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## **INTERSECTIONALITY IN LAW AND LEGAL CONTEXTS**

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## Executive Summary

Intersectionality describes the unique forms of discrimination, oppression and marginalization that can result from the interplay of two or more identity-based grounds of discrimination. The purpose of this informational brief is: 1) to highlight key ideas from existing research on intersectionality; and 2) to consider the application of intersectionality in law and in legal contexts.

The brief begins in Part 2 by recounting the origins of intersectionality, defining intersectionality with reference to two central ideas, and pointing to some critiques of intersectionality. Building upon a long history of writing by Black and racialized women about multiple oppressions, the term “intersectionality” first attracted widespread attention in the early 1990s through the work of African American law professor Kimberlé Williams Crenshaw. Crenshaw used the idea of intersectionality to explain the unique, composite kinds of discrimination experienced by Black women at the intersection of race and sex. She argued that intersectional discrimination is not captured by American antidiscrimination law, which treats identity categories like “sex” and “race” as mutually exclusive grounds of discrimination. In the thirty years since Crenshaw coined the term, intersectionality has become a significant tenet of contemporary feminist movements, and a hallmark of social justice and anti-oppression movements, advocacy and scholarship of all kinds.

Broadly speaking, intersectionality is based on two key ideas. First, viewing a problem through an intersectional lens reveals the nature of discrimination that flows from the intersection of multiple identities. When oppressions based on two or more identity categories intersect, a new form of oppression is created that is different from the constituent forms of oppression added together. Intersectionality emphasizes that there is no singular kind of marginalization experienced by everyone who shares an intersectional identity, though there may be patterns or similarities between the experiences of individuals located at a particular intersection, in a given context. The second idea connects individual and group experiences of disadvantage based on intersecting identities to broader systems of power and

privilege. In doing so, intersectionality recasts identity categories not as objective descriptors of an individual's innate characteristics, but as socially constructed categories that operate as vectors for privilege and vulnerability within our social, cultural, political, economic and legal power structures. Ultimately, intersectionality has as its goal the transformation of systems of intersectional disadvantage.

As intersectionality has gained traction across contexts, there has been a rise in the mistaken idea that intersectionality requires only the expansion of identity categories to include an infinite number of differently situated subjects. In light of this trend, intersectional scholars and activists have called for a refocusing of intersectional arguments away from groups and identities and toward structural intersectionality, centring the systems of power and exclusion from which individual experiences of identity-based oppression and discrimination flow.

Finally, the rise of intersectionality has sparked a variety of critiques. For example, one stream of critique argues that intersectionality prioritizes the intersection of race and sex at the expense of other identity-based vectors of privilege and disadvantage like sexuality, gender identity, language and class. Others have pointed out that intersectionality fails to capture the complexities of cross-border dynamics and does not engage with the ways that colonialism undergirds intersecting systems of power and privilege. Another group of critiques centres on intersectionality's reliance on identity categories, arguing, for example, that by focusing on the complexity of relations between identity categories, intersectionality does not fully capture the diversity of experience within individual identity categories. Finally, some argue that through its proliferation, intersectionality has become depoliticized, and in practice amounts to little more than a nod to inclusivity, broadly conceived.

Part 3 of the brief turns from the theory of intersectionality to the practice, looking at how lawyers and advocates can bring the insights of intersectionality to their engagements with variously located clients. Intersectionality highlights the importance of understanding power differentials between lawyers and clients not only in terms of unequal access to legal language and knowledge, but also in respect of the complex identities and resulting privileges

and vulnerabilities of both a lawyer and their client. Positionality and allyship are particularly important to operationalizing intersectionality in the lawyer-client relationship.

Positionality refers to the ways that our individual identities – including factors such as race, gender, sexuality, class, and ability status – situate us as having relatively more or less power within our social, cultural, economic, political and legal contexts. Positionality is concerned with how our identities, and the privileges and dis-privileges that flow from them, influence our perspectives and ways of being in the world. In representing clients who face intersecting forms of oppression, legal advocates must be cognizant of how our positionality impacts our understanding of the client's issues and shapes the decisions we make in representing a client including, for example, the kind of legal argument that we craft on a client's behalf. More broadly, legal advocates must be aware of the many ways that the legal system, of which we are a part, operates as an instrument of colonization and race-based oppression and has differential impacts for differently positioned people.

The term ally refers to a person in a position of relatively more privilege who stands in solidarity with individuals and/or communities in positions of relatively less privilege in a given context. Allyship is an active, on-going process of listening, learning, unlearning, accepting criticism, and continuing to show up and offer various forms of support to relatively less privileged people and communities. The concept of allyship has been subject to critique on the basis that, in the name of allyship, members of relatively more privileged groups sometimes situate themselves as “rescuers” of less privileged communities, centering their notions of justice and valorizing their involvement in the liberation of others. Instead, allyship is based on interconnectedness and the understanding that we each have a stake in the equality of all. Practicing allyship in legal advocacy, where a lawyer occupies a relatively privileged position vis-a-vis their client, includes centring the voice, experience and choices of the client, and self-educating on the social and historical context within which the client's legal issues arise.

Part 4 looks to the relationship between intersectionality and antidiscrimination law, recounting intersectionality's critique of antidiscrimination law, mapping the ways that

intersectionality is beginning to infiltrate Canadian antidiscrimination law, and identifying some avenues for improving the reception of intersectionality in antidiscrimination law. As noted above, the term “intersectionality” originated in the context of Crenshaw’s critique of antidiscrimination law in the United States. That critique is equally relevant here in Canada. Our antidiscrimination laws – codified in the *Charter of Rights and Freedoms* (*Charter*), the federal *Canadian Human Rights Act* and the 13 provincial and territorial human rights acts and codes – all establish mechanisms for redressing discrimination based on a list of prohibited grounds of discrimination, including (but not limited to): race, national or ethnic origin, colour, religion, sex, age and disability. To date, cases based on an alleged infringement of these antidiscrimination provisions have overwhelmingly been analyzed on the basis of a single prohibited ground of discrimination. Crenshaw calls this a “single-axis” model of assessing discrimination, because it treats each ground of discrimination as exclusive from the rest.

The shortcomings of single-axis frameworks are at the core of intersectionality’s critique of antidiscrimination law. First, single-axis frameworks artificially simplify the complexities of people’s lives, making the stories of those with intersectional social identities, like older Black women, or Indigenous lesbians, impossible to tell. Second, single-axis approaches essentialize the experiences of everyone who falls into a given category, concealing diversity within groups. Third, single-axis frameworks tend to understand identity categories in a limited way, ignoring the complex role of power in creating identity categories and in structuring relationships of inequality. The result is that single-axis models distort the true nature of intersectional antidiscrimination claims. As a result, courts may simply fail to see intersectional discrimination and will be unlikely to offer a meaningful remedy. Additionally, single-axis frameworks for addressing discrimination have limited ability to target the systemic dimensions of marginalization and oppression from which individual experiences of discrimination flow.

Notwithstanding the persistence of single-axis analyses, there are signs that intersectionality is beginning to infiltrate antidiscrimination law in Canada. Intersectional



arguments are being made in Canadian courtrooms, with lawyers and advocacy organizations working to advance their clients' stories in ways that are true to the complexities of their lives and circumstances. Nevertheless, intersectionality has not made significant inroads in antidiscrimination law, in part because judges and adjudicators have not consistently engaged intersectional arguments or analyses. For example, the Supreme Court of Canada has never adjudicated a discrimination claim based on multiple grounds, despite acknowledging the possibility of bringing intersectional claims pursuant to the equality guarantee in the *Charter* and receiving submissions by various parties and intervenors in numerous equality cases on the importance of an intersectional approach. When an argument based on multiple grounds is advanced, judges and adjudicators often choose to evaluate the case with reference to one ground alone, saying nothing about the other(s), or take an “additive” approach, analyzing evidence about each ground of discrimination separately and then tallying them up.

However, there are indications that some courts and tribunals adjudicating antidiscrimination cases are willing and able to incorporate more robust understandings of intersectionality into their decisions. For example, in *Turner v Canada (Attorney General)*, the Federal Court of Appeal concluded that the Canadian Human Rights Tribunal had erred in failing to consider the case on appeal as one of intersectional discrimination involving both race and perceived disability. In doing so, the *Turner* court confirmed that in cases of compound discrimination, intersectionality is necessary to make visible instances of discrimination on multiple grounds that might not be apparent if each ground is analyzed separately. *Turner* and other, similar cases demonstrate that the proliferation of intersectionality is having some impact in sensitizing judges and adjudicators to the inadequacies of single-axis analyses and the importance of intersectionality in antidiscrimination contexts.

While it is clear that intersectionality is beginning to infiltrate Canadian antidiscrimination law, its introduction has raised some specific tensions about how to better operationalize intersectionality within the boundaries of established statutory regimes and

legal doctrines. The project of fully incorporating intersectionality into antidiscrimination law will require fundamental recalibrations of every aspect of the latter. In the meantime, however, there exist important opportunities for more deeply incorporating intersectionality into existing antidiscrimination doctrine and practice. This brief identifies three such opportunities.

First, engagements with intersectionality in legal arguments and decisions must go beyond recounting a claimant's story with reference to multiple identities to include structural intersectionality as an analytical framework. This shift requires express connection of individual experiences of discrimination with the systems of power and exclusion that breed discrimination. Second, the shift towards structural intersectionality will necessitate a re-thinking of grounds of discrimination. Conventionally, grounds are treated in a formalistic, often cursory manner, requiring little more than asking whether a claimant is a member of the group identified by the ground upon which the discrimination claim is based. Structural intersectionality requires in-depth engagement with grounds as markers of systems of power. Operationalizing this insight could involve, for example, moving toward an expansive view of grounds focused on how our identities, and the power or vulnerability that flow from those identities, impact our relationships with others in a given context.

Third, while grounds are often identified as the key challenge to better incorporating intersectionality in antidiscrimination law, they are not the only stumbling block to achieving this goal. For example, recognizing the wrongs of intersectional discrimination requires a meaningful conception of substantive, rather than formal, equality. Because formalism requires comparison between two individuals who are alike in every way except for the protected characteristic (race, class, etc.), formal equality generally results in single-axis analyses. Additionally, the incorporation of intersectionality into antidiscrimination law requires careful attention to the question of evidence. Since intersectional discrimination flows from social structures and norms, evidence must focus on demonstrating widespread patterns of marginalization and vulnerability, not individual experiences of discrimination. Courts and adjudicators must also be realistic about the quantitative evidence that can

reasonably be expected of a claimant, since, for example, statistical evidence of systemic disadvantage may not always be available or accessible to a claimant in an antidiscrimination case.

Part 5 briefly considers the role that intersectionality has played in three other legal domains in Canada: criminal law, family law and immigration and refugee law. There is some evidence of attempts to adopt a holistic approach to criminal law that is attentive to the context within which certain people, communities and behaviours are disproportionately criminalized. For example, the *Criminal Code* requires sentencing judges to consider all reasonable sanctions other than imprisonment, and to have particular regard to the unique circumstances of criminalized Indigenous people. Yet intersectional trends, including, for example, the feminization and criminalization of poverty and the over-policing of racialized communities, continue to contribute to the overrepresentation of poor, young, racialized and Indigenous women in Canadian prisons.

Intersectional arguments have long been made in family law cases, including, for example, arguments at the intersection of gender and class that connect the gendered nature of domestic labour and caregiving and the feminization of poverty. Family law advocates have also called attention to the gendered impacts of family law legislation, particularly as it relates to Indigenous women at the intersection of family law and Aboriginal law. Intersectionality has had a particular impact in immigration and refugee law, where, for example, a failure to address the intersection of various risk factors faced by a refugee claimant is an error warranting judicial review. While intersectionality is having some influence in criminal law, family law and immigration and refugee law, courts and tribunals adjudicating claims in these areas have yet to fully adopt intersectional frameworks.

Part 6 of the brief flags the proliferation of intersectionality in law and legal contexts beyond Canada: in international law, in the United States, the United Kingdom and Australia, and in the work of the European Court of Human Rights. International law has made significant strides in incorporating intersectionality into the text of some conventions including, for example, the *Convention on the Rights of Persons with Disabilities*, and in the

interpretation of other, seemingly single-axis conventions like the *Convention on the Elimination of Discrimination Against Women*, which has been construed with a view to the various intersectional forms of discrimination faced by women around the world.

As in Canada, intersectionality has a mixed record in other Anglo-common law jurisdictions. For example, in the United States, courts adjudicating claims of discrimination tend to look for evidence of intention, which generally cannot be demonstrated in cases of intersectional discrimination based on systemic disadvantage. In the United Kingdom, some courts have recognized the shortcomings of single-axis analyses but have rarely gone further to incorporate full intersectional assessments into their decisions. Intersectionality faces a unique challenge in Australia, where federal antidiscrimination laws do not include a general prohibition against discrimination, but are instead codified in four distinct acts, each centred on a single prohibited ground of discrimination: race, sex, disability, and age. Finally, intersectionality more frequently informs the work of the European Court of Human Rights, as in the case of *BS v Spain*, where the specific vulnerability of African women in Europe was expressly and intersectionally acknowledged by the Court.

While inroads are being made, these comparative examples reveal that, as in Canada, antidiscrimination law across jurisdictions is generally resistant to moving beyond a single-axis approach. Where intersectionality is considered, it is often understood thinly, as a vehicle for recognizing that discrimination can occur on the basis of multiple identities and for acknowledging the shortcomings of single-axis analyses, with less attention paid to the systemic dimensions of vulnerability and marginalization that structural intersectionality requires.

The brief concludes in Part 7 by recounting its key takeaways and affirming the importance of continuing to pursue the challenging, transformative work of incorporating intersectionality into law and legal contexts.

## Part 1: Introduction

In Canada and around the world, it is “increasingly recognized that discrimination can occur on the basis of more than one ground” and that “[s]uch discrimination can create cumulative disadvantage.”<sup>1</sup> For example, a person who experiences discrimination on the basis of their gender may also be discriminated against on the basis of their race, sexual orientation, age, or disability. As a result, Indigenous women, racialized trans people and older disabled folks are among the most disadvantaged communities in Canada, experiencing disproportionate rates of discrimination, violence, poverty and social exclusion.<sup>2</sup> The concept of intersectionality, or intersectional discrimination, describes the qualitatively distinct kinds of discrimination that result from the interplay or “synergy” of two (or more) sources of discrimination.<sup>3</sup> This brief explores intersectionality in law and legal contexts.

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<sup>1</sup> Sandra Fredman, *Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law* (Brussels: European Commission, 2016) at 27, online: Oxford Human Rights Hub <<http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2016/07/Intersectional-discrimination-in-EU-gender-equality-and-non-discrimination-law.pdf>>.

<sup>2</sup> See eg Chantelle Bellrichard, “Urgent actions needed to address violence against Indigenous women and girls – UN report”, *CBC News* (27 April 2019), online: CBC <<https://www.cbc.ca/news/indigenous/un-special-rapporteur-violence-against-women-1.4637613>>; R Marcellin Longman, A Scheim, G Bauer & N Redman, “Experiences of Racism among Trans People in Ontario”, 3:1 *Trans PULSE e-Bulletin* (7 March 2013), online: TransPULSE Project <<http://transpulseproject.ca/research/experiences-of-racism-among-trans-people-in-ontario/>>; Leslie Pickering Francis & Anita Silvers, “Bringing Age Discrimination and Disability Discrimination Together: Too Few Intersections, Too Many Interstices” (2009) 11:1 *Marquette Elder’s Advisor* 139. See generally, Jenny Godley, “Everyday Discrimination in Canada: Prevalence and Patterns” (2018) 43:2 *Canadian Journal of Sociology* 111; Olena Hankivsky & Ashlee Christofferson, “Intersectionality and the Determinants of Health: A Canadian perspective” (2008) 18 *Critical Public Health* 271; Stephen Gaetz, Erin Dej, Tim Richter, & Melanie Redman, *The State of Homelessness in Canada 2016* (Toronto: Canadian Homelessness Research Network Press, 2016), online: HomelessHub <<https://www.homelesshub.ca/SOHC2016>>.

<sup>3</sup> Kimberlé Williams Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” (1989) *U Chicago Legal F* 139 [hereinafter “Demarginalizing”] at 139 describes intersectional discrimination as “synergistic.” Intersectional discrimination is distinct from other forms of multiple discrimination. See eg Fredman, *supra* note 1 at 27, distinguishing intersectionality from “sequential multiple discrimination”, which occurs when a “person suffers discrimination on different grounds on separate occasions” and “additive multiple discrimination”, which occurs when a person is “discriminated against on the same occasion but in two different ways.”

## 1.1 Nature and Scope of this Project

The purpose of this brief is twofold: 1) to highlight key themes and ideas from both originating and contemporary literatures on intersectionality; and 2) to consider the application of intersectionality in law and in legal contexts. Having introduced the project here in Part 1, the brief proceeds as follows:

- Part 2 describes intersectionality and recounts its origins, proliferation and critiques;
- Part 3 considers the insights intersectionality offers to legal advocacy, with a focus on positionality and allyship;
- Part 4 looks to the challenges of intersectionality in antidiscrimination law, and considers how antidiscrimination law might better receive the insights of intersectionality;
- Part 5 examines the influence of intersectionality outside of the antidiscrimination context, considering whether and how courts are receiving such arguments in criminal, family and immigration and refugee law matters;
- Part 6 offers a brief snapshot of how intersectionality has been utilized in jurisdictions outside of Canada and in international law; and
- Part 7 concludes by recounting some of the key takeaways of the brief.

This brief is intended to be informational and descriptive, as opposed to prescriptive or diagnostic. As we discuss below, the term intersectionality originated in the context of American legal scholarship; however, it has since proliferated across disciplines and has migrated into political, social and cultural discourses of all sorts. The result is “a burgeoning field of intersectionality studies” that includes a truly enormous and diverse collection of work.<sup>4</sup> Accordingly, this brief is by no means exhaustive. Instead, we aim to provide a representative snapshot of some of the major ideas that characterize engagements with

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<sup>4</sup> Sumi Cho, Kimberlé Williams Crenshaw & Leslie McCall, “Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis” (2013) 38:4 *Signs: Journal of Women in Culture and Society* 785 at 785. See also Shreya Atrey, *Intersectional Discrimination* (Oxford: Oxford University Press, 2019) at 34, noting, “Google Scholar alone returns tens of thousands of articles on intersectionality.”

intersectionality in law and legal contexts, and point to further reading for those interested in pursuing these ideas in more depth.

## 1.2 Collaborative Context

The creation of this brief was a collaborative project, and we each brought to the work our own personal and professional identities and experiences. Positioning ourselves in relation to this work is important not least because our respective social locations, experiences and backgrounds necessarily informed the questions we asked, the sources we gathered, our interpretations of the cases and materials canvassed, and the way that we have communicated our findings.<sup>5</sup>

Grace is a Black, able-bodied, cis-gendered woman. She works as a lawyer in the Domestic Violence Family Law program at Calgary Legal Guidance (CLG), an organization that aims to increase access to justice for those living in poverty. Grace seeks to apply an intersectional approach to all her work at CLG as her clients experience the complex forms of oppression that lie at the intersections of gender, race, and class. She seeks to advocate for clients in a way that centres their voices, autonomy and experiences.

Jena is a white, queer, cis-gendered, able-bodied woman. She is a parent to two young children and works as a law professor at the Faculty of Law at the University of Ottawa, located on the traditional, unceded territory of the Algonquin Anishnaabeg people. Jena teaches courses to law students, and conducts legal research, on topics including constitutional law, feminist legal thought, LGBTQ2S+ rights, and access to justice. Jena teaches intersectionality in her courses and strives to take an intersectional approach in her legal research.

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<sup>5</sup> For insights on author/researcher positionality in feminist research, see generally Sharlene Nagy Hesse-Biber, ed., *Feminist Research Practice: A Primer* (Thousand Oaks: Sage Publishing, 2013).

## Part 2: Intersectionality: Origins, Key Ideas and Critiques

We begin in Part 2 by briefly recounting the origins and history of intersectionality. We then explain what intersectionality is and what it does, focusing on two key ideas that characterize intersectional work: 1) understanding complex disadvantage based on intersecting social identities; and 2) connecting individual and group experiences of disadvantage based on intersecting identities to broader systems of power and oppression. Finally, this section notes three kinds critiques of intersectionality, and points to some of the complementary and alternative theories for understanding and addressing complex discrimination that have evolved from these critiques.

### 2.1 Origins and Background<sup>6</sup>

The term intersectionality first attracted widespread attention through the work of Kimberlé Williams Crenshaw, an African American law professor at Columbia University and at the University of California, Los Angeles. In two scholarly papers written in 1989 and 1991, Crenshaw critiqued the frameworks of American antidiscrimination law, second wave feminism, and the civil rights movement, demonstrating how each of these models for remedying oppression fails Black women.<sup>7</sup> Crenshaw argued:

- antidiscrimination law treats identity categories like “sex” and “race” as mutually exclusive grounds of discrimination;
- second wave feminism focusses on gender as the predominant vector of analysis and in so doing casts white women as the unstated norm; and
- antiracist policy focuses on race as the predominant vector of analysis and in so doing casts Black men as the unstated norm.

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<sup>6</sup> For a detailed account of the history and evolution of intersectionality see Ange-Marie Hancock, *Intersectionality: An Intellectual History* (Oxford: Oxford University Press, 2016).

<sup>7</sup> See Crenshaw, “Demarginalizing”, *supra* note 3 and Kimberlé Williams Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color” (1991) 43:6 Stan L Rev 1241 [hereinafter “Mapping the Margins”].



The experiences of Black women are thus “untellable” in the frameworks of antidiscrimination law, feminism and the civil rights movement.<sup>8</sup> Crenshaw used the idea of intersectionality to explain the unique, composite kinds of discrimination experienced by Black women at the intersection of race and sex. She called on lawyers, feminists and civil rights organizers to transform their strategies and frameworks for addressing discrimination to attend to the realities of intersectional discrimination, emphasizing that “...these problems of exclusion cannot be solved simply by including Black women within an already established analytical structure.”<sup>9</sup>

Although Crenshaw is widely credited with coining the term intersectionality,<sup>10</sup> the idea that different grounds of oppression interact and result in unique forms of oppression has a long history, upon which her work is built.<sup>11</sup> Many Black women before Crenshaw were thinking and writing about multiple oppressions.<sup>12</sup> In the 1980s, the idea was widely embraced and developed by Black, anti-racist feminists responding to mainstream white feminism of the time, which failed to interrogate and integrate the experiences and priorities of Black and

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<sup>8</sup> Dean Spade, “Intersectional Resistance and Law Reform” (2013) 38:4 *Signs: Journal of Women in Culture and Society* 1031 at 1031.

<sup>9</sup> Crenshaw, “Demarginalizing”, *supra* note 3 at 140.

<sup>10</sup> For important commentary on the “origin story” of intersectionality, see Patricia Hill Collins & Sirma Bilge, *Intersectionality* (Cambridge: Polity Press, 2016) at 85.

<sup>11</sup> Bim Adewumni, “Kimberlé Crenshaw on Intersectionality: I wanted to come up with an everyday metaphor that anyone could use”, *The New Statesman* (2 April 2014), online: *The New Statesman* <<https://www.newstatesman.com/lifestyle/2014/04/kimberl-crenshaw-intersectionality-i-wanted-come-everyday-metaphor-anyone-could>> summarizes, “(i)n every generation and in every intellectual sphere and in every political moment, there have been African American women who have articulated the need to think and talk about race through a lens that looks at gender, or think and talk about feminism through a lens that looks at race.” See also Atrey, *supra* note 4 at 24, concluding that intersectionality is “informed by over two hundred years of Black feminism and, more recently, since the 1980s, by Critical Race Studies, Critical Race Feminism, and Postmodernism in the United States.”

<sup>12</sup> See eg Anna Julia Cooper’s 1892 essay, “The Status of Woman in America,” in Anna Julia Cooper, *A Voice from the South: By a Black Woman of the South* (Chapel Hill: Doc South Books, 2017); Frances M. Beal’s 1969 pamphlet, “Double Jeopardy: To be Black and Female” republished (2008) 8:2 *Meridians* 166; and the work of the Combahee River Collective, including the 1977 *Combahee River Collective Statement*, recounted in Keeanga-Yamahtta Taylor, ed., *How we Get Free: Black Feminism and the Combahee River Collective* (Chicago: Haymarket, 2017).

racialized women.<sup>13</sup> While intersectionality is generally attributed to the foundational work of Black, American feminists, many have pointed out that racialized and Indigenous feminists have long been making similar arguments in other contexts. For example, Emma Velez demonstrates that “intersectional approaches can also be found in the work of many Latina feminists,”<sup>14</sup> and Natalie Clark argues that well before Crenshaw, Sioux activist Zitkala-Sa “put together the legal argument of gender, race, and age in her [1924] essay *Regardless of Sex or Age*.<sup>15</sup> Amanda Dale further complicates the American-centric origin story of intersectionality by noting “the nearly simultaneous appearance of the word [intersectionality] in the [1989] work of Canadian legal scholar Marlee Kline, who drew special attention to the intersection of indigeneity in criminal law in Canada.”<sup>16</sup>

In the thirty years since its rise to prominence in Crenshaw’s work, intersectionality has become a veritable buzzword across disciplines.<sup>17</sup> Intersectionality is now a key tenet of contemporary feminist movements, and, more broadly, a hallmark of social justice and anti-oppression movements, advocacy and scholarship of all kinds.<sup>18</sup> Intersectionality has also

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<sup>13</sup> See eg bell hooks, *Ain’t I a Woman?* (Boston: South End Press, 1981); Audre Lorde, *Sister Outsider: Essays and Speeches* (Berkeley: Crossing Press, 1984) 110; Angela Davis, *Women, Race and Class* (New York: Random House, 1981); Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness and the Politics of Empowerment* (New York: Routledge, 1991); and Angela P. Harris, “Race and Essentialism in Feminist Legal Theory” (1990) 42:3 *Stan L Rev* 581.

<sup>14</sup> Emma D. Velez, “Decolonial Feminism at the Intersection: A Critical Reflection on the Relationship Between Decolonial Feminism and Intersectionality” (2019) 33:3 *Journal of Speculative Philosophy* 390 at 391, noting specifically the work of Maria Lugones. See eg Maria Lugones, *Pilgrimages/Peregrinajes: Theorizing Coalition Against Multiple Oppressions* (New York: Rowman & Littlefield Publishers Inc., 2003).

<sup>15</sup> Natalie Clark, “Red Intersectionality and Violence-Informed Witnessing Praxis with Indigenous Girls” (2016) 9:2 *Girlhood Studies* 46 at 49. Atrey, *supra* note 4 at 24 notes that “indigenous framings of intersectionality...have existed and been developed without reference to ‘intersectionality’ as a trope.”

<sup>16</sup> Amanda Barbara Allen Dale, “Intersectional Human Rights at CEDAW: Promises Transmissions and Impacts” (2018) PhD Dissertations 43, online: Osgoode Digital Commons <<https://digitalcommons.osgoode.yorku.ca/phd/43>> at 20, citing Marlee Kline, “Race, Racism, and Feminist Legal Theory” (1989) 12 *Harv Women’s LJ* 115.

<sup>17</sup> Kathy Davis, “Intersectionality as Buzzword: A Sociology of Science Perspective on What Makes a Feminist Theory Successful” (2008) 9:1 *Feminist Theory* 67 at 67.

<sup>18</sup> Caroline Hodes, “Intersectionality in the Canadian Courts: In Search of a Decolonial Politics of Possibility” (2017) 38:1 *Atlantis* 71 at 71, concluding the “specific term ‘intersectionality’ has not only become foundational to feminist theory and praxis, it has crossed borders making appearances within and in between multiple legal jurisdictions, theoretical planes, and geographic locations.” See also Atrey, *supra* note 4 at 33-34, noting the proliferation of intersectionality in feminist movements around the world; and Tegan Zimmerman,

migrated out of academic settings and has been absorbed into popular consciousness and cultural, social and political discourses around the world.<sup>19</sup> Feminist sociologist Leslie McCall suggests that intersectionality may be the “most important theoretical contribution that women’s studies has made.”<sup>20</sup>

Despite its prominence, the ways that intersectionality circulates as a concept and practice remain contested and uneven.<sup>21</sup> Indeed, reflecting on the proliferation of intersectionality more than 20 years after her original papers, Crenshaw, writing with McCall and critical race legal scholar Sumi Cho, points out that much of “what circulates as critical debate about what intersectionality is or does reflects a lack of engagement with both originating and contemporary literatures on intersectionality.”<sup>22</sup> Feminist philosopher Sara Bernstein maps some of the various ways that intersectionality is used to describe or explain different phenomena, including:

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“#Intersectionality: The Fourth Wave Feminist Twitter Community” (2017) 38:1 *Atlantis: Critical Studies in Gender, Culture & Social Justice* 54 at 54, describing intersectionality as the “dominant framework being employed by fourth wave feminists.”

<sup>19</sup> See eg Andrea Macdonald, “Intersectionality: What it means, how to use it, and why to care in 2020”, *Toronto Star* (8 March 2020), online: The Toronto Star <<https://www.thestar.com/news/canada/2020/03/08/intersectionality-what-it-means-and-how-to-use-it-why-to-care-in-2020.html>>; Jenée Desmond-Harris, “To understand the Women’s March on Washington, you need to understand intersectional feminism”, *Vox* (21 January 2017), online: Vox <<https://www.google.ca/amp/s/www.vox.com/platform/amp/identities/2017/1/17/14267766/womens-march-on-washington-inauguration-trump-feminism-intersectionality-race-class>>; and Heather Wilhelm, “Women’s March Morphs into Intersectional Torture Chamber”, *National Review* (11 January 2017), online: National Review <<https://www.nationalreview.com/2017/01/womens-march-feminists-oppose-donald-trump-struggle-agree-how/>>.

<sup>20</sup> Leslie McCall, “The Complexity of Intersectionality” (2005) 30 *Signs: Journal of Women in Culture and Society* 1771 at 1771.

<sup>21</sup> See eg Kory Stamper, “A Brief, Convoluted History of the Word ‘Intersectionality’”, *The Cut* (9 March 2018), online: The Cut <<https://www.thecut.com/2018/03/a-brief-convoluted-history-of-the-word-intersectionality.html>>, explaining “...[a]s the word ‘intersectionality’ is becoming more common, its meaning is becoming less clear...When words move from a specialized arena into the mainstream, they often get a little flabby: their sharply delineated corners blur a bit as the word is passed down a long line of speakers.” See also Kimberlé Williams Crenshaw, “Seeing No Evil” *The New Republic* (25 March 2020), online: The New Republic <<https://newrepublic.com/article/156805/warren-sanders-peril-gender-blind-consensus-thinking>>, arguing, “[t]he casual absorption of terms such as intersectionality, diversity, and feminism into mainstream culture can short-circuit the analytical work those terms typically perform in more considered discursive compasses.”

<sup>22</sup> Cho, Crenshaw & McCall, *supra* note 4 at 788.

- to refer to members of intersectional social categories (ie: Black women);
- to refer to forms of oppression faced by members of such categories (ie: those forms of discrimination faced by Black women that are faced neither by women alone nor by Black people alone);
- to refer to a type of experience faced by members of such categories (ie: experiences had by Black women that are not entirely explicable by appeal to being Black or to being a woman);
- to explain the ways that intersecting systems of power produce effects on groups or individuals that would not be produced if the various dimensions did not intersect (the causal theory of intersectionality);
- to refer to a method of theorizing from or about a specific viewpoint (ie: when one is theorizing from the perspective of a disabled Jewish woman).<sup>23</sup>

This list demonstrates that despite its prominence, we cannot assume a common or static understanding of what intersectionality means.

## 2.2 Defining Intersectionality: Key Ideas<sup>24</sup>

Thanks to the vastness of the literature, and the diversity of theoretical and practical engagements with intersectionality, there is no singular account that perfectly captures the many nuances and various applications of the concept.<sup>25</sup> Crenshaw explains intersectionality as:

a metaphor for understanding the ways that multiple forms of inequality or disadvantage sometimes compound themselves, and they create obstacles that often are not understood within conventional ways of thinking about antiracism or feminism or whatever social justice advocacy structures we have. Intersectionality

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<sup>23</sup> Sara Bernstein, “The Metaphysics of Intersectionality” (2020) 177:2 *Philosophical Studies* 321 at 322.

<sup>24</sup> For comprehensive, book-length expositions of intersectionality theory, see eg Atrey, *supra* note 4; Collins & Bilge, *supra* note 10; and Vivian M. May, *Pursuing Intersectionality: Unsettling Dominant Imaginaries* (New York: Routledge, 2015).

<sup>25</sup> See Atrey, *supra* note 4 at 36, explaining, “[l]ike other academic work on theories of justice, theories of human rights, theories of discrimination law, etc., intersectionality is a broad church and has many theoretical or justificatory accounts which have contributed to the development of the field.” See also Collins & Bilge, *supra* note 10 at 2, noting the “tremendous heterogeneity” in how intersectionality is defined and applied.

isn't so much a grand theory, it's a prism for understanding certain kinds of problems.<sup>26</sup>

Sociologists and critical race scholars Patricia Hill Collins and Sirma Bilge offer a broad definition of intersectionality:

Intersectionality is a way of understanding and analyzing the complexity in the world, in people, and in human experiences. The events and conditions of social and political life and the self can seldom be understood as shaped by one factor. They are generally shaped by many factors in diverse and mutually influencing ways. When it comes to social inequity, people's lives and the organization of power in a given society are better understood as being shaped not by a single axis of social division, be it race or gender or class, but by many axes that work together and influence each other. Intersectionality as an analytic tool gives people better access to the complexity of the world and of themselves.<sup>27</sup>

Finally, Shreya Atrey, a professor of law and international human rights, suggests that intersectionality is "about cutting a wedge into [the] complexity [of human experience]."<sup>28</sup> Atrey explains what intersectionality does in the following terms:

[Intersectionality] helps understand the structural and dynamic consequences of interaction between multiple forms of disadvantage based on race, sex, gender, disability, class, age, caste, religion, sexual orientation, region, etc. In helping to understand this complexity, it opens up ways of addressing the disadvantage associated with it.<sup>29</sup>

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<sup>26</sup> Kimberlé Williams Crenshaw, "What is Intersectionality?" *National Association of Independent Schools* (22 June 2018), online: YouTube <<https://www.youtube.com/watch?v=ViDtnfQ9FHC>> [hereinafter "What is Intersectionality?"].

<sup>27</sup> Collins & Bilge, *supra* note 10 at 2.

<sup>28</sup> Atrey, *supra* note 4 at 33.

<sup>29</sup> *Ibid.* Atrey at 36 goes on to identify the mechanics of intersectionality, setting out exactly *how* an intersectional lens should operate, and what elements are of principal concern. She points to 5 key "strands" that characterize intersectional analyses (emphasis in original):

If there is a common thread that characterizes these explanations of intersectionality, it is the shared starting point that “understanding the complexity of disadvantage associated with multiple identities” is important because doing so allows us to better recognize, and thus more meaningfully address, systems that breed inequality, oppression and discrimination.<sup>30</sup>

We can take from this description two key ideas:

1. the “complexity of disadvantage associated with multiple identities”; and
2. connecting individual and group experiences of identity-based disadvantage to systemic mechanisms of “privilege and dis-privilege.”<sup>31</sup>

### 2.2.1 Multiple Identities and Intersectional Oppression

Intersectionality is perhaps best known for its call to recognize the ways that multiple social identities intersect. Looking at a problem through an intersectional lens reveals that “social categories such as race, class, gender, sexualities, abilities, citizenship, and Aboriginality among others, operate relationally; these categories do not stand on their own, but rather gain meaning and power by reinforcing and referencing each other.”<sup>32</sup> When oppressions on the basis of two or more identity categories intersect, a new form of

- 
1. Intersectionality is concerned with tracing **sameness and difference** in experiences based on multiple group identities;
  2. It is concerned with tracing the sameness and difference in **patterns of group disadvantage** understood broadly in terms of subordination, marginalization, violence, disempowerment, deprivation, exploitation, and all other forms of disadvantage suffered by social groups;
  3. In order to make sense of these same and different patterns of group disadvantage they must be considered as a whole, namely with **integrity**;
  4. Intersectionality can only be appreciated in its full socioeconomic, cultural, and political **context** that shapes people’s identities and patterns of group disadvantage associated with them; and
  5. The purpose of intersectional analysis is to further broadly conceived **transformative** aims which remove, rectify, and reform the disadvantage suffered by intersectional groups.

<sup>30</sup> *Ibid* at 36.

<sup>31</sup> Shreya Atrey, “The Humans of Human Rights: From Universality to Intersectionality” (2020) [unpublished], online: SSRN <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3542773](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3542773)> at 20 [hereinafter “Human Rights”] at 20.

<sup>32</sup> Bénita Bunjun et al., *Intersectional Feminist Frameworks: An Emerging Vision* (Canadian Research Institute for the Advancement of Women, 2006) at 8, online: Canadian Research Institute for the Advancement of Women <[https://www.criaw-icref.ca/images/userfiles/files/Intersectional%20Feminist%20Frameworks-%20An%20Emerging%20Vision\(2\).pdf](https://www.criaw-icref.ca/images/userfiles/files/Intersectional%20Feminist%20Frameworks-%20An%20Emerging%20Vision(2).pdf)>

oppression is created that is different from the constituent forms of oppression added together. So, understanding oppression based on intersecting identities, like race and gender, is not a matter of adding together the harms of race discrimination and the harms of gender discrimination, but instead requires consideration of the unique and indivisible kind of oppression that results from the interplay of the two in a given context.<sup>33</sup> For example, writing at the intersection of gender and disability, Canadian legal scholar Dianne Pothier explains:

I can never experience gender discrimination other than as a person with a disability; I can never experience disability discrimination other than as a woman. I cannot disaggregate myself nor can anyone who might be discriminating against me. I do not fit into discrete boxes of grounds of discrimination. Even when only one ground of discrimination seems to be relevant, it affects me as a whole person.<sup>34</sup>

Similarly, Mohawk lawyer, academic and activist Patricia Monture-Angus describes the intersection of gender and Indigeneity in these terms:

I am not just woman. I am a Mohawk woman. It is not solely my gender through which I first experience the world, it is my culture (and/or race) that pre- cedes my gender. Actually, if I am object of some form of discrimination, it is very difficult for me to separate what happens to me because of my gender and what happens to me because of my race and culture. My world is not experienced in a linear and compartmentalized way. I experience the world simultaneously as Mohawk and as woman.<sup>35</sup>

Intersectionality further emphasizes the importance of understanding identities, and the specific patterns of privilege and dis-privilege that attach to identities, in their full political, cultural and socio-economic contexts. This means, for example, that there is no singular kind of marginalization experienced by all Indigenous women, though there may be patterns or similarities between the experiences of individuals located at this particular

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<sup>33</sup> Bernstein, *supra* note 23 at 322. See also Kimberlé Williams Crenshaw, “Intersectionality is not additive. It’s fundamentally reconstitutive” (26 June 2020 at 1:41pm), online: Twitter <<https://twitter.com/sandylocks/status/1276571389911154688>>.

<sup>34</sup> Dianne Pothier, “Connecting Grounds of Discrimination to Real People’s Real Experiences” (2001) 13 CJWL 39 at 59.

<sup>35</sup> Patricia Monture-Angus, *Thunder in My Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 1995) at 177-178.

intersection, in a given context. Intersectionality thus provides a framework within which individual and group experiences of context-specific, complex discrimination are intelligible, and centres the voices and experiences of those who occupy intersectional social identities.

### 2.2.2 Connecting Experiences of Discrimination to Systems of Privilege and Dis-Privilege

The second key idea of intersectionality connects individual and group experiences of discrimination based on intersecting identities to broader systems of privilege and dis-privilege. Intersectionality is concerned with individual and group experiences of discrimination based on overlapping identities not only for their own sake, but for what they reveal about relationships of power and systemic forces of marginalization.<sup>36</sup> Atrey explains:

...[There is no essential core to the positions of difference (of Black men, white women, Black women etc.); instead the core is of complexity in the relationships of power between people. Seen this way, there are no pure categories of difference but only patterns of relationships defined both in terms of privilege and dis-privilege. Furthermore, these patterns are seen not in identarian terms alone, as a form of positive or negative attribution of qualities of characteristics, but in structural terms. Identity politics in the intersectional frame is thus interested in individual experience because it tells something useful about how people experience the systemic nature of racism etc.<sup>37</sup>

Intersectionality thus deepens our understanding of social identities, recasting them not as “mere signifiers *of* difference but constituted *by* difference, as combinations of racism, patriarchy, ableism, homophobia, transphobia, capitalism, imperialism etc.”.<sup>38</sup> In other words, intersectionality takes identity categories not as objective descriptors of an individual’s innate

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<sup>36</sup> Sumi Cho, “POST-INTERSECTIONALITY: The Curious Reception of Intersectionality in Legal Scholarship” (2013) 10:2 Du Bois Review: Social Science Research on Race 385 at 386, describes this function of intersectionality as aiming to “explain how fields of power operate and interact to produce hierarchy for any limitless combination of identities.”

<sup>37</sup> Atrey, “Human Rights”, *supra* note 31 at 20, noting the work of Trina Grillo, “Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House” (2013) 10 Berkley Women’s LJ 16, as well as that of Collins & Bilge, *supra* note 10 at chapter 1; and May, *supra* note 24 at 27.

<sup>38</sup> Atrey, “Human Rights”, *supra* note 31 at 20, noting Vrushali Patil, “From Patriarchy to Intersectionality: A Transnational Feminist Assessment of How Far We’ve Really Come” (2013) 38:4 Signs: Journal of Women in Culture and Society 847.



characteristics, but as socially constructed categories that operate as vectors for privilege and dis-privilege.<sup>39</sup> This shift facilitates analyses of discrimination and oppression that focus on the ways that our social structures and institutions “make certain identities the consequences of, and the vehicle for, vulnerability.”<sup>40</sup> Although intersectionality relies strategically on identity categories as “useful markers of inequality,”<sup>41</sup> intersectionality ultimately concerns “the way things work rather than who people are.”<sup>42</sup>

Ultimately, intersectionality has as its goal the transformation of systems of intersectional disadvantage.<sup>43</sup> As a legal concept, intersectionality as conceived by Crenshaw specifically sought to improve antidiscrimination law so that it could better attend to the realities of systemic disadvantage experienced by Black women. Gender studies and intersectionality scholar Ange-Marie Hancock explains the transformational call of intersectionality as one that “challenges scholars and activists alike to partake in an analytic shift that transforms the questions to be asked, the evidence to be considered, and the methods with which we analyze it.”<sup>44</sup> Crenshaw, Cho and McCall likewise confirm that true

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<sup>39</sup> Catharine A. MacKinnon, “Intersectionality as Method: A Note” (2013) *Signs: Journal of Women in Culture and Society* 1019 at 1023 explains that identities in intersectional frameworks should be understood as “the ossified outcomes of the dynamic intersection of multiple hierarchies, not the dynamic that creates them. They are there, but they are not the reason they are there.”

<sup>40</sup> Kimberlé Williams Crenshaw, “On Intersectionality” (Keynote address delivered at Women of the World Festival, London, United Kingdom, 8 March 2016), online: YouTube <<https://www.youtube.com/watch?v=DW4HLgYPIA&feature=youtu.be>> at 6:50 min [hereinafter “Crenshaw Keynote”]. See also Katie Steinmetz, “She Coined the term Intersectionality over 30 Years Ago. Here’s what it means to her today” *Time* (20 February 2020), online: Time <<https://time.com/5786710/kimberle-crenshaw-intersectionality/>>, quoting Crenshaw’s explanation of intersectionality as about “how certain aspects of who you are will increase your access to the good things or your exposure to the bad things in life” by virtue of engrained structures of power and privilege that characterize our communities and societies.

<sup>41</sup> Atrey, *supra* note 4 at 59. See also May, *supra* note 24 at 113, explaining that intersectionality approaches identity categories as “ideologically powerful, experientially salient (but not essentialist), and as fluid.”

<sup>42</sup> Jennifer Jihye Chun, George Lipsitz, & Young Shin, “Intersectionality as a Social Movement Strategy: Asian Immigrant Women Advocates” (2013) 38:4 *Signs: Journal of Women in Culture and Society* 917 at 923.

<sup>43</sup> Dale, *supra* note 16 at 24 notes that an aspect of Crenshaw’s early work that is often overlooked is its “orientation to policy and law reform.”

<sup>44</sup> Ange-Marie Hancock, “Intersectionality’s will Toward Social Transformation” (2015) 37 *New Political Science* 620 at 622 [hereinafter “Social Transformation”].

intersectional work is animated by “a motivation to go beyond mere comprehension of intersectional dynamics to transform them.”<sup>45</sup>

In popular and some scholarly applications of intersectionality, the first idea – acknowledging the realities of intersecting social identities – has eclipsed this second, more transformative aspect of intersectionality.<sup>46</sup> This has led to the rise of the mistaken idea that intersectionality requires only the expansion of identity categories to include an infinite number of differently situated subjects.<sup>47</sup> According to Sandra Fredman, a scholar of law, equality and antidiscrimination, this approach “raises what has been dubbed the ‘et cetera’ problem: the extent to which categories and kinds of subjects can multiply and reconfigure, and how the law can manage such proliferation.”<sup>48</sup> In light of this trend toward focusing on identities at the expense of systemic questions about privilege and dis-privilege, Crenshaw, Cho and McCall have called for a refocusing of intersectional arguments away from groups and identities and toward “structural intersectionality”, centring the structures of power and exclusion that create oppression and discrimination.<sup>49</sup> Structural intersectionality moves intersectional arguments away from a focus on abstract identity categories for their own sake and toward analyses that focus on the underlying systems of power that create and maintain those categories, and distribute privilege and dis-privilege along identity-based lines.

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<sup>45</sup> Cho, Crenshaw & McCall, *supra* note 4 at 786. See also Fredman, *supra* note 1 at 28, who describes “[t]he central problem” motivating intersectionality as “how to render visible and properly remedy the wrongs of those who are multiply disadvantaged.”

<sup>46</sup> Cho, Crenshaw & McCall, *supra* note 4 at 797, note the puzzling “recasting of intersectionality as a theory primarily fascinated with the infinite combinations and implications of overlapping identities from an analytic initially concerned with structures of power and exclusion.”

<sup>47</sup> See eg this trend noted generally in Crenshaw, “Crenshaw Keynote”, *supra* note 40 at 6:35 min.

<sup>48</sup> Fredman, *supra* note 1 at 31.

<sup>49</sup> Cho, Crenshaw & McCall, *supra* note 4 at 797. See also Fredman, *supra* note 1 at 31, and Crenshaw, “Crenshaw Keynote”, *supra* note 40.

### 2.3 Critiques of Intersectionality<sup>50</sup>

As intersectionality has gained traction across contexts and entered the mainstream, there has, predictably, emerged a wave of retaliation. Some of the most flagrant criticisms of intersectionality include arguments that intersectionality amounts to special treatment for minorities, devalues white people, is a “conspiracy of victimization” or is simply academic jargon disconnected from the realities of the world.<sup>51</sup> Many of these criticisms are overtly rooted in racism, and most of them reflect, at best, a superficial understanding of intersectionality.

Beyond these conservative criticisms, however, there are a variety of more productive, nuanced critiques of intersectionality that have contributed to developing the concept across diverse contexts, and are thus worthy of attention.<sup>52</sup> As with the literature on intersectionality proper, the volume of critiques of intersectionality – and the responses to those critiques and defences of intersectionality – is far too vast to be canvassed here in full.<sup>53</sup> We highlight below three kinds of critiques of intersectionality that characterize the field.

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<sup>50</sup> For broad engagement with many of the dominant critiques and defences of intersectionality see Anna Carasthathis, *Intersectionality: Origins, Contestations, Horizons* (Nebraska: University of Nebraska Press, 2016).

<sup>51</sup> See eg Wilhelm, *supra* note 19; Jane Coatson, “The Intersectionality Wars” *Vox* (28 May 2019), online: [Vox <https://www.vox.com/the-highlight/2019/5/20/18542843/intersectionality-conservatism-law-race-gender-discrimination>](https://www.vox.com/the-highlight/2019/5/20/18542843/intersectionality-conservatism-law-race-gender-discrimination); and Debra Soh, “Intersectionalism is Nonsense. But the Backlash Against It Is Very Real” *Quillette* (30 July 2019), online: [Quillette <https://quillette.com/2019/07/30/intersectionalism-is-nonsense-but-the-backlash-against-it-is-very-real/>](https://quillette.com/2019/07/30/intersectionalism-is-nonsense-but-the-backlash-against-it-is-very-real/).

<sup>52</sup> See also Cho, Crenshaw & McCall, *supra* note 4 at 785, where, in mapping of the field of intersectionality studies, the authors identify three broad categories of engagements with intersectionality: “the first consisting of applications of an intersectional framework or investigations of intersectional dynamics, the second consisting of discursive debates about the scope and content of intersectionality as a theoretical and methodological paradigm, and the third consisting of political interventions employing an intersectional lens.”

<sup>53</sup> May, *supra* note 24 at 98, concludes “[i]ntersectionality critiques have become something of their own genre—a form so flourishing, at times it seems critique has become a primary means of taking up the concept and its literatures.” See also Atrey, *supra* note 4 at 54-63 for an overview of various critiques and responses to intersectionality.

### 2.3.1 Intersections beyond Race/Sex

First, there is a category of engagements that focus on whether and how intersectionality addresses oppressions at complex intersections beyond race and sex.<sup>54</sup> For example, professor of African American and gender and sexuality studies, Jennifer Nash, critiques Crenshaw's theory for its "wholesale abandonment of addressing how factors beyond race and sex shape Black women's experiences of violence [which] demonstrates the shortcomings of intersectionality to capture the sheer diversity of actual experiences of women of colour."<sup>55</sup> Atrey explains this line of critique as arguing that "in keeping intersectional analysis limited to too few (two) and 'cultural' categories (like race and sex) alone, intersectionality falls short of its own promise of revealing truly complex systems of domination and structures of power."<sup>56</sup> Much of the literature falling under this umbrella is written by those with complex identities beyond race/sex who wonder whether and how intersectionality attends to their unique experiences of discrimination.

For example, an early line of critique by race/sexuality scholars suggests that intersectionality tends to prioritize race and sex as identity frames, to the exclusion of other identity categories, such as sexuality, and other forms of oppression, like heterosexism.<sup>57</sup> Related, more recent work highlights the omission of gender identity from much intersectional scholarship.<sup>58</sup> Noting that the majority of work on intersectionality comes from Anglophone scholars and is written in English, Francophone theorists have critiqued the failure of intersectionality to capture linguistic power relations and language as an axis of

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<sup>54</sup> But see Crenshaw, "Mapping the Margins", *supra* note 7 at 1244-45, note 9, where she expressly states: "While the primary intersections that I explore here are between race and gender, the concept can and should be expanded by factoring in issues such as class, sexual orientation, age, and color."

<sup>55</sup> Jennifer C Nash, "Re-thinking Intersectionality" (2008) 89 *Feminist Review* 1 at 9.

<sup>56</sup> Atrey, *supra* note 4 at 56.

<sup>57</sup> See eg Darren Lenard Hutchinson, "Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory, and Anti-Racist Politics" (1999) 47:1 *Buff L Rev* 1. For a response to the critiques that intersectionality does not sufficiently engage issues of sexuality, see eg Cho, *supra* note 36.

<sup>58</sup> See eg Ido Katri, "Transgender Intrasectionality: Rethinking Anti-Discrimination Law and Litigation" (2017) *U Pennsylvania J L & Soc Change* 20; and Alexandre Baril, "Intersectionality, Lost in Translation? (Re)thinking Intersections between Anglophone and Francophone Intersectionality" (2017) 38:1 *Atlantis* 125.

oppression, a phenomenon that Alexandre Baril, a scholar of gender, sexuality and linguistic diversity, calls the “Anglicization of intersectionality.”<sup>59</sup> Still others argue that intersectionality’s focus on social or cultural identity categories means that “material analysis has never been concretely pursued within intersectionality, given the lack of a conceptual framework for understanding the economic or redistributive forms of domination.”<sup>60</sup>

Other critiques focus on broader systems of power and privilege that are not sufficiently addressed by intersectionality. For example, sociologist and transnational feminist scholar Vrushali Patil argues that “the focus of intersectional analyses in general continues to be on the putative West, domestic and local, leaving unexamined cross-border dynamics...that...are integral to the unfolding of local processes...” of identity-formation and oppression.<sup>61</sup> Decolonial feminists have highlighted the importance of intersectional engagements with questions of coloniality, in particular noting the ways that “coloniality undergirds the categorial logics identified by intersectionality.”<sup>62</sup> Similarly, while the concept and practice of interconnectedness is not new for many Indigenous activists and writers in Canada, intersectionality as a global theory does not do enough, in the words of Métis scholar Natalie Clark, to “theorize not only the past but the current forces of colonialism as found

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<sup>59</sup> For an important analysis of this trend in the Canadian context, see Baril, *supra* note 57 and for consideration of the specific engagements of Quebec feminists with intersectionality, see eg Geneviève Pagé, “Sur l’indivisibilité de la justice sociale ou Pourquoi le mouvement féministe québécois ne peut faire l’économie d’une analyse intersectionnelle” (2014) 26:2 *Nouvelles pratiques sociales* 200. There are some notable exceptions to tendency among intersectional scholars not to consider questions of language, including, eg Chantal Maillé, “Transnational Feminisms in Francophonie Space” (2012) 23:1 *Women: A Cultural Review* 62; and Chantal Maillé, “Approche intersectionnelle, théorie post- coloniale et questions de différence dans les féminismes anglo-saxons et francophones” (2014) 33:1 *Politique et Sociétés* 41.

<sup>60</sup> Atrey, *supra* note 4 at 56. See eg Joanne Conaghan, “Intersectionality and the Feminist Project in Law” in Emily Grabham, Davina Cooper, Jane Krishnadas, & Didi Herman, eds., *Intersectionality and Beyond: Law, Power and the Politics of Location* (Oxfordshire: Routledge Cavendish, 2009) 17.

<sup>61</sup> See eg Patil, *supra* note 38 at 853. See also Sara Salem, “Intersectionality and its Discontents: Intersectionality as Travelling Theory” (2016) 25:4 *European Journal of Women’s Studies* 403; and Sylvanna M. Falcón & Jennifer Nash, “Shifting analytics and linking theories: A conversation about the “meaning-making” of intersectionality and transnational feminism” (2015) 50 *Women’s Studies International Forum* 1.

<sup>62</sup> Velez, *supra* note 14 at 392. See also Maria Lugones, “Methodological Notes Toward a Decolonial Feminism” in Ada María Isasi-Díaz & Eduardo Mendieta, eds., *Decolonizing Epistemologies: Latina/o Theology and Philosophy* (New York: Fordham University Press, 2012) 68.

within reserve politics, lateral violence, and identity politics,” nor does it sufficiently engage questions of sovereignty or the colonial nation-state.<sup>63</sup> Likewise, Kwagu’t scholar of Indigenous and decolonial methodologies Sarah Hunt points out that it is “not enough to include colonialism as one axis of oppression...[because]...colonialism conditions the whole matrix of intersecting systems of power in colonized spaces, such as North America.”<sup>64</sup>

### 2.3.2 Reliance on Identity Categories

A second group of critiques focuses specifically on intersectionality’s maintenance of, and reliance on, identity categories.<sup>65</sup> For example, some have noted that by focusing on the complexity of relations *between* identity categories, intersectionality leaves intact the identity categories themselves, and accepts the assumed inherent distinctions between them.<sup>66</sup> Intersectionality thus does not do enough to problematize the fact of identity categories even though, as queer theorist and gender studies scholar Jasbir Puar argues, “...many of the cherished categories of the intersectional mantra...are the products of modernist, colonial agendas and regimes of...violence” designed to “sort” people according to aspects of their physical or social person.<sup>67</sup>

Others have argued that by focusing on the interactions *between* identity categories, intersectionality “does not allow representation of diversity and heterogeneity of experience”

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<sup>63</sup> Clark, *supra* note 15 at 51. See also Emily Snyder, “Indigenous Feminist Legal Theory” (2014) 26:2 CJWL 365; Sarah Hunt, “Decolonizing Sex Work: Developing an Intersectional Indigenous Approach” in Emily van der Meulen, Elya M. Durisin & Victoria Love, eds., *Selling Sex: Experience, Advocacy, and Research on Sex Work in Canada* (Vancouver: UBC Press, 2013) 82.

<sup>64</sup> Sarah Hunt, “Summary of Themes: Dialogue on Intersectionality and Indigeneity” (26 April 2012) Institute for Intersectionality Research and Policy at 12, online: Academia.edu <[https://www.academia.edu/4677649/Dialogue\\_On\\_Intersectionality\\_and\\_Indigeneity\\_Summary\\_of\\_Themes](https://www.academia.edu/4677649/Dialogue_On_Intersectionality_and_Indigeneity_Summary_of_Themes)>.

<sup>65</sup> Again, Crenshaw was alive to this critique in her originating work, see Crenshaw, “Mapping the Margins”, *supra* note 7 at 1244-45, note 9, where she explains, “[i]n mapping the intersections of race and gender, the concept [of intersectionality] does engage dominant assumptions that race and gender are essentially separate categories. By tracing the categories to their intersections, I hope to suggest a methodology that will ultimately disrupt the tendencies to see race and gender as exclusive or separable.”

<sup>66</sup> McCall, *supra* note 20 at 1773. See also Maria Lugones, “Radical Multiculturalism and Women of Color Feminisms” (2014) 13:1 JCRT 68 at 73 who critiques the assumption that identity categories like race and gender are separable, even theoretically.

<sup>67</sup> Jasbir K. Puar, “I would rather be a cyborg than a goddess”: Becoming Intersectional in Assemblage Theory” (2012) 2:1 PhiloSOPHIA: A Journal of Feminist Philosophy 49 at 54.

*within* individual identity categories.<sup>68</sup> For example, queer theorist and legal scholar Ido Katri demonstrates how within the identity category of sexual orientation, those individuals who more closely conform to dominant, heteronormative scripts about relationships (ie: monogomy > non-monogamy), sex (ie: private > public) and gender (ie: cis-gender > trans/non-binary) generally have better access to rights and enjoy greater privileges than those who do not.<sup>69</sup> These intra-category differences are not generally captured by intersectionality. Others, like postcolonial feminist Sara Suleri, note the “radical inseparability” of gender and race, highlighting the “gendering of race and the racialization of gender” to show how identities don’t just intersect, but actually impact what gender and race mean in particular contexts.<sup>70</sup> These kinds of intra-category nuances are a critical part of understanding the workings of identity-based oppression.

### 2.3.3 The Depoliticization of Intersectionality

Finally, there is a group of appraisals that focus less on the theoretical boundaries of intersectionality and more on practical engagements with the idea. Some argue that through its proliferation, intersectionality has become depoliticized, often “treated as a gesture or catchphrase...[or] ...used in a token manner to account for a nebulous, depoliticized, and hollow notion of “difference.”<sup>71</sup> For example, the term “intersectional feminism” is sometimes used as a simple proxy for “inclusive feminism”. Used in this way, “intersectional” marks contemporary feminism as distinct from the overwhelmingly white liberal and radical feminisms of the past but often does little to engage with intersectionality’s calls for systemic

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<sup>68</sup> Katri, *supra* note 58 at 69.

<sup>69</sup> *Ibid.*

<sup>70</sup> Sara Suleri, “Woman skin deep. Feminism and the postcolonial condition” in Bill Ashcroft, Gareth Griffiths & Helen Tiffin, eds., *The Post-Colonial Studies Reader* (Oxford: Routledge, 1995) 273 at 273, cited in Nikita Dhawan & Maria do Mar Castro Varela, ““What Difference Does Difference Make?”: Diversity, Intersectionality and Transnational Feminist Politics” (2016) 16 *Wagadu: A Journal of Transnational Women’s and Gender Studies* 9. See also David Valentine, *Imagining Transgender: An Ethnography of a Category* (Durham: Duke University Press, 2007) at 100, arguing that “age, race, class and so on don’t merely inflect or intersect with those experiences we call gender and sexuality but rather *shift the very boundaries of what gender and sexuality can mean in particular contexts*” (emphasis in original).

<sup>71</sup> May, *supra* note 24 at 8.

change. Puar argues that the mainstreaming of intersectionality has resulted in it becoming little more than “a tool of diversity management and mantra of liberal multiculturalism.”<sup>72</sup>

What many of these critiques of intersectionality have in common is the starting premise that intersectionality is intended to be a totalizing theory, providing a full and complete account of oppressions of all sorts, across contexts, identities, and locations. In reply, defenders of intersectionality often emphasize that intersectionality has never been held out as a “totalizing theory of identity.”<sup>73</sup> Instead, in her originating work on intersectionality, Crenshaw emphasized that intersectionality is a tool, contingent and imperfect, that offers a starting point for re-considering established frameworks for understanding identity, power and oppression.<sup>74</sup>

Finally, these and other critiques of intersectionality have led to the evolution of complementary theories, like Katri’s “intrasectinality,”<sup>75</sup> designed to capture the dynamics of power and oppression *within* identity categories, and extensions of intersectionality like Clark’s “red intersectionality,” an Indigenous intersectionality framework that foregrounds anti-colonialism and Indigenous sovereignty and nationhood.<sup>76</sup> In addition, “post-intersectionality” theories, including “multidimensionality,”<sup>77</sup> “assemblages,”<sup>78</sup> “social

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<sup>72</sup> Jasbir Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Durham.: Duke University Press, 2007) at 215 [hereinafter “*Terrorist Assemblages*”].

<sup>73</sup> Atrey, *supra* note 4 at 59.

<sup>74</sup> Crenshaw, “Mapping the Margins”, *supra* note 7 at 1244-45, note 9, describes the idea of intersectionality as “provisional.”

<sup>75</sup> Katri, *supra* note 58.

<sup>76</sup> Clark, *supra* note 15.

<sup>77</sup> See eg Darren Hutchinson, “Identity Crisis: Intersectionality, Multidimensionality, and the Development of an Adequate Theory of Subordination” (2000) 6 Mich J Race & L 285; and Athena Mutua, “The Multidimensional Turn: Revisiting Progressive Black Masculinities in Multidimensional Masculinities and Law” in Frank Rudy Cooper & Ann McGinley, eds., *Masculinities and the Law: A Multidimensional Approach* (New York: NYU Press, 2012) 78.

<sup>78</sup> Puar, “Terrorist Assemblages”, *supra* note 72.



dynamics”,<sup>79</sup> “horizontal inequalities”,<sup>80</sup> and “cosynthesis”<sup>81</sup> have emerged, advancing various riffs or “improvisations” on the basic idea of understanding the complexity of oppression based on multiple identities.<sup>82</sup>

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<sup>79</sup> Davina Cooper, “Intersectional Travel through Everyday Utopias: The Difference Sexual and Economic Dynamics Make” in Emily Grabham, Davina Cooper, Jane Krishnadas, & Didi Herman, eds., *Intersectionality and Beyond: Law, Power and the Politics of Location* (Oxfordshire: Routledge Cavendish, 2009).

<sup>80</sup> Frances Stewart, “Horizontal Inequalities and Intersectionality” (2014) 24 Maitreyee: E-Bulletin of the Human Development & Capability Association, online: UNESCO <<https://en.unesco.org/inclusivepolicylab/sites/default/files/publication/document/2017/2/Group%20inequality%20intersectionality.pdf>>.

<sup>81</sup> Peter Kwan, “Complicity and Complexity: Cosynthesis and Praxis” (2000) 49 DePaul L Rev 673.

<sup>82</sup> Atrey, *supra* note 4 at 35.

### Part 3: Intersectionality and Legal Advocacy

*If you have come here to help me you are wasting your time, but if you have come because your liberation is bound up with mine, then let us work together.*<sup>83</sup>

We now turn from the theory of intersectionality to the more practical question of *how* to do intersectional work in legal contexts. In this section, we consider how lawyers and advocates can bring the insights of intersectionality to their engagements with variously-located clients who identify across many spectrums of sameness and difference. The lawyer-client relationship, and the power imbalances inherent within, has been the subject of sustained feminist attention for many years.<sup>84</sup> Much of this work focuses on the power differentials that flow from unequal access to legal language and legal knowledge.<sup>85</sup>

Intersectionality highlights the importance of understanding power differentials between lawyers and clients not only in terms of legal knowledge, but also in respect of the complex identities and resulting privileges and dis-privileges of both a lawyer and their client, how this relationship impacts the lawyer-client relationship, and the kinds of advocacy a lawyer pursues on behalf of a client or community. As Ontario lawyer Omar Har-Redeye explains, intersectionality helps “illustrate how advocacy on behalf of a discriminated or marginalized group can also inadvertently create its own patterns of oppression and exclusion, not only towards other discriminated groups, but within the advocating group itself

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<sup>83</sup> Lilla Watson & Aboriginal Activists Group, Queensland, 1970s.

<sup>84</sup> See eg Ann Scales, *Legal Feminism: Activism, Lawyering, and Legal Theory* (New York: NYU Press, 2006); Kathryn Abrams, “Feminist Lawyering and Legal Method” (1991) 16:2 *Law & Social Inquiry* 373; and Naomi R. Cahn, “Defining Feminist Litigation” (1991) 14:1 *Harv Women's LJ* 1.

<sup>85</sup> For example, Jane Doe, a feminist client recounting her experiences working with feminist lawyers in the context of suing the Toronto police for negligence and sex discrimination in the investigation of her sexual assault, describes “...client-solicitor relationships as power-based and unequal, the lawyer holding information about language and using precedents that spring from patriarchal codes.” Jane Doe, “Barriers between Feminist Clients and Feminist Lawyers, or, What Class are You In?” in Sheila McIntyre & Elizabeth Sheehy, eds., *Calling for Change: Women, Law and the Legal Profession* (University of Ottawa Press, 2006) 263 at 264. Jane Doe’s case is *Jane Doe v Metropolitan Toronto Police Force*, (1998), 39 OR (3d) 487 (Ont Ct Gen Div). See also Jane Doe, *The Story of Jane Doe* (Toronto: Random House, 2003).

when ignoring its own internal complexities and power dynamics.”<sup>86</sup> Two ideas are particularly relevant in this regard: positionality and allyship.

### 3.1 The Importance of Positionality

The way that intersectionality is applied is as important as the application itself. As such, understanding one’s positionality – or socio-political context – is a key part of effectively using an intersectional approach. Positionality refers to the ways that our individual identities – including factors such as race, gender, sexuality, class, and ability status – situate us as having relatively more or less power within our social, economic, political and legal contexts. Positionality is concerned with how our identities, and the privileges and dis-privileges that flow from them, influence our perspectives and ways of being in the world.<sup>87</sup> Feminist philosopher Linda Alcoff explores this concept by examining how a male-dominant worldview creates blinders when trying to determine the “truth” about gender.<sup>88</sup> Alcoff warns that as a movement for women, feminism is based on notions of womanhood that are steeped in sexism.<sup>89</sup> She explains that our understanding of womanhood has been shaped by history, culture, philosophy, and our everyday lives, all of which have been dominated by the male perspective.<sup>90</sup> It is important, then, that feminists do the work of deconstructing notions of womanhood, being willing to question any presupposed truths.<sup>91</sup> More importantly, there must be a willingness to continually evolve, with a focus on listening to *all* those whom the movement purports to represent.

Similarly, in representing clients who face intersecting forms of oppression, legal advocates must never lose sight of how their own positionality impacts their understanding of

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<sup>86</sup> Omar Ha-Redeye, “Understanding Intersectionality Could Help Judicial Decisions” (12 March 2019) *CanLii Connects*, online: CanLii Connects <<https://canliiconnects.org/en/commentaries/66020>>.

<sup>87</sup> Mitsunori Misawa, “Queer Race Pedagogy for Educators in Higher Education: Dealing with Power Dynamics and Positionality of LGBTQ Students of Color” (2010) 3:1 *International Journal of Critical Pedagogy* 26 at 26.

<sup>88</sup> Linda Alcoff, “Cultural Feminism versus Post-Structuralism: The Identity Crisis in Feminist Theory” (1988) 13:3 *Signs: Journal of Women in Culture and Society* 405.

<sup>89</sup> *Ibid* at 406.

<sup>90</sup> *Ibid*.

<sup>91</sup> *Ibid*.

the client's issues and the quality of the representation they can provide. Legal advocates must strike the balance of carrying out their clients' wishes while offering advice and guidance that helps to frame the clients' goals within the confines of the law. Lawyers must grapple with what it means to let the client lead the way in her own case, while the lawyer remains in a position of significant power and influence. Alcoff raises the concern that when people in power represent those who are marginalized, this often reinforces oppression for those being represented.<sup>92</sup> For example, if a white man represents a Black woman in a discrimination case, not only does it reinforce the notion that a Black woman's experience must go through the filter of a white man for it to be taken seriously, it also requires the advocate to communicate persuasively about a reality that he may never have conceptualized before encountering that client.

Alcoff notes that "there is a growing recognition that where one speaks from affects the meaning and truth of what one says, and thus one cannot assume an ability to transcend one's location".<sup>93</sup> In other words, no matter their background, advocates must consider their social location and be aware of how that impacts what they can or cannot understand about a client's case. Further, advocates should be aware of the way their positionality may reinforce certain power structures that further disadvantage a client. This awareness should compel advocates to continually take stock of their implicit biases, and constantly educate themselves on the nature and nuances of the discrimination experienced by those they represent.<sup>94</sup>

Further, legal advocates must also consider the social and political position of the tool they use to advocate for others – the legal system. The Canadian legal system is not only a product of colonization, it is itself a colonizing instrument that entrenches existing systems of

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<sup>92</sup> Linda Alcoff, "The Problem of Speaking for Others" (1991) 20 Cultural Critique 5 at 7.

<sup>93</sup> *Ibid* at 6 & 7.

<sup>94</sup> For a discussion on implicit bias in advocacy, see eg Dustin Rynders, "Battling Implicit Bias in the IDEA to Advocate for African American Students with Disabilities" (2019) 35:1 Touro Law Review 461. For further personal reflection on implicit bias, Harvard University offers a free Implicit Bias test, available online: Project Implicit <<https://implicit.harvard.edu/implicit/takeatest.html>>.

power that continually disenfranchise Indigenous peoples and communities.<sup>95</sup> In other words, the legal system not only reflects the values, worldview, and needs of the dominant group, it is also used to marginalize those who are not considered part of that group.<sup>96</sup> With this in mind, legal advocates should wield the power of the legal system carefully, recognizing its potential to effect the particular harms of colonialism.

Given the position of the legal system and the power imbalance inherent in the lawyer-client relationship – particularly where the client has been subject to discrimination – it is important to question whether that relationship can ever truly correct the very dynamic it reinforces. Even in this questioning, however, legal advocates can strive for change using the imperfect tool they have. American legal scholar Martha Minow wrestles with this concept using the words of Audre Lorde:

There is a risk that claims made in established legal forms can never adequately challenge oppressive practices at the heart of the legal or political system. Audre Lorde analyzed this problem in her powerful essay, ‘The Master’s Tools Will Never Dismantle the Master’s House,’ ... Yet, just as her own prose transformed inherited language and ideas, ... an emphatic claiming of differences through rights language could help transform existing legal and social structures. To continue with the metaphor of the Master’s House, the tools may be used to make new tools, which then can help renovate the house for others.”<sup>97</sup>

### 3.2 Allyship in Advocacy

#### 3.2.1 The Concept of Allyship

We turn now to the distinct but related concept of allyship, and in particular its role in implementing an intersectional approach in advocacy. While there is no singular definition of an ally, the concept generally refers to a person in a position of relative privilege who stands

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<sup>95</sup> Andree Lajoie, “Introduction: Which way out of Colonialism?” in Law Commission of Canada, ed., *Indigenous Legal Traditions* (Vancouver: UBC Press, 2007) at 3.

<sup>96</sup> See eg Rachel Decoste, “The Most Discriminatory Laws in Canadian History” *Huffington Post* (16 September 2013), online: *Huffington Post* <[https://www.huffingtonpost.ca/rachel-decoste/most-discriminatory-canadian-laws\\_b\\_3932297.html](https://www.huffingtonpost.ca/rachel-decoste/most-discriminatory-canadian-laws_b_3932297.html)>.

<sup>97</sup> Martha Minow, *Making all the Difference: Inclusion, Exclusion and American Law* (New York: Cornell University, 1990) 297 at note 15.

in solidarity with a marginalized person or group.<sup>98</sup> Key elements of the concept of allyship include that one's allyship is not self-defined, nor is it a permanent designation. Rather it is an active and on-going process of listening, learning, unlearning, failing, accepting criticism, and continuing to show up and offer various forms of support where it is required.<sup>99</sup>

The concept of allyship has been thoughtfully critiqued in recent years.<sup>100</sup> Advocates have been invited to consider the colonial and otherwise inherently problematic underpinnings that have accompanied the notion of allyship.<sup>101</sup> For example, in the name of allyship, members of dominant groups have often positioned themselves as helpers or rescuers, centring their own notions of justice and believing that their involvement is necessary for the liberation of those they seek to help. In truth, advocating in solidarity requires recognition of “the destructiveness of oppression to all humanity” and an understanding that “our collective well-being is interwoven”.<sup>102</sup> Despite the important critiques of the concept of allyship, we use the term for the purposes of this brief, as it acts as a common starting point for those who truly seek to understand and improve the dynamics of their advocacy.

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<sup>98</sup> The Anti-Oppression Network, “Allyship”, online: The Anti-Oppression Network <<https://theantioppressionnetwork.com/allyship/>>.

<sup>99</sup> “Allyship”, *supra* note 98. For a discussion on learning from failure in allyship, see eg Haneen Ghabra & Bernadette Marie Calafell, “From failure and allyship to feminist solidarities: negotiating our privileges and oppressions across borders” (2018) 38:1-2 Text and Performance Quarterly 38; and Jenalee Kluttz, Jude Walker & Pierre Walter “Unsettling allyship, unlearning and learning towards decolonizing solidarity” (2020) 52:1 Studies in the Education of Adults 49.

<sup>100</sup> For discussions that challenge popular notions of allyship, see eg Mia McKenzie, “No More ‘Allies’” (2013) Black Girl Dangerous, online: Charter for Compassion <<https://charterforcompassion.org/peace-building/no-more-allies>>; Stephanie Irlbacher-Fox “Traditional knowledge, co-existence and co-resistance” (2014) 3:3 Decolonization: Indigeneity, Education & Society 145; and Kluttz, Walker & Walter, *supra* note 99.

<sup>101</sup> Kluttz, Walker & Walter, *supra* note 99 at 53.

<sup>102</sup> “Allyship vs Solidarity”, adapted from J Grant, *Over the Work Ally: 9 Ways solidarity is an Act of Radical Self Love* (2017), online: New York University <<https://www.nyu.edu/content/dam/nyu/diversity/documents/2020-01-10%20-%20SW%20Solidarity%20Vs%20Allyship%20-%205x7.5%20WEB.pdf>>.

### 3.2.2 Allyship in Practice

Many writers have given recommendations on useful and not-so-useful ways to practice allyship.<sup>103</sup> For example, professor of law and African American studies, Devon Carbado, warns against the strategy of “[trading] on white privilege” when advocating for marginalized people.<sup>104</sup> In other words, advocates should not build their arguments around the foundational principle that marginalized people want to be included in the systems and structures that benefit the dominant group. Rather, advocates should consider how the systems and structures they challenge are inherently problematic. Audre Lorde alludes to this idea when she says, “the master’s tools will never dismantle the master’s house”.<sup>105</sup>

A system that was built by and for the benefit of white, heterosexual, able-bodied men will not be particularly useful when trying to achieve true equality for those who fall outside of these categories. As such, advocates must be able and willing to appreciate when the tools they are using are inherently ineffective for combatting inequality. For example, categorical approaches to identity, which are used in antidiscrimination legislation, often result in further marginalizing people with intersecting identities.<sup>106</sup> This approach, which requires claimants to fit their discrimination claim neatly into one identity category, does not account for the nuanced, lived experiences of variously-located claimants. As Pothier warns, advocates must guard against “the tendency of the legal mind to want to compartmentalize”, a tendency that does not centre the experience of the claimant.<sup>107</sup>

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<sup>103</sup> See eg Anita Balakrishnan, “List of resources for lawyers on how to be an ally to racialized colleagues” *Law Times* (1 June 2020), online: Law Times <<https://www.lawtimesnews.com/resources/practice-management/list-of-resources-for-lawyers-on-how-to-be-an-ally-to-racialized-colleagues/330118>>; and Amelie Lamont, “Guide to Allyship” (2020), online: byamelie.studio <<https://guidetoallyship.com/>>.

<sup>104</sup> Devin W Carbado, “Colorblind Intersectionality” (2013) 38:4 *Signs: Journal of Women in Culture and Society* 811 at 831.

<sup>105</sup> Audre Lorde, “The Master’s Tools Will Never Dismantle the Master’s House” in *Sister Outsider: Essays and Speeches* (Berkeley: Crossing Press, 1984) 110.

<sup>106</sup> See Part 2, above, and see generally Crenshaw, “Demarginalizing” *supra* note 3.

<sup>107</sup> Pothier, *supra* note 34 at 60.

In addition to considering how inherently problematic some legal frameworks are, advocates must also consider strategies for ushering in new frameworks. While not every advocate can take on precedent-setting strategic litigation cases, she can observe and practice the same principles that allow such cases to create meaningful change. For example, such principles are discussed in a United Nations report from the Women’s Human Rights and Gender Section (WHRGS) of the High Commissioner of Human Rights (OHCHR). The purpose of this report was to analyze and share best practices in strategic litigation for cases of sexual and gender-based violence (SGBV).<sup>108</sup> The report notes that strategic litigation must always centre “the needs, wishes and well-being of survivors”.<sup>109</sup> The report goes on to discuss how important it is to have survivors’ informed consent and meaningful participation in the litigation process:

Processes aiming at a transformational agenda towards greater goals of gender equality and non-discrimination must go in hand with a transformational agenda for the survivors, aiming at their empowerment and greater autonomy, and towards the recognition, promotion and protection of their rights.<sup>110</sup>

This is a great principle of allyship in advocacy as it focuses on the needs, wishes and well-being of those being advocated for.<sup>111</sup>

Another crucial way to practice allyship in intersectional advocacy is to continually educate oneself on the social and historical context within which a client’s legal issues are

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<sup>108</sup> Office of the United Nations High Commissioner for Human Rights, “Strategic Litigation for Sexual and Gender-based Violence: Lessons Learned” (2019), online: OHCHR <<https://www.ohchr.org/Documents/Issues/Women/WRGS/OHCHR-StrategicLitigationforSV-workshopreport-web.pdf>>.

<sup>109</sup> *Ibid* at 2.

<sup>110</sup> *Ibid*.

<sup>111</sup> For more strategic litigation principles from the context SGBV that can be applied to intersectional advocacy more generally, see *ibid* at 4 on Defining Objectives and *ibid* at 8-10 on Coordination and Collaboration among Entities Leading Strategic SGBV Litigation Processes. The goal of this approach is to strengthen the intersectional approach that can often be thwarted by single identity-based organizations. For more on the challenges raised by the dominance of single identity-based organization, see Suzanne Goldberg, “Intersectionality in Theory and Practice” in Emily Grabham, Davina Cooper, Jane Krishnadas, & Didi Herman, eds., *Intersectionality and Beyond: Law, Power and the Politics of Location* (Oxfordshire: Routledge Cavendish, 2009) at 128.



situated, alleviating the need to rely on the emotional labour of the client to gain greater insight into her lived experience. Advocates must commit themselves to enhancing their understandings of the nuanced ways in which marginalized clients experience discrimination. Anti-racism educators Erica Lawson and Amanda Hotrum discuss the importance of this concept when describing the birth of a project in Ontario known as the Connecting Communities with Counsel (CCWC) project:

From its inception, the CCWC project provided legal services to African-Canadian clients who experienced physical violence and strip searches by the police. As such, it was important to connect these clients with lawyers who understood the connections between organized state violence towards African Canadians and the daily over policing of this community under the guise of law and order.

[...]

Finally, it was important to connect clients with a lawyer who, in the process of uncovering facts, would not dismiss or attempt to justify violence towards African Canadians. This is not to suggest that a subject's story is above question. Rather, it is an acknowledgement that legal practitioners must listen and dialogue "while emphasizing the significance of the authority of experience".<sup>112</sup>

Ultimately, those who advocate for marginalized groups have a tremendous responsibility to ensure they do not perpetuate the discrimination and silencing of these groups. As such, legal advocates must consider it a duty to recognize their positionality, centre the voices and wellbeing of their clientele, and diligently pursue a more nuanced understanding of the social and historical context of the discrimination their clients face.

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<sup>112</sup> Erica Lawson & Amanda Hotrum, "Equity for Communities: Integrating Legal Counsel and Critical Race Theory" in Gayle Macdonald, Rachel L Osbourne & Charles C Smith, eds., *Feminism, Law, Inclusion: Intersectionality in Action* (Toronto: Sumach Press, 2005) 41 at 45, citing in part bell hooks, *Yearning: Race, Class, Gender and Cultural Politics* (Toronto: Between the Lines, 1990) at 29.

## Part 4: Intersectionality and Antidiscrimination Law

As noted above, the term “intersectionality” originated in the context of Crenshaw’s critique of antidiscrimination law in the United States. Crenshaw argued that by treating identity categories like “sex” and “race” as mutually exclusive grounds of discrimination, antidiscrimination law cannot recognize or effectively remedy intersectional discrimination.<sup>113</sup> That critique is equally relevant here in Canada. Our antidiscrimination laws – codified in the *Charter of Rights and Freedoms* (*Charter*),<sup>114</sup> the federal *Canadian Human Rights Act* (*CHRA*)<sup>115</sup> and the 13 provincial and territorial human rights acts and codes – all establish mechanisms for redressing discrimination based on a list of prohibited grounds of discrimination, including (but not limited to): race, national or ethnic origin, colour, religion, sex, age and disability.<sup>116</sup> To date, cases based on an alleged infringement of the antidiscrimination provisions of the *Charter* or a human rights instrument have overwhelmingly been analyzed on the basis of a single prohibited ground of discrimination. That is, an adjudicator, judge or court considers whether the claimant experienced discriminatory treatment because of one aspect of their identity – race *or* disability *or* gender, etc.<sup>117</sup> Crenshaw calls this a “single-axis” model of

<sup>113</sup> Crenshaw, “Demarginalizing”, *supra* note 3 and Crenshaw, “Mapping the Margins”, *supra* note 7.

<sup>114</sup> *Canadian Charter of Rights and Freedoms*, s 15, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [hereinafter *Charter*].

<sup>115</sup> RSC 1985, c. H-6 at s. 3.1 (added 1998) [hereinafter *CHRA*].

<sup>116</sup> All of the Canadian antidiscrimination provisions prohibit discrimination on these grounds. The CHRA, and most provincial and territorial acts, also list additional prohibited grounds including marital and family status, sexual orientation, gender identity and gender expression. See eg *CHRA*, *ibid* at s 3; and Ontario’s *Human Rights Code*, RSO 1990, c. H.19, which includes the protected grounds of citizenship, receipt of public assistance (in housing), and record of offences (in employment). In the *Charter* context, additional grounds beyond those listed may be recognized as “analogous grounds”, which have been described as personal characteristics that are “immutable, difficult to change, or changeable only at unacceptable personal cost”: *Corbière v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 60. To date, the Supreme Court has established four analogous grounds: sexual orientation (*Egan v Canada*, [1995] 2 SCR 513); marital status (*Miron v Trudel*, [1995] 2 SCR 418); non-citizenship (*Andrews v Law Society of British Columbia*, [1989] 1 SCR 143); and Aboriginality-residence as it pertains to a member of an Indigenous band who lives off reserve (*Corbière*, *ibid.*).

<sup>117</sup> The tendency of Canadian courts to analyze claims of discrimination on the basis of a single ground is consistent with the dominant normative conception of discrimination, which Atrey, *supra* note 4 at 8 calls the “the either/or model of...discrimination where multiple possibilities can only lead to discrimination based on *either* one ground *or* the other but never both or together.” On the historical development of the “single-axis” approach in antidiscrimination law, see eg Ben Smith, “Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective” (2016) 16 *The Equal Rights Review* 73 at 74; Rosemary Hunter, ed.,

assessing discrimination, because it treats each ground of discrimination as exclusive from the rest.<sup>118</sup>

The shortcomings of single-axis frameworks are at the core of intersectionality's critique of antidiscrimination law.<sup>119</sup> First, single-axis frameworks "obscure the complex reality of real life," making the stories of those with intersectional social identities, like older Black women, or Indigenous lesbians, impossible to tell.<sup>120</sup> Second, single-axis approaches essentialize the experiences of everyone who falls into a given category, assuming "that identity groups are internally homogeneous" and thus concealing diversity within groups.<sup>121</sup> Third, single-axis frameworks tend to understand identity categories in a limited way, ignoring the complex role of power in creating identity categories and in structuring relationships of inequality in a given context. Fredman explains:

Discrimination is not symmetrical; it operates to create or entrench domination by some over others. But such power relations can operate both vertically and diagonally. Thus, Black men are in a position of power in relation to their gender, but not in relation to their colour. White women conversely are in a position of power in relation to their colour but not their gender. Power operates at an even more fundamental level, to construct identity categories themselves. Race is a social construct, a marker for oppression rather than a biological reality... Ethnicity, too, is framed by power relations, with minorities in some countries being majorities in others. This demonstrates that structures of

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*Rethinking Equality Projects in Law: Feminist Challenges* (Oxford, Hart Publishing, 2008); and Sandra Fredman, *Discrimination Law* (Oxford: Oxford University Press, 2010) at ch 1.

<sup>118</sup> Crenshaw, "Demarginalizing", *supra* note 3 at 139.

<sup>119</sup> Atrey, *supra* note 4 at 8.

<sup>120</sup> Pothier, *supra* note 34 at 44-45. See also Katri, *supra* note 58 at 68, noting that if a claimant's "identity and experience [are] related to more than one protected class, they are less coherent and less likely to be read by a tribunal. When an individual is understood as signifying more than one kind of subordination...category-based claims are less adequate."

<sup>121</sup> Fredman, *supra* note 1 at 30, points out that essentialist approaches to identity-based groups have long been "confronted within feminism from the early days when white middle-class feminists were rightly criticized by Black women for assuming that their own experience was a universal characteristic of gender oppression." See also Elizabeth Spellman, *Inessential Woman* (Boston: Beacon Press, 1988).

domination work in complex ways which cannot easily be captured through a single-identity model.<sup>122</sup>

The result is that single-axis models distort the true nature of intersectional antidiscrimination claims. Without a full and accurate picture of the alleged discrimination in a given case, courts may simply fail to see intersectional discrimination and will be unlikely to offer a meaningful remedy.<sup>123</sup> Additionally, single-axis frameworks for addressing discrimination have limited ability to target the systemic dimensions of inequality and oppression from which individual experiences of discrimination flow.

With a view to intersectionality's critique of antidiscrimination law, in this section we consider the relationship between intersectionality and antidiscrimination law in Canada. We begin by mapping the existing terrain, noting the use of intersectionality in legal arguments, the reception by judges and adjudicators of intersectional arguments, and the express incorporation of intersectionality into certain statutes. We then look to the practical question of how the insights of intersectionality could more effectively be brought to bear on antidiscrimination law.

#### 4.1 Intersectionality in Canadian Antidiscrimination Law

Notwithstanding the persistence of single-axis analyses, there are signs that intersectionality is beginning to infiltrate antidiscrimination law in Canada, albeit in a piecemeal fashion and at a glacial pace.<sup>124</sup> More and more legal actors, including lawyers, judges, adjudicators and legislators, are starting to appreciate the relevance – indeed, the necessity – of incorporating the insights of intersectionality into antidiscrimination law.

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<sup>122</sup> Fredman, *supra* note 1 at 30. See also Nitya Iyer, “Categorical Denials” (1993) 19 Queen's Law J 179 at 204, who concludes, “[b]ecause...[antidiscrimination law]...doctrine is based on an oversimplified, caricatured conception of social identity, it does not recognize and redress complex relations of inequality.”

<sup>123</sup> Katri, *supra* note 58 at 67.

<sup>124</sup> See eg Ha-Redeye, *supra* note 86 who notes, “[d]espite its widespread use now in academic literature and training in disciplines such as social work...[intersectionality]...has only slowly gained use within the legal community and in judicial decisions, and can be primarily found in federal immigration cases and human rights decisions.”

First, it is clear that intersectional arguments are increasingly being made in Canadian courtrooms, and indeed in courtrooms and legal forums around the world.<sup>125</sup> For example, in her comparative survey of engagements with intersectionality across jurisdictions, including the United States, United Kingdom, Canada, South Africa, India, the European Union, Council of Europe and United Nations treaty bodies, Atrey concludes that although “the fate of intersectionality in discrimination law has been patchy...[t]hat does not mean that the effort to change this has been wanting or that the accomplishments have been small. In fact, three decades of dynamic effort have gone into trying to make intersectionality viable in discrimination law.”<sup>126</sup> Lawyers are working to advance their clients’ stories in ways that are true to the complexities of their lives and circumstances. This work is challenging, not least because of “the lack of ‘model’ examples of claims of intersectional discrimination in any jurisdiction.”<sup>127</sup> Nonetheless, individual lawyers and organizations like the Women’s Legal Education and Action Network (LEAF) are urging courts to acknowledge experiences of discrimination based on contextualized, multiple identities.<sup>128</sup> In recent years, there has been

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<sup>125</sup> The rise of intersectional arguments in antidiscrimination law is a relatively recent development. For example, in 1989, the Canadian Advisory Council on the Status of Women concluded that “... judges are not being presented with women’s unique experience of discrimination based on race, social status, disability, age, sexual orientation, marital status, or religion”: Gwen Brodsky & Shelagh Day, “Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?” (Ottawa: Canadian Advisory Council on the Status of Women, 1989) at 4-5.

<sup>126</sup> Atrey, *supra* note 4 at 8. See eg Smith, *supra* note 117 at 75, who, upon reviewing the treatment of intersectional discrimination claims by courts in the UK, Canada and at the European Court of Human Rights, concludes, “[a] common thread across all of these jurisdictions is that despite equality activists and organisations calling for recognition of intersectional discrimination, and some recognition of the need to address it at policy level, the law tends to resist movement away from a “single axis” model.”

<sup>127</sup> Atrey, *supra* note 4 at 4.

<sup>128</sup> See eg Women’s Legal Education and Action Fund, Intervenor Factum in *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78, online: LEAF <<https://www.leaf.ca/wp-content/uploads/2004/2004-auton.pdf>> at para 15 (gendered disability discrimination); and Women’s Legal Education and Action Fund, Intervenor Factum in *Withler v Canada (Attorney General)*, 2011 SCC 12, online: LEAF <<https://www.leaf.ca/wp-content/uploads/2011/03/LEAF-Intervener-Factum-Withler-SCC.pdf>> at para 22 (gendered age discrimination) [hereinafter “*Withler* Factum”]. For important background and context on LEAF’s strategizing around issues of intersectionality and diversity, particularly in its early years, see eg Carol A. Aylward, “Intersectionality: Crossing the Theoretical and Praxis Divide” (2010) 1:1 Journal of Critical Race Inquiry 1; Women’s Legal Education and Action Fund, *Equality and the Charter: Ten Years of Feminist Advocacy before the Supreme Court of Canada* (Ottawa: Emond Montgomery, 1996) at xxi, where LEAF addresses criticisms that the organization fails “...to address women’s inequality in all its complexity and diversity. This criticism is not without foundation. Because LEAF’s founding board and staff were white, middle class professional women, there was legitimate scepticism of LEAF’s ability to respond to and incorporate the interests and experiences of diverse women.” See also,

an increase in lawyer engagement with intersectionality, including, for example, continuing legal education opportunities dedicated to, or including, intersectionality<sup>129</sup> and lawyers addressing intersectionality in informal writing like blogs, opinion pieces and legal trade publications.<sup>130</sup> This suggests that Canadian lawyers are increasingly, if slowly, investing in intersectionality.

Second, how are intersectional arguments received by Canadian judges, courts and adjudicators? Based on her survey of multiple jurisdictions, including Canada, Atrey concludes that intersectionality remains “largely exterior” to discrimination law, in part because “judges have resisted the idea of responding to [intersectional] claims.”<sup>131</sup> Indeed, the Supreme Court of Canada has never adjudicated a discrimination claim based on multiple grounds, despite acknowledging the possibility of bringing intersectional claims pursuant to the equality guarantee in the *Charter*,<sup>132</sup> and receiving submissions by various parties and intervenors in numerous equality cases on the importance of an intersectional approach.<sup>133</sup>

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Sherene Razack, *Canadian Feminism and the Law: The Women's Legal Education and Action Fund and the Pursuit of Equality* (Toronto: Second Story Press, 1993); and Rhada Jhappan, ed., *Women's Legal Strategies in Canada* (Toronto: University of Toronto Press, 2002).

<sup>129</sup> See eg Canadian Bar Association, “SOGIC: Human Rights Concerns – A Discussion of Intersectionality” (6 November 2017) Saskatoon SK, online: CBA <[https://www.cbapd.org/details\\_en.aspx?id=sk\\_sogic1117](https://www.cbapd.org/details_en.aspx?id=sk_sogic1117)>.

<sup>130</sup> See eg Ha-Redeye, *supra* note 86; Oksana Romanov, “Human rights and intersectionality: I see you” *The Lawyer's Daily* (4 August 2020), online: The Lawyer's Daily <<https://www.thelawyersdaily.ca/articles/20396/human-rights-and-intersectionality-i-see-you-oksana-romanov>>; and Mary Burnet, “Intersectionality and Work Law” *PinkLarkin* (10 January 2018), online: <<https://pinklarkin.com/intersectionality-work-law/>>.

<sup>131</sup> Atrey, *supra* note 4 at 1.

<sup>132</sup> See eg *Withler v Canada*, [2011] 1 SCR 396 at para 58, where the Supreme Court acknowledged:

An individual's or a group's experience of discrimination may not be discernible with reference to just one prohibited ground of discrimination, but only in reference to a conflux of factors, any one of which taken alone might not be sufficiently revelatory of how keenly the denial of a benefit or the imposition of a burden is felt.

See also *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 94, where the Court concluded, “[t]here is no reason in principle...why a discrimination claim positing an intersection of grounds cannot be understood as analogous to, or as a synthesis of, the grounds listed in s. 15(1).”

<sup>133</sup> For review of some of the key section 15 cases where LEAF and other intervenors have made such arguments to the Supreme Court, see Jena McGill & Daphne Gilbert, “Of Promise and Peril: The Court and Equality Rights” in Matthew P Harrington, ed., *The Court and the Constitution: A 150-year Retrospective* (Toronto: LexisNexis, 2017) 235. McGill & Gilbert conclude at 241 that “[w]hile the Court recognizes multiple grounds of discrimination, it has yet to truly appreciate intersectionality as an interpretive theory for section 15” of the *Charter*.

There are countless possible explanations for the apparent reluctance of courts and tribunals to adjudicate antidiscrimination cases using intersectional frameworks. For example, Pothier suggests that “the theoretical possibility of claims based on multiple grounds of discrimination does not mean that such claims fit the legal mindset of what is expected in anti-discrimination law...the nub of the problem is the tendency of the legal mind to want to compartmentalize.”<sup>134</sup> Relatedly, part of the explanation for why intersectionality has failed to gain widespread traction with judges and adjudicators must be that they simply do not know *how* to use intersectionality within the specific limitations of the statutes and jurisprudence they are bound to follow. Indeed, when an argument based on multiple grounds is advanced, judges and adjudicators often choose to evaluate the case with reference to one ground alone, saying nothing about the other(s),<sup>135</sup> or take an “additive” approach, analyzing evidence about each ground of discrimination separately and then tallying them up.<sup>136</sup> While this latter approach succeeds in acknowledging that an experience of discrimination can be based upon multiple grounds, it fails to understand the grounds intersectionally.<sup>137</sup>

However, there are indications that some courts and tribunals adjudicating antidiscrimination cases are willing and able to incorporate more robust understandings of intersectionality into their analyses. For example, in *Baylis-Flannery v DeWilde* (No 2), a case involving sexual harassment of a Black woman, the Ontario Human Rights Tribunal described intersectional analysis as “a fact-driven exercise that assesses the disparate relevancy and impact of the possibility of compound discrimination” and emphasized that the Tribunal must

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<sup>134</sup> Pothier, *supra* note 34 at 58 and 60.

<sup>135</sup> See eg *Withler*, *supra* note 132. In *Withler*, LEAF argued for an intersectional approach to account for the combined effects of age and sex on the applicants, a group of elderly, primarily female, widows whose supplementary death benefits, provided under two federal acts, were reduced because of the age of their partners at time of death: *Withler* Factum, *supra* note 128 at para 22. However, the Supreme Court analyzed the case only with respect to age and did not adopt the intersectional approach urged by LEAF.

<sup>136</sup> See eg *Falkiner v Ontario*, [2002] OJ No 1771 (Ontario Court of Appeal), where the Ontario Court of Appeal, relying on an additive model of discrimination, concluded that discrimination against single mothers on social assistance was based on a combination of the grounds of marital status, receipt of social assistance, and sex.

<sup>137</sup> Diana Majury, “The Charter, Equality Rights, and Women: Equivocation and Celebration” (2002) 40 Osgoode Hall LJ 297 at 334.

be attentive to the effects of compound discrimination in order to avoid “reliance on a single axis analysis... [which] tends to minimize or even obliterate the impact of racial discrimination on women of colour who have been discriminated against on other grounds.”<sup>138</sup> Similar language was adopted by the Federal Court of Appeal in *Turner v Canada (Attorney General)*, where the Court concluded that the Canadian Human Rights Tribunal had erred in failing to consider the case on appeal as one of intersectional discrimination involving both race and perceived disability. The Court explained:

...[T]he concept of intersecting grounds of discrimination...holds that when multiple grounds of discrimination are present, their combined effect may be more than the sum of their individual effects. The concept of intersecting grounds also holds that analytically separating these multiple grounds minimizes what is, in fact, compound discrimination. When analyzed separately, each ground may not justify individually a finding of discrimination, but when the grounds are considered together, another picture may emerge.<sup>139</sup>

The *Turner* decision is significant for its enunciation of intersectional discrimination and its acknowledgment of the risks of single-axis analysis. Specifically, *Turner* demonstrates the Federal Court of Appeal’s understanding of the difference intersectionality makes; that is, that intersectionality makes visible instances of discrimination on multiple grounds where “either the specific contribution of any one of these grounds is indiscernible or the full extent of discrimination is only recognizable by acknowledging the combination of two or more grounds.”<sup>140</sup> These and other similar cases, where judges and adjudicators are making efforts, however imperfect, to incorporate the insights of intersectionality into antidiscrimination analyses, demonstrate that the proliferation of intersectionality is having some impact in

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<sup>138</sup> *Baylis-Flannery v DeWilde (No. 2)*, 2003 HRT0 28 at para 144. This language has been adopted by other human rights bodies grappling with complex discrimination including, eg *Radek v Henderson Development (Canada) and Securiguard Services (No. 3)*, 2005 BCHRT 302 (CanLII) at para 464. For other cases where human rights tribunals have found discrimination based on the intersection of two or more grounds, see eg *Arias v Desai*, 2003 HRT0 1 (age and gender); *Morrison v Motsewetsho* (2003), 48 CHRR D/51 (Ont. HRT) (sex and ethnic origin); *Comeau v Cote*, 2003 BCHRT 32 (age and disability); and *Flamand v DGN Investments*, 2005 HRT0 10 (family status and ancestry).

<sup>139</sup> *Turner v Canada (Attorney General)*, 2012 FCA 159 at para 48.

<sup>140</sup> Dagmar Schiek, “On uses, mis-uses and non-uses of intersectionality before the Court of Justice (EU)” (2018) 18:2-3 International Journal of Discrimination and the Law 82 at 83.



sensitizing judges and adjudicators to the inadequacies of single-axis analyses and the importance of intersectionality in antidiscrimination contexts.

Finally, in addition to increased use in legal arguments and in the decisions of Canadian courts and tribunals, since 1998, intersectionality has been codified in the *CHRA*, which specifies that “...a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.”<sup>141</sup> In addition, intersectionality has been taken up by human rights bodies like the Ontario Human Rights Commission, which was at the forefront of explaining the importance of intersectionality to antidiscrimination law with its 2001 primer, *An Intersectional Approach to Discrimination*.<sup>142</sup>

While it is clear that intersectionality is beginning to infiltrate Canadian law, its introduction has raised some specific tensions about how to better operationalize intersectionality within the boundaries of established statutory regimes and legal doctrines. The next section considers the question of how intersectionality might be more systematically incorporated into the practice of antidiscrimination law.

#### **4.2 Improving the Reception of Intersectionality in Antidiscrimination Law**

The global question of operationalizing intersectionality in antidiscrimination law is complex and warrants more detailed treatment than this brief allows. Indeed, Atrey spends an entire book on the topic.<sup>143</sup> Following a comprehensive assessment of the challenges and possibilities for transforming antidiscrimination law to move away from single-axis analyses toward intersectional understandings of discrimination, Atrey concludes, there is “no single manoeuvre [that] can single-handedly make discrimination law respond to

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<sup>141</sup> *CHRA*, *supra* note 115 at s 3.1.

<sup>142</sup> Ontario Human Rights Commission, *An Intersectional Approach to Discrimination* (2001), online: OHRC <<http://www.ohrc.on.ca/en/intersectional-approach-discrimination-addressing-multiple-grounds-human-rights-claims>>.

<sup>143</sup> Atrey, *supra* note 4.

intersectionality.”<sup>144</sup> Ultimately, bringing intersectionality and antidiscrimination law together will require fundamental recalibrations of every aspect of the latter, including “the text of legislative and constitutional non-discrimination guarantees, the grounds of discrimination and test for identifying analogous grounds, the understanding of direct and indirect discrimination, the substantive meaning of discrimination, comparators, the standard of review, justifications, the burden of proof, and remedies.”<sup>145</sup>

The magnitude of this task, as outlined by Atrey, should not be misunderstood as an invitation to give up on intersectionality in antidiscrimination law. In light of the popular proliferation of intersectionality and apparent increase in the will of some lawyers, judges and adjudicators to employ intersectionality in antidiscrimination law, this may be an opportune time to advance intersectional arguments in Canadian courts. Here, we identify three key insights relevant to the goal of more deeply incorporating intersectionality into antidiscrimination doctrine and practice.<sup>146</sup>

#### 4.2.1 From Individual Identities to Structural Intersectionality

To date, where intersectionality has been taken up by courts and tribunals, it has been understood largely as a vehicle for recognizing that discrimination can occur on the basis of multiple identities and for acknowledging the shortcomings of single-axis analyses, as in the Federal Court of Appeal decision in *Turner*, above. This is significant, not least because it can

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<sup>144</sup> *Ibid* at 3.

<sup>145</sup> *Ibid* at 2-3 (emphasis omitted), concluding, “[t]he appreciation of intersectionality in discrimination law thus requires both a theoretical framework and the comprehensive application of that framework to the doctrinal aspects of discrimination law.”

<sup>146</sup> Recognizing the limitations of the reactive, individualistic, complaint-driven model of antidiscrimination law for getting at the realities of structural discrimination, some have proposed that intersectionality may be best operationalized through proactive antidiscrimination measures including legislation, policy frameworks and accountability mechanisms. See eg Sandra Fredman, “Positive Rights and Duties: Addressing Intersectionality” in Dagmar Schiek & Victoria Chege, eds., *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (Oxfordshire: Routledge Cavendish, 2009) 73. The practice of incorporating intersectionality into proactive equality mechanisms has been most thoroughly canvassed in the European context. For perspectives from across Europe, see generally Dagmar Schiek & Victoria Chege, eds., *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (Oxfordshire: Routledge Cavendish, 2008); and Andrea Krizsan, Hege Skjeie & Judith Squires, eds., *Institutionalizing Intersectionality: The Changing Nature of European Equality Regimes* (London: Palgrave Macmillan, 2012).

make visible compound discrimination that is not apparent in a single-axis framework. However, as explained above, focusing on identities is only a part of the work that intersectionality requires; more difficult are questions of structural inequality and the dynamics that create and maintain systems of identity-based oppression.<sup>147</sup> Accordingly, a meaningful incorporation of intersectionality into legal arguments and decisions must go beyond recounting a claimant's story with reference to multiple identities; courts need specific guidance and examples about how to import structural intersectionality as an analytical framework into their analyses. This shift requires express connection of individual experiences of discrimination with the structures of power and exclusion that breed discrimination.

This is not to say that identities are not important. In order to highlight the structures of power that create them, Fredman argues that identities “should be seen both as a manifestation of the intersection of multiple hierarchies and a way of maintaining such hierarchies.”<sup>148</sup> Structural intersectionality can deepen our understanding of social identities, recasting them not as immutable descriptors of the inherent characteristics of individual people, but as the results of interlocking systems of power. Structural intersectionality thus moves intersectional arguments away from a focus on abstract identity categories for their own sake and toward analyses that focus on the underlying systems and relationships of power that create those categories and make them vectors for oppression and discrimination. The shift to structural intersectionality has clearest implications for the conceptualization of the grounds of discrimination that are central to antidiscrimination law.<sup>149</sup>

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<sup>147</sup> See Part 2.2.2, above.

<sup>148</sup> Fredman, *supra* note 1 at 31. See also Hodes, *supra* note 18 at 71, who argues, “...without carefully examining...the concept of identity itself, the use of intersectionality in the context of anti-discrimination law will continue to reproduce the essentialism and epistemic violence that intersectional resistance initially sought to disrupt.”

<sup>149</sup> For an important historical review of the importance of grounds, with reference to the grounds-less Fourteenth Amendment in the United States, see eg Andrew Kull, *The ColorBlind Constitution* (Cambridge: Harvard University Press, 1992) at chapters 4 and 5.

#### 4.2.2 Structural Intersectionality: Re-Thinking Grounds of Discrimination

The requirement for a claimant in an antidiscrimination case to demonstrate that the alleged discrimination occurred on the basis of a prohibited ground of discrimination is often identified as the key stumbling block to incorporating intersectionality into antidiscrimination law.<sup>150</sup> While the mere existence of grounds does not preclude intersectionality, the way that grounds are often understood and employed in antidiscrimination law can be problematic.<sup>151</sup> Grounds are generally treated in a highly formalistic, often cursory manner, requiring little more than asking whether a claimant is a member of the group identified by the ground upon which the discrimination claim is based. In other words, grounds are treated as a box to be ticked at the outset of an antidiscrimination case, with a focus on individual membership in an identity group.

Structural intersectionality requires in-depth engagement with grounds as markers of systems of power. Pothier explains:

[g]rounds of discrimination are not a purely legal construct. They reflect a political and social reality to which the law has, belatedly, given recognition...It is the grounds of discrimination that separate people who experience discrimination from those who do not. The focus on why something counts as a ground of discrimination should be a constant reminder of why discrimination is, legislatively and/or constitutionally, prohibited.

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<sup>150</sup> The fact of grounds, and their inability to accommodate intersectional identities and appropriately reflect the realities of people's experiences of discrimination has been the subject of significant critique in Canada. See eg Katri, *supra* note 58; Iyer, *supra* note 122; and Pothier, *supra* note 34; as well as Anne Bayefsky, "A Case Comment on the First Three Equality Rights Cases under the *Canadian Charter of Rights and Freedoms: Andrews, Workers' Compensation Reference, Turpin*" (1990) 1 SCLR (2d) 503; Daphne Gilbert, "Time to Regroup: Rethinking Section 15 of the Charter" (2003) 48 McGill LJ 627; Denise G Réaume, "Of Pigeon Holes and Principles: A Reconsideration of Discrimination Law" (2002) 40 Osgoode Hall LJ 40; and Jessica Eisen, "On Shaky Grounds: Poverty and Analogous Grounds under the Charter" (2013) 2:2 Can J Poverty Law 1.

<sup>151</sup> Intersectional claims are not precluded by the fact of grounds in and of itself. Indeed, as noted above, the possibility of incorporating intersectionality into grounds-based frameworks has been expressly acknowledged by adjudicators in antidiscrimination contexts, including in cases like *Law*, *supra* note 132 and *Withler*, *supra* note 132. Cases like *Bayliss-Flannery*, *supra* note 138 and *Turner*, *supra* note 139 demonstrate that it is possible to engage intersectionality within the bounds of a grounds-based analysis.

As long as discrimination continues to be practiced following historic patterns marked by grounds of discrimination, anti-discrimination law must pay close attention to those historic markers of the dynamics of power relationships.<sup>152</sup>

On this understanding, grounds are markers of historical and social context critical to properly understanding the systems and relationships within which discrimination occurs.<sup>153</sup>

So, for example, analyzing a case of discrimination based on the ground of “race” should be concerned not with a claimant’s actual or perceived membership in a racialized community, but with the social construction of race in Canadian society, including race relations, race-based stereotypes and the ways that the racialization of certain individuals, communities and groups is a vector for oppression. This kind of analysis sets an alleged case of discrimination in its full and proper context. Feminist critical race scholar Sherene Razack explains:

Without history and social context, each encounter between unequal groups becomes a fresh one, where the participants start from zero, as one human being to another, each innocent of the subordination of others ... Without an understanding of how responses to subordinate groups are socially organized to sustain existing power arrangements, we cannot hope either to communicate across social hierarchies or to work to eliminate them.<sup>154</sup>

In order to operationalize these insights of structural intersectionality, Fredman argues that antidiscrimination law should move away from grounds and groups as descriptors of fixed personal characteristics and toward a “relational view” of grounds, which focuses on “how our specific characteristics [ie: gender, race, age, sexual orientation etc.] pattern relationships with others” in a given context.<sup>155</sup> This move introduces a complex picture of power relationships between individuals and communities. For example, Black men may be relatively advantaged in relation to Black women, but relatively disadvantaged in relation to

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<sup>152</sup> Pothier, *supra* note 32 at 41 and 72.

<sup>153</sup> On the question of whether this reading of intersectionality adds anything to the general requirement that all discrimination cases be understood in full and proper context, Fredman, *supra* note 1 at 37-38, argues “intersectionality is valuable because it requires particular attention to be paid to the ways in which discrimination law can render the most disadvantaged the most invisible... Intersectionality is more specific than a general reference to context because it focuses on the ways in which relationships of power interact to create synergistic disadvantage.”

<sup>154</sup> Sherene Razack, *Looking White People in the Eye* (Toronto: University of Toronto Press, 1998) at 8.

<sup>155</sup> Fredman, *supra* note 1 at 33.

white men and women. Similarly, a white, cis-gendered lesbian may be relatively advantaged on the basis of race and gender, but relatively disadvantaged on the basis of sexual orientation. The single-axis model of analyzing discrimination cannot capture these relationships.

Because single-axis analyses focus only on the identified ground, the implicit assumption is that a claimant experiences disadvantage only in relation to that ground. In a gender discrimination claim, for example, an analysis that focuses only on the fact of the claimant's female-ness "assumes that all her other characteristics are on the privileged side of the relationship...she is assumed to be a white, able-bodied, heterosexual woman, of the dominant religion or belief etc."<sup>156</sup> This fails to capture the reality that a racialized woman will experience discrimination in materially different ways than a white woman because "race changes the nature of the power relationship without changing the fact that she has been discriminated against on grounds of gender."<sup>157</sup>

Fredman further argues that in order to make visible the complex relationships of power that structure experiences of discrimination on more than one ground, grounds should be construed expansively as describing "different power relationships, rather than as delineating a group."<sup>158</sup> Pointing to examples of such expansive interpretations of grounds in international law, including under the *Convention on the Elimination of Discrimination against Women (CEDAW)*<sup>159</sup> and the *Convention on the Rights of People with Disabilities (CRPD)*,<sup>160</sup> Fredman emphasizes that an expansive, relational understanding of grounds means that "a reference to a 'ground' does not necessarily mean that the ground demarcates

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<sup>156</sup> *Ibid* at 34.

<sup>157</sup> *Ibid*.

<sup>158</sup> *Ibid* at 34-35.

<sup>159</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, 1 March 1980, 1249 UNTS 13, CAN TS 1982 No 31 (entered into force 3 September 1981, ratification by Canada 10 December 1981) [hereinafter *CEDAW*].

<sup>160</sup> *Convention on the Rights of Persons with Disabilities*, 26 January 2007, 2515 UNTS 3 (entered into force 3 May 2008, ratification by Canada 11 March 2010) [hereinafter *CRPD*].

a group with set boundaries.”<sup>161</sup> As a result, a sex discrimination claim must contend with the heterogeneity of experiences under the umbrella of “sex”, and attend to the relational dimensions of power that intersect with sex to constitute the claimant’s particular experience of discrimination.

### 4.2.3 Beyond Grounds: Substantive Equality and Intersectional Evidence

Although grounds are often identified as the key challenge to better incorporating intersectionality into antidiscrimination law, grounds are by no means the only stumbling block to achieving this goal. For example, Atrey finds that “...Canadian courts have also encumbered intersectional claimants with a relatively higher burden of proof in comparison with those claiming on a single ground, applied too low a standard of review of justifications, and even used intersectionality as a defence or justification for discrimination.”<sup>162</sup> While a full exploration of each of these challenges is beyond our scope, in this section we briefly highlight two hurdles to improving the reception of intersectionality into antidiscrimination law beyond grounds: the importance of a substantive understanding of equality, and the question of intersectional evidence.

#### 4.2.3.1 Substantive Equality

Incorporating intersectionality into antidiscrimination law requires the realization of a substantive model of equality. While the meaning of the right to substantive equality “remains elusive,...[s]cholars, legislators, and judges have elucidated various core meanings, chief amongst them, equality of results, equality of opportunity, and dignity.”<sup>163</sup> A substantive

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<sup>161</sup> Fredman, *supra* note 1 at 34. Although both CEDAW and CRPD appear to be single-axis because of their focus on women and persons with disabilities, respectively, in their interpretations of these identity groups both have regard to including intersections of other bases of oppression and disadvantage.

<sup>162</sup> Atrey, *supra* note 4 at 14. See also at chapter 4 her analysis of *Gosselin v Quebec (Attorney General)*, [2002] 4 SCR 429.

<sup>163</sup> Sandra Fredman, “Substantive Equality Revisited” 14:3 (2016) *International Journal of Constitutional Law* 712 at 713 [hereinafter “Substantive Equality”]. For a summary of the diverse theoretical and judicial perspectives on the meaning and content of substantive equality, see Atrey, *supra* note 4 at 164-168. See generally Gwen Brodsky & Shelagh Day, “Denial of the Means of Subsistence as an Equality Violation” (2005) *Acta Juridica* 149; Sophia R Moreau, “What is Discrimination?” (2010) 38 *Philosophy and Public Affairs* 143; Denise G Réaume, “Discrimination

conception of equality is necessary to the incorporation of intersectionality because in theory at least, it “explicitly incorporates differences in power relationships.”<sup>164</sup> Atrey explains:

Most of our substantive understandings of what is wrong about discrimination may easily accommodate harms of intersectional discrimination. This is because the harms are in fact the same, like stereotyping, prejudice, unequal worth, loss of dignity, being demeaned, stigma, and lack of autonomy or substantive freedoms. What is different is the account of patterns of group disadvantage based on multiple identities which cause them, as opposed to membership in a single disadvantaged group. It is the distinctive explanation of these patterns which makes each intersectional claim unique.<sup>165</sup>

In Canada, courts and tribunals at all levels have consistently affirmed that the appropriate approach to equality pursuant to the *Charter* and human rights statutes is substantive.<sup>166</sup> However, despite this rhetoric, it has been a struggle to operationalize substantive equality in practice, often because of the contested meaning of substantive equality, the shifting doctrinal terrain of equality and antidiscrimination jurisprudence, and uncertainty about what substantive equality requires across contexts.<sup>167</sup> As a result, antidiscrimination analyses often fall back on the framework of formal equality, premised on the principle of treating likes alike. The re-emergence of formalism undermines intersectionality because it requires “a comparison between two individuals who are similarly situated except for the difference in protected characteristics such as race. This tempts us to ignore all other facets of identity.”<sup>168</sup> The tendency of adjudicators and courts to speak the

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and Dignity” (2003) 63 Louisiana LR 1; Sophia R Moreau, “The Wrongs of Unequal Treatment” (2004) 54 UTLJ 291; and Larry Alexander, “What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies” (1992) 141 UPenn L Rev 149.

<sup>164</sup> Fredman, *supra* note 1 at 36.

<sup>165</sup> Atrey, *supra* note 4 at 164.

<sup>166</sup> See eg *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 168, the first case adjudicated under the equality guarantee of the *Charter*, where Justice McIntyre expressly rejected the formal, “similarly situated” approach to equality rights in favour of a substantive vision. This approach has been re-affirmed in virtually every equality case under the *Charter* since *Andrews*, including eg *Law*, *supra* note 132 at para 25, and in human rights cases including, eg, *XY v Ontario (Government and Consumer Services)*, 2012 HRT0 726 (CanLII) at para 94.

<sup>167</sup> The challenges of operationalizing equality have been widely acknowledged. See eg Chief Justice Beverley McLachlin, “Equality: The Most Difficult Right” (2001) 14 SCLR (2d) 17 at 20.

<sup>168</sup> Fredman, *supra* note 1 at 8.



language of substantive equality while doing the work of formalism has been highlighted and criticized by Canadian lawyers and legal scholars.<sup>169</sup>

Given the ongoing challenges of operationalizing substantive equality in antidiscrimination law, it will be up to advocates to do the complementary work of setting out what substantive equality requires in a given case *and* demonstrating how intersectional discrimination is captured by a substantive equality framework. So, for example, with appropriate attention to structural intersectionality and the relationship between intersectional discrimination and substantive equality, Fredman proposes a four-dimensional principle that highlights the multidimensional nature of substantive equality, as follows:

...[D]rawing on the strengths of the familiar principles in the substantive equality discourse, a four-dimensional principle is proposed: to redress disadvantage; to address stigma, stereotyping, prejudice and violence; to enhance voice and participation; and to accommodate difference and achieve structural change. Behind this is the basic principle that the right to equality should be located in the social context, responsive to those who are disadvantaged, demeaned, excluded, or ignored.<sup>170</sup>

Indeed, the importance of addressing intersectional discrimination is one of the many justifications for establishing this kind of consistent, meaningful conception of substantive equality in Canadian antidiscrimination jurisprudence.

#### *4.2.3.2 Intersectional Evidence*

In addition to the challenges posed by the doctrine of antidiscrimination law, including grounds and substantive equality, the incorporation of intersectionality into antidiscrimination law requires careful attention to the question of evidence. That is,

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<sup>169</sup> See eg Iyer, *supra* note 122; Daphne Gilbert & Diana Majury, “Critical Comparisons: The Supreme Court of Canada Dumps Section 15” (2006) 24 Windsor YB Access to Justice 111; Sheila McIntyre, (2009) “Answering the Siren Call of Abstract Formalism with the Subjects and Verbs of Domination” in Fay Faraday, Margaret Denike and M Kate Stephenson, eds., *Making Equality Rights Real* (Toronto: Irwin Law, 2009); and Margot Young, “Unequal to the Task: “Kapp”ing the Substantive Potential of Section 15,” (2010) 50 SCLR 183.

<sup>170</sup> Fredman, “Substantive Equality”, *supra* note 164 at 713.

what kinds of evidence are necessary to make out a claim of intersectional discrimination, and who most properly bears the burden of marshalling that evidence?

Atrey suggests that “because the nature of intersectional discrimination resides in social structures and norms, it is important for evidence to be led from this perspective, focussing on unearthing broader patterns rather than isolated explanations of disadvantage.”<sup>171</sup> This will require lawyers, judges and adjudicators to engage with evidence beyond conventional legal sources, which, as noted above, are not generally at the forefront of intersectional analyses. Evidence illustrating the lived experiences of communities at the intersection of multiple systems of dis-privilege and oppression might include, for example, “accounts of...patterns of group disadvantage in sociology, anthropology, psychology, history, economics, feminist studies, and other relevant disciplines.”<sup>172</sup> This kind of rich qualitative evidence is necessary to establish the context of an individual intersectional antidiscrimination claim.

In addition to qualitative evidence, courts and tribunals must be realistic about the quantitative evidence that can reasonably be expected of a claimant. For example, statistics on “indirect intersectional discrimination, where the claimant has to show that an entire group has been put at a disadvantage, may not always be available...[and]...even if they are available, it may be unrealistic to demand these statistics from the claimant or a party which does not have access to them.”<sup>173</sup> In *Radek v Henderson Development (Canada) and Securiguard Services (No 3)*, the British Columbia Human Rights Tribunal expressly acknowledged the challenges of bringing

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<sup>171</sup> Atrey, *supra* note 4 at 190.

<sup>172</sup> *Ibid.* Atrey further notes that the South African Constitutional Court “leads by example in admitting elaborate explanatory accounts of intersectionality” in cases including *Bhe v Magistrate, Khayelitsha*, 2005 (1) SA 580 (SACC) and *Hassam v Jacobs*, 2009 (5) SA 572 (SACC).

<sup>173</sup> Atrey, *supra* note 4 at 191. See eg the dissenting opinion of Justice Bastarache in *Gosselin*, *supra* note 163 at paras 255-259, where he found the limited available evidence, in addition to the claimant’s experience, to be sufficiently illustrative of the general impact of the impugned legislation on the broader class of people to which she belonged.

evidence about systemic discrimination and did away with the suggestion that intersectional discrimination must be proved with statistics, stating:

the nature of the evidence necessary to establish systemic discrimination will vary with the nature and context of the particular complaint in issue. If the remedial purposes of the [Human Rights Code] are to be fulfilled, evidentiary requirements must be sensitive to the nature of the evidence likely to be available. In particular, evidentiary requirements must not be made so onerous that proving systemic discrimination is rendered effectively impossible for complainants . . . the necessity of statistical evidence, would, in the context of a complaint of the type before me, render proof of systemic discrimination impossible.<sup>174</sup>

This kind of contextual view of the evidence required to make out a case of intersectional discrimination represents a meaningful starting point for better addressing the evidentiary challenges in bringing forward an intersectional claim in antidiscrimination law.

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<sup>174</sup> *Radek*, *supra* note 138 at para 509.

## Part 5: Intersectionality Outside of Antidiscrimination Law

Given that people carry their intersectional identities, and the privileges and dis-privileges attached to those identities, into every dimension of their lives, intersectionality is also relevant outside of antidiscrimination law proper. While not always expressly referred to, intersectional themes have been embedded into arguments, decisions, and pieces of legislation in various other areas of law. In this section, we point to some examples of the use of intersectional analysis in criminal law, family law, and immigration and refugee law. We highlight some of the intersectional arguments made in these contexts, as well as courts' responses to such arguments.

### 5.1 Criminal Law

There is some evidence of attempts to adopt a holistic approach to the administration of the criminal law in Canada. For example, the *Criminal Code*<sup>175</sup> requires sentencing judges to consider all reasonable sanctions other than imprisonment, and to have particular regard to the unique circumstances of criminalized Indigenous people.<sup>176</sup>

In *R v Gladue*, the Supreme Court of Canada expanded on this principle.<sup>177</sup> *Gladue* centred on a Cree woman who pled guilty to manslaughter for killing her common law partner. She was sentenced to three years in prison. At her sentencing hearing, Ms. Gladue's lawyer did not raise the fact that she was Indigenous. On the appeal of her sentence, Ms. Gladue argued that because her intersecting identities were not adequately considered, her sentence was inappropriate. The Court determined that in applying section 718.2(e), judges are to consider "the unique systemic or background factors which may have played a part in bringing the particular [A]boriginal offender before the courts" as well as the process and

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<sup>175</sup> *Criminal Code of Canada* RSC, 1985, c C-46 [hereinafter "*Criminal Code*"].

<sup>176</sup> *Ibid* at s 718.2(e) provides: "A court that imposes a sentence shall also take into consideration the following principles: [...] (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders."

<sup>177</sup> *R v Gladue*, [1999] 1 SCR 688.

sanctions “which may be appropriate in the circumstances for the offender because of his or her particular [A]boriginal heritage or connection”.<sup>178</sup> The Court noted that there are racial, social, political, and economic factors at play which contribute to the criminalization of Indigenous people.<sup>179</sup> While not explicitly stated, intersectionality plays a role in the Court’s analysis as it recognized that for these offenders, participation in criminalized behaviour is often the effect of an entirely new form of discrimination, which results from membership in several marginalized social identity categories, and that flows from the realities of both “systemic and direct discrimination.”<sup>180</sup>

Despite this recognition on the part of the Court, many argue that the analysis in *Gladue* ignores gender as a factor, and thus lacks a truly intersectional approach.<sup>181</sup> The criminal law system affects Indigenous women differently than it does non-Indigenous women. For example, the effects of historical and ongoing colonialism on Indigenous people, such as substance abuse, poverty and homelessness, are directly linked to experiences of violence.<sup>182</sup> As such, Indigenous women are three times more likely to experience violence than non-Indigenous women.<sup>183</sup> Many female offenders commit violent crimes in self-defence or as a response to intimate partner violence.<sup>184</sup> Thus, the gender analysis – and in turn, a

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<sup>178</sup> *Ibid* at para 66.

<sup>179</sup> *Ibid* at para 67.

<sup>180</sup> *Ibid* at para 68. The Court stated, “it must be recognized that the circumstances of [A]boriginal offenders differ from those of the majority because many [A]boriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions. Moreover, as has been emphasized repeatedly in studies and commission reports, [A]boriginal offenders are, as a result of these unique systemic and background factors, more adversely affected by incarceration and less likely to be “rehabilitated” thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions.”

<sup>181</sup> See eg Research and Statistics Division, Department of Justice Canada, “Spotlight on *Gladue*: Challenges, Experiences, and Possibilities in Canada’s Criminal Justice System” (September 2017), online: Department of Justice <<https://www.justice.gc.ca/eng/rp-pr/jr/gladue/gladue.pdf> at 34> [hereinafter “Spotlight on *Gladue*”].

<sup>182</sup> *Ibid* at 169.

<sup>183</sup> *Ibid* at 35. On the importance of intersectionality in understanding criminalization see eg Hillary Potter, “Intersectional Criminology: Interrogating Identity and Power in Criminological Research and Theory” (2013) 21 *Critical Criminology* 305.

<sup>184</sup> *Ibid*.

more intersectional approach – should always accompany the *Gladue* analysis.<sup>185</sup> Due, in part, to Canadian courts’ failure to consistently implement intersectional analyses, Indigenous people continue to be overrepresented in Canadian prisons, with the rate of incarceration increasing more quickly for women than men.<sup>186</sup>

Other intersectional trends contribute to the overrepresentation of marginalized groups – and particularly, marginalized women – in Canadian prisons. Such trends include the feminization of poverty (the reality that women are more likely to live in poverty than are men)<sup>187</sup> and the criminalization of poverty (the use of the criminal justice system as a means of regulating poor people).<sup>188</sup> When gender-based discrimination intersects with discrimination based on race and class, the rates of criminalization significantly increase. As a result, poor, young, racialized women are the fastest growing population in Canadian prisons.<sup>189</sup>

While factors such as the over-policing of poor, racialized women contribute heavily to this phenomenon, advocates have demonstrated that legislation also contributes to further

<sup>185</sup> See Toni Williams, “Intersectionality Analysis in the Sentencing of Aboriginal Women in Canada: What Difference does it Make?” in Emily Grabham, Davina Cooper, Jane Krishnadas & Didi Herman, eds., *Intersectionality and Beyond: Law, Power and the Politics of Location* (Oxfordshire: Routledge Cavendish, 2009) 79. A recent example of the *Gladue* analysis accompanied by a gender analysis can be found in the Ontario Court of Appeal’s decision in *R v Sharma*, 2020 ONCA 478. In *Sharma*, the *Gladue* analysis was applied to consider whether certain sentencing laws discriminated against an Indigenous woman. Justice Feldman notes the testimony of expert witness Dr. Carmela Murdocca, and the arguments of two of the intervenors, LEAF and the David Asper Centre for Constitutional Rights. The testimony and arguments highlight both the racialized and the gendered impacts of the sentencing laws at issue (at paras 91-96). The Court concluded, at paras 102 and 127, that Indigenous women are overrepresented in the criminal justice system due to systemic discrimination, and that *Gladue* should be applied with this in mind.

<sup>186</sup> “Spotlight on *Gladue*”, *supra* note 181 at 34.

<sup>187</sup> See Amber Gazso & Ingrid Waldron, “Fleshing Out the Racial Undertones of Poverty for Canadian Women and their Families: Re-envisioning a Critical Integrative Approach” (2009) 34:1 *Atlantis* 132 at 133; and Canadian Feminist Alliance for International Action (FAFIA), *No Action: No Progress - Canadian Feminist Alliance for International Action Report on Canada’s Progress in Implementing Priority* (February 2010), online: UN Treaty Body Database

<[http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/CAN/INT\\_CEDAW\\_NGS\\_CAN\\_13431\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/CAN/INT_CEDAW_NGS_CAN_13431_E.pdf)>.

<sup>188</sup> See Eva Osazuwa, “Canadian Women in Prison: A Racial and Gendered Discursive Analysis” (2015) 13 *Social Justice and Community Engagement* at 8 & 9; and Val Marie Johnson, “Reading the Criminalization of Poverty” in Diane Crocker & Val Marie Johnson, eds., *Poverty, Regulation & Social Justice* (Toronto: Brunswick Books, 2010) 13 at 13.

<sup>189</sup> Osazuwa, *ibid* at 5.

marginalizing vulnerable groups. For example, in *Canada (Attorney General) v Bedford*, three sex workers argued that provisions in the *Criminal Code* that made it illegal to own, live in, or be present in a brothel without a lawful excuse, to “live off the avails” of someone else’s sex work activities, or to communicate with someone in a public place for the purposes of engaging in sex work, were unconstitutional.<sup>190</sup> The applicants and their advocates argued that these provisions increased the dangers of sex work as they prevented sex workers from implementing certain safety procedures, such as screening possible clients through communication and paying security guards with money made from sex work.<sup>191</sup> The applicants noted that these provisions had particularly dangerous effects for the most vulnerable sex workers – those who worked on the streets, who, more often than not, were racialized women.<sup>192</sup> This argument highlighted the ways that people experiencing intersecting forms of discrimination and vulnerability are further marginalized by the impacts of criminal legislation. The Supreme Court of Canada recognized the increased risk to vulnerable populations by the challenged provisions and determined that they were unconstitutional.<sup>193</sup>

Another example of intersectional arguments in the criminal law context can be found in *R v VK*.<sup>194</sup> In this case, an Indigenous woman, VK, pled guilty to manslaughter after killing her boyfriend, with whom she had an on-again off-again relationship. Throughout her life, she had been subject to the legacy of colonialism, including experiencing the effects of intergenerational trauma; the foster care system; the murder of her mother; drug and alcohol dependency; and sexual, physical and emotional abuse throughout her childhood. She had

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<sup>190</sup> *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 3-4. The challenged sections of the *Criminal Code*, *supra* note 176 were ss 210, 212(1) and 213(1)(c).

<sup>191</sup> *Ibid* at para 6.

<sup>192</sup> *Ibid* at para 64. See also PACE Society, “JUST brief” (2017), online: House of Commons Canada <<https://www.ourcommons.ca/Content/Committee/421/JUST/Brief/BR10002208/br-external/PACESociety2-e.pdf>>.

<sup>193</sup> *Bedford*, *supra* note 191 at para 168. For recent commentary on the regulation of sex work post-*Bedford*, see eg Laura Hensley, “Sex workers say Canada’s law put them in danger – and demand the new government fix them”, *GlobalNews* (22 December 2019), online: GlobalNews <<https://globalnews.ca/news/6073593/canadas-sex-worker-laws-bill-c36/>>.

<sup>194</sup> *R v VK*, 2006 SKPC 79 (CanLII).

also experienced abuse in several of her romantic relationships, including the one at issue in the case.<sup>195</sup> In addition to *Gladue* factors, an intersectional approach was used to argue that the intersecting forms of oppression VK faced – in particular, those based on race, gender, and class – played a crucial role in the commission of her offence.<sup>196</sup> The Provincial Court of Saskatchewan accepted that this was a crime borne of various injustices, stemming from intersecting forms of discrimination, and VK was allowed to serve her sentence in the community as opposed to in prison.<sup>197</sup>

## 5.2 Family Law

Intersectional approaches are also evident in the family law context.<sup>198</sup> For example, in *Moge v Moge*, a man sought to end spousal support payments to his ex-wife, who had worked in the home and caring for their children for duration of their marriage and had trouble finding work once the pair separated.<sup>199</sup> LEAF intervened to show how women’s domestic labour has been systematically undervalued and that because women in heterosexual marriages and partnerships continue to bear the burden of childcare and household work, they are at a significant economic disadvantage if that marriage or partnership ends.<sup>200</sup> By connecting the gendered nature of domestic labour with the feminization of poverty, LEAF successfully shed light on a form of discrimination that arises when gender and class identities intersect. As a result, the Supreme Court ruled that Ms. Moge was entitled to ongoing spousal support from her ex-husband.

Other changes have been made as advocates continue to be critical of the impacts of family law legislation on vulnerable groups. For example, in 2013 the federal government

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<sup>195</sup> *Ibid* at para 20.

<sup>196</sup> *Ibid*.

<sup>197</sup> *Ibid* at para 72.

<sup>198</sup> For commentary on intersectionality in family law contexts, see eg Charmaine Williams, “Race (and Gender and Class) and Child Custody: Theorizing Intersections in Two Canadian Court Cases” (2004) 16 NWSA Journal 46.

<sup>199</sup> *Moge v Moge*, [1992] 3 SCR 813.

<sup>200</sup> Women’s Legal Education and Action Fund, Intervenor Factum in *Moge v Moge*, [1992] 3 SCR 813, online: LEAF <<https://www.leaf.ca/wp-content/uploads/1992/1992-moge.pdf>> at para 5.



passed legislation to address an issue first recognized in the 1983 case of *Derrickson v Derrickson*.<sup>201</sup> There, a woman applied under the British Columbia *Family Relations Act*<sup>202</sup> for half of the interest in property on reserve held by her former husband pursuant to the *Indian Act*.<sup>203</sup> The Supreme Court found that the provincial *Family Relations Act* did not apply to lands on reserve.<sup>204</sup> The Court recognized the problematic effect of this finding on the applicant in that case and raised the possibility of other compensatory measures to make the division of assets fairer. This case highlighted the fact that for Indigenous women living on reserve who separate from their husbands, discrimination resulting from their intersecting identities was exacerbated by the interplay of Canadian legislation. For many years, Indigenous advocates and advocacy groups argued that filling this legislative gap was necessary for the protection of an already vulnerable population.<sup>205</sup> In 2013, the federal government addressed this gap with the passage of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*.<sup>206</sup>

### 5.3 Immigration and Refugee Law

Intersectionality has had a particular impact in immigration and refugee law. In the seminal case of *Baker v Canada*, a Black immigrant woman from Jamaica, Ms. Baker, appealed a deportation order.<sup>207</sup> Ms. Baker lived in poverty, had a mental health disability, and was a single mother to four Canadian-born children and four Jamaican-born children.<sup>208</sup> She arrived in Canada in 1981, was issued a deportation order in 1982 but resided in the country for another 10 years before receiving a second deportation order. Around the time of the

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<sup>201</sup> *Derrickson v Derrickson*, [1986] 1 SCR 285.

<sup>202</sup> *Family Relations Act*, RSBC 1979, c. 121 (now replaced by the *Family Law Act*, RSBC 2011, c. 25).

<sup>203</sup> *Indian Act*, RSC 1985, c I-5 at s 20 provides the terms by which an Indigenous person may possess land in a reserve.

<sup>204</sup> *Derrickson*, *supra* note 202 at para 41.

<sup>205</sup> Wendy Cornet & Allison Lendor, “Matrimonial Real Property Issues On-Reserve” (2004) 2 Aboriginal Policy Research Volume II Setting the Agenda for Change 143.

<sup>206</sup> *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c 20.

<sup>207</sup> *Baker v Canada*, [1999] 2 SCR 817 at para 2.

<sup>208</sup> *Ibid.*

second order, in 1992, Ms. Baker applied for welfare and was undergoing in-patient treatment for her illness.<sup>209</sup> In 1993, she applied to obtain permanent residency status on humanitarian and compassionate grounds, providing documentation from her lawyer, doctor and social worker which indicated that she was making progress and that a forced return to Jamaica could cause her to significantly regress.<sup>210</sup>

In 1994, she was denied permanent residency status without an explanation.<sup>211</sup> Following a request by her lawyer's, Ms. Baker eventually received the notes made by the investigating immigration officer, which were used in the decision-making process.<sup>212</sup> The notes read, in part:

This case is a catastrophe [*sic*]. It is also an indictment of our "system" that the client came as a visitor in Aug. '81, was not ordered deported until Dec. '92 and in APRIL '94 IS STILL HERE!

The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity. However, because of the circumstances involved, there is a potential for adverse publicity. I recommend refusal but you may wish to clear this with someone at Region.<sup>213</sup>

The notes provided clear evidence of the discriminatory assumptions that informed the investigative officer's discretionary recommendation. In appealing the deportation decision, Ms. Baker argued that the officer's notes pointed to bias, as he perpetuated various stereotypes related to her intersecting identities as a single-mother living in poverty and with a mental illness.<sup>214</sup> The Supreme Court accepted this argument, noting that the officer made assumptions about Ms. Baker's ability to be a contributing member of Canadian society based

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<sup>209</sup> *Ibid.*

<sup>210</sup> *Ibid* at para 3.

<sup>211</sup> *Ibid* at para 4.

<sup>212</sup> *Ibid* at para 5.

<sup>213</sup> *Ibid.*

<sup>214</sup> *Ibid* at para 18.

on the number of children she had, her mental illness, and her training as a domestic worker.<sup>215</sup> The Court found that Ms. Baker was not afforded procedural fairness in the assessment of her application, and granted her appeal.<sup>216</sup>

While the result in *Baker* was favourable for the appellant and the Court accepted the notion of bias based on her intersecting identities, it has been argued that a truly intersectional approach is missing from the Court's analysis, particularly in its failure to engage the systemic dimensions of the case, including how racist notions that Black single mothers are a strain on the welfare system permeate the officer's notes. Additionally, the intersections of race, gender, economic and mental health status as a source of bias are largely missing from the discussion. As such, the Court "refused to confront a critical problem that continues to disadvantage H & C applicants and their children at the first instance".<sup>217</sup>

In the context of refugee law, intersectionality has been more readily recognized and integrated into case assessments. Under the *Immigration and Refugee Protection Act*, refugee claimants are required to demonstrate "a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion," in order for their application for refugee status to be approved.<sup>218</sup> In *Gorzsas v Canada*, a gay man from Hungary who was HIV positive, made a claim for refugee protection based on risk of persecution related to his Roma ethnicity and his sexuality.<sup>219</sup> When the applicant's claim was rejected, he brought an application for judicial review. The Federal Court found that the lack of intersectional analysis in the initial decision was sufficient cause for judicial review.<sup>220</sup> The Court wrote:

Findings of the cumulative effects of discrimination require an analysis beyond a bare acknowledgement that the individual had these risk factors. It requires

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<sup>215</sup> *Ibid* at para 48.

<sup>216</sup> *Ibid* at para 76.

<sup>217</sup> Sharryn Aiken & Sheena Scott, "Baker v Canada (Minister of Citizenship and Immigration) and the Rights of Children" (2000) 15 J of Law and Social Policy 211.

<sup>218</sup> *Immigration and Refugee Protection Act*, SC 2001, c 27 at s 96.

<sup>219</sup> *Gorzsas v Canada* (Citizenship and Immigration), 2009 FC 458 (CanLII) at para 2.

<sup>220</sup> *Ibid* at paras 40-41.

canvassing specifically in this case, what risks would face a gay, HIV positive Roma returning to Hungary. This type of analysis is different than analyzing singly what risks faces a gay man, then a HIV positive person, and then a Roma person which is what was done by the officer. I agree with the applicant that the officer's reasons fail to address the "intersectionalities of the evidence and failed to treat the applicant as a sum of his parts". The officer did not consider the evidence in the manner that is in accordance with jurisprudence and, as such, failed to truly gauge the cumulative effects of the discrimination faced by the applicant.<sup>221</sup>

Courts and adjudicators continue to cite *Gorzas* to underscore the importance of an intersectional approach to assessing risk factors in refugee claims.<sup>222</sup> For example, in *Djubok v Canada*, the Federal Court admonished the Immigration and Refugee Board for failing to consider the intersection of various risk factors that a claimant would face in returning to her home country.<sup>223</sup> In doing so, it explicitly stated that failure to address risk factors in an intersectional manner is an error that warrants judicial review:

The difficulty with the Board's assessment is that it appears to have approached the various aspects of Ms. Djubok's risk profile as if they existed in discrete silos, never considering whether or how her various risk factors intersected or combined in a way that could affect her level of risk. The Board looked at her risk as a Roma and her risk as a victim of domestic violence, but never really engaged with, or assessed the risk that she faced in Hungary as a female Roma victim of serious domestic violence.

While the Board acknowledged and accepted counsel's argument that the risk factors in this case had to be considered cumulatively, it did not actually do so. The failure to address the intersectionality of Ms. Djubok's risk grounds is an error: see *Gorzas v Canada*...

In addition, guidelines designed to assist adjudicators in making determinations on immigration and refugee claims expressly highlight the importance of intersectionality in this context. For example, while notions of persecution have historically been rooted in the male-

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<sup>221</sup> *Ibid* at para 36.

<sup>222</sup> See eg *Mabuya v Canada (Citizenship and Immigration)*, 2013 FC 372 (CanLII) at para 10; and *Krishan v Canada (Citizenship and Immigration)*, 2018 FC 1203 (CanLII) at para 18.

<sup>223</sup> *Djubok v Canada (Citizenship and Immigration)*, 2014 FC 497 (CanLII) at para 18.

centred experience,<sup>224</sup> in 1993 Canada implemented *Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act: Women Refugee Claimants Fearing Gender-Related Persecution* (the *Gendered Persecution Guidelines*) to help adjudicators understand and appropriately assess gender-based persecution.<sup>225</sup> Within the *Gendered Persecution Guidelines*, it is recognized that people are often exposed to persecution because of membership in several groups.<sup>226</sup> Additionally, the *Gendered Persecution Guidelines* acknowledge that while a woman's persecution might be based on the same category as a man's (i.e. religion or race), she may experience a different type of persecution because of her gender. That is to say that the nature of the harm may be more severe for a woman than for a man and the procedural fairness afforded to her may be significantly less than that afforded to a man.<sup>227</sup> More recently, the 2017 Immigration and Refugee Board Chairperson's Guideline 9: *Proceedings before the IRB Involving Sexual Orientation and Gender Identity and Expression* expressly capture the importance of considering a claimant's risk with regard to factors that intersect with sexual orientation and gender identity.<sup>228</sup>

Despite the visibility of intersectionality in refugee law, intersectionality is still missing from some aspects of this context. For example, Jen Rinaldi and Shanti Fernando critique the ways that decision-making by the Immigration and Refugee Board in Canada places an “undue burden” on queer refugee claimants of colour because adjudicators assess the credibility of their claimed queer identity against stereotypical, race-based, highly Westernized notions of queer liberation, looking for evidence of “gendered aesthetics, participating in LGB culture, disavowal of traditional cultural values – that may not be

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<sup>224</sup> Tanya Aberman, “Gendered Perspectives on Refugee Determination in Canada” (2014) 30:2 *Refuge: Canada's Journal on Refugees* 57 at 61.

<sup>225</sup> Immigration and Refugee Board, *Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act: Women Refugee Claimants Fearing Gender-Related Persecution* (Ottawa: Immigration and Refugee Board, 1993) [hereinafter “*Gender Guidelines*”].

<sup>226</sup> *Ibid* at II.

<sup>227</sup> *Ibid* at I(1).

<sup>228</sup> Immigration and Refugee Board Chairperson, Guideline 9: *Proceedings before the IRB Involving Sexual Orientation and Gender Identity and Expression*, Guidelines issued by the Chairperson pursuant to paragraph 159(1)(h) of the *Immigration and Refugee Protection Act* (1 May 2017), s. 8.5.2, online: Immigration and Refugee Board of Canada <[https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir09.aspx#a8\\_5\\_2](https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir09.aspx#a8_5_2)>.

accessible or known to racialized refugees.”<sup>229</sup> Marshalling this kind of evidence may not be possible for queer refugees, many of whom are seeking refuge because in their country of origin they were not able to live safely as an out queer person.<sup>230</sup> This demonstrates the importance of an intersectional approach not only in the assessment of a claimant’s experience of persecution, but also to the assessment of evidence a claimant can bring forward to prove membership in a group or community subject to such persecution.

#### 5.4 Summary

As this section has demonstrated, an intersectional framework is most frequently applied in refugee law cases, but has not been widely applied by Canadian tribunals and courts in general.<sup>231</sup> The reception of intersectionality in criminal law and family law has primarily been as a vehicle for recognizing that various forms of discrimination can be at play at once.<sup>232</sup> While intersectionality is having some influence in all three of these settings, courts and tribunals have yet to fully adopt intersectional frameworks into their analyses.

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<sup>229</sup> Jen Rinaldi & Shanti Fernando, “Queer Credibility in the Homonation-State: Interrogating the Affective Impacts of Credibility Assessments on Racialized Sexual Minority Refugee Claimants” (2019) 35:1 *Refuge* 32 at 33.

<sup>230</sup> Nick Mulé & Erika Gates-Gasse, “Envisioning LGBT Refugee Rights in Canada: Exploring Asylum Issues” (2012) *Envisioning Global LGBT Human Rights*, online: Ontario Council of Agencies Serving Immigrants <[https://ocasi.org/downloads/Envisioning\\_Exploring\\_Asylum\\_Issues.pdf](https://ocasi.org/downloads/Envisioning_Exploring_Asylum_Issues.pdf)> at 19-20.

<sup>231</sup> Margot Young, “Social Justice and the Charter: Comparison and Choice” (2013) 50:3 *Osgoode Hall LJ* 669 at 682.

<sup>232</sup> *Ibid.*

## Part 6: Intersectionality in Comparative Legal Contexts

We now turn to a very brief snapshot of the impact of intersectionality in international law, in three Anglo-common law jurisdictions outside of Canada: the United States, the United Kingdom, Australia, and in the work of the European Court of Human Rights. These examples provide context for the Canadian experience, revealing that antidiscrimination law across jurisdictions is generally resistant to moving beyond a single-axis approach.<sup>233</sup> As in Canada, some courts and administrative tribunals recognize intersectionality and attempt to apply it, while there remains a general failure to effectively integrate the concept into the structure of judicial analyses writ large. Where multiple forms of discrimination are considered, it is often simply as an acknowledgement that multiple grounds of oppression can occur at once. Where the importance of intersectionality as an analytical frame has been expressly acknowledged – particularly, in international law – this recognition has not yet translated into robust frameworks to address systemic discrimination.

### 6.1 International Law

Examples of antidiscrimination and human rights law at the international level provide additional context for the way discrimination is conceptualized in the Canadian legal system. Here, we point to just a few examples of international legal documents that have, in their text or interpretation, recognized intersectionality.

The two cornerstone statutes in international human rights law, the *International Covenant on Civil and Political Rights (ICCPR)* and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* contain grounds-based anti-discrimination provisions. For example, article 26 of the *ICCPR* states that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political

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<sup>233</sup> Smith, *supra* note 117 at 75.

or other opinion, national or physical disability, social origin, property, birth or **other status**.<sup>234</sup>

Similarly, article 2(2) of the *ICESCR* reads as follows:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or **other status**.<sup>235</sup>

The United Nations Human Rights Committee (HRC) has not issued a detailed consensus commenting on the meaning of “other status,” preferring to make that determination on a case by case basis. As a result of the open-ended nature of the “other status” category in the *ICCPR*, findings of discrimination have been made on the basis of “age, disability, migrant or refugee status, place of residence, health situation, status of deprivation of liberty, sexual orientation, physical appearance, and poverty”.<sup>236</sup> However, these provisions have not typically been used as a basis for systemically considering intersectional forms of discrimination.<sup>237</sup> Rather, they have allowed the UNHRC to consider more grounds than those listed.

A number of UN conventions, documents and treaty bodies have made significant strides in incorporating intersectionality into their work. For example, the Preamble to the *CRPD*, acknowledges that those with disabilities are often subjected to “multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status”.<sup>238</sup> The *CRPD* further employs an intersectional approach by reinforcing the

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<sup>234</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976) (emphasis added).

<sup>235</sup> *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, Can TS 1976 No (entered into force 3 January 1976) (emphasis added).

<sup>236</sup> Ivona Truscan & Joanna Bourke-Martignoni, “International Human Rights Law and Intersectional Discrimination” (2016) 16 Equal Rights Review 103 at 109.

<sup>237</sup> *Ibid.*

<sup>238</sup> *CRPD*, *supra* note 161 at Preamble 16. See Fredman, *supra* 1 at 36 for further commentary on the intersectional interpretation of the *CRPD*.



importance of protecting women and children with disabilities.<sup>239</sup> Similarly, the *Beijing Declaration and Platform for Action* acknowledges that, in order to protect the most marginalized people in society, countries must plan to address multiple grounds of discrimination, because the most marginalized among us face discrimination based on a combination of such grounds.<sup>240</sup> Additionally, this document recognizes that an intersectional approach to addressing discrimination involves collaboration with people who experience intersecting forms of discrimination.<sup>241</sup> Finally, the United Nations Commission on Human Rights “recognizes the importance of examining the intersection of multiple forms of discrimination, including their root causes, from a gender perspective...”, demonstrating at least a rhetorical commitment to intersectional analysis as a vital part of tackling discrimination.<sup>242</sup>

## 6.2 Other Anglo-Common Law Jurisdictions

### 6.2.1 The United States

American courts have not proven to be noticeably receptive to intersectional arguments, particularly when it comes to antidiscrimination law.<sup>243</sup> American courts tend to look for explicit evidence of intention in order to find violations of antidiscrimination laws, making it difficult for people with intersecting identities experiencing systemic discrimination to demonstrate the kind of single-axis discrimination cases that courts understand.<sup>244</sup> For example, discrimination that results when an employer hires Black men and white women but not Black women because of reliance on stereotypes that Black women are desperate single mothers cannot be explained as the sum of racism and sexism and is thus more difficult to

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<sup>239</sup> *Ibid* at arts 6, 7, & 28(2).

<sup>240</sup> United Nations, Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995 at p 3, online: UN Women <[https://beijing20.unwomen.org/~media/headquarters/attachments/sections/csw/pfa\\_e\\_final\\_web.pdf](https://beijing20.unwomen.org/~media/headquarters/attachments/sections/csw/pfa_e_final_web.pdf)>.

<sup>241</sup> *Ibid* at p 62.

<sup>242</sup> UNCHR, 58<sup>th</sup> Sess, UN Doc E/2002/23 E/CN.4/2002/200 (“Report on the Fifty-Eight Session”) at p 217.

<sup>243</sup> See eg Atrey, *supra* note 4 at ch 4.

<sup>244</sup> Spade, *supra* note 8 at 1034.

prove in a court where it is not recognized as its own unique and multilayered form of oppression.<sup>245</sup>

American jurisprudence reveals a mixed record when it comes to engagements with intersectionality. In *Love v the Alamance County Board of Education*, the US Fourth Circuit Court of Appeals ruled that a Black woman was not discriminated against because of her race and gender.<sup>246</sup> Ms. Mary Love was a teacher at South Mebane Elementary School, and was regularly evaluated at the highest ranking possible.<sup>247</sup> Despite this, Ms. Love was repeatedly denied promotions and filed a charge of discrimination arguing that this was due to her race and sex.<sup>248</sup> The Court considered the issues of race and sex separately, finding no discrimination on the basis of sex and no discrimination on the basis of race. Furthermore, the Court did not consider statistical evidence on discrimination against Black women to be legally relevant.<sup>249</sup>

Other courts have more readily considered intersecting identities, but with a limited view. For example, in *Judge v Marsh*, the US District Court of Columbia addressed two intersecting categories at once, but posited that it would be too difficult to consider other additional identities as it would be impossible for employers to “make an employment decision under such a regime without incurring a volley of discrimination charges”.<sup>250</sup> Still other American courts have explicitly stated the importance of an intersectional approach. In *Lam v University of Hawai’i*, the Ninth Circuit Court of Appeals considered it a significant error that the district court below treated race discrimination and sex discrimination separately.<sup>251</sup>

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<sup>245</sup> Rachel Kahn Best, Laren B Edelman, Linda Hamilton Krieger & Scott R Eliason, “Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation” (2011) 45:4 Law and Society Review 991 at 993.

<sup>246</sup> *Love v the Alamance County Board of Education*, 757 F.2d 1504 (4<sup>th</sup> Cir. 1985) at para 1.

<sup>247</sup> *Ibid* at para 4.

<sup>248</sup> *Ibid* at para 6.

<sup>249</sup> Best et al, *supra* note 245 at 996.

<sup>250</sup> *Judge v Marsh*, 649 F. Supp. 770 (D.D.C. 1986) at para 37.

<sup>251</sup> *Lam v University of Hawai’i*, 40 F.3d 1551 (9<sup>th</sup> Cir. 1994).

In doing so, the Court noted that “the attempt to bisect a person’s identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences”.<sup>252</sup>

Ultimately, while there have been some acknowledgements, such as in *Lam*, on the relevance of intersectionality, research shows that a lack of diversity on the American bench contributes significantly to the absence of intersectional analysis in case rulings.<sup>253</sup>

### 6.2.2 The United Kingdom

Some British courts have recognized that discrimination in many cases cannot be parsed out into discrete categories.<sup>254</sup> For example, in *Ministry of Defence v Debieque*, Ms. Debieque, a woman who had been recruited to join the British Army from her home in St Vincent, argued that she had been subjected to discrimination on the basis of race and sex after she had received several warnings and sanctions for her inability to comply with the Army requirement of 24/7 availability.<sup>255</sup> Ms. Debieque was unable to comply with this requirement because she was a single mother, who relied on her sister, a woman who could not be admitted to the UK on a permanent basis in accordance with immigration rules, for childcare.<sup>256</sup> In its assessment, the United Kingdom Employment Appeal Tribunal recognized the importance of addressing the combined effects of race and sex discrimination, noting that a single mother of British national origin would experience Ms. Debieque’s situation very differently.<sup>257</sup> The Tribunal went on to state that “the nature of discrimination is such that it cannot always be sensibly compartmentalized into discrete categories”.<sup>258</sup>

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<sup>252</sup> *Ibid* at p 9.

<sup>253</sup> See eg Todd Collins & Laura Moyer, “Gender, Race, and Intersectionality on the Federal Appellate Bench” (2008) 61:2 Political Research Quarterly 219 at 225;

<sup>254</sup> MariaCaterina La Barbera & Marta Cruells Lopez, “Toward the Implementation of Intersectionality in the European Multilevel Legal Praxis: *B.S. v Spain*” (2019) 53:4 Law and Society Review 1167 at 1187.

<sup>255</sup> *Ministry of Defence v Debieque* [2009] UKEAT 0048\_09\_1210 at para 21 online:

<[http://www.bailii.org/uk/cases/UKEAT/2009/0048\\_09\\_1210.html](http://www.bailii.org/uk/cases/UKEAT/2009/0048_09_1210.html)>.

<sup>256</sup> *Ibid* at para 34-35.

<sup>257</sup> *Ibid* at 164.

<sup>258</sup> *Ibid* at 165.

Additionally, research shows a lack of intersectional analysis in British criminology.<sup>259</sup> Literature on criminal justice reform often focuses on gender in isolation from other forms of marginalization and thus intersectionality is missing from the analysis. Further, advocates note the difficulty of using or relying on intersectional arguments in courts, when intersectionality is not a part of the UK's *Equality Act* 2010.<sup>260</sup> This demonstrates how a lack of intersectional discourse in legislation, policy, and legal literature limits the degree to which the concept is incorporated by courts.

### 6.2.3 Australia

In Australia, there are few reported cases where intersectional discrimination is at issue, due in no small part to the nature of antidiscrimination legislation in the country.<sup>261</sup> Australia's federal antidiscrimination laws do not include a general prohibition against discrimination, but instead are codified in four distinct acts, each centred on a single ground of prohibited discrimination: race, sex, disability and age.<sup>262</sup> In keeping with this legislative framework, claimants are forced to submit their claims under one act, which limits their ability to accurately represent their intersectional experience.<sup>263</sup>

Australian law professor Beth Gaze, commenting on the lack of guidance about how intersectional claims will be treated under Australian antidiscrimination law, points out that “[t]o require a complainant to prove which element [of a discrimination claim] is sex and

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<sup>259</sup> Aviah Sarah Day & Aisha K. Gill, “Applying intersectionality to partnerships between women’s organizations and the criminal justice system in relation to domestic violence” (2020) BJC 1 at 3.

<sup>260</sup> *Equality Act 2010* (UK), c 15 [EqA 2010]. Nick Queffurus, “Intersectionality at 30” *Oxford Human Rights Hub* (20 November 2019), online: Oxford Human Rights Hub <<http://ohrh.law.ox.ac.uk/intersectionality-at-30/>>.

<sup>261</sup> Amy Pereira, “Stuck at the Intersection: Antidiscrimination Law and Intersectionality in Australia” (2019) *Asian Australian Lawyer Association* at 4, online: AALA <<http://www.aala.org.au/resources/Documents/William%20Ah%20Ket/AMY%20PEREIRA%20-%20STUCK%20AT%20THE%20INTERSECTION-ANTI-DISCRIMINATION%20LAW%20AND%20INTERSECTIONALITY%20IN%20AUSTRALIA.pdf>>.

<sup>262</sup> *The Racial Discrimination Act* 1975 (Cth); *Sex Discrimination Act* 1984 (Cth); *Disability Discrimination Act* 1992 (Cth); and *Age Discrimination Act* 2004 (Cth).

<sup>263</sup> See Julia Mansour, “Consolidation of Australian Anti-discrimination Laws, An Intersectional Perspective” (2012) 21(2) *Griffith Law Review* 533 at 542; and Andrew Thackrah, “From Neutral to Drive: Australian Anti-Discrimination Law and Identity” (2008) 33:1 *Alternative LJ* 31.

which is race discrimination would be impossible and would not reflect the wholeness of the experience of the individual affected.”<sup>264</sup> Indeed, courts have taken various approaches to dealing with intersectional claimants under these statutes. For example, in *Djokic v Sinclair & Central Qld Meat Export Co Pty Ltd*, a case involving workplace discrimination, damages were awarded separately under the act prohibiting sex discrimination and the act prohibiting race discrimination, with no discussion of the interplay between the two.<sup>265</sup>

Recently, proposals to amend the divided legislative approach to antidiscrimination in Australia have been tabled. Draft legislation put forward in 2012, entitled the *Human Rights and Anti-Discrimination Bill*, included a suggestion that Australian legislation include protection against discrimination based on “a particular protected attribute, or a particular combination of 2 or more protected attributes”.<sup>266</sup> While this *Bill* did not come into effect, it is an example of the kind of changes that could better facilitate that incorporation of intersectionality into Australian antidiscrimination law.<sup>267</sup>

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<sup>264</sup> Beth Gaze, “Has the Racial Discrimination Act Contributed to Eliminating Racial Discrimination? Analysing the Litigation Track Record 2000-2004” (2005) 11(1) Australian Journal of Human Rights 6, noting that in *Dao v Australian Postal Commission*, [1987] HCA 13 the High Court of Australia “suggested there could be problems in running a claim on both grounds together.”

<sup>265</sup> *Djokic v Sinclair & Central Qld Meat Export Co Pty Ltd* [1994] HREOCA 16. There have been some general acknowledgements in case law outside of the antidiscrimination context about intersectional experiences. For example, in *Director of Public Prosecutions v SE*, [2017] VSC 13, a case addressing the interpretation of statutory provisions guiding bail decisions, the Victoria Supreme Court made the following statement at para 28 regarding the application for bail by a young Indigenous person with an intellectual disability:

The disadvantage and vulnerability suffered by persons who experience discrimination on multiple grounds, or who experience discrimination upon multiple grounds which intersect, are commonly different and greater in nature than is the case with discrimination upon a single ground.

[...]

I have therefore borne in mind that the different forms of [the applicant’s] discriminatory disadvantage and vulnerability likely cumulate and interact, making accommodation even more necessary.

<sup>266</sup> Australian Government. Human Rights and Anti-Discrimination Bill 2012 (Cth) Exposure Draft Legislation at s 19.

<sup>267</sup> In 2013 the Attorney General of Australia decided not to table the Bill before the 2013 election, see “Anti-Discrimination Bill 2012 Shelved by Australian Government” *Equal Rights Trust* (26 March 2013), online: Equal Rights Trust <<https://www.equalrightstrust.org/news/anti-discrimination-bill-2012-shelved-australian-government>>.

### 6.3 The European Court of Human Rights

Intersectional analysis has played an important role in the work of regional bodies, such as the European Court of Human Rights (ECHR). *B.S. v Spain* is perhaps the most well-known case in which the vulnerability of African women in Europe was explicitly, and intersectionally, acknowledged by the ECHR.<sup>268</sup> In that case, a Nigerian woman living in Spain and working as a sex worker was harassed and physically assaulted by police.<sup>269</sup> When she lodged a formal discrimination complaint, her case was dismissed on the basis of insufficient evidence.<sup>270</sup> While the applicant's review request and subsequent appeal were both unsuccessful in Spain, her case made its way to the ECHR, where Women's Link Worldwide, an international organization that uses law to advance the rights of women and girls, became involved in the case.<sup>271</sup> Women's Link Worldwide sought to obtain an intersectional ruling from the ECHR which could be applied to future cases.<sup>272</sup>

The applicant and her advocates argued that she was particularly vulnerable to discrimination as a Black woman working as a sex worker, and that those factors could not be considered separately in the analysis of her case.<sup>273</sup> The ECHR agreed and explicitly stated that the Spanish courts failed to consider the applicant's intersectional vulnerability as an African woman working as a sex worker.<sup>274</sup> The ECHR took a holistic and intersectional approach to determining discrimination by not only considering the complainant's gender, race, immigration status, and occupation, but by considering these factors in the context of police attitudes in that time and place. *BS* has been called "an exceptional case of successful

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<sup>268</sup> *BS vs Spain* 47159/08 Judgment 24.7.2012 [Section III], online: [https://www.legislationline.org/download/id/6861/file/ECHR\\_Case%20of%20B.S.%20v.%20Spain\\_2012\\_en.pdf](https://www.legislationline.org/download/id/6861/file/ECHR_Case%20of%20B.S.%20v.%20Spain_2012_en.pdf) >.

<sup>269</sup> *Ibid* at paras 6-9.

<sup>270</sup> *Ibid* at para 12.

<sup>271</sup> Women's Link Worldwide, "About Women's Link", online: Women's Link Worldwide <<https://www.womenslinkworldwide.org/en/womens-link/about-us>>.

<sup>272</sup> Women's Link Worldwide, "Spain, European Court of Human Rights *BS v Spain*" (2012), online: Women's Link Worldwide <<https://www.womenslinkworldwide.org/en/gender-justice-observatory/court-rulings-database/b-s-v-spain>>.

<sup>273</sup> *BS*, *supra* note 268 at para 52.

<sup>274</sup> *Ibid* at para 62.

implementation of intersectionality in the European multilevel legal context.”<sup>275</sup> It highlights not only the possibilities for intersectional decision making at the ECHR, but also the importance of intersectional advocacy in strategic litigation.

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<sup>275</sup> La Barbera & Lopez, *supra* note 254 at 1170.

## Part 7: Conclusion

Intersectionality is a lens, tool or analytical perspective that provides a framework for understanding individual and group experiences of discrimination based on multiple identities and connecting those experiences to systems of privilege and dis-privilege. Intersectional lawyering requires attention to questions of positionality and allyship in the lawyer-client relationship, and the centring of client voices and experiences. While advocates around the world are increasingly bringing intersectional claims before courts, antidiscrimination law has yet to fully realize intersectionality as an analytical framework. Similarly, while the insights of intersectionality are relevant to criminal law, family law and immigration and refugee law, intersectionality appears infrequently and inconsistently in these contexts. Yet the proliferation of intersectionality across contexts, its increasing currency in the work of Canadian lawyers and legislators and the decisions of judges and adjudicators, and its successes at the international level, including in international law and at the ECHR, demonstrate the potential for intersectionality to be more fully incorporated into antidiscrimination law.

Importantly, in pursuing this goal, advocates must be wary of adopting a diluted version of intersectionality focused only on identity categories. Structural intersectionality centres systems of privilege and dis-privilege and structures of power from which discrimination flows. In incorporating intersectionality into law and legal contexts, advocates must continue to problematize these systems, including the legal system itself, and reflect on our roles within these systems. This is difficult work, focused on the long-term goal of transforming our communities into more just, caring and equal places. As Crenshaw explains:

It is not necessary to believe that a political consensus to focus on the lives of the most disadvantaged will happen tomorrow in order to recenter discrimination discourse at the intersection. It is enough, for now, that such an effort would encourage us to look beneath the prevailing conceptions of discrimination and to challenge the complacency that accompanies belief in the effectiveness of this



framework... The goal of this activity should be to facilitate inclusion of marginalized groups for whom it can be said: “When they enter, we all enter”.<sup>276</sup>

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<sup>276</sup> Crenshaw, “Demarginalizing”, *supra* note 3 at 167.