, for claiming it as one's own in addition to what the "evidence" might say ("we agree that the experts offered common sense....").

Gramsci's concerns about the contradictory content of common sense and its unreliability as a source of evidence are thus partly played out in the various judgments of the *Chaoulli* case. The majority judgment does reflect Gramsci's idea that common sense is vulnerable to instrumental use, and cannot be used as evidence of any given proposition. But in the majority judgment in *Chaoulli*, common sense is described as problematic because it is *empty* as far as this legal argument is concerned – it cannot, on its own, push us one way or the other. For Gramsci, common sense is not empty but rather overflowing with ideas and perspectives that need careful scrutiny from a political perspective.

Thus, this case also works well to facilitate discussion of Gramsci's approach to common sense precisely because of what is missing from the judgments: analysis of power. The *reason* that Gramsci is concerned about the heterogenous and contradictory content of common sense is that

531 The recitation of expert qualifications also harkens back to Reid's idea that common sense is a type of knowledge that can be contrasted with expert knowledge.
532 Choudhry, *supra* note 508 at 533.

it undermines the capacity of certain social groups to have a world view that meaningfully explains their experiences. Gramsci's concern is that the "conception of the world" that frames our vision reifies and perpetuates the oppression of some groups by others. It is on *this* basis that Gramsci rejects resort to "common sense" on its own as a way to prove an argument. McLachlin C.J. and Major J. also reject "common sense" in *Chaoulli*. However, *Chaoulli* is not a case in which "common sense" becomes a vector for transporting hegemonic perspectives into legal judgment in order to obtain a result favourable to dominant groups. In contrast, in this case the majority judgment *rejects* "common sense" in favour of "evidence," but nonetheless reaches a result that tends to support the class interests of wealthier Canadians.[533] Moreover, the class and equality elements of the case, such as the accessibility of healthcare and the ability of the wealthy to advance their claims in court, are strangely invisible in the decision itself.[534] "Common sense" is apparently not the only concept requiring more transparent treatment.

Gramsci asks that we be critical of "common sense," subjecting it to careful scrutiny. But his approach to common sense does not stop there. Gramsci's common sense is connected to history and power. A vague or generalized skepticism will not do; we have to engage with common sense in a contextualized, specific, and dialogical manner. The goal is to critique common sense in order to understand its power implications and to undermine them, to allow other kinds of information or "evidence" to come into dialogue with common sense. Moreover

533 Petter, *supra* note 80.

534 For example, McLachlin and Major J.J. invoke the interests of "the vast majority of Canadians (middle-income and low-income earners)" to support the idea that private medical insurance should be allowed (as only the wealthiest Canadians can afford to pay for private medical care out-of-pocket). (*Chaoulli*, *supra* note 31, para 137. At the same time, the majority judgment does not identify the commitment to needs-based (as opposed to wealth-based) access to healthcare as a primary rationale for the legislation and the public healthcare system as a whole. This allows them to align the interests of "the vast majority" of Canadians with access to private insurance, instead of access to public healthcare, and thereby find the legislation arbitrary.

(and this is what is missing in *Chaoulli), both* common sense and "evidence" or "science" or "philosophy" should leave the encounter transformed.

This is the "philosophy of praxis" – a dialogical process, one that Gramsci likens to a student-teacher exchange. In contrast, in *Chaoulli,* McLachlin and Major J.J. reject "common sense" because of its unclear content and its vulnerability to instrumental use in reasoning, but they do not apply this same critique to the "evidence" they do rely on. Gramsci would ask us to consider whose "common sense" is being offered to support the prohibition on private medical insurance? Whose "common sense" is being offered to oppose it? Whose interests are at stake? But further, whose interests are furthered by the demand for scientific "evidence?" What evidence is understood as persuasive or legitimate? What kinds of assumptions underly the "scientific" claims offered in contrast to "common sense? For example, in their comment on the case, legal scholars Colleen Flood and Sujith Xavier argue that the majority judges assume, falsely, that a government monopoly on health services causes wait lists.[535] This is a crucial part of the case, but receives little in the way of clear scrutiny.

Gramsci's idea of hegemony describes how the interests of dominant groups come to be inscribed in common sense, but also in all kinds of other social and cultural institutions and practices, including science, philosophy, religion and education. The critique he levels at "common sense" is crucial because of the way common sense can appear as the natural and default "conception of the world" that most ordinary people possess. But the content and

535 Flood & Xavier, *supra* note 521 at 3.

function of other "conceptions of the world" are by no means exempt from the historical-political critique that is necessary to uncover domination and generate the conditions for political transformation. Moreover, Gramsci's idea of "common sense" provides criteria for determining what parts of "common sense" are valuable towards this goal (and can count as "good sense"), and it is this theme that I explore next.

Sauvé

In *Sauvé v. Canada (Chief Electoral Officer)*[536] the language of "common sense" also plays a central role in the judges' articulation of what is required in order to demonstrably justify the breach of a constitutional right, this time in the context of s. 1 of the *Charter*. In that case, the Supreme Court of Canada was asked to assess the constitutionality of part of the *Canada Elections Act*, which denied the vote to "[e]very person who is imprisoned in a correctional institution serving a sentence of two years or more."[537] This legislation was challenged by Richard Sauvé and other prisoners who argued that the legislation violated their right to vote and their right to equality. On the question of the right to vote, protected by s. 3 of the *Charter*, the government conceded that the legislation infringed this right, but argued that this infringement was justified in a free and democratic society pursuant to s. 1 of the *Charter*.[538] The government argued that the legislation was justified because it pursued of the objectives of promoting civic responsibility and imposing appropriate punishment.[539]

536 *Sauvé*, supra note 409.
537 *Ibid*, para 2.
538 *Ibid*, para 6.
539 *Ibid*, para 19.

McLachlin C.J., writing for a majority of herself and four other justices, held that the legislation unjustifiably infringed the right to vote and was unconstitutional. She raised concerns about the "vague," "abstract" and "thinly based" nature of the rationales offered by the government, but held that it was nonetheless "prudent" to proceed with the proportionality analysis.[540] McLachlin C.J. found that the legislation was not rationally connected to the government's stated objectives, it did not minimally impair the right in question, and further that the detrimental effects of the legislation greatly outweighed any benefit that might flow from it.[541] Writing for himself and three other dissenting judges, Justice Gonthier found that the government's evaluation of philosophical and policy issues merited deference, and that the legislation did in fact meet the tests for justification.[542] Both judgments feature prominent references to "common sense," particularly in relation to the question of whether the government adequately demonstrated the connection between the stated objectives and the means chosen to achieve them, as well as the approach that should be taken to the justification exercise in general.

In the majority judgment, McLachlin C.J. writes:

> The right to vote is fundamental to our democracy and the rule of law and cannot be lightly set aside. Limits on it require not deference, but careful examination. This is not a matter of substituting the Court's philosophical preference for that of the legislature, but of ensuring that the legislature's proffered justification is supported by *logic and common sense*.[543]

In this passage, McLachlin C.J. finds that it is part of the court's obligation to ensure that the

540 *Ibid*, paras 22–26.
541 *Ibid*, paras 53, 56, 62.
542 *Ibid*, paras 66–7.
543 *Ibid*, para 9. [emphasis added]

government's proffered justification *does accord with common sense*. Unlike in other passages in this judgment and others, common sense is described as mandatory, not just supplementary or optional. Common sense is aligned with "logic," and contrasted with "philosophical preference." In other passages, McLachlin C.J. writes as if common sense can serve to *supplement* evidence in the justification process (and indeed as a matter of legal doctrine, this appears to be the general approach)[544] But here, in this passage, "common sense" is invoked as part of what is required in order for the government to justify the breach of a right.

The majority and dissenting judges in *Sauvé* explicitly disagree about the *content* of common sense in relation to the rational connections alleged in this case. Specifically, while considering the government's claim that disenfranchisement formed a part of appropriate punishment, McLachlin C.J. finds that "[n]either the record nor common sense supports the claim that disenfranchisement deters crime or rehabilitates criminals."[545] In contrast, Gonthier J. finds that common sense does support a rational connection to both of the government's stated objectives. He writes:

> I support the analysis of the courts below: reason, logic and common sense, as well as extensive expert evidence support a conclusion that there is a rational connection between disenfranchising offenders incarcerated for serious crimes and the objectives of promoting civic responsibility and the rule of law and the enhancement of the general objectives of the penal sanction.[546]

And:

> I share the view of the courts below that given that the objectives are largely

544 *Ibid*, para 18.
545 *Ibid*, para 49.
546 *Ibid*, para 157.

> symbolic, common sense dictates that social condemnation of criminal activity and a desire to promote civic responsibility are reflected in disenfranchisement of those who have committed serious crimes.[547]

In this respect, the treatment of common sense by both judgments in the *Sauvé* case again reflects Gramsci's fundamental observation that the content common sense is much too heterogeneous and incoherent as a body of knowledge to meaningfully count as evidence of any given claim: one can always find both a proposition and its opposite in common sense. Common sense tells us that disenfranchisement can serve as a meaningful punishment, *and* common sense also tells us that this makes no sense. Faced with this dilemma, Thomas Reid might say that a claim about the connection between social condemnation of crime and disenfranchisement lies far beyond the jurisdiction of "common sense" knowledge. But Gramsci argues that common sense – our uncritical "conception of the world" – does include a wide range of things that might well include an approach to punishment and its relationship to civil rights. On its face, it is unclear how Gramsci's theory of "common sense" could guide legal judgment through this impasse created by two competing "common sense" claims. But a careful look at the "aspect" of common sense under consideration here provides a way through. Gramsci's approach to common sense also requires attention to the context of common sense claims, and an analysis of how people came to hold the views they do. Unlike the judgments in *Chaoulli,* both judgments in *Sauvé* also also offer some observations that speak to this issue.

For example, Gonthier J. goes on to identify the source of the disagreement about the content of common sense on this matter as resting with differing social and political philosophies.[548] He

547 *Ibid*, para 159.
548 *Ibid*.

argues that the Chief Justice's rejection of the government's claims consists merely of a rejection of one reasonable philosophical view in favour of another, without offering supporting reasons for so doing.[549] Indeed, the heart of Gonthier J.'s dissent is that, in many cases, the act of justification under s. 1 must involve some appreciation of these underlying philosophical views. He argues that

> In the case at bar, there is very little quantitative or empirical evidence either way. In such cases, the task of justification relates to the analysis of human motivation, the determination of values, and the understanding of underlying social or political philosophies — it truly is justification rather than measurement.[550]

Gonthier J. finds that the task of true justification in this sense, when the question seems to be about a fundamental philosophical perspective rather than evidence or expertise, should involve deference to the way in which Parliament has approached the matter.[551] In this respect, Gonthier's judgment suggests a further element of Gramsci's common sense, which is the idea that common sense is not only a source of knowledge, but also an entire "conception of the world" with political and philosophical content. Part of Gonthier J.'s argument is about institutional competence and the question of who should be charged with resolving public debates about alternative "conceptions of the world," and opts to defer this exercise to the legislature. I think Gramsci would be unhappy with this outcome because of the resulting further political marginalization of prisoners in the context of a capitalist society. However, I also think Gramsci would agree with Gonthier J.'s general assertion that these are choices with political and philosophical content.

549 *Ibid*, paras 100, 157.
550 *Ibid*, para 90. See also paras 91, 93.
551 *Ibid*, para 101.

In his discussion of "principled" reasoning in relation to *Sauvé,* Graham Mayeda argues that McLachlin C.J. also side-steps the question of alternative political theories, not by deferring to the legislature, but by invoking "common sense" and focusing on the more pragmatic proportionality analysis.[552] Without principled engagement with the alternative philosophical frameworks at play, McLachlin C.J.'s judgment lacks transparency, and the invocation of "common sense" allows judgment to proceed without scrutiny of the political and philosophical commitments at play.[553] This is a consequence at the heart of Gramsci's notions of common sense and hegemony. However, as Mayeda also notes, McLachlin C.J. does address some issues that flag the need for justification and "principled reasoning." These issues arise especially in relation to "common sense."[554]

Specifically, McLachlin C.J. addresses the possible reasons that might exist for disagreement about the content of common sense. While Gonthier J. speaks generally about philosophical perspectives, McLachlin C.J. notes specifically the risk that "stereotypes" can engender: "one must be wary of stereotypes cloaked as common sense, and of substituting deference for the reasoned demonstration required by s. 1."[555] Here, McLachlin C.J. is more explicitly endorsing a form of critical review for common sense, to test its adequacy against the norms of legal

552 Graham Mayeda, "Between Principle and Pragmatism: The Decline of Principled Reasoning in the Jurisprudence of the McLachlin Court" (2010) 50 Sup Ct L Rev 41 at 46 ["Principle and Pragmatism"].

553 Mayeda writes: "In reading *Sauvé II,* one cannot understand the normative basis for rejecting the government's explicit or implicit goals. Chief Justice McLachlin does not reject the goals of enhancing civic responsibility, respect for law and imposing additional punishment on prisoners put forward by the government. Instead, she dismisses them as vague and symbolic goals that belie the government's real, unstated objectives. But the Court never explains what these unstated objectives are or why they are illegitimate. At the very least, one could have expected the Court to explain the principled arguments for and against allowing prisoners to vote and explaining why the principles that favour denying such a vote are unjustifiable based on cogent reasons acceptable in the contemporary public forum." *Ibid* at 54.

554 *Ibid* at 51.

555 *Sauvé*, *supra* note 409, para 18.

judgment. "Stereotypes," adopting the general definition offered by feminist legal scholar Denise Réaume, are "inaccurate generalizations about the attributes of members of a group that can usually be traced back to a time when social relations were based more overtly on contempt for the moral worth of the group."[556] On this view, for legal judgment, "stereotypes" are a problem not only because they may be wrong or misleading, but also because they can reflect inequalities in existing social relations, and can function to silence and oppress. While the specific stereotypes at work in this case are not explicitly identified, one can imagine potential candidates, such as the idea that people in prison are inherently incapable of contributing to a democratic community, or that people in prison are lesser citizens for whom the right to vote is not important, or who must be taught civic responsibility in a punitive manner.[557]

The invocation of "common sense" as a possible conduit for "stereotypes" brings Gramsci's more critical perspective to bear on legal judgment in this case. At the same time, the language of "stereotypes" is actually quite limited as a way to articulate how "common sense" should be measured against "justice." For example, in her analysis of equality law and the concept of human dignity, Réaume points out that:

> Prejudice and stereotype are core cases of impugning the moral worth of others. Their eradication constitutes a necessary part of the landscape of equality. However, protection against them does not exhaust the notion of respect for human dignity.[558]

Testing "common sense" for the presence of "stereotypes" may be an essential part of ensuring

556 Denise Reaume, "Dignity, Equality and Second Generation Rights" in Poverty: Rights, Social Citizenship and Legal Activism (Vancouver: U.B.C. Press, 2007) 281 at 286.

557 McLachlin C.J. does note the "crisis" of the disproportionate incarceration of Aboriginal peoples in relation to the proportionality analysis. *Sauvé*, *supra* note 409, para 60.

558 Reaume, *supra* note 556 at 286.

its legitimacy for legal judgment, but it is a far cry from the thoroughgoing and dialogical critique that Gramsci envisions in the philosophy of praxis.[559] And the risks of adopting "common sense" in the absence of this richer critique were made manifest in the case of *Gosselin*.

Gosselin

In Chapter 3, focusing on the "aspect" of common sense that we see in Thomas Reid – that is, common sense as common knowledge – the appearance of "common sense" in the *Gosselin* case raised issues about false claims of universality and the rhetorical re-exclusion of marginalized peoples. Reid's perspective reveals the importance of common sense knowledge in grounding judgment and articulating a commitment to egalitarianism, but his approach provides little guidance once we identify significant conflicts within common sense knowledge that cannot be resolved with the simple reference to "self-evidence" that Reid imagined. In the context of *Gosselin*, we need Gramsci's perspective in order to develop criteria for accepting some common sense and rejecting other common sense, for distinguishing between "good sense" and what is just commonly believed. We need access to the "aspect" of common sense as a whole "conception of the world" that relates us to our communities. Looking again at the text referring to "common sense" reinforces the idea that we learn different things about legal judgment when reading with this new "aspect" of common sense in mind.

559 For further discussion of the limitations of the concept of "stereotypes" in equality law, see Margot E Young, "Unequal to the Task: 'Kapp'ing the Substantive Potential of Section 15" (2010) 50 Supreme Court Law Review 183 ["Unequal to the Task"].

In *Gosselin,* the language of "common sense" does not appear in the context of questions about government justification of the breach of a right. Rather, it appears in the context of the analysis of s. 15 equality rights. However, in this case, McLachlin C.J.'s majority judgment effectively imports some aspects of justification into the s. 15 analysis, so that once again the issue is in part about what is required to establish a connection between a government's proffered objective and the means it has chosen to achieve that objective.[560] In comparison with most of the judgments in *Chaoulli* and *Sauvé* discussed above, references to "common sense" in *Gosselin* create a stronger sense of confidence in the value of "common sense." Here, McLachlin C.J. adopts the phrase "common sense" to describe the content of her own argument. In one passage, dealing with the role of the purpose of the law in assessing its impact, she writes:

> *As a matter of common sense*, if a law is designed to promote the claimant's long-term autonomy and self-sufficiency, a reasonable person in the claimant's position would be less likely to view it as an assault on her inherent human dignity.[561]

McLachlin C.J. uses the language of common sense to articulate the basis of a substantive claim in the case, one which gives the government's proffered justification for the law significant leverage in the discrimination analysis. McLachlin C.J. also writes that the "legislator *is entitled* to proceed on informed general assumptions," where those assumptions are grounded in "common sense."[562] Compared with most of the judgments discussed above, these passages portray a general approach to "common sense" that is optimistic about its potential value. (Perhaps the strongest contrast can be found in McLachlin J.'s statement in *Chaoulli* that "[t]he task of the courts, on s. 7 issues as on others, is to evaluate the issue in the light, not just of common sense or theory, but of the evidence."[563])

560 Brodsky, "Autonomy with a Vengeance," *supra* note 36.
561 *Gosselin*, *supra* note 7, para 27. [emphasis added]
562 *Ibid*, para 46.
563 *Chaoulli*, *supra* note 31, para 150.

But in *Gosselin,* as in *Sauvé,* McLachlin C.J. calls for caution in relying on common sense because of the risk that it might harbour stereotypes. In *Sauvé*, she cautions against "stereotypes cloaked as common sense,"[564] and in *Gosselin* she notes that the government's underlying common sense assumptions must not be based in "arbitrary and demeaning stereotypes."[565] This caution is merited in the context of both these cases, which deal with groups of people who are very often the subject of powerful and damaging stereotypes. Incarceration in federal prisons in Canada overlaps with social categories including mental illness, race, aboriginality and gender.[566] Low income status overlaps with social categories including gender, mental and physical disability, age and immigration status.[567] All of these categories invoke relations of social inclusion and exclusion, relative power and experiences of oppression.

In *Sauvé,* this wariness of common sense and its potential to cloak stereotypes leads McLachlin C.J. to reject resort to "common sense." But in *Gosselin*, the majority judgment does not eschew but rather relies on "common sense" knowledge that is quite compromised by stereotypes.[568] For example, note again the passage about whether the law in question properly responded to the claimant's "actual needs and circumstance":

> Logic and *common sense* support the legislature's decision to structure its social assistance programs to give young people, who have a greater potential for long-term insertion into the work force than older people, the incentive to participate in programs specifically designed to provide them with training and

564 *Sauvé*, *supra* note 409, para 18.
565 *Gosselin*, *supra* note 7, para 27.
566 Mia Dauvergne, "Adult correctional statistics in Canada, 2010/2011" (Statistics Canada: 2012), online: <http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11715-eng.htm#a7>.
567 Chantal Collin and Hilary Jensen, "A Statistical Profile of Poverty In Canada" (Library of Parliament: 2009), online: <http://www.parl.gc.ca/content/lop/researchpublications/prb0917-e.htm>.
568 Critical race legal scholar Neil Gotanda argues that "common sense" about race operates to perpetuate racism, including when it functions as an evidentiary methodology in a courtroom: Gotanda, *supra* note 259.

experience.[569]

McLachlin C.J. writes that this conclusion does not rely on stereotypes because it corresponds to the "actual needs and circumstances" of young people and constitutes an "affirmation of their potential."[570] This constructs an understanding in which "stereotypes" are generalizations that are necessarily empirically false. Therefore, the "common sense" proposition at hand is found not to be a stereotype because it is empirically true.[571] This approach to the concept of "stereotype" merits further scrutiny, as I discuss below. But setting this aside for a moment, it is also unclear whether this particular common sense proposition does, in fact, avoid untrue stereotypes. For example, in her analysis of the case, Gwen Brodsky argues that the challenged regulation is "manifestly based on the view that the under-thirty group of social assistance recipients needs to be coerced, through a highly punitive withdrawal of support, to make them seek employment opportunities."[572] By upholding the law and accepting the government's explanation of its purpose, the Supreme Court also endorses that stereotype: "[t]he Gosselin decision itself perpetuates a negative stereotype of poor young adults. The claimants in Gosselin were viewed by the majority as resilient but lazy young adults with enormous, but untapped, human potential, who needed some tough love."[573] Addressing the tone of the judgment more generally, Kim and Piper write:

> In addition to failing to account for the simple realities of those living in poverty, the paternalistic undertones of [certain passages from the judgment] would seem to be based on underlying stereotypes of the poor and the young as being unemployed by choice, lack of motivation, or laziness. Clearly the majority did not intend to invoke stereotypes, but its subtle assumptions (combined with the

569 *Gosselin*, *supra* note 7, para 44. [emphasis added]
570 *Ibid*, para 42.
571 See Young, "Unequal to the Task," *supra* note 559 at 192–3.
572 Brodsky, "Autonomy with a Vengeance," *supra* note 36 at 205.
573 *Ibid* at 206. Note that the plural "claimants" in this quotation refers to the fact that the *Gosselin* case was framed as a class-action lawsuit.

> lack of proof or discussion of their veracity) are reflective of the insidious discrimination faced by the poor in society generally.[574]

Thus, there is a strong argument to be made that the invocation of "common sense" in the *Gosselin* case indeed facilitates the perpetuation of stereotypes.[575] Further, in this case, "common sense" worked to close down the discrimination claims of a marginalized and impoverished group in society. Gramsci's perspective highlights this effect of common sense and the need for critical review in order to make common sense worthy as a source for knowledge, reasoning and action.

With Gramsci's approach in mind, I want to make two further comments about "common sense" in *Gosselin*. First, it seems clear that the concept of "stereotype" is inadequate to serve as the sole criterion for distinguishing liberatory from oppressive common sense (or identifying "good sense" as Gramsci would say). The justice issues at stake in *Gosselin* include concerns about poverty, sexism, age discrimination and the obligations of the state in a liberal democracy; these include, but go far beyond, the question of whether the impugned regulation or the Court's use of "common sense" advanced a stereotype of young adults as lazy. In particular, the concerns about justice in *Gosselin* remain active whether or not this stereotype is "true." This issue recalls the approach to "prejudice" that Thomas Reid employs, concerning himself with the epistemological risk of empirical error.

574 Kim & Piper, *supra* note 50 at 777.

575 Through the notion of hegemony, Gramsci shows us how such stereotypical views would come to be held, not only by members of dominant classes, but also by others, including the middle class, working class, and even people living in poverty.

But for Gramsci, the criteria for "good sense" are not only *empirical* criteria, they are *political* criteria about the capacity for good sense to ground the judgment and action of whole groups of people, to allow them to understand their own social reality and to take up action to resist their oppression by others. In a similar vein, some legal scholars critique the court's reliance on the concept of "stereotype" as a benchmark for inequality precisely because injustices can occur in the absence of "untrue" generalizations.[576] Indeed, sometimes it is the state's attempts to pin down the exact "truth" of marginalized groups that is the source of injustice.[577] And so our attention must reach beyond the risks of stereotypes.

Second, Gramsci's concern about the capacity of common sense to advance the interests of dominant groups is made manifest in *Gosselin* in a way that is more clear than in other cases. The differences between the outcomes of *Gosselin* and *Chaoulli* are particularly stark from this perspective: one holds that "common sense" is insufficient to uphold the government's claim that the public medical system must be protected from private insurance, and creates rights for middle and upper class people. The other holds that "common sense" *is* sufficient to uphold the government's claims that young adults on social assistance have greater employment opportunities that older adults, and that a law providing incentives to join the labour force (including in the form of the threat of extreme poverty), would not infringe the dignity of a reasonable person, and denies the rights claims of some of the most impoverished.

576 For example, see Young, "Unequal to the Task," *supra* note 559.

577 Foucault argues much more broadly that power and knowledge are inherently linked; the study, classification and interpretation of people can work to constitute and facilitate oppression. For example, see Foucault, "History of Sexuality," *supra* note 225.

Thus, despite the identification of the need to distinguish legitimate from illegitimate "common sense," in *Gosselin* this process of scrutiny fails to achieve what is needed to strengthen legal judgment for social justice. The process of identifying "good sense" is dependent on the existence of a whole set of political conditions, enabling meaningful critical reflection by both more powerful and less powerful people. It is the philosophy of praxis that makes it possible to identify which elements of common sense are useful towards political transformation and which are not. The most important part of this analysis - an understanding of power relations, including the ways in which common sense upholds and maintains those relations - is largely absent from the judicial considerations of "common sense" in *Chaoulli*, *Sauvé* and *Gosselin*. Thus the distinction between "common sense" and "stereotypes" offered by McLachlin C.J. in *Sauvé* and *Gosselin* hints at something important but stops before this distinction can be of much service. Without a process for the kind of ambitious self-reflection envisioned by Gramsci, set in the context of the right social conditions, nothing prevents McLachlin C.J. from embracing common sense claims that uphold the power of dominant groups and continue to marginalize people in poverty.

Conclusion

The "aspect" of common sense that comes to light by reading Gramsci is the notion of common sense as a historically and politically constituted conception of the world, constructed through heterogeneous social experiences and embedded in relations of power. Common sense serves, in part, to uphold the cultural domination of some groups by others and to maintain the political

and economic relations that serve the interests of the powerful. However, common sense is also a necessary part of individual and collective life, and Gramsci advocates that attention be turned to the practices of critical reflection that can transform fragmentary and oppressive common sense into a coherent conception of the world that helps everyone make sense of their experiences.[578]

Examining legal judgments that use the language of "common sense" through the lens provided by this aspect of common sense leads to certain conclusions about the meaning and role of common sense in legal judgment. As explicitly identified by a number of judges in the cases considered in this chapter, the fragmentary and incoherent nature of common sense makes it a highly suspect source of evidence in the context of legal judgment. We see contradictory claims all made in the name of common sense, and in Gramsci's view this is an inherent characteristic of common sense which renders it inappropriate as "proof" of anything in particular. There is a sense in which this characteristic of common sense could render uncertain or unknowable the necessary burden of proof in any given case; if a judge may rely on "common sense" to uphold a finding, this does nothing to structure the case that a litigant must meet.[579]

However, the problem with the incoherence of common sense is not just that its contents can self-contradict. Rather, this self-contradiction takes place in a specific context in which some experiences and some kinds of knowledge are valued over others. Thus, the problem with

578 Gramsci expected that organic intellectuals from subaltern groups, such as unionists, feminist scholars, artists, journalists, etc. would lead the way in this process. See Gramsci, *supra* note 123 at 14–16, 340.
579 McIntyre, "Supreme Court and Section 15," *supra* note 50 at 744–45.

common sense is not just that it might have any content in particular, but also that it consists of knowledge that functions precisely to maintain existing power relations. In the context of legal cases concerned with adjudicating the rights of marginalized individuals and the evidence required to support a government's interference with those rights, Gramsci's perspective on common sense provides good reasons to be wary of common sense, not because it is empty of meaning, but rather because its rich and persuasive meaning is imbued with unequal power relations.

This caution applies even more strongly when the case in question involves a proffered government justification for infringing the rights of historically marginalized people. Indeed, in the context of constitutional equality claims, Sheila McIntyre writes that "judicial complacency in invoking or accepting 'common sense' notions about historically marginalized, stigmatized or stereotyped groups amounts to bad judging."[580] Gramsci's approach explains why, *in this context*, legal judgment requires scrutiny of common sense. For Gramsci, the critique of common sense is an essential part of political transformation that aims to improve the lives of marginalized groups and end disparities in wealth and power. For a conception of legal justice also motivated by these values, the critique of common sense in legal judgment is essential.

Gramsci's approach to common sense takes it to be embedded in our daily experiences as well as our membership in a multitude of social groups, especially economic class. Common sense is not a discrete body of knowledge, but is rather located in all kinds of knowledge and practices,

580 *Ibid* at 764.

with their attendant role in maintaining the hegemony of dominant groups. Further, common sense helps structure the way people see the world; nothing sits fully outside of its reach. This approach to common sense issues a major challenge to legal judgment because it contemplates that, insofar as they rely on or participate in common sense, all legal actors and institutions are implicated in the creation and replication of relations of power.

Gramsci proposes that common sense must be made the subject of criticism. He further argues that in order to do this in a full and meaningful way, certain political conditions must exist to enable the participation and self-reflection of all kinds of people. These political conditions and the philosophy of praxis are what make it possible to engage in the kind of self-reflection that has the potential to identify "good sense" and render common sense coherent and meaningful. I argue that just as the philosophy of praxis is necessary for the critique and transformation of common sense, a framework for critical self-reflection is a necessary condition for the exercise of good legal judgment. The judgments considered in this chapter acknowledge the need for some reflection on the content and meaning of "common sense" in order to make it a useful or legitimate part of legal judgment: caution about "common sense" is raised in *Chaoulli*, the need for criteria to test the legitimacy of common sense knowledge is proposed in *Sauvé,* and *Gosselin.* The prospect of stereotyping is raised. However, the text of the judgments contain very little guidance about what this practice of critique and reflection might look like. While Gonthier J. argues in *Sauvé* that questions of justification may require substantive engagement with philosophy rather than weighing measurable facts, he defers the substance of this exercise to non-judicial actors. The absence of a framework for critical self-reflection means that the

question of problematic common sense is opened but not addressed, and this makes it possible, for example, for McLachlin C.J. to rely on stereotypes about people on welfare while explicitly denying that she is so doing.[581] It also allows McLachlin C.J. and Major J. to avoid turning their critical attention to the ways in which "common sense" exists in context of other forms of knowledge such as "science" and "evidence."

In the concluding chapter I say more about what this kind of critical reflection might look like in legal judgment. But here it is important to notice how radical Gramsci's demands are for the transformation of common sense, and it is likely that these demands could never be faithfully fulfilled within the bounds of legal judgment in a capitalist, liberal democracy due to class-based inequalities generated by capitalism. However, Gramsci's writings do provide some starting points for thinking about how to structure the critique of common sense in legal judgment in a way that reflects the goals and spirit of his analysis. For example, in articulating how the philosophy of praxis will work, Gramsci relies heavily on educational metaphors; he argues that the relationship between philosophers and mass community members must be one in which each party is *both* a student and a teacher. Gramsci also notes the importance of individuals who have the knowledge and social role that enable them to help bridge gaps between community and elite conceptions of the world; these are the "organic intellectuals" whose interests and commitments lie with mass society but who have had the opportunity to develop their "conception of the world" into a useful framework for thought and action.

581 *Ibid* at 760.

These strands in Gramsci stress the importance of integrating expert and non-expert knowledges and of facilitating exchange between powerful and less powerful people. They suggest that legal judges should see their role, at least in part, as trained practitioners who should use their special knowledge but who must understand the needs and interests of ordinary people. Critical self-reflection about the invocation of "common sense" and the adequacy of any given common sense claim must come from a place of allegiance with marginalized groups and constant openness to critique.

Gramsci also leaves a number of significant unanswered questions when it comes to practices of critical reflection. In particular, there are outstanding questions about the way in which this kind of critical reflection can or should take place in the context of legal judgment, which is both highly structured and constrained by legal institutions and principles, and also highly subjective, emerging from the knowledge and experiences of individual judges who (by Gramsci's account) are also affected by the practices and interests of their own social groups. Gramsci's focus on reason and transparency leaves questions unanswered about the capacity of individuals to transform their thinking in the manner this would require. To address some of these issues I turn in the next chapter to Hannah Arendt.

Chapter 5 – Hannah Arendt's common sense: Imagining communities and the basis of valid judgment

Queen Common-Sense takes the stage. We glance around for our guest, political theorist Hannah Arendt, arrived from the late 20th century. She has chosen a seat in the front row, far stage right, where she can see into the wings if she turns her head slightly, and can also watch the reactions of the other audience members. She observes the proceedings with interest. When Queen Common-Sense recites her dying speech, Arendt laughs. But there is a hint of knowing sadness in her eyes.

Oh! Traytor, thou hast murder'd Common-Sense.
Farewel vain World! to Ignorance I give thee,
Her leaden Sceptre shall henceforward rule.
Now, Priest, indulge thy wild ambitious Thoughts,
Men shall embrace thy Schemes, 'till thou hast drawn
All Worship from the Sun upon thy self:
Henceforth all things shall topsy turvy turn;
Physick shall kill, and Law enslave the World:
Cits shall turn Beaus, and taste Italian Songs,
While Courtiers are Stock-jobbing in the City.
Places, requiring Learning and great Parts,
Henceforth shall all be husled in a Hat,
And drawn by Men deficient in them both.
Statesmen---but Oh! cold Death will let me say
No more---and you must guess & cetera.

[Dies.][582]

582 Fielding, *supra* note 3 at V.1.

Introduction

This chapter engages with the third and last "aspect" of common sense that I use to build a "perspicuous representation" of common sense in legal judgment, aiming to see common sense in new ways, and evaluating those perspectives against the requirements of politically reflective and legitimate legal judgment. In this chapter I explore the work of Hannah Arendt, whose use of the term "common sense" is part of a different discourse about the possibility and potential of human judgment, and the role of shared communities in contemporary society.

The work of identifying and exploring different "aspects" of common sense has had two stages so far. First, I looked at common sense from the perspective of Thomas Reid. Reid understands common sense as a kind of shared knowledge, arising from daily life and equally accessible to all. Reid's common sense reveals elements of common sense that support democracy, and hold us accountable for exercising our own judgment. At the same time, it also reveals elements of common sense that are vulnerable to capture from powerful groups, and ways in which common sense can rhetorically fortify the knowledge of dominant groups. Reid's perspective is insufficient to address these concerns adequately, and so I shifted perspective to see a new "aspect" of common sense as revealed by Antonio Gramsci, who is concerned directly and explicitly with questions of power. From Gramsci's perspective, common sense is a socially constructed body of knowledge that we inherit through our membership in various communities. Common sense is a historically contingent framework that we use to understand and assess other kinds of knowledge. Gramsci's perspective reveals elements of common sense that are tied to social power, and work to replicate that power for dominant groups. We also see the potential

for common sense to be the subject of critical reflection, and to be transformed in a way that could allow all communities to more effectively make sense of their experiences. But Gramsci's perspective also leaves questions unanswered, especially about the capacity of individuals to engage in the kind of critique that Gramsci advocates for, and the links between common sense and practices that reach beyond rational argument, such as judgment and emotion. To think through these questions, I change perspectives again to explore the "aspect" of the concept that is revealed by engaging with the writings of political theorist Hannah Arendt.

Hannah Arendt (1906-1975) was born in Germany. In 1933, she was forced to leave Germany, and moved to Paris where she worked with Jewish refugee organizations. In 1941 she emigrated to the United States, where she became very active in many aspects of intellectual life. As a political philosopher, she wrote and lectured on many themes including totalitarianism, human rights and modern society, and she is widely regarded as one of the most influential thinkers of the 20th century.[583] In Arendt's writings, "common sense" is embedded in explorations of the human capacity for judgment and its practice in later 20th century western society. Engagement with common sense is the way judgment can become valid across a community. Common sense signifies the collective judgment of a community, as it is imagined by an individual seeking to judge in a particular case. As such, common sense is not a static body of information that can be specified in advance, but rather a part of a dialogical practice that helps not only to identify but also to generate shared beliefs and standards. "Common sense" and judgment are important for Arendt because of their connections to freedom and

583 Maurizio Passerin d' Entreves, "Hannah Arendt" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, Fall 2008 ed (2008), online: <http://plato.stanford.edu/archives/fall2008/entries/arendt/>.

genuine political action. Thus, the "aspect" of common sense that emerges from engagement with Hannah Arendt is that of common sense as a part of the practice of judgment, with judgment understood as an activity of the mind that is inherently connected to the sociability of human beings.

This provides a point of contrast with both Reid and Gramsci, whose notions of "common sense" are more descriptive of an identifiable body of knowledge or method of reasoning. Gramsci envisions common sense as dynamic and changing from context to context, and even Reid identifies ways in which our access to common sense can be improved. For Arendt, "common sense" describes the common judgments of a community that enable the practice of judgment, which in turn works to shape that very community. And thus the *process* of developing our "common sense" and engaging with it through judgment form the heart of the "aspect" Arendt's writings reveal. For Reid, everyone has the capacity to form judgments in accordance with common sense. For Gramsci, everyone has a common-sense "conception of the world" that shapes their thought and action. For Arendt, what pre-exists for everyone is the nascent capacity to judge as a member of a community.

As in the previous ones on Reid and Gramsci, this chapter has two parts. In the first part, I describe Arendt's perspective on "common sense" in more detail. I focus on three themes: the role of common sense in determining the validity and assessing the quality of judgment, the relationship between common sense and the role of persuasion, and the way common sense works not only to reflect but to *constitute* communities through the choices we make about

community boundaries and communicability. In order to accurately understand and describe Arendt's approach, I make reference to the context of her arguments, and the questions that she was trying to address as a political thinker. At the same time, I also use my own framework – concerned as it is with *legal* judgment and the social justice problem of poverty – to determine which aspects of her approach to elaborate and evaluate.

In the second part of this chapter, I explore Arendt's notion of common sense in the context of legal judgment. In this part, I ask what can be learned about legal judgment by thinking about common sense as Arendt does. I also make my own concerns about law and poverty the measures for evaluating the strength of Arendt's approach for understanding common sense in the context of legal judgment. In this endeavour, I choose for consideration texts involving the issue of judicial impartiality, and the Supreme Court of Canada's use of the phrase "common sense" in relation to the concept of a "reasonable apprehension of bias." I discuss the case of *R. v. R.D.S.*[584], which brings these two concepts together, and which touches upon many of Arendt's concerns about community, validity and impartiality. I also re-read *Gosselin* once again, in light of the aspect of common sense we see in Arendt. While the *Gosselin* case is not "about" the concept of judicial impartiality in a doctrinal sense, it is worthwhile to consider in relation to this concept because of the way the various judgments invoke concepts like imagination and the proper role of judges in defending their findings.

Arendt's perspective on "common sense" demonstrates the great potential of this concept for

584 *R v S(RD)*, [1997] 3 SCR 484, 151 DLR (4th) 193 ["*R.D.S.*"].

facilitating good judgment. By working to identify and create the communities that are necessary not only for judgment but for political action and human flourishing, Arendt's common sense creates links between the private act of judgment and the public, shared life of the community. Adopting this perspective on common sense shifts emphasis away from epistemology and towards communicability and persuasion as criteria for good judgment. And in this way, Arendt's common sense also creates a powerful connection between common sense and justice.[585] Taking this "aspect" of common sense seriously shows the potential for "common sense" to serve as a way to find practices of legal judgment that are capable of addressing injustices of poverty and marginalization.

Arendt on common sense

Validity and criteria for good judgment

Arendt's discussion of common sense is situated in the context of her writings on judgment. For Arendt, "common sense" refers to the judgments of a community, to which I refer in my imagination when I engage in the act of judging. "Common sense" is part of the practice of judgment. Arendt's explicit discussions of judgment as a human practice emerged near the end of her life, and she did not live to complete the full volume on this topic that she intended.[586] However, in a number of texts, most explicitly in the *Lectures on Kant's Political Philosophy*,[587] Arendt sets out some elements of her perspective on judgment, why it is important, and what is at stake in our understanding of judgment. In the *Lectures*, Arendt invokes Kant's theory of

585 Hanna Fenichel Pitkin, "Justice: On Relating Private and Public" (1981) 9:3 Political Theory 327.
586 Nedelsky, "Communities of Judgment," *supra* note 19 at 247.
587 Arendt, "*Lectures*," *supra* note 125.

aesthetic judgment as a framework for developing her approach to political judgment.[588] Her particular take on "common sense" is central to this account.

In this context, Arendt is using the word "judgment" to describe the distinct human faculty that makes possible the act of judging: I *judge* the morality of a practice or the beauty of a work of art. "Judgment" is also a noun: I pass judgment or come to a judgment or share my judgment. In this chapter, the multiple uses of the term judgment become particularly evident and the slippage between them particularly productive. If I am judge in a court of law, my practices of judgment, the content of my judgments, and the written reasons for my disposition of a legal dispute (a "judgment") are all subject to scrutiny from a justice perspective. The practice of judging is a distinct human capacity, one which lies at the heart of political life, and in this chapter, I engage more fully with the implications of understanding legal judgment as part of this larger category of human judgment.[589]

Judging involves the *evaluation* of a particular person or thing.[590] It might involve, for example, determining whether something is good or bad, right or wrong, beautiful or boring, meaningful or empty. Further, this evaluation is of a *particular* person or thing, and does not simply involve the application of rules or established categories.[591] Arendt writes: "If you say, 'What a beautiful

588 Arendt's appropriation of Kant is controversial. This is only addressed in this dissertation to the extent that questions about Arendt's reliance on Kant are linked to larger questions about her own theory of judgment. See Ronald Beiner, "Rereading Hannah Arendt's Kant Lectures" in *Judgment, Imagination and Politics* (Lanham, Maryland: Rowan & Littlefield Publishers, 2001) 91; Bryan Garsten, *Saving Persuasion: a Defense of Rhetoric and Judgment* (Harvard University Press, 2006) at 101.

589 Hannah Arendt, "The Crisis in Culture" in Jennifer Nedelsky & Ronald Beiner, eds, *Judgment, Imagination and Politics* (Lanham, Maryland: Rowan & Littlefield Publishers, 2001) 3 ["Crisis in Culture"].

590 *Ibid* at 66.

591 Arendt, "*Lectures*," *supra* note 125 at 13. Ronald Beiner summarizes this aspect of Arendt's interpretation of

rose!' you do not arrive at this judgment by first saying, 'All roses are beautiful, this flower is a rose, hence this rose is beautiful.'"[592] As such, judgment is different from logical or other forms of purely rational thought; judgments cannot be arrived at by simple deduction or induction.[593] Rather, judgment begins (though note, it does not end) with a kind of experience of liking or not-liking something, and in this way shares some of the characteristics of aesthetic "taste" as understood by Kant.[594] This process of assessment always has an inherently subjective component that cannot be decontextualized or established as "true" in a universal sense.

At the same time, judgment is not the same as taste, and is not solely concerned with subjective experiences of preference or pleasure. Indeed, Arendt argues that judgments make claims to validity that extend beyond the individual. Thus, when I say "I like this novel," I am expressing my taste or preference, and probably have no expectation that my statement reflects more than my subjective experience. But when I say: "this is a great novel," I am making a judgment. While I do not understand myself to be expressing a universal truth, I am staking out a claim that the novel is "great" in some sense that extends beyond my personal preference. I believe that others will make the same judgment, and I am prepared to justify my judgment on those terms.[595]

judgment when he writes: "…this is what judgment means: to size up the unique particular that stands before one, rather than trying to subsume it under some universal scheme or interpretation of a pregiven set of categories." Beiner, *supra* note 588 at 99.

592 Arendt, "*Lectures*," *supra* note 125 at 13.

593 *Ibid* at 4.

594 *Ibid* at 15, 66. Focusing on the link between aesthetic judgment and other forms of judgment, such as moral or political judgment is the subject of considerable debate. For example, Kennan Ferguson explores the advantages of this approach in Kennan Ferguson, *The Politics of Judgment: Aesthetics, Identity, and Political Theory* (Lexington Books, 2007). George Kateb focuses on the risks of characterizing political judgment as fundamentally aesthetic in nature in George Kateb, "The Judgment of Arendt" in *Judgment, Imagination and Politics* (Lanham, Maryland: Rowan & Littlefield Publishers, 2001) 121.

595 Nedelsky describes a number of examples of reflective judgment and their relationship to the common sense of various communities. For example, she provides a sustained exploration of reaching a judgment about the

"Common sense" lies at the heart of the practice of judgment, through a process that Arendt calls "enlargement of mind" or "enlarged mentality."[596] The practice of enlarged mentality requires one to consider the perspectives of other judges in a community, and to measure one's own (tentative, initial) judgment against theirs. Arendt describes the judgments of others (with which we engage when judging) as the "common sense" of the community.[597] She also sometimes uses the Latin phrase *sensus communis,* or the English translation "community sense," when she wants to draw particular attention to the special way she is using these words.[598] Arendt writes that "[o]ne's community sense makes it possible to enlarge one's mentality."[599]

Development of an enlarged mentality is what allows us to move beyond our private feelings, beliefs and idiosyncrasies, and come to a conclusion that is not just a statement of opinion, but a *judgment.*[600] A judgment is *valid* beyond my individual preferences, to the extent that I have engaged with the judgments of others.[601] It is the process of reflection and judgment that characterizes Arendt's use of "common sense," and differentiates it from other uses, including

fashion choice to wear high-heeled shoes, in relation to the "common sense" of the feminist community. While the political significance of the example about shoes may not be apparent at first glance, Nedelsky uses this example to explore those aspects of judgment that are about politics, autonomy, self-knowledge and community building. See Jennifer Nedelsky, "The Reciprocal Relation of Judgment and Autonomy" in Jocelyn Downie & Jennifer Llewellyn, eds, *Being Relational: Reflections on Relational Theory and Health Law* 35 at 36–7 ["Reciprocal Relation"].

596 Arendt, "*Lectures*," *supra* note 125 at 42–3.

597 *Ibid* at 66, 69.

598 *Ibid* at 71–2. Kant rejected resort to "common sense" when understood to mean simply the views of ordinary people, and specifically criticized Reid for so doing. When describing judgment, Kant instead used the Latin phrase "sensus communis." Arendt also uses this language, and the English translation "community sense," but as noted here, she also uses the English phrase "common sense." See summary at *Ibid* at 72.

599 Arendt, "*Lectures*," *supra* note 125 at 73.

600 *Ibid* at 72.

601 Note the way in which Arendt's approach approach begins to collapse the distinction between "judgment" and "valid judgment." (A judgment that fails to critically engage with common sense is not just a poor or invalid judgment, it is not really a judgment at all). In a sense, this is reminiscent of Reid's insistence that following a philosophical "system" or set of rules does not really count as "judgment."

Reid's and Gramsci's.[602]

There are two parts to the process of developing an "enlarged mentality" by engaging with common sense. The first part involves *imagination*. Here, I imagine or represent to myself what I know about the feelings and beliefs of others. I think about what their views are or try to imagine what my views would be, in their place.[603] Arendt writes that "[t]o think with an enlarged mentality means that one trains one's imagination to go visiting."[604]

The second part of engaging with common sense involves *reflection*.[605] Here, I reflect on my own private experience of liking or not-liking something, and try to think about whether others would agree. I imaginatively compare my ideas with the ideas of others, and imagine whether and how I could explain and justify my conclusions to them. I do not adopt the views of others uncritically (this would merely be substituting their idiosyncrasies for mine),[606] but rather think about what would be required to persuade others in my community that my judgment is right. Thus, according to Arendt, expressions of taste are transformed into judgments through *reflective* engagement with the common sense of a community.[607]

602 In this regard, Arendt is following Kant.

603 Arendt provides little detail about what precisely is required for this act of imagination. Nedelsky, "Reciprocal Relation," *supra* note 595 at 54. Further, interpreters differ about how best to understand Arendt's notion of imagination, and how best to extend or critique this idea. See, for example: Linda MG Zerilli, "Toward a Feminist Theory of Judgment" (2009) Signs: Journal of Women in Culture and Society ["Feminist Theory of Judgment"]; Linda MG Zerilli, "Response to Thiele" (2005) 33:5 Political Theory 715; Leslie Paul Thiele, "Judging Hannah Arendt: A Reply to Zerilli" (2005) 33:5 Political Theory 706.

604 Arendt, "*Lectures*," *supra* note 125 at 43. Arendt also says that the role of the imagination is to provide examples for judgment: *Ibid* at 80.

605 Arendt, "*Lectures*," *supra* note 125 at 66.

606 *Ibid* at 43.

607 *Ibid* at 69, 72.

The importance of reflection in Arendt's notion of judgment means that the relationship between good judgment and common sense is not entirely straightforward. Arendt is clear that attention to common sense is not the same as deferring to an empirical social consensus on something, which could mean ratifying a consensus produced by prevailing power relations or unreflective popular opinion.[608] Engagement with common sense does not mean that I "count noses in order to arrive at what I think is right."[609] Nor is it about "an enormously enlarged empathy through which one can know what actually goes on in the mind of all others...This would be too 'passive,' and might simply constitute replacing one's prejudices with the prejudices of others."[610] These passages suggest an essential critical distance between Arendtian judgment and the actual judgments of people in a community. The common sense of a community is part of a practice of judgment that necessarily includes acts of critical reflection, and attention to the boundaries of the community of judging others. Crucially for Arendt, sometimes good judgment will require one to judge against one's community.[611] Judgement relies on common sense, but sometimes true judgment – reflective and exercised with an enlarged mentality – will diverge from popular opinion or from tradition.[612]

The nature of a judging person's engagement with the common sense of the community

608 Arendt, "*Lectures*," *supra* note 125 at 43.
609 Unpublished lecture by Arendt, quoted in Beiner, *supra* note 588 at 107.
610 Arendt,"*Lectures*," *supra* note 125 at 43.
611 This aspect of judgment is essential for Arendt, and is part of her thinking on the Holocaust and the Eichmann trial. In that context, Arendt's focus was on the problem of thoughtlessness as opposed to reflective judgment. Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin, 2006) ["Eichmann"]. See also Leora Y Bilsky, "When Actor and Spectator Meet in the Courtroom: Reflections on Hannah Arendt's Concept of Judgment" in *Judgment, Imagination and Politics* (Lanham, Maryland: Rowan & Littlefield Publishers, 2001) 257.
612 Nedelsky, "Reciprocal Relation," *supra* note 595 at 45.

determines the quality and validity of their judgments. Whereas the validity of a logical deduction or some other truth claim might be general or universal, the validity of a judgment is specific and context-dependent.[613] In particular, for Arendt, the validity of a judgment is specifically linked to the scope of the common sense that has been engaged: "claims to validity can never extend further than the others in whose place the judging person has put himself for his considerations."[614] A judgment is valid across the community of judging others who share in the common sense that grounds that judgment.

Communication and persuasion

In her discussion of reflective judgment, Arendt argues that "the criterion, then, [for judgment] is communicability, and the standard of deciding about it is common sense."[615] Judgments can be communicated across a community of judging others who share a common sense; thus, communication, common sense and judgment are inherently linked.[616] The idea of communicability, and the related ideas of persuasion and intersubjectivity, are important aspects of Arendt's notion of common sense.

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613 Arendt describes this as "exemplary" validity: Arendt, "*Lectures*," *supra* note 125 at 76. Jerome Kohn, speaking about Kant specifically, notes that reflective judgment has "exemplary" rather than "apodictic" validity: Jerome Kohn, "Reflecting on Judgment: Common Sense and a Common World" in Richard J Bernstein, Seyla Benhabib & Nancy Fraser, eds, *Pragmatism, Critique, Judgment: Essays for Richard J Bernstein* (Cambridge, Mass: MIT Press, 2004) at 271. Nedelsky notes that for Kant, our "common sense" is based in universal cognitive capacities, making genuine judgments universally valid. For Arendt, judgment is connected to actual communities. Nedelsky, "Communities of Judgment," *supra* note 19 at 250–1.

614 Arendt, "Crisis in Culture," *supra* note 589 at 20.

615 Arendt, "*Lectures*," *supra* note 125 at 69.

616 For an exploration of how these three concepts relate in Arendt's thought, see: Nedelsky, "Communities of Judgment," *supra* note 19.

This social character of judgment begins with Arendt's orientation of judgment outside of the self, towards "common sense" and the other members of a judging community. Some modes of thinking, such as logic and even some versions of moral reasoning, are directed to internal consistency and agreement with the self.[617] Further, once I discover, through independent thought, that something follows the rules of logic, this fact is established for any context; the truth of the matter "compels" agreement from others examining the same rules of logic. In contrast, when I make a judgment, I must orient my thinking to other people:

> The power of judgment rests on a potential agreement with others, and the thinking process which is active in judging something is not, like the thought process of pure reasoning, a dialogue between me and myself, but finds itself always and primarily, even if I am quite alone in making up my mind, in an anticipated communication with others with whom I know I must finally come to some agreement.[618]

Further, when claims about agreement are made, they are never "compelled" in the way some other "truth" claims can be. No judgment is ever certain or final. Instead, judgment relies on *persuasion* to reach agreement.[619] Arendt writes:

> …one can never compel anyone to agree with one's judgments…; one can only "woo" or "court" the agreement of everyone else. And in this persuasive activity one actually appeals to the "community sense." In other words, when one judges, one judges as a member of a community.[620]

The central role of persuasion in the practice of judgment is part of how judgment comes to be oriented so strongly to the world rather than the abstract "self," and to the actual communities

617 Kant's categorical imperative has this characteristic. See Arendt, "Crisis in Culture" *supra* note 589 at 19.
618 Arendt, "*Lectures*," *supra* note 125 at 20.
619 Gramsci's approach to common sense is also about persuasion in the sense that he recognizes the need to engage people on all levels in order that they can come to understand the disconnect between dominant "common sense" and the reality of their lives.
620 Arendt, "*Lectures*," *supra* note 125 at 72. The persuasive as opposed to compulsory or coercive nature of judgment is important for Arendt, because these are characteristics important for the sphere of political exchange which is the target of her analysis.

that inhabit it. If judgment requires that I consider how I might justify my judgment to others, I have to know something about who those others are, what their views might be, and what kinds of arguments they might find persuasive.[621] Persuasion is about bringing someone to see something in a new way, even if they might not have seen it that way before. Feminist political theorist and Arendt scholar Linda Zerilli writes:

> The ability to persuade depends upon the capacity to elicit criteria that speak to the particular case at hand and in relation to particular interlocutors. It is a rhetorical ability, fundamentally creative and imaginative, to project a word like *beautiful* or a phrase like *created equal* into a new context in ways that others can accept, not because they (necessarily) already agree with the projection (or would have to agree if they are thinking properly), but because they are brought to see something new, a different way of framing their responses to certain objects and events.[622]

In order to come to a valid judgment, I have to test my judgment against the collective judgment of a community – against the "common sense" of that community. But in order to think about how I might justify a judgment to others in my community, there has to be a certain level of shared understanding that might allow me to communicate with others and potentially persuade them. Thus, the process of identifying and reflecting on "common sense" actually requires considerable engagement with other people.[623]

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621 Garsten, *supra* note 588.

622 Linda MG Zerilli, "'We Feel Our Freedom'" (2005) 33:2 Political Theory 158 at 171 ["We Feel Our Freedom"].

623 The idea of persuasion and rhetoric (including the role of "common sense") has a long and rich history as a topic of philosophical and political conversation. In the context of my study, it is noteworthy that advocates of rhetoric and the art of persuasion as legitimate political speech connect good judgment with communities in a similar way that "common sense" does. Advocating for the value of rhetoric also opens many of the same concerns about power imbalances and conservatism. For example, see Garsten, *supra* note 588; James Arnt Aune, Book Review of *Saving Persuasion: A Defense of Rhetoric and Judgment* by Bryan Garsten (2008) 41:1 Philosophy and Rhetoric 94.

This element of Arendt's common sense, which involves communication and persuasion, provokes questions about the nature of the "community" to which a judge should refer when engaging in reflective judgment. One way to approach this is with a distinction between "communicability" in the abstract and the actual "communications" that take place in reality.[624] Unlike some other approaches (such as Kant's), Arendt's account of common sense is rooted in an understanding of "community" as actual, empirical community.[625] Arendt argues that communicability "obviously implies a community of men who can be addressed and who are listening and can be listened to."[626]

However, among interpreters of Arendt, there is debate about what exactly is required to critically engage with the common sense of real communities.[627] This debate is fueled in part by the fact that Arendt's own writings are complex and ambiguous on this point.[628] On one hand, Arendt does indicate that her notions of common sense and the enlarged mentality refer, not to an abstract or universal "human" community, but rather concrete, specific communities in the real world. (Take, for example, the passages quoted above

624 Garsten, *supra* note 588 at 102.

625 Nedelsky, "Communities of Judgment," *supra* note 19 at 265. This interpretation allows Arendt to address some of the concerns about power and context that are central to Gramsci's account. For critique of this interpretation of Arendt, see Annelies Degryse, "Sensus communis as a foundation for men as political beings: Arendt's reading of Kant's Critique of Judgment" (2011) 37:3 Philosophy Social Criticism 345.

626 Arendt, "*Lectures*," *supra* note 125 at 40. It is noteworthy that this is one of the fronts on which Arendt's appropriation of Kant is most controversial. For my purposes. it is sufficient to note that Arendt, regardless of whether or not her interpretation of Kant is a good one, prefers a formulation in which the community of reference is a real and empirical one, not a universal, abstract or transcendent one.

627 Iris Marion Young, "Asymmetrical Reciprocity: On Moral Respect, Wonder, and Enlarged Thought" in *Judgment, Imagination and Politics: Themes from Kant and Arendt* (Lanham: Rowan & Littlefield, 2001) 205 ["Asymmetrical Reciprocity"]; Seyla Benhabib, "Judgment and the Moral Foundations of Politics in Hannah Arendt's Thought" in *Judgment, Imagination and Politics* (Lanham, Maryland: Rowan & Littlefield Publishers, 2001) 183 ["Judgment and the Moral Foundations of Politics"].

628 Nedelsky, "Reciprocal Relation," *supra* note 595 at 54.

about judging as a member of a community, and referring to a listening audience).[629]

Arendt also says that:

> ...this enlarged way of thinking, which as judgment knows how to transcend its own individual limitations, on the other hand, cannot function in strict isolation or solitude; it needs the presence of others 'in whose place' it must think, whose perspectives it must take into consideration, and without whom it never has the opportunity to operate at all.[630]

However, Arendt also expresses a great deal of faith in the capacity of the imagination. For example, when describing Kant's own attempts at enlargement of mind purely through reading, she writes that "he – who never left Konigsberg – knew his way around both London and Italy."[631] Indeed, it is possible to read Arendt as saying that the imaginative representation of others is actually a *better* way of taking their perspective into account. For example, she writes:

> Suppose I look at a specific slum dwelling and I perceive in this particular building the general notion which it does not exhibit directly, the notion of poverty and misery. I arrive at this notion by representing to myself how I would feel if I had to live there, that is, I try to think in the place of the slum-dweller. The judgment I shall come up with will by no means necessarily be the same as that of the inhabitants, whom time and hopelessness may have dulled to the outrage of their condition, but it will become for my further judging of these matters an outstanding example to which I refer…Furthermore, while I take into account others when judging, this does not mean that I conform in my judgment to those of others, I still speak with my own voice and I do not count noses in order to arrive at what I think is right. But my judgment is no longer subjective either.[632]

This passage emphasizes the essential critical distance that exists between the empirical common sense of a given community and the practice of reflective judgment. The

629 See footnotes 620, 626.
630 Arendt, "Crisis in Culture," *supra* note 589 at 20.
631 Arendt, "*Lectures*," *supra* note 125 at 44.
632 Unpublished lecture by Arendt, cited in Beiner, *supra* note 588 at 107.

passage also alludes to the potential for oppressive social conditions to interfere with someone's capacity to exercise judgment. It is also possible to interpret this passage as denying the value of the situated knowledge of marginalized people, or even saying that the common sense of marginalized people is best understood through an imaginative exercise of the privileged. Indeed, this passage could be read to support the view that marginalized people are, *by their very experience of marginalization*, precluded from contributing to a community of judgment. For feminists and social justice critics, such consequences would be deeply troubling and would seem to condemn common sense to an ongoing allegiance with the status quo. Indeed, the parallel to the invocation of "common sense" in *Gosselin* immediately springs to mind: by interpreting the law through her subjective experience of poverty rather than the benevolent aims of the state, Ms. Gosselin is excluded from the community of judgment. This is one of the dangers of common sense; one that has arisen in all of the theories considered so far, and interpreting Arendt in this way certainly allows her approach to fall into this same problem.

However, I argue that the most useful readings of Arendt are those focusing on "common sense" as a part of the process of developing an enlarged mentality, which always includes both an imaginative and a critical reflective component. I follow those interpreters of Arendt, including feminist interpreters, who take Arendt in a distinctly democratic direction by focusing on the complexity of the "common senses" we have access to and the contextualized processes of engagement with common sense.[633] For

633 It is important to note that Arendt's body of work as a whole is deeply ambiguous when it comes to questions

example, in her discussion of the requirements of the enlarged mentality, Nedelsky argues that it is crucial to attend to the complexity of social locations, and our relationships to each other and to our social conditions. This complexity allows us to see that we rely on a "variety of 'common senses' that are available to us from the different communities to which we belong."[634] Engagement with our different communities will provide us with different (and potentially contradictory) versions of common sense. Further, we may undertake more or less critical reflection about different aspects of our social context. For example, Nedelsky writes:

> ...a person who is poor in a rich country such as Canada may feel that it is her fault that she is poor. Or she may have a carefully developed critique of the distribution of wealth, of the subsidy of corporations, and of the very limited extent to which Canada has a progressive income tax regime. Her standpoint on welfare reform, on corporate tax, and on whom to vote for will depend on the nature of her relation to her 'location' as a poor person.[635]

Thus, when we engage with the perspectives of others, we engage, not with their unconsidered opinion or simply their social location, but with a reflective consideration of all of the relevant perspectives.[636] We do not "count noses," as Arendt says, but nor do we simply disregard the views of marginalized people. Nedelsky stresses that we must approach all of this with an adequate dose of humility about the extent to which we can

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about gender, justice and feminism and also social justice and poverty. Arendt's own theories contain a number of concepts and approaches that are problematic from a feminist perspective, such as a form of public/private divide, devaluation of the physical body and women's labour in the household. For example, consider Arendt's hierarchy of action-work-labour, and the sharp distinction between the social and the political in *The Human Condition*. Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958) ["Human Condition"]. At the same time, some feminists have found Arendt's work both substantively and methodologically useful. For discussion of these issues see: Bonnie Honig, ed, *Feminist Interpretations of Hannah Arendt* (University Park, Pa: Pennsylvania State University Press, 1995); Hanna Pitkin, *The Attack of the Blob: Hannah Arendt's Concept of the Social* (Chicago: Univ. of Chicago Press, 1998).

634 Nedelsky, "Reciprocal Relation," *supra* note 595 at 45.

635 *Ibid* at 42.

636 *Ibid*. This would contrast with, for example, a simplistic version of "standpoint feminism."

understand perspectives very different from our own, and to disregard the views of marginalized peoples would transgress this requirement.[637] Here, focusing on the complexity of social location and intellectual humility allows Nedelsky to read Arendt's reflective judgment in a way that is compatible with feminist and social justice goals.

Further, in summarizing her own approach to judgment, Nedelsky writes that "...Arendt says very little about the kind of experience it takes to be able to exercise the enlarged mentality. I think it is important to actually talk to people. Imagination is fine as long as it has a lot of real experience on which to build."[638] Crucially, Nedelsky argues that such "real experience must be characterized by openness, attentiveness, and receptivity."[639] These qualities are the conditions for identifying common sense that can form the basis for valid judgment.

Another way to approach this issue is to ask questions about what, exactly, must be shared between people in order to make possible the acts of imaginative "visiting" that Arendt describes. What must I understand about others in order to meaningfully imagine their perspectives, or think about what might persuade them in judgment? In her assessment of Arendt's approach, Iris Marion Young cautions against any interpretation that relies on the symmetry or interchangeability of individual subject positions.[640] Young argues that it is "neither possible nor morally desirable for persons engaged in

637 *Ibid* at 43.
638 *Ibid* at 54.
639 *Ibid*.
640 Young, "Asymmetrical Reciprocity," *supra* note 627.

moral interaction to adopt one another's standpoint."[641] Rather, Young argues, it is necessary for people to recognize the differences that characterize their experiences and locations, and to adopt a mode of respectful communication that does not presume sameness or symmetry between their positions. Young argues that the best way to take up Arendt's ideas is to fully respect the centrality of human plurality in Arendt's work, and that this can be achieved only if we attend, not only to the perspectives of others, but to the specific context in which they arise.[642] This process needs to account for the ways in which individuals and communities are located in society, and the collective ways in which our judgments are shaped. Young writes:

> We make our moral and political judgments, then, not only by taking account of one another's interests and perspectives, but also by considering the collective social processes and relationships that lie between us and which we have come to know together by discussing the world.[643]

In locating "common sense" within a process of respectful dialogue, Young is able to show the links between reflective judgment and practices of deliberative democracy.[644] In a related way, Nedelsky focuses on the ways in which the "enlarged mentality" is not a static, objective measure, but rather part of a process in which one continuously attempts to expand one's horizons.[645] It is not so much that there is a pre-determined level of "sharedness" that can or

641 *Ibid* at 206.

642 *Ibid* at 223. Arendt's notion of plurality is also ambiguously situated in relation to feminism and social justice. For Arendt, respect for human plurality is extremely important. Human plurality relates "the fact that men, not Man, live on the earth and inhabit the world." Plurality is and the condition of human action "because we are all the same, that is, human, in such a way that nobody is ever the same as anyone else who ever lived, lives, or will live" See Arendt, "Human Condition," *supra* note 633 at 7–8. But her idea of plurality is an individual one, and her focus is not on equality but on freedom. For one discussion of how this affects her take on law, see James Bohman, "The Moral Costs of Political Pluralism: the Dilemmas of Difference and Equality in Arendt's 'Reflections on Little Rock'" in *Hannah Arendt: Twenty Years Later* (MIT Press, 1997).

643 Young, "Asymmetrical Reciprocity," *supra* note 627 at 225.

644 Seyla Benhabib takes a similar approach in her engagement with Arendt as a way to think about politics and public space: Benhabib, "Judgment and the Moral Foundations of Politics," *supra* note 627.

645 Nedelsky, "Communities of Judgment," *supra* note 19 at 265.

must be achieved, but rather an ongoing practice of reflection, challenge and expansion. The "common sense" that can form the basis of good judgment need not be understood as a static body of knowledge, but something that grounds an ongoing process. Nedelsky writes that:

> one can expand the scope of one's mentality by acquiring a broader base of knowledge. One's common sense is a starting point because one cannot begin to put oneself in another's place without something that is shared. But one can build that common sense.[646]

Common sense, as the collective judgment of a community, is always a work in progress, and contributes to good judgment when it is part of an ongoing practice of communication and critical reflection.

The other thinkers considered in this dissertation also raise related issues about the need to have a wide variety of social experiences in order to strengthen one's access to common sense. Gramsci's whole approach to "common sense" is focused on the connections between social experience and the content of common sense knowledge, and the potential for transforming "common sense" through critical reflection. And, as noted previously, Reid also writes about avoiding prejudices by increasing the breadth of one's social experience:

> Men judge other men by themselves, or by the small circle of their acquaintance.....It is commonly taken for granted, that this narrow way of judging of men is to be cured only by an extensive intercourse with men of different ranks, professions, and nations; and that the man whose acquaintance has been confined within a narrow circle, must have many prejudices and narrow notions, which a more extensive intercourse would have cured.[647]

646 *Ibid* at 265.
647 Reid, "Essays," *supra* note 272 at 530.

However it is here with Arendt that this practice of *developing* common sense takes on the most central role. Adopting the readings of Nedelsky and Young ties common sense to actual communities and actual communication: adequate engagement with "common sense" requires us to engage with real communities. I make my common sense better (and thereby increase my capacity for judgment) through a practice of ongoing reflection, dialogue and critique. This is important from a feminist perspective because it has the potential to respond to feminist concerns about marginality and privilege. Focusing on common sense as a part of a practice that links judgment and community not only affects common sense; it also affects the community, and it is this theme that I explore next.

Judgment and the creation of communities

Reflective engagement with common sense is a condition for good judgment; it is through common sense that a judge moves away from partiality and towards validity. Judgment is valid to the extent that the judge has engaged with the common sense of the relevant community. Thus, the act of judging marks and circumscribes a community. Arendt says that common sense (in the special sense she means) "fits us into a community."[648] In some respects, this hearkens back to Gramsci's idea of "good sense" and the way it allows us to understand our lives in context. But there is another special relationship between Arendt's common sense and communities. Arendt writes:

> The difference between [a] judging insight and speculative thought lies in that the former has its roots in what we usually call common sense, which the latter constantly transcends. Common sense - which the French so suggestively call the

648 Arendt, "*Lectures*," *supra* note 125 at 70.

> 'good sense,' *le bon sens* - discloses to us the nature of the world insofar as it is a common world; we owe to it the fact that our strictly private and 'subjective' five senses and their sensory data can adjust themselves to a nonsubjective and 'objective' world which we have in common and share with others. Judging is one, if not the most, important activity in which this sharing-the-world-with others comes to pass.[649]

Arendt argues that when people judge, with reference to their shared common sense, they are making space for a "common world" and deciding what it will be like.[650] Common sense not only allows us to move beyond our purely subjective experiences, it also "discloses to us the nature of the world insofar as it is a common world." Through the creation of shared space, engagement with common sense thus not only *relies* on communities, but works to *create* them.[651] Creating or re-creating communities is what happens when we practice judgment.[652] In his essay on the relationship between law and reflective judgment in general (including consideration of Kant and Arendt), philosopher William Rasch emphasizes the way reflective judgment conceives of common sense as a part of judging practice, and summarizes how the act of judging creates community. He writes:

> The "common sense" on which judgments are based are neither psychologically nor anthropologically predetermined, but rather retrospectively posited as the supplement of judgment. A judgment is made and with it comes a challenge that others should make the same judgment. What emerges is a community, and not just one community, but a plurality of communities, each legitimizing its own decisions on the basis of a universality that can only be performed and never grounded. What emerges is the world as if it had always already existed.[653]

As part of the disclosure of common space, engagement with common sense is also about

649 Arendt, "Crisis in Culture," *supra* note 589 at 20–1.
650 *Ibid* at 22. See also Zerilli, "We Feel Our Freedom," *supra* note 622 at 179.
651 Nedelsky, "Reciprocal Relation," *supra* note 595 at 44.
652 Kohn, *supra* note 613.
653 William Rasch, "Judgment: The Emergence of Legal Norms" (2004) 57:1 Cultural Critique 93 at 102–3.

disclosure of the *self:* "Wherever people judge the things of the world that are common to them, there is more implied in their judgments than these things. By his manner of judging, the person discloses to an extent also himself, what kind of person he is...."[654] Or in Nedelsky's words: "As we judge, and communicate our judgments, we enable ourselves to be known."[655] When we judge through our engagement with common sense, we disclose some of our selves, and we make choices about the community of reference we are appealing to. Arendt writes: "By communicating one's feelings, one's pleasures and disinterested delights, one tells one's *choices* and one chooses one's company..."[656]

In her discussion of Arendt's theory of judgment and its relationship to freedom, Zerilli focuses on this community-building aspect of judgment, and argues that this is the real significance of political judgment.[657] Arendt herself says, notably, that "common sense... is the political sense par excellence."[658] This element of common sense, which involves judgment and disclosure, importantly goes beyond knowledge to involve acts of choice and political will. Nedelsky writes that "[k]nowing the possibility of change opens a path for change, but it does not simply bring it about."[659] We have to choose to judge, to act, to participate. Returning to the idea of judgment, Zerilli argues that political judgment is not about finding truth, but about creating political space, and this involves not a contest of facts but political choices: "Every extension of a political concept always involves an imaginative opening up of the world....."[660]

654 Arendt, "Crisis in Culture," *supra* note 589 at 22.
655 Nedelsky, "Reciprocal Relation," *supra* note 595 at 43.
656 Arendt, "*Lectures*," *supra* note 125 at 74.
657 Zerilli, "We Feel Our Freedom," *supra* note 622; Zerilli, "Feminist Theory of Judgment," *supra* note 603.
658 Cited in Thiele, *supra* note 603 at 707.
659 Nedelsky, "Reciprocal Relation," *supra* note 595 at 51.
660 Zerilli, "We Feel Our Freedom," *supra* note 622 at 181. For a debate between Zerilli and Leslie Thiele about the extent to which Arendt's judgment is all about creating openness and freedom vs. finding persuasive

The political and community-creating aspects of "common sense" are tied to Arendt's political theory in general, especially her commitments to freedom, plurality, and a form of civic republicanism.[661] These provide criteria for the choices we exercise in judgment. In explaining how this works, Zerilli writes: "Understood as a *political* concept, plurality is something of which we need to take account when we decide what will count as part of our shared or common world. Judging is the activity that enables us to take account of plurality in this distinctly political sense."[662]

In this dissertation, the role of "common sense" as a part of the practice of judgment and as a way communities are marked and created takes place in relation not just to political judgment, but in relation to legal judgment, which introduces some new themes and new criteria for judgment that require consideration. In this context, the values of plurality and diversity are still important, but attention must be paid to the specific conceptual and institutional requirements of law and legal reasoning. These also generate criteria for the choices we make about good judgment and the boundaries of communities.

narratives/examples based in common sense, see: Zerilli, "We Feel Our Freedom," *supra* note 622; Thiele, *supra* note 603; Zerilli, "Feminist Theory of Judgment," *supra* note 603.

661 These major themes appear throughout Arendt's work but all play an important role in *The Human Condition*: Arendt, *supra* note 633.

662 Zerilli, "We Feel Our Freedom," *supra* note 622 at 165. [emphasis in original]

Arendt's common sense in legal judgment: impartiality, persuasion and practice

It is noteworthy that Arendt's approach to judgment and common sense is developed in the service of a theory of *political* judgment. There are important differences between political judgment and *legal* judgment, which is the subject of my inquiry. Arendt's own thoughts on the nature of legal judgment are complicated. Arendt was interested in law and legal judgment. For example, she famously chronicled the trial of the Nazi official Adolf Eichmann, who was tried and convicted of war crimes in Jerusalem in 1961.[663] She also provided commentary on the desegregation of schools in the United States.[664] In contemporary scholarship, her work is being used to understand many aspects of law, including international law, human rights, and constitutionalism.[665] However, when writing about "common sense" and the practice of enlarged mentality, Arendt is addressing practices of political judgment, not legal judgment. And while Arendt's idea of "judgment" can reach across different areas of life to include, for example, aesthetic judgment, moral judgment or political judgment, Arendt herself did not think that the legal decisions of a court were a form of judgment in this sense. Indeed, Arendt interpreters, including Jennifer Nedelsky and Ronald Beiner, conclude that Arendt did not intend to incorporate legal judgment in her analysis of reflective judgment.[666] Nedelsky writes:

> Neither Arendt nor Kant thought that this special capacity for what Kant called

663 Arendt, "Eichmann," *supra* note 611.

664 Hannah Arendt, "Reflections on Little Rock" in Ed Jerome Kohn, ed, *Responsibility and Judgment* (New York: Schocken Books, 2003) 193. For critical discussion of Arendt's controversial essay "Reflections on Little Rock" and reactions to it, see: Bohman, *supra* note 642. Bohman focuses on the ways in which this essay reflects Arendt's commitment to her notion of plurality.

665 See for example the essays in this volume: Marco Goldoni & Christopher McCorkindale, eds, *Hannah Arendt and the Law* (Hart Publishing, 2012).

666 Ronald Beiner & Jennifer Nedelsky, "Introduction" in *Judgment, Imagination and Politics* (Lanham, Maryland: Rowan & Littlefield Publishers, 2001) vii at xii.

> reflective judgment was involved in law. Both saw legal judgments as determined by rules or principles, whereas one of the key characteristics of reflective judgments is that they cannot be determined by rules or concepts.[667]

However, following scholars such as Nedelsky, I think it is nonetheless useful to apply Arendt's idea of common sense and judgment to legal judgment. Arendt's notion of common sense helps address a number of important questions about legal judgment, as I discuss below. I also suggest that this extension or re-contextualizing of Arendt's concept of judgment is consistent with her overriding concerns with freedom and human plurality.

Summarizing her own position on this point, Nedelsky says:

> My own view is that one should have an open mind about the nature of judgment in all these different spheres and, indeed, about the nature of judgment in all the daily forms it takes: in the evaluation of character, of policy, of books, of arguments, of courses, colleagues, students, and exams. I think it is likely that all of these forms of judgment share a basic nature; they all pose the problem of making thoughtful, defensible judgments that cannot be determined by rules or concepts. It is also likely that there are interesting differences between judgments made by judges in court and those made by legislators or ordinary citizens in evaluating policy.[668]

Bringing Arendt's theory of common sense in judgment to the legal context challenges the idea that legal judgment is only, or even primarily, about the application of rules. While the nature of legal judgment is the subject of all kinds of debate, most judges and commentators acknowledge that legal judges necessarily engage with their own subjective experiences, interests and

667 Nedelsky, "Communities of Judgment," *supra* note 19 at 248.

668 *Ibid*. Nedelsky has explored the usefulness of Arendt's theory of judgment for law in a number of texts, including: Jennifer Nedelsky, "Embodied Diversity and Challenges to Law" (1996) 42 McGill LJ 91 ["Embodied Diversity"]; Nedelsky, "Communities of Judgment" *supra* note 19; Nedelsky, "Judgment, Diversity and Relational Autonomy," *supra* note 74; Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press, 2012); Nedelsky, "Reciprocal Relation," *supra* note 595.

knowledges to some degree when making legal judgments.[669] Moreover, even in traditional terms, legal judgment is understood as intersubjective at least to some extent (for example, in addition to engaging with the written judgements that form the precedents for a case, judges in appeal courts often sit on panels and hear each others' lines of argument.) Thus, the line between legal and other forms of judgment (such as moral, political or aesthetic judgment) should not be drawn too sharply.

However, once this element of subjectivity is brought into the picture, many accounts of legal judgment have difficulty reconciling their accounts of legitimacy or validity with the presence of this subjectivity. In the context of some approaches, the influence of judicial subjectivity constitutes a threat to basic legal principles such as judicial impartiality, or the rule against applying laws retroactively. For example, if reflective judgement were understood to mean that a judge paid no heed to legal rules or precedents and instead simply did what he or she judged to be right (a mistaken interpretation in my view), a judge in a court of law would not be respecting his or her unique institutional role. Thus, it can appear that we are faced with a choice between denial of the human subjectivity of judges, and abandoning legal judgment to the realm of arbitrariness and preference; a choice between a satisfying account of human

669 For example, in their discussion of judicial impartiality in *R.D.S.* (discussed below), the majority of the Supreme Court of Canada, citing the Canadian Judicial Council with approval, wrote: "The requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes. It has been observed that the duty to be impartial 'does not mean that a judge does not, or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave. True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.' (Canadian Judicial Council, Commentaries on Judicial Conduct (1991), at p. 12.)." *R.D.S.*, *supra* note 584, para 119.

practices and capabilities, and the core values of the rule of law.[670] Arendt's approach to judgment and the role of common sense within it, creates a potential way through this impasse.

Adopting Arendt's approach to judgment for law situates legal judgment alongside other forms of judgment (moral, aesthetic, political) as part of one more general human practice.[671] At the same time, Arendt's approach to common sense, placing it at the centre of judgment, requires that attention be paid to the specific context of law. Thus, while allowing us to see the ways in which judgment is the same across various contexts, it also requires that we attend to the ways judgment must be evaluated with reference to criteria that derive from a *particular* context. This is because judgment is always oriented to the assessment of something particular. For example, Arendt says:

> How, for example, is one able to judge, to evaluate, an act as courageous? When judging, one says spontaneously, without any derivations from general rules, "This man has courage." If one were a Greek, one would have in "the depths of one's mind" the example of Achilles present...."[672]

Thus, the criteria for valid *legal* judgment will come, in part, from highly context-specific

670 Nedelsky argues that "[l]aw, in particular, needs an articulation of the nature of judgment, with its irreducible element of subjectivity, that can sustain the core values of the rule of law" Nedelsky, "Communities of Judgment," *supra* note 19 at 247. Nedelsky also discusses how this apparent dilemma of judicial subjectivity arises in the context of debates about diversity on the bench: see Nedelsky, "Judgment, Diversity and Relational Autonomy," *supra* note 74 at 113.

671 Scholars who discuss the idea that legal decision-making should be understood as a form of reflective judgment also engage with Kant directly, as well as with thinkers in the rhetorical tradition such as Vico. See Douglas E Edlin, "Kant and the Common Law: Intersubjectivity in Aesthetic and Legal Judgment" (2010) 23 Can J L & Jurisprudence 429; Kohn, *supra* note 613; Francis J Mootz, "Vico and Imagination: An Ingenious Approach to Educating Lawyers with Semiotic Sensibility" (2009) 22:1 Int J Semiot Law 11; Linda Meyer, "Between Reason and Power: Experiencing Legal Truth" (1998) 67 U Cin L Rev 727; Rasch, *supra* note 653. For an approach that frames law as a form of rhetoric itself, see James Boyd White, "Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life" (1985) 52:3 U Chicago L Rev 684. For a feminist analysis of how the rhetorical strategies at play in a courtroom relate to experiences of oppression see Lucie E White, "Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G" (1990) 38 Buff L Rev 1.

672 Arendt, "*Lectures*," *supra* note 125 at 84.

sources, including legal institutions, values and principles. In the following sections of this chapter I discuss one important concept for valid legal judgment: judicial impartiality.

In his discussion of Arendtian judgment and common law legal judgment, legal scholar Graham Mayeda highlights some of the unique characteristics of legal judgment that must play a role for validity in this context.[673] Joining those interpreters who focus on and extend Arendt's less transcendental and more democratic aspects, Mayeda argues that the validity of common law legal judgment must in part derive from the judge's attention to the *particular* dispute before her or him. This includes the individual parties as well as the specifics of how the case came before the court. He writes:

> To make Arendt's theory an acceptable theory of legal judgment, we must thus adapt it by deriving the normativity of impartiality, not from disinterest, but from the function of the judge as a person involved in an actual dispute...What this points to is that the judge must consider the impact of her judgment and its effect both on the broader community (Kantian and Arendtian enlarged mentality) and on the parties. She must also take into account the specific parties before her. And because of the reciprocal relationship between the parties and this community, the judge must also consider the impact that the community norms and values have had on causing and framing the dispute.[674]

Mayeda's point about the importance of a specific, actual dispute in common law legal judgment directs attention to a further issue, and that is determining the proper community of reference for the "common sense" that should underlie a legal judgment. As Nedelsky notes, "[b]y basing judgment in real community, Arendt invites the question that underlies so much jurisprudential and political debate: good judgment for and according to whom?"[675] When judges communicate

673 Graham Mayeda, "Uncommonly Common: The Nature of Common Law Judgment" (2006) 19:1 Can JL & Jur 107, ["Uncommonly Common"].
674 *Ibid* at 121.
675 Nedelsky, "Communities of Judgment," *supra* note 19 at 251.

their decisions, to what audience do they direct their reasons? What community or communities do they imagine when coming to a conclusion?

Several overlapping possibilities come to mind. Judges direct their reasons to the litigants in the case. Legal principles tell us that both parties should understand the reasons for the decision, and even the unsuccessful party should believe that a just procedure was followed to reach the decision.[676] Legal principles and institutions (such as the doctrine of precedent, the appellate court system), also mean that judges direct their reasons to the community of other judges and legal practitioners. Further, judges direct their reasons to a larger community, which might be the larger political community or the entire set of people who are bound by the law.

Thinking about reflective *legal* judgment also draws attention to legal criteria of impartiality, equality and justice. Mayeda, Nedelsky and Young all argue that we must pay attention not only to the boundaries of the relevant communities, but also to the relationships between them and the social phenomena that shape those relationships. For example, Mayeda writes:

> Thus while Arendt considers that the community of judgment consists of those who share our values and to whom we can communicate our judgments, from the point of view of legal judgment, the appropriate community of judgment must include the party or parties for whom the judgment is to be valid (and therefore, who will be affected by the judgment) *and who are actually or systematically excluded from the community because they may not share community values*.[677]

This attention to the relationships between communities and the characteristics of the specific

676 Berger, *supra* note 392.

677 Mayeda, "Uncommonly Common," *supra* note 673 at 122. [emphasis added] Here, Mayeda draws attention to the fact that people who are legally members of the political community may nonetheless be excluded from the community of judgment to whom a legal judgment is addressed.

common sense/s they bring to bear on judgment is very important in the context of legal judgment. One of the most influential communities of judgment in a legal case is the community of other judges and legal practitioners. Legal principles and institutions such as the doctrine of precedent, the appellate court system, and our understanding of judicial impartiality are part of what frames the community of judgment in this way; judges have to measure their judgments in part against how they think other judges would decide.[678]

However, this community is, in fact, very narrow in some respects. Indeed, the Canadian judiciary is overwhelmingly drawn from very particular groups – specifically white and middle class men and some white and middle class women.[679] It is the obligation of legal judges to make decisions that apply to society as a whole, but they come from only a small subset of that society. Nedelsky writes:

> To understand judicial impartiality, we must ask who judges are, and with whom they imagine themselves to be in conversation as they make their judgments. Whom do they imagine persuading and on whom do they make claims of agreement? If their attention is turned to only a narrow group (white, middle-class males), then judges will surely remain imprisoned in their limited perspective.[680]

Thus, if judges refer their imaginations only to the common sense of fellow judges, this impedes their ability to come to judgments that are valid across a wider part of Canadian society. Scrutinized through a feminist and anti-poverty lens, the problem of diversity (or the lack of it) becomes a problem of validity, and thus legitimacy. And Arendt's notion of common sense

678 Nedelsky, "Judgment, Diversity and Relational Autonomy," *supra* note 74 at 114; Edlin, *supra* note 671 at 440–1.
679 Omatsu, *supra* note 75.
680 Nedelsky, "Embodied Diversity," *supra* note 668 at 243.

begins to speak directly to the requirements of justice and of practices for good legal judgment.

In this chapter, I have chosen to explore the strengths and weaknesses of Arendt's common sense in the context of the law on judicial impartiality. This is an area where there is a meaningful overlap between the specific, context-derived "legal" requirements of legitimate legal judgment, and the requirements of "validity" as understood through Arendtian reflective judgment. Both invoke the notion of "impartiality," and in both cases the language of "common sense" is important.

Judgments from the Supreme Court of Canada directly addressing judicial impartiality form a small but significant group of cases.[681] The phrase "common sense" is not a repeated trope in these cases. However, in 1997, the Court handed down its complex decision in *R. v. R.D.S.*[682],which has played an important role in shaping Canadian law. In this case, "common sense" is invoked by the majority judgment and is referenced by a number of the other judgments. In the following sections, I explore Arendt's notion of "common sense" against the invocation of this phrase in the context of the law on judicial impartiality.

R.D.S.

R.D.S. is a case that is completely turned on its head when we give the phrase "common sense"

681 A leading case in this area is *Committee for Justice and Liberty et al v National Energy Board et al,* [1978] 1 SCR 369, 1976 CanLII 2 (SCC).
682 *R.D.S.*, *supra* note 584.

the meaning that Arendt does. Judges working with Arendt's "aspect" of common sense would see very clearly not the potential for bias, but the increased potential for validity when Arendtian "common sense" is shared between judges and the people bound by the law. Thus the *R.D.S.* case is a great example for exploring the constructive potential – as well as the daunting scope – of Arendt's notion of common sense and her theory of judgment as a way to think about legal judgment.

In the case of *R. v. R.D.S.*, the Supreme Court of Canada was called upon to review the law on judicial impartiality and its application to the conduct and verdict of a Youth Court Judge in Nova Scotia. R.D.S. was a 15 year-old African Canadian boy who was arrested after allegedly interfering with the arrest of another youth. He was charged with offences relating to interfering with a police officer in the course of his duties, including assaulting a police officer. At the trial, the accused and the police officer, who was white, provided the only testimony. Judge Corinne Sparks – herself a Black woman living in Halifax – found that the testimony of the accused raised a reasonable doubt as to his guilt, and acquitted him. In the course of her judgment she made the following comments:

> The Crown says, well, why would the officer say that events occurred the way in which he has relayed them to the Court this morning. I am not saying that the Constable has misled the court, although police officers have been known to do that in the past. I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are dealing with non-white groups. That to me indicates a state of mind right there that is questionable. I believe that probably the situation in this particular case is the case of a young police officer who overreacted. I do accept the evidence of [R.D.S.] that he was told to shut up or he would be under arrest. It seems to be in keeping with the prevalent attitude of the day.
>
> At any rate, based upon my comments and based upon all the evidence before the

> court I have no other choice but to acquit.[683]

The Crown alleged that Judge Sparks' comments raised doubts about her impartiality as an adjudicator, and these comments became the subject of appeals up to the Supreme Court of Canada.[684] The Supreme Court of Canada was divided in its judgment on this case. A majority decision, written by Justice Cory, and concurring reasons by Justices McLachlin and L'Heureux-Dubé, found that Judge Sparks' conduct did not raise a reasonable apprehension of bias. A dissenting judgment by Justice Major found that it did.

All of the judgments agree on the relevant legal test: it is the task of the reviewing court to determine whether the impugned words or conduct of the judge have raised a "reasonable apprehension of bias." This test for judicial impartiality was authoritatively stated by the Court in an earlier case which found:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. ... [The] test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude...."[685]

The differences between the judgments in *R.D.S.* concern how the test should be applied in this case. Cory. J. finds that Judge Sparks' comments did not raise a reasonable apprehension of bias, although they were "unfortunate" and "close to the line," because they were insufficiently

683 *Ibid*, para 53.
684 It is rare for allegations of judicial bias to receive this level of judicial review, including when judges with race privilege make much more deeply problematic comments. See Sherene Razack, "R.D.S. v. Her Majesty the Queen: A Case about Home" in Enakshi Dua & Angela Robertson, eds, *Scratching the Surface: Canadian Anti-Racist Feminist Thought* (Toronto: Women's Press, 2000) 281.
685 *R.D.S.*, supra note 584, para 111.

clear about the difference between "generalizations" about race and credibility, as contrasted with the individual facts of the case.[686] The dissenting justices found that this line had been fully crossed, and that Judge Sparks' comments indicated that her conclusions were drawn on the basis of generalizations for which there was no evidence in the case before her.[687] In contrast, Justices McLachlin and L'Heureux-Dubé hold that Judge Sparks' comments "reflect an entirely appropriate recognition of the facts in evidence in this case and of the context within which this case arose -- a context known to Judge Sparks and to any well-informed member of the community."[688]

All of the judgments in *R.D.S.* reflect considerable engagement with the question of how legitimate, impartial legal judgment relates to social context and the personal knowledge and experience of a judge. In his judgment, Cory J. specifically calls on the language of "common sense" to help articulate his view:

> It is the highly individualistic nature of a determination of credibility, and its dependence on intangibles such as demeanour and the manner of testifying, that leads to the well-established principle that appellate courts will generally defer to the trial judge's factual findings, particularly those pertaining to credibility....However, it is also the individualistic nature of a determination of credibility that requires the judge, as trier of fact, to be particularly careful to be and to appear to be neutral. This obligation requires the judge to walk a delicate line. On one hand, the judge is obviously permitted to use common sense and wisdom gained from personal experience in observing and judging the trustworthiness of a particular witness on the basis of factors such as testimony and demeanour. On the other hand, the judge must avoid judging the credibility of the witness on the basis of generalizations or upon matters that were not in evidence.[689]

686 For discussion of the issue of "generalizations" in legal judgment and in this case in particular, see Christine Boyle et al, "R. v. R.D.S.: An Editor's Forum" (1998) 10 CJWL 159.
687 *R.D.S.*, *supra* note 584, paras 6–10.
688 *Ibid*, para 30.
689 *Ibid*, paras 128–9.

In this passage, "common sense" is set beside "wisdom gained from personal experience" as a legitimate basis upon which to render judgment, including as to the credibility of witnesses. Cory J. contrasts this with reliance on "generalizations," which might well raise a reasonable apprehension of bias.

Arendt's approach to common sense and the "aspect" of common sense that comes to light in her writings resonates with several aspects of this passage and the *R.D.S.* case as a whole. First, the test for "reasonable apprehension of bias" itself contemplates the necessity for a kind of community knowledge similar to Arendt's notion of common sense. Knowledge of our fellow judges is essential when we are imagining how we might persuade or "woo" their agreement in judgment. In the law on judicial impartiality, knowledge of the community is essential in order to know what people in that community might perceive as biased. In elaborating on the test for reasonable apprehension of bias, Cory J. writes:

> This test...contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case...Further, the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold"...To that I would add that the reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community.[690]

In further describing what is required for impartial judging in a diverse society, he writes:

> Canada is not an insular, homogeneous society. It is enriched by the presence and contributions of citizens of many different races, nationalities and ethnic origins. The multicultural nature of Canadian society has been recognized in s. 27 of the

690 *Ibid*, para 111.

> *Charter*. Section 27 provides that the *Charter* itself is to be interpreted in a manner that is consistent with the preservation and enhancement of the multicultural heritage of Canadians. Yet our judges must be particularly sensitive to the need not only to be fair but also to appear to all reasonable observers to be fair to all Canadians of every race, religion, nationality and ethnic origin. This is a far more difficult task in Canada than it would be in a homogeneous society. Remarks which would pass unnoticed in other societies could well raise a reasonable apprehension of bias in Canada.[691]

Seen through the lens of Arendt's theory of judgment and common sense, these passages can be understood to provide guidance on the nature and scope of the common sense that a legal judgment must engage in order to render a valid judgment in Canadian law. For Cory J., the relevant community is the entire political community of Canada, which he characterizes in the second passage as "multicultural." At the same time, in the first passage, Cory J. circumscribes the relevant community to include only those Canadians who are "reasonable" and "informed," including about the prevalence of racism in a given community. Thus, it seems that for Cory J., legally relevant "common sense" must be structured by the legal requirements of reasonableness and community knowledge.

In their concurring reasons, McLachlin and L'Heureux-Dubé JJ. take this idea further, and refer directly to an approach to judgment influenced by Arendt. In setting out their approach to impartiality, these justices refer to the concept of the enlarged mentality and quote Nedelsky's work on judging:

> Judicial inquiry into the factual, social and psychological context within which litigation arises is not unusual. Rather, a conscious, contextual inquiry has become an accepted step towards judicial impartiality. In that regard, Professor Jennifer Nedelsky's "Embodied Diversity and the Challenges to Law" [...] offers

691 *Ibid*, para 95.

> the following comment: "What makes it possible for us to genuinely judge, to move beyond our private idiosyncracies and preferences, is our capacity to achieve an "enlargement of mind". We do this by taking different perspectives into account. This is the path out of the blindness of our subjective private conditions. The more views we are able to take into account, the less likely we are to be locked into one perspective .... It is the capacity for "enlargement of mind" that makes autonomous, impartial judgment possible.[692]

While Cory J. frames his approach to impartiality in terms of respecting "diversity" in the abstract, McLachlin and L'Heureux-Dubé JJ. talk more directly about the actual communities that are being referenced, including the local communities of which Judge Sparks was a member. This particular community context is one in which anti-black racism, including on the part of state actors, is a reality.[693] Further, the reasonable person, from whose perspective apprehended bias is to be assessed, is someone who knows this reality:

> The reasonable person is not only a member of the Canadian community, but also, more specifically, is a member of the local communities in which the case at issue arose (in this case, the Nova Scotian and Halifax communities). Such a person must be taken to possess knowledge of the local population and its racial dynamics, including the existence in the community of a history of widespread and systemic discrimination against black and aboriginal people, and high profile clashes between the police and the visible minority population over policing issues. [...] The reasonable person must thus be deemed to be cognizant of the existence of racism in Halifax, Nova Scotia. It follows that judges may take notice of actual racism known to exist in a particular society.[694]

Thus, for Justices McLachlin and L'Heureux-Dubé, the community of reference for generating the appropriate "common sense" includes people who are not only aware of the diversity of the Canadian population, but who are connected directly with the local communities in question and

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692 *Ibid*, para 42.

693 The reality of anti-black racism in Canada, and in Toronto specifically, was the subject of judicial notice in *R v Parks* (1993), 24 CR (4th) 81, 65 OAC 122 (ON CA), leave to appeal refused by *R. v. Parks*, [1994] 1 SCR x.

694 *R.D.S.*, *supra* note 584, para 47.

know their history. Therefore,

> as a member of the community, it was open to [Judge Sparks] to take into account the well-known presence of racism in that community and to evaluate the evidence as to what occurred against that background....In alerting herself to the racial dynamic in the case, she was simply engaging in the process of contextualized judging which, in our view, was entirely proper and conducive to a fair and just resolution of the case before her.[695]

Justices McLachlin and L'Heureux-Dubé also introduce a further criterion for the common sense that could form the basis for valid, impartial judgment in this case. They say that the reasonable person contemplated by the test for bias is someone who, "as a member of the Canadian community, is supportive of the principles of equality."[696] This criterion for circumscribing the relevant community of judgment is very valuable when assessing legal judgment against equality and social justice goals. Thus, the common sense that should inform legal judgment must be structured by a commitment to the constitutional value of equality, and this criterion is grounded directly in the legal system itself.[697]

In some respects, the "common sense" invoked in this case reflects the "aspects" of common sense revealed in Reid and Gramsci: "common sense" refers to a body of shared knowledge, assumptions, generalizations or perspectives that underlie legal judgments. Gramsci, more than the other two theorists, would be alive to the political context of *R.D.S.*, with its overlapping engagement with issues of race, class, age and locality. But Arendt's "aspect" of common sense as part of an ongoing *practice* of reflection and judgment also comes to the surface.[698] For

695 *Ibid*, paras 56, 59.
696 *Ibid*, para 48.
697 See the very useful discussion of this issue at Boyle et al, *supra* note 686.
698 Reflecting this focus on process as essential to judicial impartiality, Mayeda argues that impartiality comes

example, Cory J. invokes "common sense" in tandem with "wisdom gained from personal experience," but goes on to insist that such common sense and wisdom be transformed with reference to reason and the knowledge of relevant communities. McLachlin and L'Heureux-Dubé J.J. introduce further criteria for engagement with common sense that are not about empirical reality but about political choice and legal values. By invoking equality values, the judgment of McLachlin and L'Heureux-Dubé J.J. also bring a further element of Arendt's common sense into their notion of judicial impartiality, and this is the requirement for *reflection* on one's own assumptions and the consequences of those assumptions. If the relevant common sense must reflect equality values, background knowledge that is grounded in discrimination is illegitimate for legal judgment.

Arendt's ideas about the role of common sense in judgment thus help us understand *how* the subjective experiences and knowledge of a judge can work to enhance, rather than detract from, the impartiality of his or her judgments. This is because a judge's personal experience can – as it did in *R.D.S.* – provide important access to the "common sense" of a relevant community. Engagement with the common sense of Black residents of Halifax as a member of that community does not compromise the impartiality of the judge in this case, it is *essential* in order for that judgment to have the requisite validity. Without engagement with *this* common sense, legal assessment of judicial bias would not be valid across that community. In this sense, Judge Sparks was quite possibly an ideally situated adjudicator, in contrast to other judges lacking a basis in this community's common sense. At the same time, judges whose "common sense"

"from ensuring that judges engage with principles that the community and the particular litigants in the case would recognize as valid. Impartiality derives from the *process* of engaging with principle, not from the espousal of any particular principle." Mayeda, "Principle and Pragmatism," *supra* note 552 at 47.

begins in other subjective experiences (for example, judges who live with race privilege or who live in rural areas) are not powerless to remedy their partiality in this respect. A judge can *achieve* impartiality by seeking out the community sense that is needed to ground a valid judgment in any case. In their commentary on the *R.D.S.* case, a forum of Canadian feminist legal scholars argue that this approach is reflected in the doctrinal findings of the majority and concurring judgments. They write:

> One aspect of grounding legitimacy in the knowledge of the reasonable person in the community, and not the individual judge, is that it places responsibility on all judges, regardless of their gender, race, or ethnic background, to be sensitive to the operation of discriminatory effects of racialization in the fact determination process...Grounding legitimacy in the knowledge of the community also ensures that one aspect of legitimacy is that knowledge of social context draws on empirical and other data available to the community.[699]

Thus, a judge who seeks to make impartial judgments that will be valid beyond their own subjective experiences, and valid across relevant communities, must engage with the common sense of those communities. Arendt's approach to common sense and to judgment thus generate an obligation on the part of legal judges to actively take steps to correct their own subjective partiality, and through the practice of engagement with "common sense," develop a practice of judgment that reflects an enlarged mentality.

The invocation of "common sense" in *R.D.S.* also provides a way to discuss the community-creating element of legal judgment and of common sense. The *R.D.S.* case is not only about

699 Boyle et al, *supra* note 686 at 188–189. Other feminist scholars also take the view that the best understanding of judicial impartiality generates a positive obligation to seek out knowledge, especially when the judge is situated in a position of relative privilege. For example, see Boyle & MacCrimmon, *supra* note 20; Feldthusen, *supra* note 257; Patricia Hughes, "A New direction in judicial impartiality?" (1998) 9 NJCL 251; Omatsu, *supra* note 75; McIntyre, "Keeping Equity Academic," *supra* note 57.

determining whose common sense should count for the basis of valid legal judgment; it is also about determining the communities to whom the law speaks. The case rhetorically works to *create* communities, to delineate who matters. In her commentary on *R.D.S.*, feminist critical race scholar Sherene Razack focuses on this aspect of the judgment, characterizing it as a "case about home."[700] She writes:

> I propose to read *R.D.S. v. Her Majesty the Queen* as a ... moment of public education in Canada [similar to the O.J. Simpson case in the United States], when an official story, an agreed-upon public truth, is told. This public truth is also about race. It is the story that race does not matter *except under highly specific and limited circumstances*. The heroes of this story are innocent, white subjects.....If the official story is that there is no racism in Canada, then those who insist otherwise do not belong."[701]

Like Arendt's approach to common sense, Razack's analysis focuses on the practices of judgment and persuasion, and the ways they work to create community and belonging. Razack's critique of the case is itself a compelling demonstration that legal judgment has this effect: she describes the "line" that emerges between "those who think race always matters from those who think it only matters, if at all, under highly limited circumstances involving specific individuals."[702] Razack shows how the legitimacy of the Supreme Court of Canada is undermined for people of colour when the Court fails to comprehend their reality. Razack also shows that this goes far beyond the matter of accurate social facts, and extends into the ways legal judgment can affirm or deny membership in the community.[703]

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700 Razack, *supra* note 684.

701 *Ibid* at 282–3.

702 *Ibid* at 284. Schneiderman also notes the rhetorical power of courts to "certify reality" through their invocation of "common sense:" Schneiderman, "Common sense and the Charter," *supra* note 30 at 7.

703 Razack describes how these discourses work to create identity on a more individual level. She writes: "Without gambling Chinese and emotional Black women partial to their own people and biased against white police officers, there would be no reasonable and impartial white men." She also notes the way these ideas are rooted at a deep emotional level. Razack, *supra* note 684 at 286, 292.

Gosselin

As in *R.D.S.,* the invocation of "common sense" in *Gosselin* has implications for understanding the role of the impartial legal judge, and the boundaries of the communities to whom the judgment speaks. With Arendt's understanding of common sense in mind, "common sense" in *Gosselin* seems even more significant and even more problematic from the perspective of justice.

Recall that McLachlin C.J.C. writes:

> *As a matter of common sense*, if a law is designed to promote the claimant's long-term autonomy and self-sufficiency, a reasonable person in the claimant's position would be less likely to view it as an assault on her inherent human dignity.[704]

When reading it in light of Gramsci's perspective on common sense, I said that this passage shows that sometimes "common sense" is invoked as a substantive ground upon which to base a legal judgment. McLachlin C.J. claims that common sense supports her conclusion. Seen through the lens obtained by Reid, we also see that this common sense claim marks the boundary between reason and nonsense. But here, against the background of Arendt's approach to common sense, the rhetorical effect of this passage becomes more than a marker of rational debate, it becomes a marker of community. A "reasonable person in the claimant's position" would come to a certain judgment about the welfare rules under consideration. Since she disagrees, Ms. Gosselin herself is being unreasonable and not properly exercising her judgment. Further, since this judgment is a matter of common sense – the common sense that is appropriate

704 *Gosselin*, *supra* note 7, para 27. [emphasis added]

for legal judgment in this case – Ms. Gosselin is set outside the community of people to whom the law should speak. The passage is a reiteration that Ms. Gosselin does not belong; her perspective is specifically contrary to common sense. Thus, common sense works not only to determine the appropriate form and content of legal justification; it works to create the community to whom the law should be held accountable.

In her dissenting judgment, Justice L'Heureux-Dubé also addresses this question of who will count as a member of the relevant community. She does not use the language of "common sense" in her judgment, but engages with the majority argument on this point quite directly. She says:

> [If we acknowledge that Ms. Gosselin's physical integrity was breached] [t]he sole remaining question is whether a reasonable person in Ms. Gosselin's position, apprised of all the circumstances, would perceive that her dignity had been threatened. The reasonable claimant would have been informed of the legislature's intention to help young people enter the marketplace. She would have been informed that those 30 and over have more difficulty changing careers, and that those under 30 run serious social and personal risks if they do not enter the job market in a timely manner. She would have been told that the long-term goal of the legislative scheme was to affirm her dignity.
>
> The reasonable claimant would also likely have been a member of the 88.8 percent who were eligible for the programs and whose income did not rise to the levels available to all adults 30 years of age and over. Even if she wished to participate in training programs, she would have found that there were intervals between the completion of one program and the starting of another, during which the amount of her social assistance benefit would have plunged. The reasonable claimant would have made daily life choices in the face of an imminent and severe threat of poverty. The reasonable claimant would likely have suffered malnourishment. She might have turned to prostitution and crime to make ends meet. The reasonable claimant would have perceived that as a result of her deep poverty, she had been excluded from full participation in Canadian society. She would have perceived that her right to dignity was infringed as a sole consequence of being under 30 years of age, a factor over which, at any given

> moment, she had no control. While individuals may be able to strive to overcome the detriment imposed by merit-based distinctions, Ms. Gosselin was powerless to alter the single personal characteristic that the government's scheme made determinative for her level of benefits.
>
> The reasonable claimant would have suffered, as Ms. Gosselin manifestly did suffer, from discrimination as a result of the impugned legislative distinction. I see no other conclusion but that Ms. Gosselin would have reasonably felt that she was being less valued as a member of society than people 30 and over and that she was being treated as less deserving of respect.[705]

L'Heureux-Dubé also uses other language that engages an Arendtian understanding of "common sense." She writes:

> As a result of [the impugned regulation], adults under 30 were uniquely exposed by the legislative scheme to the threat of living beneath what the government itself considered to be a subsistence level of income. Of those eligible to participate in the programs, 88.8 percent were unable to increase their benefits to the level payable to those 30 and over. Ms. Gosselin was exposed to the risk of severe poverty as a sole consequence of being under 30 years of age. Ms. Gosselin's psychological and physical integrity were breached. There is little question that living with the constant threat of poverty is psychologically harmful. There is no dispute that Ms. Gosselin lived at times below the government's own standard of bare subsistence. In 1987, the monthly cost of proper nourishment was $152. The guaranteed monthly payment to young adults was $170. *I cannot imagine* how it can be maintained that Ms. Gosselin's physical integrity was not breached.[706]

By placing Ms. Gosselin outside the bounds of the community who participate in the relevant "common sense," the majority judgment in this case further marginalizes and excludes poor and marginalized women, rather than seizing an opportunity to include their views among those who count, or those who will find a "home" in Canadian law. The aspect of common sense revealed by Thomas Reid showed how "common sense" in *Gosselin* sets the boundaries of reasonable

705 *Ibid*, paras 131–3.
706 *Ibid*, para 130. [emphasis added]

debate. The "aspect" revealed by Antonio Gramsci showed how "common sense" in *Gosselin* allows powerful social groups to benefit from a burden of proof and hegemonic worldviews to maintain their hold on public discourse. But Arendt's "aspect" provides a way to see why "common sense," *as part of a practice of judgment,* not only reflects injustices of sexism and poverty, it also re-creates them.

Because Arendt's "common sense" works to circumscribe and develop communities, it can be invoked to exclude and marginalize. But, it can also be invoked to broaden, to include and diversify. Arendt's approach to common sense as a fundamental part of human judgment requires that we make choices about the membership of the communities we refer to when justifying our judgments. Judgment is always a normative, evaluative exercise.[707] In legal judgment, those choices can be guided or "disciplined" by legal principles such as equality.[708] In the following chapter, I take some further steps towards developing criteria that could be used to guide how legal judges engage with common sense.

Conclusion

The "aspect" of common sense that is made visible by reading Arendt situates common sense as a central part of the human practice of judgment. Engagement with common sense, as part of a

707 In his discussion of law and reflective judgment, Rasch summarizes the practice of judgment in this way: "As a judge, one decides a case with a sidelong glance at the way one assumes another judge would also decide. The other judge in question is an empirically real judge, not an ideal construct (for that would duplicate the gesture of subsumption that Schmitt aims to avoid), but we do not determine what that other judge would do by polling the other's opinion. In asserting that our decision would also have been made by another practicing judge, we are not engaged in a sociological or a mass-psychological exercise.... Rather, our act re-mains normative." Rasch, *supra* note 653.

708 Boyle & MacCrimmon, *supra* note 20.

process of imaginative representation and critical reflection, is what enables one to make judgments that are valid across some greater community. Common sense is related to communicability, persuasion, and the disclosure of oneself to others. Engagement with common sense, through judgment, opens up space for communication and generates community.

In the context of legal judgment, Arendt's approach to common sense has direct consequences for how the role of the judge should be understood; when legal judgment is understood as a form of reflective judgment, the duty of impartiality is fulfilled, not by attempting to limit one's thinking to the application of rules, but rather by attempting to achieve an enlarged mentality through engagement with relevant communities. Arendt's common sense signals an ongoing practice, rooted in subjective experience and transformed through critical reflection. For these reasons, Arendt's perspective has the potential to be very productive for developing practices of judgment that have the capacity to address the injustices of poverty and social marginalization. Arendt's common sense calls on judges to think critically about whether their judgment is valid for the right communities, and whether the criteria that guide their judgment are justifiable.

As with the critical reflection advocated by Gramsci, which enables one to turn common sense into “good sense,” the critical reflection required to practice genuine Arendtian judgment is very demanding, particularly when questions of social inequality arise. This is a context where critical reflection poses the most challenges as well as the place where it is most needed to achieve validity. Engagement with common sense is partly about disclosure of the self, and willingness to reflect on the extent to which one's subjective experiences can be generalized to

others. However, as the above discussion of *R.D.S.* and *Gosselin* demonstrates, core legal principles such as the principle of judicial impartiality provide points of contact with this approach, and show that while Arendt's approach is demanding, it is not impossible.[709]

Arendt's perspective on common sense is also productive in the context of legal judgment because of its focus on the way "common sense" works to mark and create communities. The rhetorical effects of a legal judgment are especially important when understood in this light, and Arendt's common sense provides a way to comprehend how legal judgment both reflects and generates multiple communities. Arendt's "aspect" of common sense thus provides resources we can use to address the question "common to whom?" when this question becomes important in legal judgment. This "aspect" of common sense also helps explain why this question is so important: it is not only about the accuracy of the information courts use in their judgments, it is also about political claims of membership and inclusion.

In their own ways, all three of the theorists considered here place a high value on the knowledge and sense of "the people." For Reid, this valuation leads to the view that we should allow common sense to benefit from a burden of proof, and that the appropriate posture towards common sense is one of intellectual humility. For Gramsci, this burden of proof is in fact suspect, not only from a philosophical perspective but from a political perspective. Gramsci asks that we be much more specific and critical when thinking about who "common" people are.

709 For a different discussion of how complex judging practices are already practiced, see Brenda Cossman & David Schneiderman, "Beyond Intersecting Rights: The Constitutional Judge as Complex Self" 57 University of Toronto Law Journal 431.

Arendt's “aspect” of common sense prompts us to return to the reason for Reid's reluctance to overthrow common sense, i.e. that when people hold a belief, they do so for a reason, or because it serves some valuable purpose in their life, and further, that we can ask what that purpose is. Taking an Arendtian approach and demanding attention to particular context, we can look at “common sense” in legal judgment and ask whether it serves the particular purpose it purports to serve there, guided by the political and legal values we choose to guide our judgment.

Arendt's “aspect” of common sense also prompts a return to Gramsci's critique of common sense. While Arendtian judgment provides openings for “common sense” to facilitate justice and equality, Arendt herself does not provide the criteria needed to achieve this. Gramsci's worries about common sense and hegemony, and indeed Arendt's own ambiguity on these issues, reaffirm the need for an analysis of power and inequality. Feminist and social justice perspectives are essential in order to structure the choices that must be made in the exercise of reflective judgment. This is how it becomes possible to move from common sense in judgment to common sense and justice.

Chapter 6 – Conclusion

At the end of *Pasquin*, the ghost of Queen Common Sense laments that, with her death, the world will be ruled by Queen Ignorance, aided by the unchecked power of Law, Religion and Science. But, she promises, the world will always be haunted by Common Sense. In many respects, all legal judgments are haunted by common sense: it sits in the background to frame judgment or to ground assumptions or to circumscribe reflective reasoning. But, in some cases, a judge writes the words "common sense" in his or her reasons for judgment, and Queen Common Sense reappears in person. In this dissertation, I have explored these appearances of "common sense" in legal judgment. I have asked what is learned and what is challenged when we observe Queen Common Sense from the perspectives provided by Thomas Reid, Antonio Gramsci, and Hannah Arendt.

Taking all three of these perspectives into account creates a "perspicuous representation" of common sense. It becomes possible to see different "aspects" of common sense. Common sense is a kind of shared knowledge. Common sense is also a philosophical frame that is inherited from our social history. And common sense is also a part of the practice of judgment, and makes demands on our political values. Taken together, these "aspects" of common sense do not form a complete or coherent representation of the concept.[710] Rather, they demonstrate the multiple layers and uses that characterize any truly meaningful piece of language. Just as

710 Baker writes that "there is clearly no commitment whatever to the idea that perspicuous representations must be (even roughly) additive....There is no more reason to suppose that perspicuous representations are additive than to claim that the successive seeing of two different visual aspects in the duck-rabbit diagram can be combined into a single visual experience of seeing both aspects at once." Baker, *supra* note 168 at 37.

Gramsci claims about the content of common sense, the *concept* of common sense itself has a complex intellectual history and contains contradictory as well as mutually reinforcing components. The usefulness and meaningfulness of the phrase "common sense," as with all language, are not impeded by the impossibility of a singular definition, but rather made richer. The purpose of creating a "perspicuous representation" is thus not to answer questions about meaning definitively, but to open up avenues for consideration and debate.

The value of this critical opening is that it enables better ways of thinking about and using "common sense" in legal judgment – ways of thinking about and using common sense that have the potential to make legal judgment more sensitive to the demands of equality and social justice. In chapters one and two, I argued that legal discourse is, to some extent, held "captive" to a picture of common sense as a type of shared knowledge. I said that this captivity is facilitated partly by the nature of common sense itself, as a concept that eludes critique and circumscribes debate. This captivity allows "common sense" to function in an unexamined and problematic (but also powerful) way in legal judgments about poverty. While held "captive" in this way, we invoke "common sense" without full appreciation of its power to oppress and marginalize, but we also invoke "common sense" without allowing it to transform our judgment in a progressive and inclusive way.

The "perspicuous representation" presented here breaks down our captivity to a picture of "common sense," allowing discourse around common sense and legal judgment to address a much wider range of issues that are relevant to justice, including issues arising from feminist

and anti-poverty demands about justice. This perspicuous representation allows us to ask, not only whether common sense knowledge is appropriately "common," but how common sense relates to rules and expertise, how it relates to power, and what communities are reflected and generated by its invocation.

At the most general level, this richer representation of common sense makes it clear that subjecting "common sense" to scrutiny from the perspective of equality and social justice means more than restricting its use. That is, the response is not simply one of blanket condemnation of recourse to "common sense." All three "aspects" of common sense do reveal significant potential for "common sense" to compromise the quality and legitimacy of legal judgment in the context of poverty and marginalization. But, they also show that reliance on common sense can sometimes require a type of reasoning or practice of judgment that actually demands robust consideration of issues that relate to poverty and social justice, such as marginalization in public discourse, the political history of knowledge, and the valuation of different types of reasoning. Thus, the best practices of legal judgment will *actively engage* with "common sense," neither relying on it unreflectively nor excluding it wholly by abandoning it as merely an artifact of oppressive ideology.

Each of the three "aspects" of common sense explored in this dissertation generates criteria that can be used to assess a legal judge's engagement with common sense. In the remainder of this chapter, I will pull together these criteria and expand on what they mean for legal judgment specifically. This part of the dissertation takes the methodology inspired by Wittgenstein

("perspicuous representation") and uses it to construct, not exactly a "program" or concrete prescription for action, but, rather, some suggestions for following the insights discovered through my perspicuous representation through to their consequences for legal judgment. This is a part of the project that Wittgenstein may or may not have approved of. So, here, I rely more on those aspects of my methodology inspired by theorists who argue for the value of placing concepts in new contexts, including the feminist and social justice thinkers who animate my work.[711]

In the following sections, I will first describe how each "aspect" of common sense configures an image of the legal judge. Second, I explore some of the criteria for evaluating the use of common sense in legal judgment that emerge from the representation of common sense created by consideration of all three "aspects." Finally, I will return a final time to the case of *Gosselin* and the issue of poverty as a concern for justice and legal judgment. I conclude the chapter with some final reflections on the extent to which my "perspicuous representation" creates new ways to think about common sense and about legal judgment.

The role of the judge

Reid, Gramsci and Arendt each present a particular view about what constitutes good judgment, and how "common sense" fits into judgment. Each "aspect" of common sense also contains implicit or explicit notions that speak to the proper role of judges as part of a particular

711 E.g. feminist interpreters of Wittgenstein, see Scheman, "Forms of Life," *supra* note 252.

institution, in a particular context. For example, in the context of Gramsci's work, it is important to consider whether any of his exhortations for good judgment could be achieved by people operating as part of the state in a capitalist democracy. When asking about the "role of the judge," all of these insights are valuable. However, it is interesting that when writing about "common sense," in particular, each thinker also describes a certain distinctive figure whose characteristics disclose a special relationship between good judgment and common sense. In each case, these special figures bear some relationship to the thinker him or herself: for Reid, it is the educated person who speaks on behalf of common sense, for Gramsci, the organic intellectual, and for Arendt, the critical, thinking person who exercises an enlarged mentality. These special figures can also be used to help think through how the role of the legal judge is best understood when it comes to "common sense."

The educated representative of common sense

The special figure who emerges from Reid's perspective on common sense is, in a sense, Reid himself: an educated representative of common sense. While the idea of an "expert" or "specialist" in common sense is possibly paradoxical (and, as John Coates notes, definitely odd), it also reflects some of what Reid and his fellow members of the Wise Club had in mind when they championed the knowledge of ordinary people.[712] As Sophia Rosenfeld writes:

> [T]he defense of this distinctive epistemology [in which common sense is

712 Coates, *supra* note 283 at 17. In a lecture at the Faculty of Law, University of British Columbia, Justice Lynn Smith also invoked the idea that judges might think of themselves as "experts in common sense," and that such expertise might require judges to critically reflect on and actively develop their common sense: Lynn Smith, "What Can Judges Know?" (Lecture given at the Faculty of Law, University of British Columbia, 2010).

> privileged] produced in eighteenth-century Aberdeen the phenomenon of a new and lasting social type: the educated avatar of common sense who has no choice but to define himself (and only considerably later, herself) as a spokesman for the truths already established by masses of ordinary people).[713]

In her discussion of the political history of common sense and its relationship to democracy, Rosenfeld argues that this figure – the educated "avatar" of common sense – continues to play a role in democratic politics, in which discussants in political debates are very likely to justify their positions at least in part on the basis of common sense. In that context, the figure of the educated representative of common sense is presented as the ideal person for exercising political judgment. But what of legal judgment? When this special figure is considered as a model for the person exercising legal judgment – the judge – the conceptual and institutional requirements of legal judgment come into play. Judges are bound by precedent, by their duty to act impartially, by their constitutional role in a liberal democracy in Canada. Thus, embodying common sense is not enough; judges must also carry their special expertise in law into their judging practices.

But Reid's representative of common sense, who exercises good judgment, who gives credence to the knowledge that ordinary people already share, and who values daily life as a source for legitimate knowledge, does provide some interesting criteria for thinking about the role of a judge. Reid's theory of common sense places a high value on the knowledge of ordinary people, and opposes the intervention of expert knowledge or systems of rules where those interventions might interfere with the thoughtful exercise of judgment. These are postures that can be adopted by judges of law, just as much as judges of any matter. As a legal judge, the avatar of common

713 Rosenfeld, *supra* note 86 at 62.

sense would place a burden of proof on propositions contradicting the content of that knowledge. This common sense legal judge would also be alive to the boundaries of "real" common sense, to restrict the influence of "prejudices" that might mislead or undermine the proper exercise of good judgment. Approaching his or her role as requiring the representation of the knowledge of ordinary people brings Reid's egalitarianism into the heart of legal judgment. On many matters (though certainly not all), what is already known in the community should be respected, not overturned by the presumptuous opinions of experts.

At the same time, Reid's avatar of common sense is insufficient as a model for the legal judge. This model insists on the value of knowledge held by ordinary people, but is grounded on the assumption that all such ordinary knowledge is the same, and that all legitimate common sense will be shared universally. On one hand, this limits what can count as common sense knowledge to a very narrow list of items (like the existence of physical objects). But on the other hand, it invites treatment of a much wider range of things with the same approach, privileging what is already widely believed by non-experts (how to determine when a witness is telling the truth?). Reid's discussion of "prejudice" and the risk that real common sense could be undermined by undue deference to authority, or by reliance on unjustified analogies, demonstrates an understanding that "common sense" is not always a solid and unchallengeable body of knowledge. But Reid's worries about "prejudice" still leave us with questions about what a judge should do when presented with competing claims about common sense, or when common sense claims seem problematic not because they are wrong, but because they are tied to injustice. Further, Reid's avatar of common sense is bold in the face of distracting or elitist

claims to superior knowledge, but carries no record of his or her own history. How does Reid's common sense figure acquire his or her common sense? To whom is his or her judgment accountable? Reid himself, after all, was a member of a small class of educated and wealthy men who lived in a fairly insular town, and yet his explicit aim was to discover universal principles of common sense. These outstanding questions show why the avatar of common sense cannot be a complete model for the good judge.

The organic intellectual

The second "aspect" of common sense studied in this dissertation configures a different personage who has a special relationship to common sense and to good judgment: Gramsci's organic intellectual. Like Reid's avatar of common sense, the organic intellectual contains both elements of education and connections to ordinary people. In a sense, both figures embody the knowledge and experience of a community. But Gramsci's organic intellectual does not simply speak for the common sense of the community. Rather, the organic intellectual embodies a process of critical self reflection and transformation, in which the common beliefs of a community become *good sense*, and thereby work towards the transformation of society. Gramsci's approach to common sense pays central attention to the processes that allow common sense to emerge, and the processes that are needed to challenge the hegemony of dominant world views and replace them with common sense that is capable of supporting equality and the liberation of oppressed peoples.

As a model for the *legal* judge, Gramsci's organic intellectual contemplates the enormous challenges associated with measuring legal justice in a liberal democratic state with the justice of liberation and equality that was the goal of Gramsci's political theory. There are fundamental ways in which legal judges are manifestly *not* the "new" intellectuals that Gramsci thinks can critique hegemonic common sense and support political transformation (indeed, in many respects, they are the epitome of "traditional intellectuals," who claim objectivity and historical continuity, but who are in fact captured by the hegemonic perspectives of the dominant group).[714] At the same time, there are at least two important ways in which the figure of the organic intellectual can be important for legal judgment. First, Gramsci seems to have a particular optimism about the potential for expert practitioners to develop into organic intellectuals; he mentions engineers and architects as examples of people who must acquire a nuanced and abstract knowledge, while not losing touch with the physical reality in which their work will take place.[715] Gramsci suggests that organic intellectuals should approach their task, to some extent, as if they are expert practitioners of philosophy.[716] In general, the difference between the engineer and the philosopher is that while most people do not have much, or any, knowledge about building, everyone does have some knowledge about philosophy (for most people, in the form of common sense).[717] Therefore, what is required to make someone an "expert" in philosophy is not necessarily the acquisition of special knowledge, but the

714 Gramsci, *supra* note 123 at 5–8.

715 *Ibid* at 347. It is interesting to note that Arendt also describes the legal profession as sitting somewhere between theory and practice: "For Kant, the 'middle term' that links and provides a transition from theory to practice is judgment; he had in mind the practitioner - for example, the doctor or lawyer, who first learns theory and then practices medicine or law, and whose practice consists in applying the rules he has learned to particular cases." Arendt, "*Lectures*," *supra* note 125 at 36.

716 Gramsci, *supra* note 123 at 347.

717 *Ibid*.

opportunity to make their knowledge more formalized and coherent. Organic philosophers gain their knowledge from everyday life, and work to make it critical through the philosophy of praxis. Like engineers and architects, lawyers and legal judges do have specialized knowledge, and can be understood as experts in a certain kind of practice. Their expertise sets them apart from other members of the community, but their necessary connections to the practical application of their ideas can help them from becoming isolated or from acting as traditional intellectuals in an unproblematic way. Further, since law, like philosophy, contains connections to communities and to common sense, legal judges can use their status as practitioners to foster and develop those connections, and thereby fulfill a role that is more like that of an organic intellectual.

Second, the figure of the organic intellectual provides an aspirational model for the practice of critical reflection and the transformative potential of intellectual activity that genuinely engages with the needs of marginalized people. Gramsci argues that the relationship between organic intellectuals and "the masses" should be a mutually transformative one, analogous to a student-teacher relationship. For legal judges to adopt this as a model for their own practices of reflection, and as a model for how judges should relate to the people in their communities, challenges judges to think carefully about the origin of their knowledge and how it relates to legitimacy, institutional capacity, and justice at the broadest level. Although judges do not, for the most part, come from subaltern social groups themselves, the model of the organic intellectual still provides a valuable way to think about how practical experience and elite knowledges can be understood in order to generate positive intellectual transformation and

political change. Schneiderman's critique of *Gosselin* shows the tendency of the Supreme Court of Canada to follow behind the dominant "common sense" in Canadian society; Gramsci's approach shows how they might, instead, lead the way.

The judging person engaged with the community sense

Gramsci's description of organic intellectuals provides a compelling model. But it provides few details about how an individual judge might go about the practice of critical reflection that can transform "common sense" into "good sense." A third special common sense figure arises from the "aspect" of common sense that emerges from the work of Hannah Arendt. This figure is the judging person who practices "enlargement of mind" through engagement with common sense. Arendt herself seems to offer Kant as an example of such a person ("he – who never left Konigsberg – knew his way around both London and Italy.")[718] In this dissertation, with the assistance of theorists such as Nedelsky and Young, I have adopted Arendt's approach to enrich the model of the thinking, engaged judge for feminist and social justice purposes. For this special figure, access to "common sense" is constituted through engagement with actual communities, and scrutiny of one's imaginative acts from the perspective of justice and equality.

Arendt's model of the imaginative and reflective judge also displays a notable capacity and willingness to reflect on his or her own views. The reflective judge is the opposite of the unthinking individual, who Arendt sees as such an enormous threat to political life. As in many

718 Arendt, "*Lectures*," *supra* note 125 at 44.

aspects of her thought, Arendt values freedom and action, and critiques any tendency to complacency, passivity or deference. Arendt's figure of the imaginative, reflective judge provides an extremely useful model for the role of the legal judge: it calls for a form of impartiality in which judges may be required to actively seek out the information they need to identify and engage with the communities affected by the law.

It is important to notice that all three of these special figures – the avatar of common sense, the organic intellectual, and the reflective judge – all emerge specifically through each theorist's engagement with common sense. These models become visible only because of the relationship between judgment and common sense specifically, reaffirming the importance of this concept and the need to examine it from the perspective of equality and justice.

Criteria for the use of common sense in legal judgment

The "perspicuous representation" of common sense described in this dissertation includes analysis of the three "aspects." Based on this methodology, it is not possible to abstract or summarize from these three aspects to describe a complete or objective understanding of common sense. However, it is notable that several criteria for the use of common sense in good judgment reappear, in different forms, in more than one of the "aspects." These "criteria" are not formulaic rules; I do not suggest that it is possible to develop a checklist that, once completed, produces good legal judgment. Quite the contrary. My discussion of common sense

in good legal judgment focuses on practices that are complex, even confounding, requiring judges to engage with all components of themselves as human beings in multiple communities. My discussion of "criteria" emerges from my treatment of legal judgment as a form of human judgment in general, and reflects my insistence (following scholars such as Nedelsky) that embracing the subjective, reflective elements of human judgment does not abandon legal judgment to the realm of arbitrariness, idiosyncratic preference, or bald political interest. It is possible to have touchstones and ideals for developing practices that work towards good legal judgment, practices that are better or worse as far as "common sense" is concerned.

In this section, I describe three criteria for the use of common sense in legal judgment. While it will always be necessary for judges to approach their task with openness and flexibility, attention to these three criteria will be essential to the understanding and use of common sense in legal judgment in the service of social justice. Properly made common sense claims should work towards fulfilling the requirements of good judgment, and, in this section, I explore in more detail what it means for common sense claims to be *properly made* in legal judgment.

In earlier parts of this dissertation, I have attempted to pay careful attention to the actual texts under review (both scholarly and legal), and to show that the three "aspects" of common sense that emerge from these texts are quite distinct. The goal of these earlier chapters has been to take the apparent conundrum of common sense – as both self-evident and inscrutable – and to explore some of the various components that make up this composite and dynamic concept. In this chapter, I start to talk about "common sense" in general terms, sometimes allowing

slippages between the different "aspects." Having started to notice the different ways that "common sense" can be used and understood, it is necessary to see what happens when all of these issues are returned together to the context of legal judgment.

Intellectual humility and critical self-reflection

Creating a "perspicuous representation" of "common sense" reveals the significance of self-reflection as part of good judgment. This self-reflection takes different forms and has different meanings for each "aspect" of common sense, but it continually reappears. For all three thinkers, the self-reflection that is called for by "common sense" finds value in an attitude of intellectual humility. For Reid, commitment to common sense challenges the hubris involved in rejecting outright the legitimacy of the knowledge that ordinary people rely on every day. For Gramsci, thinking about common sense forces one to see the connections between beliefs, politics and history, and to reject any attempt to view one's own knowledge as transcendent or universal. And for Arendt, the essential role of common sense in judgment is what transforms subjective, idiosyncratic preferences into justifiable and valid judgments; we must always be aware that our untested private beliefs are never enough, on their own, to ground valid judgment. All three thinkers find some value in other modes of reasoning, including abstract philosophizing and purely introspective rational thought. But *good judgment* needs, not a posture of comprehensive rationality, the universal application of a framework, or the quest for some ground upon which I can say that my knowledge is true for everyone, everywhere. Instead, good judgment requires careful attention to the limits of my own experience, the

specificity of the derivation of my own knowledge, and the capacity to listen to the views of others.[719]

Beyond this general starting point of humility and openness, all three perspectives also require that the legitimate invocation of "common sense" involve acts of critical self-reflection. Different "aspects" of common sense assign a different scope and significance to this self reflection, but the theme is reiterated across the different perspectives. For example, Reid points to the need to check one's common sense knowledge for signs of prejudices, and insists that one must never treat one's common sense as infallible. Gramsci calls for an enormously demanding form of self-reflection that makes known the connections between so-called common sense and the hegemony of powerful social groups; he calls on everyone to think about whether and how "common sense" can make sense of their own interests and experiences. Arendt's writings on common sense and the enlarged mentality introduce another form of critical self-reflection, in which good judgment requires judges to actively test their beliefs against the common sense of a community of other judges.

Thus, intellectual humility and critical self-reflection can be adopted as conditions for the use of "common sense" in judgment. These might be adopted just as a general intellectual approach, but they can also guide interpretation of specific legal concepts. For example, a commitment to "common sense," understood adequately, provides a certain lens for understanding what is required by judicial impartiality. The use of "common sense" can support the impartiality of a

719 The notion of intellectual humility can be related directly to power. For example, Davina Cooper argues that people with the capacity to exercise power can choose to decline to do so: see Cooper, *supra* note 127 at 80.

legal judgment if the reference to common sense prompts the judge to engage in critical self-reflection and to consider the value and relevance of community knowledge that is offered or implied by others. For good legal judgment, we need impartiality that is informed by common sense, based in intellectual humility and critical self-reflection.

Humility and self-reflection are especially important in legal judgment when judges are asked to decide on questions involving poverty, inequality and marginalization. As mentioned in earlier sections, Canadian judges are drawn largely (although not entirely) from the most privileged social groups in Canadian society. Further, the role of a judge itself grants certain forms of privilege and social power. As a group, the people who are judges in Canada rarely have experience with living in poverty, and are most likely to have social and community lives that are isolated from people who do. Their knowledge of poverty is likely to be abstract and incomplete at best. Thus, intellectual humility and an openness to new perspectives are necessary.

Moreover, as Gramsci demonstrates, through the concept of hegemony, that which seems the most natural or the least problematic from the perspective of dominant groups can sometimes turn out to be the thing that merits the greatest scrutiny. Moreover, it can be easiest to be sure of yourself when you are standing in a position of power. Since, like Gramsci (and informed by a host of feminist theorists), I take the position that such unequal power relations are intimately related to justice and injustice, the certainty of those in power is worthy of critical attention. Thus, the kind of humility required for common sense to work in favour of good legal judgment

is not only intellectual but also political; it requires acts of political will for privileged individuals to question their most certain or their most comfortable assumptions.

Political justification and accountability

Common sense demands intellectual humility, and, further, asks for caution in overturning the knowledge of any community. At the same time, it calls on judges to be bold in their thorough exercise of human judgment; common sense does not permit the abdication of judgment to a system of rules or the opinion of an expert. Common sense requires judges to acknowledge that they are making choices with political consequences, and that the consequences of these choices must be justified and transparently accounted for. The unavoidability of political claims, and the need to justify those claims, is part of what is revealed through my "perspicuous representation" of common sense.

For Reid's "aspect" of common sense, this theme of judgment and justification emerges in a nascent way with his juxtaposition of common sense with philosophical "systems" and expertise. Undue deference to the opinions of experts permits and indeed encourages people to hold beliefs without exercising judgment. Reid does not explicitly recognize the political nature of "common sense" claims, but he does insist that people exercise judgment independently and with attention to the consequences. It is genuine human judgment – not reference to rules – that has the potential to allow people to develop meaningful knowledge of the world. The exercise

of judgment is necessary in order to think clearly about accountability – the person who judges is accountable for the judgment he or she renders.

Gramsci takes this question of accountability much further, explicitly pointing to the political consequences of certain bodies of knowledge and philosophical outlooks, including common sense. Gramsci asks *whose* common sense is at work in a given judgment, and whether the content of common sense knowledge is capable of supporting the kind of political transformation that he seeks. Gramsci shows us that common sense is infused with political choice and reveals the need for justification. Making a common sense claim is a claim about good knowledge, about shared knowledge, and thus must be justified. For Gramsci, this justification is always political. In Arendt's "aspect" of common sense, the exercise of justification is at the heart of what she means by "common sense." "Common sense" or the "community sense" is the basis for judgment, which always involves the practice of imaginatively justifying a judgment to a community of others. Thus, common sense claims are importantly related to questions of political choice and the justification of those choices.

While each theorist envisions different kinds of methods and criteria for holding judges accountable and testing the justification of their choices, in each case, a good invocation of "common sense" requires a sort of bravery and commitment, a willingness to put oneself on the line for one's judgment. Arendt calls this disclosure of the self to others, and puts it at the centre of the act of judgment and engagement with common sense. Bravery and self-disclosure might seem to be in tension with the idea of intellectual humility, but both arise from self reflection.

Critical self-reflection will ask me to think carefully about my invocation of "common sense" and about the grounds on which I can justify that invocation. Having made a choice, I communicate my judgment and my reasons to others and accept responsibility for that judgment.

The related acts of political choice and political justification are challenging and even provocative when used to guide the use of common sense in legal judgment. On this approach, the invocation of common sense in legal judgment can strengthen the quality of that judgment when it facilitates meaningful justification of the political choices that are always part of judging practice. Meaningful justification can enhance transparency and legitimacy.[720] Invoking common sense requires a judge to reflect on and make choices about the political consequences of the knowledge and framework he or she is endorsing. So, for example, a judge who says that the irrelevance of the timing of disclosure for the credibility of a child's account of abuse is a matter of *common sense*, is not (or not only) making an empirical claim, but also making a political and legal claim about what knowledge should form the basis of legal judgment; here, the judge is making a political choice to privilege the value of equality and the perspective of children. By this invocation of common sense, the judge orients the exercise of justification towards those political values; what must be justified is not so much the empirical claim about the timing of disclosure, but the valuation of children's testimony in the context of their vulnerability and inequality. A different choice about the use of "common sense" might, for

720 Mayeda argues that legal judgment can be made more transparent through engagement with "principled reasoning," which does engage with politics. For example, in relation to *Sauvé,* he argues that McLachlin C.J.'s refusal to engage directly with the political questions at hand reduced the transparency of that judgment: Mayeda, "Principle and Pragmatism," *supra* note 552 at 54.

example, privilege the value of the adversarial trial process by allowing debate on absolutely any matter.

As this example shows, these choices are complex and it is by no means obvious how to draw the link between a political or legal value and a particular judgment. However, what is clear is that reliance on common sense (or refusal to rely on it) does involve the exercise of political will.[721] A question that immediately arises: on what basis can a judge exercise political will and still respect the goals and limitations of his or her institutional role? It is clear that a legal judge cannot base his or her judgment in a personal ideological preference, for example. Various strands of legal theory have sought to answer this question in different ways. All of these traditions have something useful to say about the complex process of legal judgment (and indeed, the act of judgment in any context). However, I argue that the component of judgment that is subjective, calling on the political and other commitments of a legal judge, is unavoidable because it lies at the heart of the practice of judgment, not at its periphery. But, as Arendt demonstrates, the necessary subjective component of judgment is not a reason to despair about the validity or legitimacy of judgment.

Here, the value of having a "perspicuous representation" of common sense becomes evident. If "common sense" is understood too narrowly, perhaps only as a form of community knowledge, it is less clear how common sense can meet the challenges of impartial judgment. However, if it

721 Mayeda argues that the invocation of "common sense" can actually be a sign that a judge has specifically declined to engage in this kind of political reasoning. *Ibid* at 46. Overall, Mayeda's description of "principled reasoning" fits well with the conclusions in this dissertation; the contrast lies with the fact that I focus on the ways in which "common sense" can be part of that project rather than lying outside it.

is understood that "common sense" can also refer to philosophical outlook and the collective component of the judging process, "common sense" becomes a very useful idea for thinking about impartiality. "Common sense" can provide a way to understand how human particularity and subjectivity can work to make judgment better and more legitimate instead of less so. If, as Arendt suggests, invoking common sense in judgment requires attention to the knowledge of a relevant collective of judging others, this breaks down partiality in judgment and actively builds impartiality and reflective validity.

Thus, when judges in a court of law invoke "common sense" with attention to intellectual humility and reflective political choice, the quality of their judgment can be enhanced, and the potential for addressing social injustices is strengthened. This dissertation focuses on increasing the number, form and character of the questions that can be asked about common sense and legal judgment. But this should not leave readers with the idea that the concept of common sense is so complex or dynamic that it can provide no guidance. Indeed, I suggest that very central and established legal principles provide considerable resources for guiding the exercise of political will that attends this kind of complex judging practice.

In particular, the constitutional value of equality, codified in section 15 of the *Canadian Charter of Rights and Freedoms,*[722] provides a reason for judges to exercise their political will in favour of marginalized communities, in favour of knowledge arising from marginalized experiences, in favour of legal outcomes that reduce rather than replicate or enhance social inequality. As

722 *Charter*, *supra* note 35.

explored in chapter 5, the concepts of judicial impartiality and reasonable apprehension of bias also provide doctrinal support for exercising judgment in a manner that pushes towards equality. These laws and doctrines are resources for grounding legitimate legal judgment from within the legal system.

However, focusing on "common sense" shows that an act of political will, of political choice (and the attendant justification of that choice) is inescapable. Concepts like equality and impartiality are valuable and show how we can find criteria for good judgment that are securely moored in the legal system. But ultimately the way these concepts are understood and deployed will always require acts of judgment and justification. Exercise and invocation of "common sense," fully understood, requires attention to the fact that judgment does require these acts of political will that must be justified and for which the judge is held accountable.[723] "Common sense" does not permit us to point to a system of rules or to escape the fact that judgment can never be completely certain; instead, it holds us accountable for what, in the end, must always be a politically grounded choice. This idea has appeared in numerous places in this dissertation. It appears in relation to Wittgenstein's "perspicuous representation" as a methodology that works towards making something useful (rather than true or certain). It appears in relation to Gonthier J.'s finding that the justification exercise under s. 1 will at least sometimes be impossible as an exercise of "measurement" and will instead truly be about "justification." And it appears in relation to Arendt's idea of "self-disclosure" as part of the practice of judgment.

723 Legal scholar Jean-Francois Gaudrealt-DesBiens argues that judges must sometimes decide between alternative understandings of history. He writes that "Choices, often hard ones, underlie the constitution of historical memory." Jean-Francois Gaudreault-DesBiens, "The Quebec Secession Reference and the Judicial Arbitration of Conflicting Narratives about Law, Democracy, and Identity" (1998) 23 Vt L Rev 793 at 798.

My insistence on the importance of acts of will as part of the practice of judgment is informed by the feminist thinkers whose writings motivate this study and assist in interpreting my research materials.[724] It is persuasively summarized by Naomi Scheman in the following passage:

> Justification is not less so for being fallible: it is, in fact, demonstrated openness to demonstrate fallibility that marks true justification. The demand for something that would put an end to the process, some bedrock that would ground it, is a demand for the dismantling of what actually makes justification work. Arguing that the demand is for the impossible, while conceding that without it justification is ungrounded, lets one off the hook when it comes to being responsible for what makes justification come to an end (or seem to) when it does, and for creating the conditions under which it could come to a better one.[725]

In this passage, Scheman is interpreting and expanding on Wittgenstein's methodological ideas, in which the justification of a theoretical approach ultimately ends with a political choice, not an empirical truth. I have adopted this methodolgocial approach in this dissertation. However, I am also arguing here that the unavoidability of political claims and justification is part of what has been revealed in the substantive part of my dissertation, about "common sense" and legal judgment. And different choices can be made: judges *can* come to other conclusions, legal judgments *can* be made differently.

A compelling demonstration of this can be found in the emergence of alternative judgment writing projects around the world, including the Women's Court of Canada, the UK Feminist Judgments Project, the Australian Feminist Judgments Project, the Irish Feminist Judgments

724 Recall that Zerilli says that the difficulty with some political-theoretical problems (such as surround the category "woman") is not one about knowledge or information; "Rather, the difficulty is a problem of the will." Zerilli, "Doing without Knowing," *supra* note 152 at 143.

725 Scheman, "Introduction," *supra* note 172 at 20.

Project and the Mainstreaming Diversity Project for the European Court of Human Rights.[726] These projects undertake to re-write the legal histories of their jurisdictions in a way that centres rather than marginalizes the rights of women and other groups, and demonstrate the contingency of legal judgments that oppress or discriminate.[727] As exercises in exploring practices of good judgment, these projects touch a number of themes that emerged in relation to "common sense." First, it is notable that among the re-written, feminist judgments, a large number do not alter the outcome in the case.[728] The concern is with *practices* of judgment, with the reasoning processes engaged in to come to a conclusion. This is reflected in an essay introducing the Women's Court of Canada by legal scholar Diana Majury, who writes:

> We wanted to go beyond critique to offer a fully articulated alternative. We wanted to see if, within the limits of a judicial decision, we could say what we wanted to say, what we believe should be said, what must be said. In this process, we are no longer offering a perspective or an argument or even an analysis; we are giving a judgment.[729]

Second, all of the projects highlight the goal of disrupting existing jurisprudence by demonstrating that, even within the constraints of existing precedents and judicial conventions,

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726 Eva Brems, Diversity and European Human Rights: Rewriting Judgments of the ECHR (Cambridge: Cambridge University Press, 2012); Rosemary C Hunter, Clare McGlynn & Erika Rackley, Feminist Judgments: From Theory to Practice (Hart Publishing Limited, 2010); Australian Feminist Judgments Project, online: <http://www.law.uq.edu.au/australian-feminist-judgments-project>.; Irish Feminist Judgments Project, online: http://humanrights.ie/announcements/introducing-the-irish-feminist-judgments-project/>; "Women's Court of Canada" (2006) 18:1 CJWL 27.

727 For example, the Women's Court of Canada describes itself in the following terms: "The Women's Court of Canada is an innovative project bringing together academics, activists, and litigators in order literally to rewrite the Canadian Charter of Rights and Freedoms equality jurisprudence. Taking inspiration from Oscar Wilde, who once said 'the only duty we owe to history is to rewrite it', the Women's Court operates as a virtual court, and 'reconsiders' leading equality decisions. The Women's Court renders alternative decisions as a means of articulating fresh conceptions of substantive equality." Women's Court of Canada, online: <http://womenscourt.ca/home/>.

728 "Judicial Edgework: Judgment Re-Writing Projects from Around the World" Roundtable discussion at *Law on the Edge* (Annual meeting of the Canadian Law and Society Association and the Law and Society Association of Australia and New Zealand, University of British Columbia, 2 July 2013) (author's notes) ["Judicial Edgework"].

729 Diana Majury, "Introducing the Women's Court of Canada" 18:1 CJWL 1 at 10.

judgment can be practiced differently. There is nothing necessary or obvious about the practices of judgment that currently dominate in our courts. In a way, the alternative judgment projects seek to free us from captivity to a certain picture of legal judgment by demonstrating the contingency of that picture. This also liberates us to consider how "common sense" might be used as part of an alternative, progressive judging practice that attends to questions of inequality and the injustices of marginalization.

Finally, the alternative judgment projects also engage with the question of subjective identity in judgment. The Irish Feminist Judgments Project in particular is very explicit about this goal: it seeks to "[inaugurate] a fresh dialogue on gender, judicial power, and national identity within Ireland."[730] The Irish Feminist Judgments Project engages the issue of identity not only through thinking about the identities of legal judges, but also how practices of judgment work to create the identities of people bound by the law.[731] Judging can be practiced differently.

Attention to rhetorical effects and the creation of communities

All of the aspects of "common sense" explored here reveal the enormous rhetorical significance of this phrase, capturing the powerful ways in which "common sense" is used in communication and persuasion. "Common sense" is used to draw lines around rational debate, around the norms and values of the reasonable person and around the communities that count in any given

730 "Judges' Troubles: Northern/Irish Courts and the Gendered Politics of Identity," Irish Feminist Judgments Project, online:<http://www.dur.ac.uk/glad/activities/feminist_judgments/irishfjp/>.
731 "Judicial Edgework," *supra* note 728.

context. It not only reflects these boundaries, but also works to enforce and even create them. Invoking "common sense" can persuade and alienate, include and exclude. In order for "common sense" to be used in the service of good legal judgment, this rhetorical power must also be used thoughtfully and judges should be attuned to its effects and accountable for its consequences.

Among the rhetorical objectives of a written legal judgment is the persuasion of the community at large that justice has been done. When judges address this objective, they reveal the boundaries of the community that "counts" in this respect. The people who are referenced, appealed to or persuaded by the judgment are members of the community to which the judgment is addressed. They are the people whose sense of justice the judgment tries to meet. When "common sense" appears in a judgment, different communities are drawn, reinforced or erased, depending on the context and the way "common sense" is invoked. For example, in *Vetrovec* "common sense" seemed to reference a community of undifferentiated non-experts or "ordinary" Canadians, all capable of making judgments about credibility. In *R.D.S.* "common sense" is used to describe what is known by the members of a particular community who share, among other things, the values enshrined in the *Charter*. These are the communities of people to whom the judges directed their words, whose perspectives matter, and who are among those ultimately bound by the judgment issued by the court.

In Reid's approach to common sense, the rhetorical power of the concept comes from its normative universality, and the way "common sense" marks what should be known by every

reasonable person. According to Reid, claims contrary to what every reasonable person knows from her or his everyday life are properly subject to heavy scrutiny and even ridicule. There is an egalitarian impulse at the heart of this approach that can provide some guidance for judges exercising their rhetorical options. Most strongly, Reid's approach reminds judges that ordinary people matter, and that the tools of communication and persuasion that judges choose to engage will affect how the law is positioned in relation to those people.

When it comes to identifying the right community to which a legal judge must address her or himself, Gramsci provides much more specific answers: justice requires that subaltern peoples be empowered to overturn the political structures that oppress them, and so those subaltern peoples are the ones whose views and interests must be considered in order for common sense to be transformed into "good sense." Although this specific vision of socialist emancipation may be far removed from the task and situation of legal judges in a liberal democracy, it does provide some guidance about how legal judges should think about the communities bound by that law and the rhetoric used to address them. Claims about "common sense" are important rhetorically and politically, and can either support or subvert the political freedom of any group; the choice must be made with reflection and knowledge of the relevant history.

The "aspect" of common sense that emerges from Arendt's writings speaks even more directly to the rhetorical consequences of invoking "common sense." Arendt argues explicitly that engaging with common sense works not only to reflect and affect certain communities, but also works to constitute those communities. It matters a great deal who our imagined communities

are. All three theorists suggest that judgment is improved by diverse social discourse. Reid argues that a wider circle of exchange decreases the risk of prejudicial reasoning through reliance on inappropriate analogies. Gramsci argues that the common sense of intellectual elites and the common sense of the masses must be brought into meaningful conversation with each other. And Arendt shows how there is a substantive link between our communities of judgment and the reflective validity of our judgments.

In the context of practices of legal judgment, there are a number of ways that this diverse social discourse, or validity-enhancing reflection, might be made stronger. The first is the diversity of the imagined communities. This includes, crucially, the diversity of the judiciary itself. It also includes the diversity of the legal profession as a whole, since this is a very important community of reference for legal judgment.[732] But more than this, Arendt's approach to common sense and judgment shows that it is important to think beyond this community to the other communities that are created and maintained through the practice of legal judgment. Importantly, both Gramsci and Arendt suggest that our common sense, and thus our judgment, cannot be made better *just* by widening the scope of our social discourse, per se. Diversity can play its role in strengthening judgment only under certain conditions that allow marginalized voices to be heard and critical reflection to take place. We need a framework of respect, equality, and accountability in order for this to happen in political judgement or in legal judgment.[733]

732 Nedelsky points out that the diversity of the bench begins with the diversity of law schools, and it is beginning with law school that legal practitioners begin to "practice" the act of judging by justifying their conclusions to legal colleagues. See Nedelsky, "Embodied Diversity," *supra* note 668 at 243.

733 Nedelsky, "Reciprocal Relation," *supra* note 595 at 54.

When legal judgments address social marginalization, claims about common sense can work to actively exclude and silence, reducing the space for a community in the public sphere. Alternatively, public proclamation of "common sense" that has reflectively engaged with the judgments of a marginalized group does more than affect the outcome of the judgment, it supports the life of the community. We move closer to justice both because the judgement becomes more valid, and because community life becomes more inclusive.

Challenging our captivity to a picture of "common sense" as shared knowledge

Wittgenstein's methodology of "perspicuous representation" is intended to serve as a kind of "therapy," allowing some release from conceptual puzzlement and our "captivity" to a certain "picture." In chapter two, I described four elements of my methodology as adapted from Wittgenstein: the search for clarity as generated through juxtaposition; approaching text to "look and see;" the need to seek new examples; and the requirement for reflexivity and political accountability. In this dissertation I have applied this methodology towards the specific goal of generating new ways of understanding and using "common sense" that can make legal judgment more responsive to the needs of justice in our complex and unequal society. In this section, I reflect on the strengths and weaknesses of this methodology as explored in this dissertation, and consider to what extent my "perspicuous representation" succeeds in its objectives.

The methodological goal of clarity through juxtaposition aims to generate experiences that allow

one to come to see more than one “aspect” of something, where before a single “aspect” dominated. As discussed in chapter 2, Wittgenstein's substantive concerns are about our captivity to a certain picture of language as a system of signs, and our captivity to this picture is much more complete than our captivity to a picture of common sense as a form of knowledge. Therefore, the exercise of discovering new “aspects” for juxtaposition is less dramatic for common sense than for language. However, on reflection it is clear that drawing out the three “aspects” revealed by reading Reid, Gramsci and Arendt has opened up for discussion issues that were missing or invisible before. Certainly, as a researcher, I myself have experienced “changes in aspect” with respect to the concept of “common sense,” and will no longer see these words in any straightforward manner again.

The methodological exhortation to “look and see” is the source of both strengths and weaknesses in my perspicuous representation. The ongoing project of suspending definitions and generalization in favour of rigorously attending to the text and its context allows this dissertation to make a truly unique contribution to the study of common sense and legal judgment. Focusing on legal judgments where the words “common sense” actually appear orients the “perspicuous representation” to issues of rhetoric and inclusion, some of the issues that escape attention when we are held captive to a picture of common sense as a form of knowledge. Further, diligent attention to the instruction “look and see” helps achieve the goals of “perspicuous representation” by limiting the scope for assuming understanding of text, rather than waiting to see if it can speak for itself. It is noteworthy that not only Wittgenstein but also Reid and Gramsci also take this general methodological approach when grappling with

"common sense."[734]

On the other hand, the constant attempt to bracket abstract definitions from the outset places obstacles in the way of clear communication on the page. (How can I use a word before it has been explored? etc.). While the challenge of operating with suspended definitions and judgments has demonstrated its value, it has also proved to be a source of frustration and, at times, confusion. In her writing on Wittgenstein and justice, Hanna Pitkin notes this difficulty among a range of writers grappling with Wittgenstein's approach:

> It is essential to notice how most of the writers cited in this chapter [about the relationship between language and the world in Wittgenstein] experience a certain difficulty in articulating their views, in finding vocabulary that allows them to say what they think without paradox.[735]

The methodological guideline about seeking new examples has, I believed, served my objectives well but also draws attention to some the limitations of this dissertation. The three theorists – Reid, Gramsci and Arendt – do indeed reveal significantly different "aspects" of common sense, all of which precipitate useful insights about legal judgment. Even the work of Reid, which most closely resembles the dominant picture, turns out to be much more complex than one might think without careful consideration of the text. The decision to seek out examples for the purpose of creating contrast has had productive results. At the same time, this element of my

734 Marcil-Lacoste, *supra* note 229 at 73–79; Ives, *supra* note 443 at 66.

735 Pitkin, "Wittgenstein and Justice," *supra* note 150 at 111. Acknowledging this difficulty himself, Wittgenstein writes: "Now you try and say what is involved in seeing something as something. It is not easy. These thoughts I am now working on are as hard as granite." Quoted in Havercroft, *supra* note 166 at 149. I think it is no coincidence that Wittgenstein relies on visual metaphors and illustrations to explain some of his thoughts, and it would be interesting to explore the ways in which representations of concepts can be made more "perspicuous" by moving from textual representation to visual representation through art or movement, for example.

methodology directs attention to the limits of my approach, which sits in an interdisciplinary space somewhere between law and political theory. Examples drawn to create contrast, as mine are, do not fulfill the needs of a doctrinal legal study, which would draw examples with an eye to comprehensiveness and the internal rules of jurisprudence; such a study would also reveal important things about common sense in law and legal judgment that are absent here.

The final element of my methodology is the requirement for critical self-reflection and political accountability for judgment. The intersecting issues of poverty and marginalization, legal judgment and "common sense" could not be investigated without this requirement; the value of concepts such as reflexivity and marginality cannot be overstated. My own political commitments and my own, situated common sense are properly subject to scrutiny in relation to the arguments offered here. This is necessarily a work in progress. In chapter 2, I offered a brief justification for the ideas I use to determine what will count as "good" legal judgment, but this justification itself could merit much greater analysis, and would take this study away from jurisprudence and towards legal and political theory. Alternatively, an empirical study of "common sense" in different communities would situate the researcher in yet another way, and would take the study of common sense and legal judgment away from social theory and philosophy, and towards social science. A more empirically-oriented study would also fulfill different elements of Wittgenstein's insistence that meaning always finds its home in particular social practices.

Overall, I remain convinced of the value of "perspicuous representation" as a model for feminist

research. This method for choosing examples is also consonant with the feminist and anti-poverty political commitments that ground my research, because it highlights the fact that juxtaposition works to make things clear *for a specific purpose*. Within this framework, it becomes possible (and even necessary) to be open to the nuance and complexity that characterizes social life, and it recognizes the elements of contingency and political will in the creation of meaning. We can change our practices of meaning-creation, judgment, and communication to make the world a better, more just, place.

Poverty and Gosselin

Throughout this dissertation, the case of *Gosselin* has served as a touchstone for exploring the intersection of "common sense," legal judgment, and the injustices of poverty in Canada. It is a case in which the invocation of "common sense" by the majority of the judges of the Supreme Court of Canada compromises the quality of legal judgment as practised in that case. This is because, in a context of overlapping inequality based on poverty, gender and age, "common sense" is invoked to reify the perspectives of the privileged, to reinforce the marginalization of young women in poverty, to legitimize stereotypes and to reject the claimant's arguments as lying outside the realm of reasonable debate. Taking a broad view, these are all legitimate uses of the term "common sense," and they draw on a number of the "aspects" studied in this dissertation. But in the context of law, where judgment is measured by its capacity to effect justice, these uses of "common sense" undermine the legitimacy, validity and quality of legal judgment. Of course, this claim is grounded in political commitments that privilege certain

values (such as equality and inclusion) over others (such as deference to legislative decisions or some forms of individual liberty). It has been an overarching claim in this dissertation that such judgments (and the obligation to be held accountable for them) are always at work when "common sense" is invoked.

I have argued throughout this dissertation that the invocation of "common sense" in *Gosselin* compromises the quality of that judgment in many different ways. In their imaginative re-writing of the *Gosselin* case, the Women's Court of Canada also identify problems with "common sense" in that case. The judgment (co-authored by Gwen Brodsky, Rachel Cox, Shelagh Day and Kate Stephenson) contrasts the majority's assessment of the claimants' experience on the basis of "common sense" with the "objective reality" of her circumstances:

> Also unconvincing is the view of the Supreme Court of Canada that the government's intention of integrating young people into the workforce militates against a finding of discrimination. McLachlin C.J. explained her conclusion by claiming that the intention of the legislator was a positive one. She wrote: "As a matter of common sense, if a law is designed to promote the claimant's long-term autonomy and self-sufficiency, a reasonable person in the claimant's position would be less likely to view it as an assault on her inherent human dignity" (Gosselin SCC, at para 27). Given the objective reality of the impoverished circumstances of people trying to survive on the reduced rate, this is deeply troubling. [736]

Brodsky, Cox, Day and Stephenson also note the way "common sense" facilitates the operation of stereotyping in that case:

> The Supreme Court of Canada majority treated the government's claimed positive intention for the scheme as though it were determinative. Yet it is well established in human rights and Charter equality rights law that good intentions do not justify discriminatory effects. As early as 1985, in the

736 *Gosselin* in "Women's Court of Canada" (2006) 18:1 CJWL 27 at para. 74.

> landmark case of Ontario (Human Rights Commission) v. Simpson-Sears Ltd. (O'Malley), [1985] 2 S.C.R. 536, the Supreme Court of Canada held that a well-intended policy could have discriminatory effects and that proof of adverse effects is sufficient to ground a claim of discrimination. In this case, however, the majority of the Supreme Court of Canada treated the government's positive intention as though it were the equivalent of positive outcomes and used it to negate the very harm that was the grounding of Louise Gosselin's section 15 claim. The majority decision provides a demonstration of how insidious stereotypes can be—a stereotype can be so accepted in society that it is invisible even to conscientious judges.[737]

Thus, the Women's Court of Canada writers identify some of the ways in which "common sense" can undermine practices of good judgment. By their act of re-imagining the judgment, they also work to relativize the judgment itself, opening our minds to other possibilities. But their invocation of "common sense" leaves that concept itself relatively untouched. Like other critics of the *Gosselin* case, their (trenchant and appropriate) critique of the invocation of "common sense" leads them to set it aside. They do not use the phrase "common sense" in their own judgment.

While endorsing their critique, I have a different aim than the writers of the Women's Court of Canada. The focus of my challenge is our captivity to a picture of "common sense." Working through my "perspicuous representation" has led to the view that "common sense," *properly invoked*, can be a tool for *good* legal judgment. When common sense is invoked in accordance with the three criteria described above – in the spirit of intellectual humility, through open political justification and with attention to the boundaries of communities – its potential as a resource for good legal judgment is made manifest.

737 *Ibid* para. 75.

What would have been the consequences if the Women's Court of Canada *had* invoked "common sense" in this way? How could they have achieved this? What difference would it have made? In this dissertation, I have argued that what is required to make "common sense" a progressive concept for strengthening legal judgment is a dynamic, even confounding approach that maintains a constant openness and attends to complex social phenomena of politics and rhetoric. As Nedelsky argues in relation to the development of an enlarged mentality, this is an endeavour that is indeed an *exercise* or a *practice;* it takes concerted effort and is never easy.[738] Without diminishing the demanding nature of this undertaking, I also want to suggest that it is not impossibly difficult to engage with common sense in this way, to respond to the criteria of intellectual humility, political accountability and attention to communities. As an invitation to think through these issues, I offer a series of passages invoking "common sense" that could have been part of a feminist, anti-poverty judgment in the *Gosselin* case. These passages engage with different "aspects" of common sense: common sense as shared knowledge, common sense as a conception of the world, common sense as a part of judgment. Some of these invocations of "common sense" would be mutually contradictory in a single judgment, whereas others might be used together.

1. *"There is no social scientific evidence needed to support the claim that individuals attempting to survive on less than $200 per month will experience the harms of destitution. It is a matter of common sense"*
2. *"The government's claim that a proffered well-meaning objective will mitigate the harms*

738 Nedelsky, "Communities of Judgment," *supra* note 19 at 265.

of poverty and discrimination belies common sense, and is approached with caution."

3. *"Ms. Gosselin's evidence, placed in the context of the common sense of her community, provides valuable insights into the effects of the impugned legislation."*
4. *"The government's argument advancing the value of 'incentives' in moving young adults from welfare to paid employment seems to be supported by certain forms of 'common sense.' However, this perspective excludes important justice considerations and is therefore partial and inadequate as the 'common sense' of this court."*
5. *"The law must be interpreted in accordance with the common sense held not by a few, but by all communities bound by the law."*

Each of these passages engages a different "aspect" of common sense, and takes up different concerns for legal judgment, including the quality of evidence, the identities of the communities bound by the law, and the assignment of burdens of proof. All of them are problematic in their own ways, but they suggest the range of possibilities that exists when "common sense" is understood in a complex and nuanced way.

Common sense for good legal judgment, and the transformation of Lord Law

To say that "common sense" is conservative, or majoritarian, or works to close down debate is to point to real issues that will always be significant for questions of justice. However, to relinquish the idea of "common sense" leaves practices of judgment without a powerful and

positive tool for grappling with community, with subjectivity, and the significance of daily life.

"Common sense" draws boundaries, to be sure, and a judge must always be ready to defend those boundaries as appropriate for the context, but this exercise can be productive as well as dangerous. "Common sense" can be ideal for covering over our most centrally held assumptions, but once a judge is compelled to reflect on this power, it can direct attention to the political consequences of those assumptions and their appropriateness (or not) for the legal judgment at hand. And "common sense" brings with it revaluation of everyday, non-expert knowledge, which might reify a dominant perspective or simply rein in the scope of a judgment to those things we are competent to truly, genuinely judge in a responsible way.

Without "common sense," we lose the ability to take on the exasperated voice of the ordinary person encountering obfuscating bureaucracy or oppressive discourses of expertise; we lose the ability to insist that meaningful communicability and shared experience should be essential bases for judgment; and we lose a powerful way of making the democratic claim that everyone's knowledge can be valuable and is worthy of critical reflection when it is called upon.

To judge, as happened in *Gosselin*, that a young woman living in poverty in a Canadian city experiences no infringement of her legal rights because "common sense" insists her dignity is intact, or because her government made a "common sense" decision to reduce welfare rolls with harsh incentives, is not only a mistaken interpretation of Canadian law. It is not only a

misrepresentation of the facts involved in that case. It is not only a politically charged rejection of social and economic rights. It is also, importantly, an affront to common sense. It represents a failure to respect and represent the valid knowledge of the community that lives under the law, a failure to take responsibility for the political choices underlying the judgment, and a failure to appreciate the rhetorical consequences of endorsing an unreflective and oppressive view of people in poverty. Instead, it is necessary to develop practices of judgment that are attuned to the rhetorical effects of common sense, that foster accountability, are based in knowledge of relevant communities, constitute communities in accordance with who is governed by the law, and that demonstrate acts of critical imagination. This is the "common sense" that can challenge the injustices of poverty.

In *Pasquin*, Lord Law refuses to remain in the court of Queen Common Sense; he does not want merely to *serve* Common Sense. Although in the play it leads him to treason, I suggest that Law is fundamentally right in that resistance. But I also suggest that this need not be the end of the story for Queen Common Sense and Lord Law. What might happen if Lord Law were to leave the Royal Court and take up a position on the bench of a common law court? As a legal judge, Lord Law might become convinced to see Common Sense not just as a constraint on the power of law to serve its own interests, but as a complex source of wisdom. Following her untimely demise, the ghost of Queen Common Sense promises to haunt the world forever. This dissertation suggests that there are specific ways that Queen Common Sense should haunt Law. Common Sense should pull Law away from the Royal Court and into the community, where Law can start to see the diversity of the world and the possibilities for justice.

Bibliography

Legislation

Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11.

Cases

Alden v Gaglardi et al, [1973] SCR 199, 1972 CanLII 140 (SCC).

Baker v Canada, [1999] 2 SCR 817, 174 DLR (4th) 193.

Chaoulli v Quebec (Attorney General), 2005 SCC 35, [2005] 1 SCR 791.

Committee for Justice and Liberty et al v National Energy Board et al, [1978] 1 SCR 369, 1976 CanLII 2 (SCC).

Eldridge v British Columbia (Attorney General), [1997] 3 SCR 624, 151 DLR (4th) 577.

Falkiner v Ontario (Director of Income Maintenance, Ministry of Community & Social Services) (2002), 212 DLR (4th) 633, 59 OR (3d) 481 (ON CA).

Federated Anti-Poverty Groups of BC v Vancouver (City), 2002 BCSC 105, 40 Admin LR (3d) 159.

Finlay v Canada (Minister of Finance), [1993] 1 SCR 1080, 101 DLR (4th) 567.

Gosselin v Quebec (Procureur general), 2002 SCC 84, [2002] 4 SCR 429.

Harper v Canada (Attorney General), 2004 SCC 33, [2004] 1 SCR 827.

Lovelace v Ontario, 2000 SCC 37, [2000] 1 SCR 950.

MacDonald v MacDonald, [1976] 2 SCR 259, 1975 CanLII 28 (SCC).

New Brunswick (Minister of Health and Community Services) v G (J), [1999] 3 SCR 46, 177 DLR (4th) 124.

Québec (Attorney General) v Canada, 2011 SCC 11, [2011] 1 SCR 368.

R v Banks (2007), 275 DLR (4th) 640, 84 OR (3d) 1 (ON CA).

R v Bryan, 2007 SCC 12, [2007] 1 SCR 527.

R v Butler, [1992] 1 SCR 452, 89 DLR (4th) 449.

R v DD, 2000 SCC 43, [2000] 2 SCR 275, 2000.

R v Hamilton (2003), 8 CR (6th) 215, 172 CCC (3d) 114 (ON Sup Ct J).

R v Khela, 2009 SCC 4, [2009] 1 SCR 104.

R v Lifchus, [1997] 3 SCR 320, 150 DLR (4th) 733.

R v Marquard, [1993] 4 SCR 223, 108 DLR (4th) 47.

R v Mohan, [1994] 2 SCR 9, 114 DLR (4th) 419.

R v Parks (1993), 24 CR (4th) 81, 65 OAC 122 (ON CA)

R v S(RD), [1997] 3 SCR 484, 151 DLR (4th) 193.

R v Walle, 2012 SCC 41, [2012] 2 SCR 438.

RJR-MacDonald Inc v Canada (Attorney General), [1995] 3 SCR 199, 127 DLR (4th) 1.

Sauvé v Canada (Chief Electoral Officer), 2002 SCC 68, [2002] 3 SCR 519.

Snell v Farrell, [1990] 2 SCR 311, 72 DLR (4th) 289.

Tranchemontagne v Ontario (Director, Disability Support Program), 2006 SCC 14, [2006] 1 SCR 513.

Vetrovec v The Queen, [1982] 1 SCR 811, 136 DLR (3d) 89.

Books

Arendt, Hannah. *The Human Condition* (Chicago: University of Chicago Press, 1958).

Arendt, Hannah. *Lectures on Kant's Political Philosophy* (Chicago: University of Chicago Press, 1982).

Arendt, Hannah. *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin, 2006).

Austin, J L. *How to Do Things with Words* (Oxford: Clarendon Press, 1962).

Bakan, Joel. *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997).

Benhabib, Seyla. *Democracy and Difference* (Princeton: Princeton University Press, 1996).

Benhabib, Seyla. *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton: Princeton University Press, 2002).

Benhabib, Şeyla & Drucilla Cornell. *Feminism As Critique: On the Politics of Gender* (Mineapolis: University of Minnesota Press, 1987).

Boulter, Stephen. *The Rediscovery of Common Sense Philosophy* (New York: Palgrave Macmillan, 2007).

Brems, Eva. *Diversity and European Human Rights: Rewriting Judgments of the ECHR* (Cambridge: Cambridge University Press, 2012).

Broadie, Alexander. *The Scottish Enlightenment: An Anthology* (Edinburgh: Canongate Classics, 1997).

Cannon, Martin J & Lina Sunseri, eds. *Racism, Colonialism, and Indigeneity in Canada: A Reader* (Don Mills, ON: Oxford University Press, 2011).

Chakrabarty, Dipesh. *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton: Princeton University Press, 2000).

Coates, John. *The Claims of Common Sense: Moore, Wittgenstein, Keynes and the Social Sciences* (Cambridge: Cambridge University Press, 1996).

Cooper, Davina. *Challenging Diversity: Rethinking Equality and the Value of Difference* (Cambridge: Cambridge University Press, 2004).

Dua, Enakshi & Angela Robertson, eds. *Scratching the Surface: Canadian Anti-Racist Feminist Thought* (Toronto: Women's Press, 2000).

Faraday, Fay, Margaret Ann Denike & M Kate Stephenson. *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto, ON: Irwin Law, 2006).

Femia, Joseph V. *Gramsci's Political Thought: Hegemony, Consciousness, and the Revolutionary Process* (Clarendon Press, 1981).

Ferguson, Kennan. *The Politics of Judgment: Aesthetics, Identity, and Political Theory.* (Lexington Books, 2007).

Fielding, Henry. *Pasquin: A Dramatick Satire on the Times: Being the Rehearsal of Two Plays, viz. A Comdy call'd The Election; And a Tragedy call'd, The Life and Death of Common-Sense* (Cambridge: Chadwick-Healey, 1997).

Finkel, Norman J. *Commonsense Justice: Jurors' Notions of the Law* (Cambridge: Harvard University Press, 1995).

Forguson, Lynd. *Common Sense* (London: Routledge, 1989).

Foucault, Michel. *Power/Knowledge: Selected Interviews and Other Writings 1972 - 1977*, Gordon Conlin, ed. (New York: Pantheon Press, 1980).

Foucault, Michel. *The History of Sexuality, Volume I: An Introduction* (New York: Random House, 1990).

Fraser, Nancy. *Scales of Justice: Reimagining Political Space in a Globalizing World* (New York: Columbia University Press, 2009).

Fraser, Nancy & Axel Honneth. *Redistribution or Recognition?: A Political-Philosophical Exchange* (London: Verso, 2003).

Fuller, Lon. *The Morality of Law* (New Haven: Yale University Press, 1964).

Gadamer, Hans-Georg. *Truth and Method*, 2nd, rev. ed. (London; New York: Continuum, 2004).

Garsten, Bryan. *Saving Persuasion: a Defense of Rhetoric and Judgment* (Harvard University Press, 2006).

Garver, Newton. *Wittgenstein and Approaches to Clarity* (Amherst NY: Humanity Books, 2006).

Goldoni, Marco & Christopher McCorkindale, eds. *Hannah Arendt and the Law* (Hart Publishing, 2012).

Gramsci, Antonio. *Selections from the Prison Notebooks*, translated by Quentin Hoare & Geoffrey Nowell Smith (New York: International Publishers, 1971).

Harding, Sandra. *Discovering Reality: Feminist Perspectives on Epistemology, Metaphysics, Methodology, and Philosophy of Science*, 2nd ed. ed (Dordrecht [Netherlands];Boston MA: Kluwer Academic Publishers, 2003).

Hart, HLA. *The Concept of Law* (London: Oxford University Press, 1961).

Heyes, Cressida. *The Grammar of Politics: Wittgenstein and Political Philosophy* (Ithaca: Cornell University Press, 2003).

Heyes, Cressida J. *Self Transformations* (Oxford University Press US, 2007).

Honig, Bonnie, ed. *Feminist Interpretations of Hannah Arendt* (University Park, Pa: Pennsylvania State University Press, 1995).

Houston, J. *Thomas Reid: Context, Influence and Significance* (Edinburgh: Dunedin Academic, 2004).

Howard, Philip K. *The Death of Common Sense: How Law is Suffocating America* (Random House, 1994).

Hunter, Rosemary C, Clare McGlynn & Erika Rackley. *Feminist Judgments: From Theory to Practice* (Hart Publishing Limited, 2010).

Ives, Peter. *Language and Hegemony in Gramsci* (Pluto Press, 2004).

Lakoff, George & Mark Johnson. *Metaphors We Live By* (Chicago: University of Chicago Press, 1980).

Lazarus-Black, Mindie & Susan F Hirsch. *Contested States: Law, Hegemony, and Resistance* (Routledge, 1994).

Lemos, Noah. *Common Sense: A Contemporary Defense* (Cambridge: Cambridge University Press, 2004).

MacIvor, Heather. *Women and Politics in Canada* (University of Toronto Press, 1996).

Marcil-Lacoste, Louise. *Claude Buffier and Thomas Reid, Two Common Sense Philosophers* (Kingston: McGill-Queen's University Press, 1982).

Marx, Karl. *Critique of Hegel's "Philosophy Of Right"*, Joseph O'Malley, ed. (Cambridge University Press, 1982).

Marx, Karl & Friedrich Engels. *The German Ideology* (International Publishers Co, 1970).

Nedelsky, Jennifer. *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press, 2012).

Pitkin, Hanna. *The Attack of the Blob : Hannah Arendt's Concept of the Social* (Chicago [u.a.]: Univ. of Chicago Press, 1998).

Pitkin, Hanna Fenichel. *Wittgenstein and Justice: On the Significance of Ludwig Wittgenstein for Social and Political Thought* (Berkeley: University of California Press, 1972).

Reid, Thomas. *An Inquiry into the Human Mind on the Principles of Common Sense* (Edinburgh: Edinburgh University Press, 1997).

Reid, Thomas. *Essays on the Intellectual Powers of Man* (Edinburgh: Edinburgh University Press, 2002).

Rogers, Sanda & Sheila McIntyre, eds. *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham, Ont. ; Dayton, Ohio: LexisNexis, 2010).

Rosenfeld, Sophia A. *Common Sense: A Political History* (Cambridge, Mass: Harvard University Press, 2011).

Santos, Boaventura de Sousa. *Toward a New Legal Common Sense: Law, Globalization And Emancipation* (London: Butterworths, 2002).

Scheingold, Stuart. *The Politics of Rights: Lawyers, Public Policy and Political Change* (Ann Arbor: University of Michigan Press, 2004).

Smith, Dorothy E. *The Everyday World As Problematic: A Feminist Sociology* (Toronto, ON: University of Toronto Press, 1987).

Smith, Linda Tuhiwai. *Decolonizing Methodologies: Research and Indigenous Peoples* (London & New York: Zed Books, 2005).

Valverde, Mariana. *Law's Dream of a Common Knowledge* (Princeton: Princeton University Press, 2003).

Williams, Patricia. *The Alchemy of Race and Rights* (Cambridge: Harvard University Press, 1991).

Wittgenstein, Ludwig. *Philosophical Investigations* (Malden, MA: Blackwell Publishing, 1953).

Wittgenstein, Ludwig. *On Certainty* (Maldon, Massachusetts: Blackwell Publishing, 1975).

Wollstonecraft, Mary. *A Vindication of the Rights of Woman: With Strictures on Political and Moral Subjects* (Unwin, 1891).

Wolterstorff, Nicholas. *Thomas Reid and the Story of Epistemology* (Cambridge, U.K: Cambridge University Press, 2001).

Young, Iris Marion. *Intersecting Voices: Dilemmas of Gender, Political Philosophy, and Policy* (Princeton, N.J.: Princeton University Press, 1997).

Young, Margot et al, eds. *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: U.B.C. Press, 2007).

Articles and Book Chapters

Allen, Amy. "Feminist Perspectives on Power" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, Spring 2013 ed (2013).

Allen, Ronald A. “Common Sense, Rationality, and the Legal Process” (2000) 22 Cardozo L Rev 1417.

Arendt, Hannah. “The Crisis in Culture” in Jennifer Nedelsky & Ronald Beiner, eds, *Judgment, Imagination and Politics* (Lanham, Maryland: Rowan & Littlefield Publishers, 2001) 3.

Arendt, Hannah. “Reflections on Little Rock” in Ed Jerome Kohn, ed, *Responsibility and Judgment* (New York: Schocken Books, 2003) 193.

Aune, James Arnt. Book Review of *Saving Persuasion: A Defense of Rhetoric and Judgment* by Bryan Garsten (2008) 41:1 Philosophy and Rhetoric 94.

Baker, Gordon P. “Philosophical Investigations s. 122: Neglected Aspects” in Gordon P Baker & Katherine J Morris, eds, *Wittgenstein’s Method: Neglected Aspects* (Malden, MA: Blackwell Publishing, 2004).

Bala, Nicholas. “Double Victims: Child Sexual Abuse and the Canadian Criminal Justice System” (1990) 15 Queen’s LJ 3.

Beiner, Ronald. “Rereading Hannah Arendt’s Kant Lectures” in *Judgment, Imagination and Politics* (Lanham, Maryland: Rowan & Littlefield Publishers, 2001) 91.

Beiner, Ronald. “Hannah Arendt on Judging” in *Lectures on Kant’s Political Philosophy* 89.

Beiner, Ronald & Jennifer Nedelsky. “Introduction” in *Judgment, Imagination and Politics* (Lanham, Maryland: Rowan & Littlefield Publishers, 2001) vii.

Benhabib, Seyla. “Judgment and the Moral Foundations of Politics in Hannah Arendt’s Thought” in *Judgment, Imagination and Politics* (Lanham, Maryland: Rowan & Littlefield Publishers, 2001) 183.

Berger, Benjamin L. “Trial by Metaphor: Rhetoric, Innovation, and the Juridical Text” (2002) Court Review: The Journal of the American Judges Association.

Bilsky, Leora Y. “When Actor and Spectator Meet in the Courtroom: Reflections on Hannah Arendt’s Concept of Judgment” in *Judgment, Imagination and Politics* (Lanham, Maryland: Rowan & Littlefield Publishers, 2001) 257.

Biletzki, Anat & Anat Matar. “Ludwig Wittgenstein,” Edward N. Zalta, ed. *The Stanford Encyclopedia of Philosophy,* Summer 2011 ed.

Bohman, James. “The Moral Costs of Political Pluralism: the Dilemmas of Difference and Equality in Arendt’s ‘Reflections on Little Rock’” in *Hannah Arendt: Twenty Years Later* (MIT Press, 1997).

Boyd, Susan B. “Some Postmodernist Challenges to Feminist Analyses of Law, Family and State: Ideology and Discourse in Child Custody Law” (1991) 10 Can J Fam L 79.

Boyle, Christine et al. “R. v. R.D.S.: An Editor’s Forum” (1998) 10 CJWL 159.

Boyle, Christine & Marilyn MacCrimmon. “To Serve the Cause of Justice: Disciplining Fact Determination” (2001) 20 Windsor YB Access Just 55.

Brodsky, Gwen. “Gosselin v. Quebec: Autonomy with a Vengeance” (2003) 15 CJWL 194.

Carter, Peter. “Do courts decide according to the evidence?” (1988) 22 UBC L Rev 351.

Choudhry, Sujit. “So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter’s Section 1” (2006) 34 Supreme Court Law Review 501.

Cossman, Brenda. “Turning the Gaze Back on Itself: Comparative law, Feminist legal studies, and the Postcolonial Project” (1997) 2 Utah L Rev 525.

Cossman, Brenda & David Schneiderman. “Beyond Intersecting Rights: The Constitutional Judge as Complex Self” 57 UTLJ 431.

Crenshaw, Kimberle. “Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color” (1991) 43:6 Stan L Rev 1241.

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

Degryse, Annelies. “Sensus communis as a foundation for men as political beings: Arendt’s reading of Kant’s Critique of Judgment” (2011) 37:3 Philosophy Social Criticism 345.

Devlin, Richard F, A Wayne MacKay & Natasha Kim. “Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards a ‘Triple P’ Judiciary” (2000) 38:3 Alta L Rev 734.

Edlin, Douglas E. “Kant and the Common Law: Intersubjectivity in Aesthetic and Legal Judgment” (2010) 23 Can J L & Jurisprudence 429.

Entreves, Maurizio Passerin d’. “Hannah Arendt” in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, Fall 2008 ed (2008).

Feldthusen, Bruce. “The Gender Wars: ‘Where the Boys Are’” (1990) 4 CJWL 66.

Femia, Joseph. “Hegemony and Consciousness in the Thought of Antonio Gramsci” (1975) 23:1 Political Studies 29.

Flood, Colleen & Sujith Xavier. *Health Care Rights in Canada: The Chaoulli Legacy* (Rochester, NY: Social Science Research Network, 2008).

Foucault, Michel. “The subject and power” in Hubert Dreyfus, ed, *Michel Foucault, beyond structuralism and hermeneutics* (Chicago: University of Chicago Press, 1982).

Fraser, Nancy. “What’s Critical about Critical Theory?: The Case of Habermas and Gender” in *Feminism as Critique:* (Minneapolis: University of Minnesota Press, 1987) 31.

Fraser, Nancy. “Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy” in Craig Calhoun, ed, *Habermas and the Public Sphere* (Cambridge: MIT Press, 1992) 119.

Fraser, Nancy. “Mapping the Feminist Imagination: From Redistribution to Recognition to Representation.” (2005) 12:3 Constellations: An International Journal of Critical & Democratic Theory 295.

Fraser, Nancy & Linda Gordon. “‘Dependency’ Demystified: Inscriptions of Power in a Keyword of the Welfare State” (1994) 1 Social Politics 4.

Fuller, Lon. “Positivism and Fidelity to Law - A Reply to Professor Hart” (1957) 71:4 Harv L Rev 630.

Gaudreault-DesBiens, Jean-Francois. “The Quebec Secession Reference and the Judicial Arbitration of Conflicting Narratives about Law, Democracy, and Identity” (1998) 23 Vt L Rev 793.

Gavigan, Shelley. “Poverty Law, Theory, and Practice: The Place of Gender and Class in Access to Justice” in *Locating Law: Race/Class/Gender Connections* (Halifax: Fernwood Press, 1999) 208.

Geertz, Clifford. “Common Sense as a Cultural System” in *Local Knowledge* (Basic Books, 1983) 73.

Gibbon, Angus. “Social Rights, Money Matters and Institutional Capacity” (2003) 14 NJCL 353.

Gotanda, Neil. “The ‘Common Sense’ of Race” (2010) 83 S Cal L Rev 441.

Graycar, Regina. “The Gender of Judgments: Some Reflections on Bias” (1998) 32 UBC L Rev 1.

Hall, Stuart & Alan O'Shea, “Common-sense liberalism” in Stuart Hall, Doreen Massey & Michael Rustin, eds., *After Neoliberalism? The Kilburn Manifesto* (Lawrence & Wishart, 2013, online: <http://www.lwbooks.co.uk/journals/soundings/manifesto.html> accessed 17 October, 2013).

Harding, Sandra & Kathryn Norberg. “New Feminist Approaches to Social Science Methodologies: An Introduction” (2005) 30:4 Signs: Journal of Women in Culture and Society 2009.

Hartsock, Nancy C M. “The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism” in Sandra Harding, ed, *Feminism and Methodology: Social Science Issues* (Bloomington: Indiana University Press; Open University Press, 1987) 157.

Havercroft, Jonathan. “On Seeing Liberty As” in *The Grammar of Politics: Wittgenstein and Political Philosophy* (Ithaca: Cornell University Press, 2003).

Heyes, Cressida J. “‘Back to the Rough Ground!’: Wittgenstein, Essentialism, and Feminist Methods” in Naomi Scheman & Peg O’Connor, eds, *Feminist Interpretations of Ludwig Wittgenstein* (University Park, Pennsylvania: Penn State Press, 2002) 195.

Hill Collins, Patricia. “Learning from the Outsider Within: The Sociological Significance of Black Feminist Thought” in Mary Margaret Fonow & Judith A Cook, eds, *Beyond Methodology: Feminist Scholarship as Lived Research* (Bloomington: Indiana University Press, 1991) 35.

Hoagland, Sarah Lucia. “Making Mistakes, Rendering Nonsense, and Moving Toward Uncertainty” in Naomi Scheman & Peg O’Connor, eds, *Feminist Interpretations of Ludwig Wittgenstein* (University Park, Pennsylvania: Penn State Press, 2002) 119.

Holthoom, Fritz van. “Common Sense and Natural Law: From Thomas Aquinas to Thomas Reid” in *Common Sense: The Foundations for Social Science* (VI: University Press of America, 1987) 99.

Holthoom, Fritz van & David R Olson. “Common Sense: An Introduction” in *Common Sense: The Foundations for Social Science* (VI: University Press of America, 1987) 1.

hooks, bell. “Choosing the Margin as a Space of Radical Openness” in Ann Garry, ed, *Women, Knowledge, and Reality: Explorations in Feminist Philosophy*, 2nd ed. ed (New York: Routledge, 1996) 48.

Hughes, Patricia. “A New direction in judicial impartiality?” (1998) 9 NJCL 251.

Hunt, Alan. “The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law” (1985) 19 Law & Society Rev 11.

Hutchinson, Phil & Rupert Read. “Toward a Perspicuous Presentation of ‘Perspicuous Presentation’” (2008) 31:2 Philosophical Investigations 141.

Jackman, Martha. “The Protection of Welfare Rights Under the Charter” (1988) 20 Ottawa Law Review 257.

Jackman, Martha. “Reality Checks: Presuming Innocence and Proving Guilt in Charter Welfare Cases” in Margot Young et al, eds, *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2007) 23.

Kateb, George. “The Judgment of Arendt” in *Judgment, Imagination and Politics* (Lanham, Maryland: Rowan & Littlefield Publishers, 2001) 121.

John Kihlstrom, “Joseph Jastrow and His Duck -- Or Is It a Rabbit?”, online: <http://ist-socrates.berkeley.edu/~kihlstrm/JastrowDuck.htm> accessed 28 July, 2013.

Kim, Natasha & Tina Piper. “Gosselin v. Quebec: Back to the Poorhouse ...” (2003) 48 McGill LJ 749.

Kohn, Jerome. “Reflecting on Judgment: Common Sense and a Common World” in Richard J Bernstein, Seyla Benhabib & Nancy Fraser, eds, *Pragmatism, Critique, Judgment: Essays for Richard J Bernstein* (Cambridge, Mass: MIT Press, 2004).

Litowitz, Douglas. “Gramsci, Hegemony, and the Law” 2000:2 Crit L Studies 515.

MacCrimmon, Marilyn T. “Fact Determination: Common Sense Knowledge, Judicial Notice and Social Science” in *The Judicial Role in Criminal Proceedings* (Oxford: Hart Publishing, 2000).

MacCrimmon, Marilyn T. “What is ‘Common’ About Common Sense: Cautionary Tales for Travelers Crossing Interdisciplinary Boundaries” (2001) 22 Cardozo L Rev 1433.

Maher, F K H. “Common Sense and Law” (1971) 8 Melb U L Rev 587.

Majury, Diana. “Introducing the Women’s Court of Canada” 18:1 Canadian Journal of Women and the Law 1.

Makin, Kirk. “Of 100 new federally appointed judges 98 are white, Globe finds”, *Globe and Mail* (17 April 2012), online: <http://www.theglobeandmail.com/news/politics/of-100-new-federally-appointed-judges-98-are-white-globe-finds/article2405888/,%20http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm04-11-01-eng.asp>.

Maroney, Terry A. “Emotional Common Sense as Constitutional Law” (2009) 62 Vand L Rev 851.

Matsuda, Mari J. “When the First Quail Calls: Multiple Consciousness as Jurisprudential Method” (1989) 11 Women’s Rts L Rep 7.

Matsuda, Mari J. “Pragmatism Modified and the False Consciousness Problem” (1989) 63 S Cal L Rev 1763.

Mayeda, Graham. “Uncommonly Common: The Nature of Common Law Judgment” (2006) 19:1 Can JL & Jur.

Mayeda, Graham. “Between Principle and Pragmatism: The Decline of Principled Reasoning in the Jurisprudence of the McLachlin Court” (2010) 50 Sup Ct L Rev 41.

McIntyre, Sheila. “Studied Ignorance and Privileged Innocence: Keeping Equity Academic” (2000) 12 CJWL 147.

McIntyre, Sheila. “The Supreme Court and Section 15: A Thin and Impoverished Notion of Judicial Review” (2006) 31 Queen’s LJ 731.

Meyer, Linda. “Between Reason and Power: Experiencing Legal Truth” (1998) 67 U Cin L Rev 727.

Moore, GE. “A Defense of Common Sense” in *Philosophical Papers* (London: George Allen & Unwin Ltd., 1925) 32.

Mootz, Francis J. “Vico and Imagination: An Ingenious Approach to Educating Lawyers with Semiotic Sensibility” (2009) 22:1 Int J Semiot Law 11.

Morgan, Brian G. “Proof of Facts in Charter Litigation” in *Charter Litigation* (Toronto: Butterworths, 1987) 159.

Morrison, Barry R & Warren Comeau. “Judging Credibility of Witnesses” (2001) 25 Advocates’ Q 411.

Mosher, Janet. “Managing the Disentitlement of Women: Glorified Markets, the Idealized Family, and the Undeserving Other” in *Restructuring Caring Labour* (Toronto: Oxford University Press, 2000) 30.

Mosher, Janet. “The Shrinking of the Public and Private Spaces of the Poor” in *Disorderly People: Law and the Politics of Exclusion* (Halifax: Fernwood, 2002) 41.

Mossman, Mary Jane. “Choices and Commitments for Women: Challenging the Supreme Court of Canada in the Context of Social Assistance” (2004) 42 Osgoode Hall LJ 615.

Munro, Vanessa E. “Resemblances of Identity: Ludwig Wittgenstein and Contemporary Feminist Legal Theory” (2006) 12:2 Res Publica 137.

Nedelsky, Jennifer. “Embodied Diversity and Challenges to Law” (1996) 42 McGill LJ 91.

Nedelsky, Jennifer. “Dilemmas of Passion, Privilege and Isolation: Reflections on Mothering in a White, Middle Class Nuclear Family” in Julia E Hanigsberg & Sara Ruddick, eds, *Mother Troubles: Rethinking Contemporary Maternal Dilemmas* (Beacon Press, 1999).

Nedelsky, Jennifer. “Communities of Judgment and Human Rights” (2000) 1 Theor Inq L 245.

Nedelsky, Jennifer. “Judgment, Diversity, and Relational Autonomy” in *Judgment, Imagination and Politics: Themes from Kant and Arendt* (Lanham, Maryland: Rowman & Littlefield, 2001) 103.

Nedelsky, Jennifer. “The Reciprocal Relation of Judgment and Autonomy” in Jocelyn Downie & Jennifer Llewellyn, eds, *Being Relational: Reflections on Relational Theory and Health Law* 35.

Norris, John & Marlys Edwardh. “Myths, Hidden Facts and Common Sense: Expert Opinion Evidence and the Assessment of Credibility” (1995) 38 Crim LQ 73.

Nun, José. “Elements for a Theory of Democracy: Gramsci and Common Sense” (1986) 14:3 boundary 2 197.

Omatsu, Maryka. “The Fiction of Judicial Impartiality” (1997) 9 CJWL 1.

Owen, David. “Geneaology as Perspicuous Representation” in Cressida Heyes, ed, *The Grammar of Politics: Wittgenstein and Political Philosophy* (Ithaca: Cornell University Press, 2003) 82.

Parret, Herman. “Common Sense in Philosophy” in *Common Sense: The Foundations for Social Science* (VI: University Press of America, 1987) 17.

Petter, Andrew. “Wealthcare: The Politics of the Charter Re-visited” in *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005).

Pitkin, Hanna Fenichel. “Justice: On Relating Private and Public” (1981) 9:3 Political Theory 327.

Purvis, Trevor & Alan Hunt. “Discourse, Ideology, Discourse, Ideology, Discourse, Ideology...” (1993) 44:3 Brit J Soc 473.

Rasch, William. “Judgment: The Emergence of Legal Norms” (2004) 57:1 Cultural Critique 93.

Razack, Sherene. “R.D.S. v. Her Majesty the Queen: A Case about Home” in Enakshi Dua & Angela Robertson, eds, *Scratching the Surface: Canadian Anti-Racist Feminist Thought* (Toronto: Women's Press, 2000) 281.

Reaume, Denise. “Dignity, Equality and Second Generation Rights” in *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: U.B.C. Press, 2007) 281.

Riddell, William Renwick. “Common Law and Common Sense” (1918) 27:8 Yale LJ 993.

Roberts, Thomas. “Legal Positivism and Scottish Common Sense Philosophy” (2005) 18 Can JL & Jur 277.

Robinson, Andrew. “Towards an Intellectual Reformation: The Critique of Common Sense and the Forgotten Revolutionary Project of Gramscian Theory” (2005) 8:4 Critical Review of International Social and Political Philosophy 469.

Rupert, Mark. “Globalising Common Sense: A Marxian-Gramscian (Re-)vision of the Politics of Governance/Resistance” (2003) 29:Supplement S1 Rev Int’l Studies 181.

Salter, Michael. “Common Sense and the Resistance to Legal Theory” (1992) 5:2 Ratio Juris 212.

Scheman, Naomi. “Forms of Life: Mapping the rough ground” in Hans Sluga & David G Stern, eds, *The Cambridge Companion to Wittgenstein* (Cambridge: Cambridge University Press, 1996) 383.

Scheman, Naomi. “Introduction” in Naomi Scheman & Peg O’Connor, eds, *Feminist interpretations of Ludwig Wittgenstein* (University Park, Pennsylvania: Penn State Press, 2002) 1.

Schneiderman, David. “Social Rights and ‘Common Sense’: Gosselin Through a Media Lens” in Margot Young et al, eds, *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: U.B.C. Press, 2007) 57.

Schneiderman, David. “Common sense and the Charter” (2009) 45 Sup Ct L Rev 3.

Smith, Lynn. “What Can Judges Know?” (Lecture given at the Faculty of Law, University of British Columbia, 2010).

Summers, Anne. “The Sexual Politics of Power” online: <http://meanjin.com.au/articles/post/the-sexual-politics-of-power/> accessed 28 July 2013.

Taylor, Charles. “Comparison, History, Truth” in *Philosophical Arguments*, 1st Harvard University Press pbk. ed. ed (Cambridge Mass.: Harvard University Press, 1997) 146.

Taylor, Charles. “Overcoming Epistemology” in *Philosophical Arguments*, 1st Harvard University Press pbk. ed. ed (Cambridge Mass.: Harvard University Press, 1997) 1.

Taylor, Charles. “Gadamer and the Human Sciences” in Robert J Dostal, ed, *The Cambridge Companion to Gadamer* (Cambridge University Press, 2002) 126.

Thiele, Leslie Paul. “Judging Hannah Arendt: A Reply to Zerilli” (2005) 33:5 Political Theory 706.

Thompson, Richard H. “Common Sense and Fact-Finding: Cultural Reason in Judicial Decisions” (1995) 19 Legal Stud F 119.

Tully, James. “The Pen is a Mighty Sword: Quentin Skinner’s Analysis of Politics” in *Meaning and Context: Quentin Skinner and his Critics* (Princeton: Princeton University Press, 1989).

Tully, James. “Wittgenstein and Political Philosophy: Understanding Practices of Critical Reflection” in *The Grammar of Politics: Wittgenstein and Political Philosophy* (Ithaca: Cornell University Press, 2003).

Webber, Jeremy. “A Judicial Ethic for a Pluralistic Age” in Omid A Payrow Shabani, ed, *Multiculturalism and law: a critical debate* (University of Wales Press, 2007) 67.

White, James Boyd. “Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life” (1985) 52:3 U Chicago L Rev 684.

White, Lucie E. “Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G” (1990) 38 Buff L Rev 1.

Wilson, Bertha. “Will Women Judges Really Make a Difference?” (1990) 28 Osgoode Hall LJ 507.

Winter, Steven L. “The ‘Power’ Thing” (1996) 82:5 Va L Rev 721.

Wiseman, David. “The Charter and Poverty: Beyond Injusticiability” (2001) 51 UTLJ 425.

Wiseman, David. “Competence Concerns in Charter Adjudication: Countering the Anti-Poverty Incompetence Argument” (2005) 51 McGill LJ 503.

Wolterstorff, Nicholas. “Reid on Common Sense” in *The Cambridge Companion to Reid* (Cambridge: Cambridge University Press, 2004) 77.

Wolterstorff, Nicholas. “Reid on Common Sense, with Wittgenstein’s Assistance” 74:3 American Catholic Philosophical Quarterly.

Yaffe, Gideon & Ryan Nichols. “Thomas Reid” in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, Winter 2009 ed (2009).

Young, Iris Marion. “Impartiality and the Civic Public: Some Implications of Feminist Critiques of Moral and Political Theory” in *Feminism as Critique: On the Politics of Gender* (Minneapolis: University of Minnesota Press, 1987) 57.

Young, Iris Marion. “Asymmetrical Reciprocity: On Moral Respect, Wonder, and Enlarged Thought” in *Judgment, Imagination and Politics: Themes from Kant and Arendt* (Lanham: Rowan & Littlefield, 2001) 205.

Young, Margot. “Rights, the Homeless and Social Change: Reflection on Victoria (City) v. Adams (BCSC)” (2009):164 BC Studies: The British Columbian Quarterly 103.

Young, Margot E. “Introduction” in Margot Young et al, eds, *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: U.B.C. Press, 2007) 1.

Young, Margot E. “Unequal to the Task: ‘Kapp’ing the Substantive Potential of Section 15” (2010) 50 Supreme Court Law Review 183.

Zerilli, Linda M G. “Doing without Knowing: Feminism’s Politics of the Ordinary” in Cressida Heyes, ed, *The Grammar of Politics: Wittgenstein and Political Philosophy* (Ithaca: Cornell University Press, 2003).

Zerilli, Linda M G. “‘We Feel Our Freedom’” (2005) 33:2 Political Theory 158.

Zerilli, Linda M G. “Response to Thiele” (2005) 33:5 Political Theory 715.

Zerilli, Linda MG. “Toward a Feminist Theory of Judgment” (2009) Signs: Journal of Women in Culture and Society.

Zuckerman, Adrian AS. “Law, Fact or Justice?” (1986) 66 Boston University Law Review 487.

“Haymarket Theatre,” Wikipedia, the free encyclopedia (2013), online: <http://en.wikipedia.org/wiki/Haymarket_Theatre> accessed 28 July, 2013.

“A Vindication of the Rights of Woman,” Wikipedia, the free encyclopedia (2013), online: <http://en.wikipedia.org/w/index.php?title=A_Vindication_of_the_Rights_of_Woman&oldid=563855483> accessed 28 July 2013.

Reports and other Documents

Arbour, Louise. “‘Freedom from want’ - from charity to entitlement” LaFontaine-Baldwin Symposium Lecture” (March 4, 2005).

Australian Feminist Judgments Project, online: <http://www.law.uq.edu.au/australian-feminist-judgments-project> accessed 28 July, 2013.

Brodsky, Gwen et al. *Human Rights Denied: Single Mothers on Social Assistance in British Columbia* (West Coast LEAF, 2006).

Canada. *Report on Evidence* (Ottawa: Canada Law Reform Commission, 1975).

Canada Without Poverty, online: <http://www.cwp-csp.ca> accessed 28 July, 2013.

Canadian Centre for Policy Alternatives, “Closing Canada’s Gender Gap”, online: CCPA <http://www.policyalternatives.ca/publications/reports/closing-canadas-gender-gap> accessed 28 July, 2013.

Canadian Centre for Policy Alternatives. “Fact Sheets on Women’s Poverty”, online: CCPA <http://www.policyalternatives.ca/publications/commentary/fact-sheets-womens-poverty-recession> accessed 28 July, 2013.

Canadian Centre for Policy Alternatives. “Poverty or Prosperity”, online: CCPA <http://www.policyalternatives.ca/publications/reports/poverty-or-prosperity> accessed 28 July, 2013.

Canadian Council on Social Development. “Economic Security Fact Sheet #2: Poverty,” online: CCSD <http://www.ccsd.ca/factsheets/economic_security/poverty/index.htm> accessed 28 July, 2013.

Canadian Judicial Council. *Ethical Principles for Judges* (Ottawa), online: <http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf> accessed 28 July, 2013.

Collin, Chantal and Hilary Jensen. “A Statistical Profile of Poverty In Canada” (Library of Parliament: 2009), online: <http://www.parl.gc.ca/content/lop/researchpublications/prb0917-e.htm> accessed 28 July, 2013.

Dauvergne, Mia. “Adult correctional statistics in Canada, 2010/2011” (Statistics Canada: 2012), online: <http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11715-eng.htm#a7> accessed 28 July, 2013.

Gill, Krystyle & Alycia Shaw. “Representing Canada on the Bench: On Gender Balance, Equality and Judicial Appointments” (Canadian Bar Association, 2013), online: CBA <http://www.cba.org/CBA/conf_women/Women_Newsletters2013/bench.aspx> accessed 28 July, 2013.

Gosselin v. Quebec (Attorney General), [2002] 4 S.C.R. 429 (Factum of the Intervenor National Association of Women and the Law).

Human Resources and Skills Development Canada, “Low Income in Canada: 2000-2006 Using the Market Basket Measure,” (2008), online: HRSCD <http://www.hrsdc.gc.ca/eng/publications_resources/research/categories/inclusion/2008/sp-864-10-2008/page01.shtml> accessed 28 July, 2013.

Irish Feminist Judgments Project, online: <http://humanrights.ie/announcements/introducing-the-irish-feminist-judgments-project/> accessed 28 July, 2013.

“Judicial Edgework: Judgment Re-Writing Projects from Around the World” Roundtable discussion at *Law on the Edge* (Annual meeting of the Canadian Law and Society Association and the Law and Society Association of Australia and New Zealand, University of British Columbia, 2 July 2013) (author's notes).

Justice with Dignity <http://dawn.thot.net/Kimberly_Rogers/kria.html> accessed 28 July, 2013.

Poverty and the International Covenant on Economic, Social and Cultural Rights, Committee on Economic, Social and Cultural Rights, 25th Sess. 10/05/2001, UN Doc. E/C.12/2001/10.

Progressive Conservative Party of Ontario, "The Common Sense Revolution," online: <http://www.scribd.com/doc/57099326/Common-Sense-Revolution> accessed 28 July, 2013.

Victoria Anti-Poverty Coalition, Press Release, "The Gosselin Decision: Canada's Supreme Court is out of touch with economic, environmental and poverty realties," online: <http://www.povnet.org/node/1135> accessed 28 July, 2013.

Women's Court of Canada, online:< http://womenscourt.ca/home/> accessed 28 July, 2013.