

Obiter ♦ Dicta

LONGING FOR 4L: REFLECTIONS ON LAW SCHOOL...



- ESTHER MENDELSON

My friends tell me that I am the only person whom they have heard utter the following refrain: I am devastated that law school is almost over.

I know, I know. A job will allow me to pay off my debt (of course, if I stay in school forever, I can continue to accrue debt I never have to pay off), and I have been working towards becoming a lawyer, not the ghost of Gowlings Hall. But as I think back to the time I have spent in that hallway, holding court with Osgoode royalty and jesters alike, I cannot help but feel nostalgic, and even sad, now that this magical time is coming to a close.

I have looked into law school victory laps, but have been told that they are frowned upon, and an LLM is simply not the same.

I will not miss writing exams or being ranked. I will not miss the acute imposter syndrome (though I am almost certain it will follow

me into practice). And I will not lament leaving York's brutalist architecture behind. But I will miss the people, the endless opportunities to learn and contribute, and the love of learning shared by my professors and classmates (whether or not the latter freely admit to it). And frankly, I don't know how I'm going to deal with Septembers now that I will never have another first day of school.

I always dreamed of coming to law school. I fantasized about my first day the way that rom-com protagonists fantasize about their wedding day. I couldn't wait to get here, though I certainly did not think that getting here was a sure thing. Despite the late nights and arduous toil, it has been everything I hoped it would be and so much more.

» continued on page 5

In this Issue . . .

editorial

Reflections on the Pursuit of Perfection. 2

news

Court Finds Survivors Guilty. 6

opinion

An Early Retirement. 8

opinion

Paid Prescriptions. 12

sports

Mamba Emeritus. 14

Reflections on the Pursuit of Perfection.

- HEATHER PRINGLE

It all begins with four years of political science, economics, engineering, or maybe even art and design. At this stage, we stand out from those around us. Earning straight-A's comes easily and most of us graduate at the top of our class with a 4.0 GPA. Some might immediately turn their attention toward the LSAT while others might pursue higher education, and others still might spend several years building successful careers. No matter what events transpired between our undergrad and the decision to study law, we all spent close to four hours locked in that miserable room with one thing in mind: How close to 180 can I get? Whether law school was the plan since crawling in diapers or only a recent decision, once here, we all take it very seriously. They say that this profession is self-selecting—attracting the perfectionists, the obsessive-compulsive, the neurotic. It's true that many of us come in with the next three years of our lives researched, analyzed, planned out to maximize the value of this opportunity. We expect that adhering to this guide without allowing for any "missteps" will lead to the perfect future. In my case, everything about the past three years failed to live up to the plans I had for myself and yet, looking back, the resulting imperfection couldn't be more perfect.

I came here from Vancouver after working in advertising and publishing for nearly a decade. I was living in the perfect city (no offence Toronto) and while I wasn't perfect at my job, I was still pretty damn good. Law school was just another accomplishment that I hoped to achieve with equally stellar success. This is where I let you in on a little secret: I generally don't like doing things that I'm not very good at. Call it insecurities or just part of the type-A personality. Either way, there is a large part of me that decides which opportunities I'm willing to pursue based on my perceived likelihood of success. If you had asked me three years ago where I would be today, I would have answered with something to the effect of "working in entertainment and media law somewhere on Bay Street." I focused specifically on IP because I never imagined that I was capable of doing anything else. I was convinced that any success I might have in law would necessarily be tied to the creative industry so I didn't even entertain the idea of practicing in any other area. Needless to say, I spent the majority of 1L rolling my eyes and just waiting to get to the "good stuff." Children getting hit by ice cream trucks and Aboriginal land claims were interesting issues, but would rarely make an appearance in a patent application. That being said, I still ensured that I was doing all the "right" things. My first weeks of law school involved following a checklist: sign up for CLASP, seek out a mentor, apply to the



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law journal, join as many clubs as are willing to have you as a member, the Lerner's moot, and, of course, dreaded networking. The irony of my story is that the more I kept trying to do everything "right," the more it all felt wrong to me—leading to the worry that I truly was some sort of imposter who didn't belong here. Making matters worse was my unwavering commitment to a particular idea of what the law school experience should involve and blinding myself to anything that fell outside that vision.

In hindsight, my tunnel-vision did me no favours and simply prevented me from exploring opportunities that may have revealed unexpected strengths and interests hiding within me. Not until my last year did I realize that my pursuit of perfection had actually taken me further from it. In somewhat of an ironic twist, my IP intensive forced me to engage in a variety of different areas of law than IP. It was the first experience since 1L where I was involved

with legal concepts outside the realm of either patents, trademarks, or copyright and it took me by surprise that I enjoyed it as much as I did. All of this is a very long-winded way of saying that while it's great to have the best-laid out plans for your future, don't allow them to restrict you from the experiences that you never even knew you wanted. It's fine if you're one of those people who knows exactly what you want, exactly how to achieve it, and you just want to "git er done." Hell, I thought I was one of you. I thought I had the perfect plan to get me through law school but, as it turns out, what I thought was perfect couldn't be further from where I currently stand. I really, really thought I loved vanilla ice cream... and then mango madness came along and I was like, "I'm all over that shit. Sorry vanilla."

Sometimes you don't really know what perfection is until you find it in the most unlikely of places (applies equally to dating).

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"It is legal because I wish it."
- Louis XIV

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This One Goes Out to All The MILS

(Mature in Law School)

- JENNIFER DAVIDSON

► Photo: Christinna Muschi/Reuters

Before starting law school, I diligently researched what it was like to enter law school as a mature student. I found pitifully few accounts from those that had succeeded in the role, and many that just dropped off without a concrete indicator of where their journey ended. As I near the end of my three years at Osgoode, I can offer evidence (just what every law student needs) that success as a MILS is possible, nay probable. Legal training can occur in tandem with parenting, mortgage payments, and extra-curricular activities. This article goes out to all those who are researching law school as a mature student—and those beginning your academic journey towards a Juris Doctor degree (J.D.).

A bit about me: I consider myself first and foremost a mother to my three terrific kids (now ages 5, 8 and 11). I left a good job to come to law school because I am passionate about the practice and I refused to spend a lifetime in a career where I was not challenged or inspired. I have never looked back.

In entering law school, I found a beautiful community of peers –many of whom (although definitely not all) are also mature, and several of whom are parents. As a 1L, this was a surprise to me; I had not truly expected to find so many like-minded individuals roaming the halls.

Osgoode's student body is incredibly diverse and welcoming. To the newly minted MILS, this is exceptional news because law school is not a solitary act; it requires a village and it is a much better experience with the support and friendship of those who you can trust and learn with.

And so I humbly offer advice I have learned from my time as a JD student, to all those who are just beginning this beautiful journey:

Get out of your comfort zone:

Law school is an exceptional opportunity. However, it will feel very alien at first. This is natural. Embrace it. Go to events (especially the Mature Students Association orientation); talk to and get to know new people. Your community starts on day 1. Get out there and meet people; they may become your lifeline and best friends.

Get used to feeling like law is a puzzle with pieces that don't yet fit together:

Law is new. Studying might be too. Do not panic if you don't get everything right away, learning is a process that might come together slowly. It takes time to figure out how the pieces fit together. No one said this was going to be easy—be patient with yourself.

Study smart; not long:

Let's face it, MILS come with complex lives and multiple responsibilities. Don't tell the professors—but you don't have to read every word assigned. Instead, study smart—learn to identify themes and issues and read with purpose.

Learn to avoid the frenzy:

EXAMS ARE STRESSFUL! Law students can become hyper-competitive, animalistic beasts at exam time. Do not cave to the desire to jump into the middle of this feeding frenzy of stress. As MILS, we have dealt with many stressful times—100% exams are nothing compared to this. Please keep this in mind when you enter into your first set of mid-terms or final exams. Stress works against you here—you need a level head, quality sleep, food and hydration. Let your experience be your advantage.

SPEAK UP:

If you have something to add to the conversation, speak up! MILS can benefit the student body by bringing real-life experience to the table. Use your experience to pin abstract legal concepts back to real-life understanding. This trick will help you retain what you are learning and may help other students understand theoretical concepts in practical terms.

“MILS can benefit the student body by bringing real-life experience to the table.”

Leverage your background into your RESUME:

Yay—you got into law school. Next step: find a job. Your experience can be your

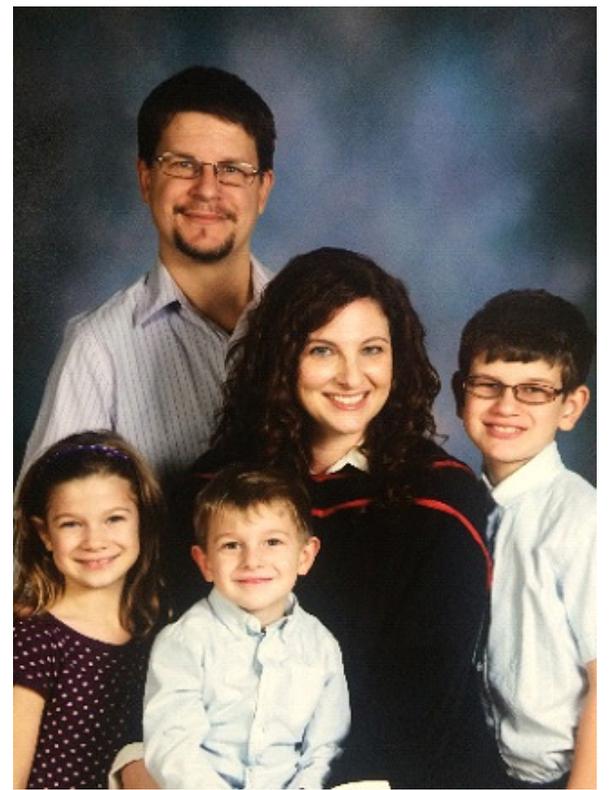
greatest asset to set you apart from the many applications that start going out after first term 1L (yes, it does start that early). Speak to the Career Development Office (CDO) about leveraging your transferrable skills and experience in your resume. MILS tend to do well in recruitment sessions because we can harness our backgrounds into an advantage.

SLEEP, EXERCISE and DOWNTIME:

The brain works better when you treat the body right. Know your limits and play within it—that old adage actually applies to law school. Take some time off—get some downtime and start again the next morning. Remember: this is a marathon, not a sprint.

Never try to do it all alone:

This one is applicable to all, but is particularly true for the parents out there. Everyone needs a few solid people you can rely on—at home, at school, in life. Treat those people - particularly partners/significant others/spouses - like the GUARDIAN ANGELS they are—because when those stressful times come, you will need them to remind you that there is a bigger picture and grades aren't everything.



► Photo source: lightguidejournal.wordpress.com

Have fun!

I know that we are all super-serious law students out to change the world, but no one said you can't have fun while doing it! Law school is an incredible opportunity to meet new people and try new things! Join a club or a team, write an article—or try mootng. Get out there and do it—and have fun! Law school can be a great place to spread your wings, make new friends and yes, even have a great time doing it!

Remember: You can do this!

It's going to be a challenge sometimes—and there will be days where you wonder if you can get through. Give yourself time and space to remember why you chose to come to law school and realize that you are not alone. Draw on that inner strength. You are in law school because you deserve to be here— YOU CAN DO THIS!

One small side note for the Moms out there. If you are like me, mothering comes bundled with guilt any time you can't be 100% there for your kids. Juggle your commitments with your gut. Missing a lecture might be necessary to attend a recital; and missing a parent coffee to attend class might need to happen. Above all, try not to sweat it too much. Make sure to find the time to play with your kids, do homework side by side, have family meals together and return to work after. You will find a way to successfully navigate this with your family—and you will all emerge stronger. Your kids will learn what hard work is by watching you and they will soar higher as a result of your influence.

To all those just starting out on this journey—you can do this! Just keep these ten tips in your back pocket and you are on your way! See you on the flip side JDs.

Yours truly,

Jennifer R. Davidson
President of the Mature Students Association
(2015-16)

So you want to be an international lawyer...

- CANADIAN LAWYERS FOR INTERNATIONAL HUMAN RIGHTS - OSGOODE

Students interested in international law often ask what it takes to find a career in this highly competitive and amorphous area of law. What is the recipe for success and where do I find the ingredients? At last month's International Law Career Panel, hosted by Canadian Lawyers for International Human Rights - Osgoode (CLAHR-Osgoode), three panellists tried to outline these criteria. I say "try" because the panellists could not agree on the perfect recipe for a successful international law career. However, they were able to outline three key ingredients all aspiring lawyers should have: a specific interest within international law, credibility in that area and most importantly, perseverance. Admittedly, these three criteria are quite broad and abstract. So to help students conceptualize these attributes and to provide a concrete example of their impact, we would like to share the journey of a young and accomplished international lawyer: Katharine Marsden.

Katharine Marsden is an Associate Legal Officer at the International Criminal Tribunal for the former Yugoslavia (ICTY), working in the Appeals Division of the Office of the Prosecutor. Her career, however, did not begin in the hallowed courtrooms of the United Nations, or even in the area of international law. Katharine studied sciences in CEGEP and then completed a commerce degree at McGill University, two relatively diverse academic streams. She was initially reluctant to consider a legal career, but after a gap year, Katharine made the decision to attend law school. This decision was premised on the intention to pursue international human rights, her primary interest within the law. To Katharine, this career trajectory was non-negotiable; she had

found her specific interest. Now it was time to gain experience and credibility within the field.

Katharine held several positions related to human rights after law school. She worked as a refugee lawyer and an evaluation advisor at the Quebec Human Rights Commission. Some of her most valuable experiences, however, were outside of Canada. Katharine had interned at the International Criminal Tribunal for Rwanda (ICTR) in Tanzania and with the Al-Haq Organization in Palestine. She credits these experiences with bringing her one step closer to working within international law. Her experience in Palestine enabled her to observe a regional conflict first-hand and to navigate a diverse and dynamic setting. While working for the ICTR, allowed her to gain familiarity with an international tribunal and its inner workings, preparing her to later work at the ICTY.

Although there is no magic recipe to becoming an international lawyer, Katharine stresses field and tribunal experience as important ingredients; they add tremendous credibility to your resume.

Since being called to the Bar, Katharine has clearly achieved many successes in her international legal career. These accomplishments are a direct result of her continued perseverance. Katharine admits that she did not have the highest grades in law school and she faced periods of unemployment throughout the beginning of her legal career, mainly because of limited job opportunities in this distinct area of law. Many aspiring lawyers may view these periods as roadblocks in their career. We do not want to understate the personal and financial difficulty of these periods, but as in Katharine's case, if you are able to persevere, they can be viewed as speed

"The disrespect starts early on in women's legal careers."



bumps that you must and can roll over. Katharine continued to apply for jobs within international law even though she was not getting immediate traction. "In fact, the hiring process for the ICTY took several months to even complete. Although a lengthy process, Katharine's perseverance clearly paid off as she began working for the ICTY in September 2013."

Katharine Marsden's career path took its own course, but is evidence of the impact of the three criteria highlighted above. In finding her specific interest within international law, gaining credibility in that area, and continuing to persevere, she has been able to achieve a career in international law. CLAHR-Osgoode would like to help all students navigate these three steps. We are currently looking to develop an online career resource featuring job postings, testimonials and other information pertinent to becoming an international lawyer. If you have been inspired by Katharine's story and would like to be a part of building this exciting initiative, please contact us at clahr.osgoode@gmail.com or check out our Facebook group for more information.

The views expressed herein are those of Katharine Marsden alone and do not necessarily reflect the views of the International Tribunal or the United Nations in general.

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Goodbye to Toronto's Most Troubled Politician: In the End, He was Only Human.

- IAN MASON

On 22 March 2016, Rob Ford – former mayor of Toronto and city councillor for Etobicoke North – died of cancer. My condolences to his family, particularly his children.

Rob Ford was a surprisingly complicated man, considering he was actually something of a simpleton with no capacity for subtlety or nuance. He was a demagogue who was allegedly awkward and uncomfortable in person. He was profoundly privileged, but was more at home in a dive bar than a golf club. He was a champion to some, and a merciless bastard to others. He desperately tried to speak truth to power, but was a pathological liar who wouldn't work with anyone who challenged him. Even fate seemed to take note of his contradictory nature: he died soon after what appeared to all as a turn to better health.

I never liked Rob Ford. He was ignorant, callous, and profoundly hypocritical. He often pandered to the lowest common denominator, and exploited those who had the most faith in him. He often thought he knew better than anyone, but somehow managed to get blackmailed by crack dealers twice. He drove drunk so often that he kept a toothbrush in his car, vainly assuming that brushing your teeth after downing a mickey of vodka in fifteen minutes would somehow prevent a police officer from smelling alcohol on your breath. He was a truly dangerous man.

That said, he was never going to be anything better than the Rob Ford we came to know all too well. I hate to blame someone's flaws on their family, but Mr. Ford was not raised to be a well-adjusted, well-rounded person, nor were any of his siblings. His mother was at the very least an enabler, and his father was at the very least emotionally abusive. Between Rob and his siblings, Doug seems to be the most functional and stable, which is quite the statement. As a city of almost three million people watched Rob Ford self-implode, his mother and brother dismissed his obvious and glaring issues because addressing such issues could threaten their megalomaniacal

interests. Mr. Ford was a grown man who should have been capable of recognizing and addressing his personal issues, but better men than him have done worse things in the name of family, and he thought he was working for the benefit of a major city.

It wasn't just Rob Ford's family who enabled – if not tacitly encouraged – his awful behaviour. His supporters sneered and hissed when people challenged him. They accused people of lying when his troubling tendencies became public knowledge, only to shrug their shoulders when practically everything he was accused of turned out to be true. They stood by him when he abused his position to help his friends, stopped showing up to work, lied through his teeth, and issued forced, blatantly phony apologies. Inexcusable as Ford's behaviour was, he wasn't aware of the extent of his own wrongdoing, and he had a million people telling him how fantastic he was. People didn't just support Ford when he blundered through misdeed after misdeed: they attacked those who dared to call him out! A lot of people would behave terribly with that level of support, and Rob Ford was... well, Rob Ford.

Frankly, this makes me feel sorry for him. I may have despised Rob Ford's politics, but I sincerely believe that he thought he was helping people. As a city councillor and for the first year of his mayoralty, he worked his butt off, because he thought people needed his help. When he needed those same people to help him – or even admit he needed help, they watched him go up in flames. Rob Ford had a lot of enemies, but none were greater than his own supporters. They watched him suffer, and did nothing because they thought he was saving them a few dollars. I've had my share of parasitic friends, but sweet tap-dancing Marduk (slayer of Tiamat), I can't imagine what it must be like to have "friends" like that.

I met Rob Ford once. It was Christmas Eve of 2010 or 2011. I was at the liquor store, stocking up before it closed for the holidays, and getting in some last-second Christmas shopping. Rob Ford

was at the peak of his popularity, and his alcoholism wasn't public knowledge at the time. He walked in without fanfare, quickly collecting a mickey of Smirnoff and a twenty-sixer of Russian Prince. I'm admittedly familiar with alcoholism. I used to call running out of rye "a drinking problem." I know an alcoholic's emergency run when I see one; hell, I was partially engaged in one myself. He kept his eyes to the ground, people whispered behind their hands, and we both exited at roughly the same time.

He was making awkward small talk with some supporters when I left, and I – as someone he'd consider a pinko – was inclined to give him a piece of my mind. Then I thought "right now, we're not very different. The main thing separating us is that I don't have a dozen people judging my bad habits as they indulge their own." I wished him well, and he gave me a fist bump instead of a handshake because my hands were full. Maybe it was the Christmas spirit, maybe it was an understanding that he didn't listen to criticism anyway, maybe the thought of getting into a shouting match in a liquor store parking lot seemed a little white trash even for me. Whatever it was, there was no hostility.

point is two-fold. First, I certainly had moments of sympathy for a guy who was basically an awkward fat kid in way over his head (been there). Those moments were few and far between, but they were sincere. Second, his problems must have been known to the people close to him long before he started beating up his friend and drug dealer with a bag of McDonald's.

Rob Ford was a profoundly, obviously troubled man who was used by the people who were supposed to care about him. The most human politician Toronto has ever seen was treated as a tool by his friends and family. He wasn't a monster: he was a man, albeit a very weak and damaged one. Many people won't remember him fondly, but we can't forget that he was practically doomed to be broken. We don't have to like, respect, or defend him, but we should remember our shared humanity, and try not to judge him too harshly. In his situation, many of us wouldn't have fared any better.

Goodbye, Rob Ford. Toronto municipal politics is going to seem awfully boring without you.

Longing for 4L: Reflections on Law School..

- ESTHER MENDELSON

I am so proud to be even a miniscule part of this institution's history. I feel incredibly fortunate to have passed through these doors, walked these halls, and sat in these classrooms. I have met incredibly gifted, interesting, and accomplished people who have exposed me to ideas and perspectives that I may not have otherwise been exposed to. I had the opportunity to delve deeper into topics that piqued my interest (thank you, Justices Greene and Crosbie) and confront topics which intimidated me (many thanks to Prof. Waitzer). My inner nerd has been nurtured and, while the red marking pen may have been like a machete hacking away at my sense of self-worth, comfort and strength could always be found with Gayle, Nicola, and Nadia and Mary on the third floor. I found role models in my professors and classmates alike and learned a great deal from both. Here I found knowledge, skills, and empowerment. What more could a girl ask for?

I know that most 3Ls have one foot out the door already, and most 1Ls and 2Ls envy us, but if your eyes aren't misty yet, consider this:

» continued from front page

where else will you have the opportunity to wax judicial on the finer points of privity of contract over a cold beer? Discussing evidentiary burdens with your favourite people may not happen every day once you graduate. And I'm not sure that your boss will meet your imitation of Lord Denning with the same gusto that your law school friends have for the past three years.

And awaits us once we leave? Articling: the acne-riddled, awkward teen-stache phase of our legal careers. To paraphrase Britney, you're not a student, not yet a lawyer. No one is impressed, and no one likes you. You are once again starting the climb from the bottom rung, and there is no safety net. But there is even more to miss than there is to dread.

Those who know me know that I am not one for sentimentalism and mush, but this is truly a special place, and I will miss it very much once I graduate. Sometimes I question whether some of my less stellar grades were the product of a subconscious attempt to sabotage my own graduation (and hence departure) from Osgoode, but then I remember that they are in fact the

product of my own intellectual shortcomings. I am still looking forward to convocation, however, and for those contemplating skipping the festivities, my mother tells me that she will be joining me on stage to receive my degree and that she will tell Dean Sossin all about how she suffered trying to get me to do my homework in grade 1, so it's sure to be entertaining.

As we stand on the precipice of our chosen careers, I want to offer you all a heartfelt blessing. May we all become the lawyers we want to be. May we go forth and chase justice. And may we never forget the ideals that brought us to this place or the things we learned here. Dear colleagues, classmates, professors, administrators, and staff, you have made me better – more articulate, well-rounded, informed, judicious, and compassionate. I am forever in your debt (and the bank's, but I feel decidedly less warm and fuzzy about that). Friends, I know our paths will cross again in the future, and that knowledge softens the blow of having to leave this wonderful place. These have been among the happiest, most challenging and rewarding years of my life; they will be hard to top. Thank you. Thank you. Thank you.

Court Finds Survivors Guilty:

Ghomeshi Acquittal A Watershed Moment for Sexual Predators and Their Apologists

- ESTHER MENDELSON

I remember my skepticism when colleagues and acquaintances waxed optimistic about how this trial would be a watershed moment for the criminal justice system's treatment of sexual assault. I recall thinking that even if Ghomeshi was found guilty, nothing would fundamentally change. I knew that Marie Heinen would whack the complainants. I knew that the judge would do little, if anything, to stop her. And I knew that for every word of support for the survivors, there would be a deluge of misogynistic trolling.

I was right.

Bikinis and Bouquets

Some of the most "damning" evidence should not have been introduced at all. Section 276 of the Criminal Code states that "evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or (b) is less worthy of belief." Yet this is precisely what the now infamous emails and bikini picture were used for, whether or not defence counsel admits it or the judge realizes it.

Had the purpose of introducing the emails been to suggest that the complainants were unreliable because they did not remember sending those emails, there would be little objection (though there is a simple explanation if one understands responses to trauma) or even that they were not credible because they previously stated that there was no contact after the assaults. But it wasn't; Heinen went further—and too far. The text of the emails, and especially the bikini picture, should not have found their way to open court. They were simply not necessary to prove the complainants made inconsistent statements. All that would be needed to challenge reliability or to impeach credibility would be the dates the emails were sent, their sender, and their recipient. Including the "flirtatious" text and bikini picture could only serve one purpose. What other inference could be drawn if not the complainant is a slut, therefore she is less credible and more likely to have consented? How can a trier of fact disabuse her or his mind from the image of a string bikini on a complainant accusing a man of sexual assault? The judge had the power to exclude this evidence even without an objection from the Crown, but he did not.

Post-Assault Conduct as Post-Facto Consent

There is a Talmudic concept known as *kal vachomer*, which is about inductive reasoning—learning the lax from the strict. The Supreme Court in *J.A.* stated that there is no such thing as advance consent; consent must be on-going. If there is no such thing as advance consent, then *kal vachomer*, there is certainly no such thing as post-facto consent. That is, unless your defence counsel is Marie Heinen.

By picking apart every word, every thought, every email, the defence successfully suggested that the complainants' post-assault conduct was proof positive of their consent to being choked, punched, and bitten. But how can conduct from the future qualify as consent to an act being perpetrated in the present? It cannot.

Moreover, we know enough about trauma and the socialization of women to please and self-blame that we can safely state, as the judge conceded, that post-assault conduct, though "odd" to onlookers, can be a perfectly normal response for someone who has experienced sexual violence.

The Verdict

The decision in the Ghomeshi trial is not the worst decision in a sexual assault trial that I have read, but that says more about sexual assault trials in general than it does the Ghomeshi trial in particular.

Justice Horkins made a point to note that "the expectation of how a victim of abuse will, or should, be expected to behave must not be assessed on the basis of stereotypical models" before he did just that. He referenced the complainants' post-assault conduct at least forty times in the hundred and forty-two paragraph decision. He explained that his decision was based on things like complainants' inconsistent statements, but the fact that analysis of post-assault conduct based on discredited rape myths figured so prominently in the decision is troubling.

We hold complainants to an impossible standard and set them up for failure. If they recall details too well, they are rehearsed and therefore unreliable. If they do not recall details—even inconsequential details of events that took place over a decade ago—they are unreliable.

Justice Horkins did not just deem the complainants to be unreliable, however, he went to disturbing lengths to call them liars, stating that they "deliberately withheld" relevant information, and that their "questionable behaviour" and "outright deception" "tainted" their accounts. The "questionable behaviour" was seeking support from other survivors before considering pressing charges, and the "outright deception" refers to the fact that complainants left out the fact that their attacks occurred while they were kissing Ghomeshi, even though there was no evidence that this was a deliberate decision. But consensual kissing a defence of consent does not make.

Of course, this focus on post-assault conduct is largely due to Heinen's subversion of evidentiary rules. Heinen was part of a continuing professional development panel where she told criminal lawyers "to introduce all this otherwise inadmissible evidence" in sexual assault cases, especially in judge-alone trials, like Ghomeshi's, "and if it's excluded, well, oh well, the judge has heard it." She certainly took her own advice.

Un-Civil Discourse

The verdict was disappointing, as have been the posts and comments from some male (and female) law students following the verdict (Note: While I am often disappointed on this score, I also want to acknowledge and thank my male friends and colleagues who stand shoulder to shoulder with those of us working towards justice for survivors and a more ethically sound and legally correct approach to sexual assault). Law students should know better. While most lay people have probably never read Ewanchuck, Seaboyer, Pappajohn, or Osolin, we have. Not everyone has taken the Sexual Offences seminar (which I highly recommend), but we have all encountered analyses of misogyny and other forms of oppression at some point in law school. The idea that lawyers have ethical obligations, which include civility towards adverse witnesses and a commitment to equality, is inculcated even before classes formally begin for 1Ls. The defence of deliberate ignorance is not available to any of us.

It is therefore disappointing when fellow law students engage in the same vile victim-blaming and unabashed misogyny as the ubiquitous internet trolls. Despite the more polished vernacular and sophisticated packaging, their posts are based on the same facile misperceptions of women, sexuality, and gender-based violence.

Responses praising the verdict range from condescending, snarky, and contemptuous to aggressive, unabashedly misogynistic, and hateful. There is a sense of emboldened misogyny brought on by this verdict. I do not need to give these responses another platform; just check the comments section on any Ghomeshi-related article.

It started even before the verdict, though. The day I attended the trial, I overheard two popped collars from UofT Law behind me in line lamenting the possibility that this trial would make prosecuting sexual assault "too easy." No worries, bro, looks like you and your frat brothers have nothing to fear.

Systemic Failings

Complainants are put through the ringer from the moment they report their assaults to police. What follows is usually a crude and cold reception by police. Crowns are often just as bad. To cap off the experience, complainants are given the third degree on the stand—where their clothing, lifestyle, and mental health are violently challenged in a bid to discredit them as witnesses. After decades of reform, the law is where it should be, but given the way lawyers and judges ignore or subvert it, one cannot help but to conclude *plus ça change, plus la même*.

To be sure, the presumption of innocence is a safeguard that must be jealously protected and the standard of reasonable doubt exists to do just that. In sexual assault trials, where credibility is often the only issue, questions of admissibility are particularly challenging and must be answered with the most precise and nuanced reading of the laws of evidence and the Code. Determining whether a "flirtatious" email is admissible because it is proffered to impeach the complainant's statement denying contact or inadmissible because it is proffered to suggest that the complainant is promiscuous and therefore less credible or more likely to have consented to the act in question is often challenging. Demarcating these lines requires a fine brush, not a roller.

These systemic failings lead to further systemic failings as the attitudes and assumptions rejected by the Code and the Supreme Court are further ingrained into the minds of lawyers and judges. This, in turn, perpetuates and legitimizes society's skewed perceptions of sexual violence.

Many were hoping that this trial, and the courageous decision by Lucy DeCoutere to waive the publication ban on her identity, would encourage more survivors to come forward and report their sexual assaults to police. Given what the complainants were put through and the berating in the decision, this watershed moment will likely have the opposite effect.

At a demonstration following the verdict, a topless woman who approached the area where the Crown Attorneys were giving a statement outside the courthouse and shouted "Ghomeshi guilty," was tackled to the ground by two large male police officers. If the complainant whacking and berating by the judge was the metaphor, this was its physical manifestation. Indeed, our system seems quite adept at punishing women for raging against gender-based violence, but cannot bring to justice the men who perpetrate it.

I have found myself explaining to family and non-law school friends how it is that the survivors were found guilty while Ghomeshi was acquitted. It is hard to tell which one of us is more disappointed with my explanation. I cannot help but think that we spend far too much time explaining this verdict and not enough time fixing what made it so.

R v Ghomeshi and its Impact on Nonstranger Sexual Assaults: Bringing Awareness to the 'Gap'

A brief look at how stereotypes, myths & seduction affect the application of law in sexual assault cases

- JESSICA ZITA

Law has power in constructing knowledge and ideology, yet it functions in dynamic tension with social structure and systems that affect its operation.

–Ruthy Lazar

If the outpouring of dialogue inspired by Ghomeshi indicates anything, it is that Ruthy Lazar was onto something: there is a gap between legal theory and its function, and it is apparent in how the courts treat stranger and nonstranger sexual assault cases (see her 2010 article, “Negotiating Sex: The Legal Construct of Consent in Cases of Wife Rape in Ontario, Canada” in the *Canadian Journal of Women and the Law*). We have a problem: there is a widespread lack of public confidence in the criminal justice system with respect to sexual violence. It is true that sexual assault law in theory and sexual assault law in practice are not always the same. There is a gap between sexual assault law as interpreted by the Supreme Court of Canada and its application and enforcement at the grassroots level by police, prosecutors and trial judges.

Research shows that most sexual assaults are committed by someone known to the assailed. Despite this fact, non-stranger assaults are the least reported and prosecuted form of sexual assault. This, in response to the discrepancy in the application of the law, has resulted in a large enforcement gap with respect to sexual assault offenses allegedly committed by nonstrangers. It is here that one begins to see why the facts in Ghomeshi have caused such uproar. The enforcement of law at grassroots levels has been unable to apply these standards fairly.

The Gap: What is it and why?

The enforcement gap with respect to assaults by nonstrangers results in-part from the influence of cultural paradigms and narratives about what is ‘normal sexual behaviour’ on how grassroots decision-makers think and talk about sexual activity and sexual assault. It is why Ghomeshi has prompted mass media discussion of rape culture that is focused on an interrelation of how, why and what effect legal analysis has on ‘norms and expectations’.

Articulating ‘The Problem’

It is a common misconception that one must accept that which makes them uncomfortable because they are made to feel it is the ‘normal’ thing to do.

The Ghomeshi case introduced these ‘myths’ to broader audience. The complainants are put on the stand and asked questions about the alleged assaults. The complainant testifies that they continued dating after the alleged assault. The presumption when looking at this pattern is that these are not typical victims, since the fear of the abuser is not “typical.”

Similar fact patterns play out in the context of relationships that have been going on for years. Sometimes, saying ‘no’ is not an option. Often, complainants are not being heard, so they resort to saying nothing as a way to prevent crueller harms.

Some lower courts would argue, even today, that this is simply a woman fulfilling her marital purpose (see for example *R v V(R)*, at para 10). Some judges have trouble seeing a “dividing line” between what is assumed to be normal, acceptable sexual activity within a relationship, and what constitutes criminal sexual activity. There is a fine line between non-consensual sexual touching and ambiguous communication, and that line is commonly referred to as “sexual seduction.”

A. Seduction

Seduction, generally speaking, is the process of inducing someone to do or agree to do something that, but for the seduction, they might not do. Seduction remains one of the principal psychosocial mechanisms giving rise to internal psychological conflicts between reason, emotion and instinct that characterize relationships. Seduction is often used to deflect responsibility for one party’s sexual choices and sexual activity to the other party, a function that conveys how seduction has informed the legal construction of responsibility in sexual assault cases.

In seduction, the seducee exercises “free will” and makes “autonomous choices” in response to desire. Those who touch

first and ask later, if at all, may honestly believe they are acting in accordance with what the other party wants because the one who initiates believes that the desire is mutual. This is the story many sexual offenders tell, feeling as if they were just doing what the complainant ‘wanted,’ as per usual. Essentially, the roles of the initiator-aggressor and the target become blurred, and the question of who touched whom without consent is lost from the inquiry. Such cases rarely proceed.

When intention or motive are ambiguous—as is the case in most nonstranger sexual assaults—a decision-maker will more easily rationalize a decision not to proceed, despite a solid case on the whole of the evidence, by concluding that if the case went to trial, the trier of fact would be unlikely to believe that the accused had the required mens rea.

B. Deception as seduction: creating a gap where parties to a relationship lack protection when faced with sexual behaviour that is factually criminal

There is little room to argue when deception is masked as seduction. The Court’s interpretation of sexual consent law leads to a contradiction when consent obtained through deception is at issue, however. The definition of “sexual consent” as “voluntary agreement” suggests that the agreement will be deliberately formed based on relevant information—that is, that valid consent is “informed consent.” If so, duplicity with respect



► Source: www.thestar.com

to any issue that influenced the decision made by a complainant must vitiate consent.

As long as deception or fraud does not have the effect of exposing the complainant to significant risk of serious bodily harm, a complainant who agrees to sexual activity that they would have refused had they not been deceived, is deemed to have “consented.” Thus, sexual consent by individuals in relationships, whom are neither incompetent nor incapable, but deceived by circumstance, is valid and legally effective.

That approach reinforces the widely held understanding that seduction, even if it involves some element of deception, is not sexual assault because the seducee is a freethought not necessarily prudent—actor who makes choices about what to do in response to the seducer’s words and actions. In the absence of proof beyond a reasonable doubt to the contrary, all sexual activity is assumed to involve some elements of seduction and is therefore presumed to be consensual, notwithstanding the words and conduct of both parties, either of whom could refuse to participate. These assumptions continue to be used by many decision-makers to distinguish non-criminal sexual activity from sexual assault. The net effect is that many complainants are found to have “consented”—even though the legal significance of the facts viewed through the lens of the legal definition of “consent” as voluntary agreement would show that in law they did not.

When both police and prosecutors use a seduction paradigm to screen such complaints, often the result is doubt concerning the absence of consent leading to nonenforcement.

The effect of this problem is a disproportionate result between the commission of nonstranger sexual assaults versus the reporting and enforcement of non-stranger sexual assaults.

Ghomeshi has moved us to take a microscope to the facts underlying sexual assault cases. In doing so, a grey area is found with respect to how courts treat non-stranger assaults. Notions such as seduction are factored into the consent analysis. That makes for a very fine line, where a victim of nonstranger sexual assault is caught without systemic protection while at the same time a number of people are protected from wrongful prosecution and conviction.

The consent analysis goes much deeper than “yes” or “no.” The attitudes and beliefs of ordinary Canadians, police, prosecutors, and judges determine how legal decisions about sexual activity are made. Our system and its process must therefore evolve to narrow this enforcement gap.

If anyone is looking for further information and/or sources on the subject matter discussed in this piece, Jessica can be reached at jessicazita@osgoode.yorku.ca.

An Early Retirement: Justice Cromwell's departure will test the Liberal government's call for transparency.

- NADIA ABOUFARISS

The news that Justice Cromwell had announced he will retire from the Supreme Court of Canada (SCC) on 1 September of this year—twelve years before the mandatory retirement age of 75—seemed to come out of nowhere. It appears that I wasn't the only one who thought so. Osgoode Professor Philip Gerard, who knows Justice Cromwell from their days teaching at Dalhousie, also expressed his surprise to Maclean's magazine, saying that he was under the impression that he enjoyed his job at the Supreme Court. Some had even pegged Cromwell to be Chief Justice Beverley McLachlin's replacement, since (I really hate to say this) her mandatory retirement date is coming up in 2018. While his personal reasons for leaving Ottawa are yet to be made public, many hope that he will lend his wisdom and judicial insight to another sector of law.

Although Justice Cromwell wrote judicial reasons in a large variety of cases ("...everything from A to Z, from aboriginal to zoning," stated lawyer Eugene Meehan), the decisions that are most memorable are probably no stranger to anyone who has taken criminal law. In *R v Fearon*, the right for police officers to search cell phones during a lawful arrest was upheld as constitutional with regard to section 8 of the Charter of Rights and Freedoms, which prohibits unreasonable search and seizure. I might be stealing this joke from Professor Berger, but here's a note to potential criminals: it is not a good idea to send a text saying "we did it" after committing a crime. In another section 8 case, *R v Spencer*, Justice Cromwell wrote for a unanimous court in a decision widely hailed as a massive victory for privacy rights on the internet.

Also written by Cromwell were the reasons in *M.M. v Minister of Justice*, which somewhat famously led Justice Abella, writing for the dissent, to call the majority's decision "Kafkaesque." The case was

"...many hope that he will lend his wisdom and judicial insight to another sector of law."

a tragic story of a mother being extradited to the United States to face charges of child abduction after her children ran away from their abusive father. Justice Cromwell, however, reasoned that this case did not violate the principle of double criminality. On a more positive note, Professor Girard told Maclean's that, more than likely, Justice Cromwell's biggest impact as a justice will be the SCC's application of his lower court reasoning regarding Aboriginal title in *Tsilhqot'in Nation v British Columbia*, which was previously rejected in the *Marshall* and *Bernard* cases.

The vacancy on the SCC will be interesting from a political point of view, as Justin Trudeau has made two promises regarding Canada's highest court. The first of these was a pledge to make judicial appointments more transparent; a reform which has been pledged by the government numerous times since 2004. Stephen Harper originally agreed with the need for reform and promised to shed more light on the process during a speech given at the appointment of

(Osgoode's own) former Justice Marshall Rothstein, but despite this, the process actually became less clear during his tenure. The criteria used in determining appointments hasn't been published since 2006 and after the Marc Nadon controversy came to light, the media and even Parliament have been purposefully left in the dark. Critics have consistently stated that this lack of openness and transparency undermines the judicial branch, so if Trudeau is able to implement anything in this regard, it will be a huge success for the Liberal party and a positive step forward for the government as a whole.

The second promise made by the Liberals was that all appointees to the SCC would be "functionally bilingual." This poses a particular problem in replacing Justice Cromwell since he is from Nova Scotia and therefore according to convention, has to be replaced by another candidate from the Atlantic provinces. Many worry that this will unnecessarily limit the amount of qualified judges that can be considered,



► Philippe Landreville/
Supreme Court of Canada Collection

especially when considering that Newfoundland and Labrador has yet to be represented on the Supreme Court and currently has no bilingual judges sitting on the Court of Appeal.

I am very excited to see who Trudeau pegs as the nominee and whether the process will change from the closed doors affair it has been throughout Canadian history. Will the government continue to keep Canadians in the dark about the nomination process for its most important court? After all, as the Prime Minister has said himself, "sunlight is the world's best disinfectant."

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Court Finds Survivors Guilty:

Ghomeshi Acquittal A Watershed Moment for Sexual Predators and Their Apologists

- ESTHER MENDELSON

» continued from page 6

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It started even before the verdict, though. The day I attended the trial, I overheard two popped collars from UofT Law behind me in line lamenting the possibility that this trial would make prosecuting sexual assault "too easy." No worries, bro, looks like you and your frat brothers have nothing to fear.

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To be sure, the presumption of innocence is a safeguard that must be jealously protected and the

“This is why I love my job”: Black Lives Matter and the Optics of Justice



► Source: Black Lives Matter Toronto

- SHANNON CORREGAN

A little over a week ago, Black Lives Matter Toronto staged a demonstration at City Hall to protest a decision by the Special Investigations Unit not to criminally charge the officer who shot and killed Andrew Loku last summer. Many see the death of Andrew Loku, a forty-five-year-old survivor of war and father of five with a history of mental illness, as part of an undeniable pattern of police violence against black men and women in Toronto, and across North America.

On Sunday, protestors moved their demonstration a few blocks north to the Police Headquarters on College Street – and on Monday evening, police officers attacked the peaceful sit-in. While CTV and the Toronto Star reported “clashes” between protestors and police, that passive language intentionally obfuscates the surprising and unprovoked attacks. Videos posted to the BLM Toronto Twitter account and under the #BLMOTotencity tag show police using force against unarmed and non-violent protestors. (I mean, that’s “clashing” if you want to get pedantic about it, but I can think a few ways to more accurately describe that situation.)

“...the fact that nobody thought this was bad optics is pretty telling.”

According to Twitter user syrus marcus ware, the police were “laughing and joking after attacking our people. One is overheard saying, ‘this is why I love my job.’”

There are so many things that can be said and need to be said about this latest instance of police violence being used inappropriately against non-white individuals, but the thought that I keep cycling back to is this:

In law school, we’re taught time and again that in the judicial system, justice must not only be done, it must be seen to be done. The power of the judicial system rests largely in the public perception of its integrity and fairness.

It would have been so easy for the police officers in HQ to do nothing that night. Protests and public activism aren’t uncommon in Toronto—you’d think that it would have been no skin off TPS’s nose to let BLM make their voices heard in the wake of the ruling. Stand to the side and make sure nothing got out of hand. It would have been so easy not to assault the (peaceful!) protestors in the middle of the night. It surely could not have been that difficult to approach this situation compassionately—or at the very least, diplomatically.

Did they not check with their PR people before doing this?

Putting aside any thoughts of actual empathy and engagement, the fact that nobody thought this was bad optics is pretty telling. One can’t know what individual officers were thinking or what orders they were acting under, but it seems as though they didn’t think that people would care.

Nobody thought to say out loud, “Whoa, guys, it’s 2016—we have to at least pretend to care about Black Lives Matter! This might look bad!”

On the contrary: “This is why I love my job.”

This is why I love my job.

As though protestors deserve violence for exercising their Charter rights.

Who do we think our police officers are protecting? Who do they think they’re protecting? It seems pretty clear who they aren’t interested in protecting.

We all deserve to feel as though our police are protecting us. That is their job, and it is difficult one, but it can be respected if and only if it is done with integrity and fairness.

Instead, the police officers there that night doubled down—and unfortunately for them, BLM has doubled down now, too. Perhaps they didn’t expect it. They probably should have, though.

Black Lives Matter has already changed the North American narrative. They’ve forced us to confront what for so long was easy to ignore, forced us to look head-on at what most of us were happy looking away from. Black Lives Matter said you don’t get to do that any more, and people, it seems, are listening.

On Saturday, huge crowds gathered en masse in front of College Street HQ to support BLM, and it doesn’t look like the demonstrations are going to die out any time soon.

In an ironic twist, Desmond Cole observers that the unprovoked attacks happened on the International Day for the Elimination of Racial Discrimination.

I can’t track down any video to verify syrus marcus ware’s claim about the police officer’s statement, but while looking, I watched a lot of videos of protestors being shoved and pushed aside, or even to the ground, as police officers doused their firewood and belongings with fire retardant.

TPS was quick to respond the next day by saying that they respected individuals’ rights to peaceful protest.

It didn’t work, and I don’t know why anyone thought it would. It’s 2016. If justice can’t be seen to be done, then maybe it isn’t being done.

standard of reasonable doubt exists to do just that. In sexual assault trials, where credibility is often the only issue, questions of admissibility are particularly challenging and must be answered with the most precise and nuanced reading of the laws of evidence and the Code. Determining whether a “flirtatious” email is admissible because it is proffered to impeach the complainant’s statement denying contact or inadmissible because it is proffered to suggest that the complainant is promiscuous and therefore less credible or more likely to have consented to the act in question is often challenging. Demarcating these lines requires a fine brush, not a roller.

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assaults to police. Given what the complainants were put through and the berating in the decision, this watershed moment will likely have the opposite effect.

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The Retention of Women in Private Practice: The Challenge is Intersectional.

- ANDREA ANDERSON



► Source: *Legally Blonde*, Metro-Goldwyn-Mayer

There is nothing quite like being a defence lawyer—walking into a criminal courtroom with a nice suit on, pulling your litigation case, proceeding to the front to sit at counsel table ready to advocate for your client—only to be stopped by another member of the bar who advises you that the general public are to sit in the body of the courtroom and wait for their matter to be called. There is nothing quite like that when it happens more than once.

Female lawyers experience various forms of gender-based challenges in practicing criminal law.

This is a recent finding from a Criminal Lawyers Association (CLA) study, which highlights that female defence lawyers are leaving the practice at a higher rate than men. The March 2016 report, “Retention of Women in Criminal Defence Practice Study,” reveals that unpredictable hours and income, limited family support, and sexism are some of the reasons that female defence lawyers are dropping out of the profession at higher rates than their male counterparts. In a recent CBC interview, prominent criminal defence lawyer and CLA’s VP Breese Davies made note of the survey’s findings, which included specific examples of sexism female lawyers experienced, including occasions where senior male counsel assumed they were students, being asked to do administrative tasks, and being propositioned by male clients. The respondents of the survey also reported mistreatment at the hands of senior women lawyers and judges.

The CLA report, which examined the extent of the problem in Ontario, gathered data from focus groups, Legal Aid Ontario, the Law Society of Upper Canada (LSUC), and a 2015 survey the CLA conducted amongst 224 of its female members. The authors found that between 1996 to 2014, forty-seven women and eighty-seven men were practicing criminal law. By 2014, sixty percent of women who had started out in defence had left, compared to forty-seven percent of men. Women left criminal law more quickly than men between the five to ten year mark of their careers. The report contains a number of recommendations for change, which include improving

mentorship opportunities, greater supports for women taking maternity leave, and on-going education for lawyers and judges to address the differential treatment of lawyers in the system.

While the report effectively illustrates the various ways female lawyers are impacted by sexism, it is relatively silent on other forms of systemic discrimination female lawyer experience, such as racism: specifically, anti-black and anti-Indigenous racism. Indigenous women and women of colour may be leaving criminal practice for similar reasons to those outlined by the report. When discussing the retention of women in defence, we must not forget the additional challenges faced by Indigenous and women of colour. Coupled with families and demanding schedules, racialized women’s experiences are also impacted by the structural barriers of being both a woman and a person of colour in the legal profession. For example, in 2010, the LSUC released a report on “Racialization and Gender of Lawyers in Ontario” that found that women of colour not only made less than men, but also less than their white female counterparts. The 2014 report from the LSUC, “Challenges Facing Racialized Licenses,” highlighted many of the obstacles facing racialized licensees in comparison to their counterparts, including those that arise from the lack of professional contacts, not having similar socio-economic backgrounds as their peers, as well as having manners and cultural gestures misinterpreted in negative ways. Many people of colour practicing defence are sole practitioners. The question arises as to whether this is by choice or an underlying perception that they do not “fit” in the private practice setting.

While not an exhaustive list, in my own experiences practicing criminal defence, I have often (too many times to count) been mistaken for the co-accused, the surety to the girlfriend of my male clients and in turn, prohibited from crossing over to sit at the counsel table or looking at the docket sheet from other members of the Bar—all instances that have included non-racialized female counsel. I have listened to male interviewers make inappropriate comments about my body type, questioning whether I am fit to practice criminal defence. I have been randomly asked in an interview whether I would find it difficult to represent clients who are Jamaican (I only assumed the interviewer asked me that question as he thought I was Jamaican, and I only assume this because he did not ask me if I would find it difficult to represent any other ethnicity or cultural background). I won’t get into the various stories from racialized colleagues about being mistaken as the court interpreter by other counsel. The examples are numerous, from the notion that when we walk into a courtroom we are never the lawyer, the moments of listening to colleagues make racial slurs against their clients, to the narrative recounted by one of my peers who was offered and accepted a job by a firm, only to be told later that they went

with another non-racialized female who they said was a better “fit.” The narratives of women of colour include the experiences of the everyday verbal and nonverbal micro-aggressions around our hair and the way we dress, the reminders of “how articulate we are,” and/or the feeling that despite how hard we work our perceived stereotypical attitude prohibits us from succeeding in the firm’s cultural setting.

In its inability to highlight the way misogynoir—a word coined by queer, black feminist scholar Moya Bailey, meaning the combination of anti-blackness and sexism—that manifests in various systems, the discussion around the CLA report neglects these and other experiences. We cannot significantly improve the well-being of female lawyers without dealing directly with the vulnerability that women of colour face in the practice. Silencing the experiences of racialized female lawyers contributes to the continued misunderstanding of how multiple vulnerabilities are enhanced in relation to one another. If we exclusively focus on gender-based challenges, we cannot work towards understanding the other forms of systemic discrimination facing Indigenous and women of colour.

“...women of colour not only made less than men, but also less than their white female counterparts.”

Over thirty years ago, activist and critical race scholar Kimberle Crenshaw coined the term intersectionality to address the many challenges facing women of colour in America. The term was used to describe a case where African American

women sued General Motors on the grounds of race and gender discrimination. Though the company had employed both women and members of the Black community, the jobs that were available for Blacks were only given to men, and the jobs that were available to women were only given to white women. As Crenshaw noted, for years the intersection of General Motors’ race and gender policy had a specific impact on African American women, in the way they were completely excluded from jobs. Today the theory of intersectionality is used to recognize the overlapping vulnerabilities people face, which creates compound forms of discrimination.

Understanding the varying ways that people experience the exclusionary aspects of practicing law can allow for the inclusions of other realities. This means including Indigenous and the voices of women of colour in the conversation in a meaningful way. Ultimately, intersectionality highlights aspects of discrimination that historically have made it more difficult for certain people to be seen and heard. The battle for equity in the legal profession is also one of misogynoir and systemic racism which includes white female lawyers. By not identifying the intersection of our social identities within the practice of law, we continue to push Indigenous and women of colour to the margins of these discussions that are supposed to include all women.

Like Going to a Knife Fight Armed with a Stick

A few thoughts on the very public negotiation between the Blue Jays and Jose Bautista

- BARBARA CAPTIJN

I was pleased to be invited to Osgoode Law School's "Bring a Self-Represented Litigant (SRL) to Law School Day" on March 14th. Thanks to Dr. Julie Macfarlane of the University of Windsor Law School and Dean Sossin of Osgoode Hall for this opportunity to interact with students and law professors, and share our experiences as SRLs.

I arrived early on the day of the event and had some time to wander the halls of this prestigious law school, where photos of graduation classes dating back to the 1920's are proudly displayed. I felt intimidated about being there, and also some regret at not knowing my late father's graduation year to search for his photo. I spotted some of his contemporaries, some of whom later became judges, and began to think: what motivates anyone to study law—justice, fairness, love of language, societal good, making a good living...?

I was pleasantly surprised by the warm and friendly welcome we received as SRLs at Osgoode. I wondered what makes these open, kind, respectful people into some of the legal attack dogs we encounter in the courtroom.

Winning at all costs may be financially advantageous for lawyers and clients, but it has long-lasting negative effects on SRLs and society as a whole. We would all hire the best lawyers if we could afford it. Unfortunately, the cost of legal assistance is priced beyond the reach of most of the middle class. At hourly fees of \$450-750 (ex. HST), or retainers from \$30,000-\$60,000, few can afford this. Add to this the cost of time spent away from work, and the emotional and financial anxiety litigation brings to entire families.

The day's events at Osgoode included a warm welcome by the Dean, law student Hannah De Jong, and a team of student "buddies" for each SRL. We attended classes together, shared lunch, and participated in a panel discussion on the SRL experience.

I feared they might see us as outsiders, non-users of their services who didn't understand the rules of the game and caused delays in the system. On the contrary, we were treated with respect and compassion. Many students were genuinely shocked to hear about our experiences. Professors valued our input and included us in class discussions. This was done with the greatest of respect, even though our levels of understanding were very different. What a breath of fresh air.

If statistics show that fifty to sixty percent of the litigants who come to court these days are SRLs, we have a serious access to justice problem. Legal opinion leaders have raised red flags about this for years. Ordinary citizens come to the justice system to solve problems, not to create more.

But why should law firms lower their fees for ordinary citizens, if they make good incomes from large corporations and the very wealthy who account for most of their revenue?

If this problem is to be properly addressed, it should involve SRLs at the policy table. Victims of the current system need to be heard and understood. We need a collaborative approach to solve this

affordability problem and widen the range of legal services to provide equal justice for all.

Our society doesn't let those accused of violent crimes appear in court unrepresented, because there's a fear they may not get a fair trial. Why doesn't this apply to civil courts? Many citizens fear losing their homes or life savings trying to resolve legal disputes in the current adversarial system. Aggressive litigation strategies like withholding evidence, attacking the credibility of witnesses, frequent objections, and procedural roadblocks are all fair game in civil trials. None of this is illegal, but it isn't fair or balanced.

If winning at all costs is the goal, aggressive litigation strategies are highly successful against SRLs. But this often leaves problems unsolved and creates psychological and financial hardship for many. The Law Society's rules against "sharp practice" in dealing with SRLs seem to be about as useful as window-dressing.

Most SRLs come to court thinking it's all about getting at the truth. We think if the judge hears our story, justice will prevail. When you're telling the truth, you've only got one story, as the saying goes. You're not prepared for the opposing party blocking

your story with objections, procedural tricks, case law, and opaque legal terminology. Being right and being able to prove you're right in court are two different things.

It takes years of training for lawyers to acquire skills in cross-examination, research and interpretation of case

law, understanding procedure, and knowing the difference between argument and evidence. SRLs seem expected to learn this within a few days or weeks. There's an asymmetry in information and financial resources, no matter how well-prepared or well-educated the SRL is. It feels like going to a knife fight armed with a stick.

I recently accompanied an SRL to a Licence Appeal Tribunal (LAT) hearing to provide moral support. The claim was for new home construction defects, the hearings took thirty days, and the judgment, after one-and-a-half years, awarded the appellants only \$3,500 for a claim over \$100,000. This was lucrative for the lawyers and the warranty corporation which avoided a substantial claim. If winning at all costs was the goal, this certainly takes the cake. If justice was the goal, it's hard to see how anyone except the lawyers were winners. The home defects were not fixed, and a new house could have been built for the money spent in legal fees. The SRL's family suffered months of time away from work, lived in a home with construction defects, and endured months of psychological and financial stress. Even the taxpayer who funds the LAT is not well-served by lengthy, costly proceedings against SRLs. At what point does this become "litigation abuse" by large corporations?

No one is suggesting the influx of SRLs is easy on the courts or judges either. There needs to be a more cost-efficient, fair, and respectful way of resolving legal problems than the adversarial courtroom.

Law firms benefit from high hourly fees, drawn-out disputes, bringing motions, and using technicalities to confound the opponent, especially SRLs. Winning is what their clients pay them to do. They're in the legal business, not the justice business,



as a US Supreme Court judge once famously retorted to his law clerk.

Where's the incentive then for law firms to make court proceedings more cost-efficient for the middle class if they can earn \$600-\$800 an hour from corporate and very wealthy clients? The taxpayer is not served by lengthy courtroom disputes, and our court system is already over-burdened. But often, a lawyer's performance is evaluated by how much money they bring to the firm, and promotions hinge on this.

SRLs have no funding, no lobbyists, legal advisers, media pulpit, or political connections. Many members of the legal profession see SRLs as subversives or nut-cases. We have the weakest microphone, and the access to justice problem is spiraling out of control.

SRLs want to give their input on solutions to this problem. Osgoode and the University of Windsor have started to raise awareness among students and faculty with this SRL programme, and it's a step forward. If the words we heard in the classroom like "fairness" and "social justice" are to be relevant in real life, we need a collaborative effort to bring access to those priced out of the current system.

Heading back down the corridor, gazing at the photos of decades of law graduates, I came back to thoughts about the common ideals which must still draw students to the profession. As ordinary citizens, we think part of it must be a sense of fairness and justice, and doing good for society.

We need the help of policy-makers in government, academia, and the legal profession to create more problem-solving options for ordinary middle-class citizens. We need more use of cost-efficient technology in document preparation and dispute resolution, more unbundling of legal services, more mediation, less use of the courtroom, more pressure on large corporations to provide their own transparent and fair dispute resolution services, and perhaps more education in high schools on how to avoid common legal problems.

Those with a vested interest in the status quo may be the ones most resistant to change.

We need your help as lawyers of the future.

As my late father may have said, in the undemonstrative way of parents of his generation,

"I'm sure you'll figure something out."

Paid Prescriptions: How Pharma Companies Influence Medical Decision Making

- JERICO ESPINAS

Pharmaceutical companies that manufacture a particular kind of drug can maintain their monopoly over this product through patent protections, preventing other companies from manufacturing, marketing, and profiting from the drug. However, drug patent protections do expire; most drugs are initially protected for around twenty years in the US, though the particular lifetime of these patents will vary depending on the particular country and drug. Once patents expire, other countries can come into the market and manufacture generic drugs that compete against brand-name medicines. Often, these generic drugs are significantly cheaper than their brand-name counterparts, and so reduce the profits of established pharmaceutical companies.

When only one particular pharmaceutical company manufactures, let's say a vaccine, for a particular illness, then physicians essentially must prescribe that product. However, when other competitors can create the same or similar products, their prescription is less guaranteed, especially when there are more affordable alternatives for patients.

One strategy to ensure prescription is through more traditional marketing techniques, such as television ads and billboards. Arguably, this form of marketing is directed towards patients, who either buy the drug off the counter or ask their doctor for more information about the medicine.

Another strategy, which is more contentiously implemented, is to give physicians payments and benefits in exchange for higher brand-name prescription rates. For some, the issue is ideological. Some physicians dislike the claim that they can be

"Some physicians dislike the claim that they can be 'bought out' by pharmaceutical companies."

"bought out" by pharmaceutical companies. So, they strive to distance themselves from corporate influence. For others, the issue is causal. Some physicians claim that there is no connection between the payments they receive and how they prescribe drugs.

The former issue is hard to resolve. Studies have shown that most doctors in the US take money from drug and device companies, with around three quarters of physicians across five medical specialties receiving at least one payment in 2014. The five specialties studied were family medicine, internal medicine, cardiology, psychiatry, and ophthalmology, and the numbers varied between states. At least in the US, the practice of receiving payments is relatively entrenched within the medical profession.

These payments can be relatively simple, and can include meals and samples from company representatives. However, these payments can also be quite substantial, especially for physicians who actively accept pharmaceutical support and seek lucrative connections with brand-name companies. For example, these physicians can be sought for speaking engagements, endorsing particular drugs or devise to fellow practitioners in exchange for a substantial speaking fee. Others include travel expenses, consulting fees, and general gifts. Some physicians receive tens of thousands of dollars a year from these payments.

The latter issue of establishing a connection between pharmaceutical payments and brand-name prescriptions is increasingly being addressed by studies and discussions within the profession. A recent ProPublica study, for example,

found that US physicians who received more than \$5,000 from companies in 2014 were more likely to prescribe brand-name drugs. The analysis suggests that these payments are helpful in changing prescription practices and, ultimately, in generating profits for pharmaceutical companies.

The outcomes of these studies simply affirms beliefs by ideological objectors to this common practice. The consequences, they claim, can be quite significant for patients. Generic versions of brand-name drugs are biochemically similar or identical to each other. Thus, the generic versions reinforce the claim that they are as effective at addressing the same patient illness. As such, prescribing more expensive drugs and devices may disproportionately affect those who can only comfortably afford cheaper generic versions. More importantly, it suggests that physicians can be influenced to make medical decisions based on monetary compensation rather than on efficacy. The worry here is that physicians are not entirely making medical decisions for their patient's best interest, and consequently are eroding patient trust.

There are relatively fewer studies on how this practice affects medical decision making in low- and middle-income countries. If the outcomes are similar, it could have even greater consequences for their patients, some of whom are less empowered to speak out and request the cheaper alternatives.

Addressing the issue of physician payments will likely require changing professional norms to more openly discuss the influence that these connections can have on medical prescriptions. Only time will tell, however, whether the profession will be receptive to these criticisms.

This Year's Mock Trial

...that nearly went forgotten

- JESSICA ZITA

Something horrible almost happened, Mock Trial was almost forgotten in the Obiter Dicta.

Mock Trial is one of, if not the biggest events every year at Osgoode. A simple Google search proves it: "Mock Trial Osgoode Hall" brings up Obiter Dicta recap articles that go back to 2011, with one as recently as last year.

I don't know about you, but I've been looking forward for this year's recap since the second week of February. How disappointed I've been to see that Mock Trial has passed on without some offering of immortality.

I will not let my last year at Osgoode go down as the one that missed the opportunity to write about Mock Trial. Who cares if I was in it? Someone's gotta put this year down in history.

Speaking of history, what a way to begin a 90s themed night than by starting with an

energetic ensemble of this year's Mock Trial execs. Long-time executive member Danielle Knight and 2L Madeleine Brown did an impressive job at bringing together this big, bubbly group of people responsible for making the show happen.

The first skit of the show was Washed Up 90s Support Group, where we saw our very own bring 90s heroes like Topanga (could Kortney Shapiro have been any more perfect for that part?) and the Olsen Twins (thanks for making "you got it, dude!" a thing again) to life. Don't tell me you didn't die inside when Harjot Dosanjh busted out her take of Steve Irkel—Did I do that? Oh man, did she ever!

What a surprise Harjot was this year! From her role as C3PO in Raphael Jacob's Social Justice Wars to absolutely killing the Elaine dance in Dan Cook's Seinfeld, Harjot's performances should go down in Mock Trial history.

With the aid of Harjot's dancing & walkman playing, Seinfeld was an instant Mock Trial classic. The skit was so popular its props are now in high demand (shout-out to Justin Philpott on his Judges t-shirts—best way to introduce a product to its audience, I'd say). This skit, in my opinion, was flawless: from the tees, the stripping

George (care of Ivan Ivkovic), Milomir Strbac's Oscar-worthy fat-suit performance as Newman, to the bang-on character portrayals done by Michael Thorburn and Jakub Schnitzler, the skit about nothing was everything, and more.

Another skit-favourite was Erica Whitford's Friends. The casting on this was absolute perfection: I could not imagine a better Phoebe than Mock Trial wunderkind Brittany Ross-Fichtner; Erin Garbett was great as fashion-obsessed Rachel; Marco Ciarlariello as the sandwich-eating Joey was instantly hilarious (I can personally confirm: the laughs had been going since rehearsals); Milomir is up again as a perfectly down-trodden Ross; and Russ Hall as the snide-talking, quip-throwing Chandler. But I think I speak on behalf of many when I say that Alessia Crescenzi's version of Janice was so memorable, you might have forgotten who her original Queen B was (Alessia was Chief Justice Bev McLachlan in last year's Mean Girls-esque skit).

It was great to see some newcomers take the stage this year. I already mentioned Harjot's scene-stealing performances, but another 3L who came out of nowhere was Kira Domrathev, who dazzled in her ditzy/silly/adorable rendition of

Being There:

Supporting a Friend Work Through the Mental Health Impact of Sexual Assault

The Obiter Dicta generally does not publish anonymous articles. A strict, limited exception allows students to publish anonymously exclusively for articles about their mental health experiences in law school. This exception exists only for cases where there are concerns directly regarding the risk of exposure or stigma. The Obiter Dicta Executive Board has full and final discretion over whether to publish submissions, and whether to require an author name for an article to be published.

- SAMUEL MICHAELS (EDITOR-IN-CHIEF)

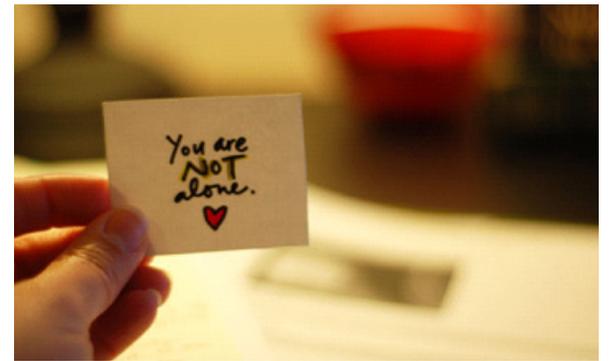
With the Ghomeshi trial floating around and the recent celebration of International Women's Day, it's both a good and a bad time to deal with what it means to have experienced sexual assault. On the one hand, grappling with the memories of it is easier when classmates are talking about meaningful consent, how we should treat each other, and what we can do to support those who are working through the stigma of sexual assault. On the other hand, the pressure to be a law student unaffected by stressors outside school can make it more challenging to deal with the adverse impact that sexual assault can have on one's mental health. Not that discussions about prominent news events can render one incapacitated through the sheer force of a careless remark about how suspicious a victim may seem, but in that law students who have experienced violence may be so tied up in maintaining a façade of equilibrium that it is difficult to accept it's okay to be upset. So what can we do to be there for those who have been impacted?

A place to start is to consider how it may be helpful to respond if a friend, spurred on by the prominence of an ignited discourse around sexual assault, discloses to you that they have experienced it. Believing them, counterintuitive as it may be in a world that frames narratives according to a standard of proof, is a start. This might be hard; for example, a disjointed story and delay in sharing may seem suspicious, but a friend may have been apprehensive that they'll be doubted or they may have had trouble figuring out how to explain what happened. In my case, because I was an adult when it happened, I was often embarrassed that I needed help, just as I was when I dealt with anxiety or depression over the course of

my degree. And when it became an issue again with the controversy surrounding the Ghomeshi trial (as well as other news items that have cropped up over the past school year), I was reluctant to tell law school friends I needed support because I thought it made me look less competent for not being able to Just Get Over It. And, with the types of cases I began to encounter in class, it didn't seem that what happened to me was bad enough to warrant support or empathy. I'm sure other students have their own list of reasons. It is helpful if you are unconditionally accepting that your friend is going through a difficult time, separate from what you're able to do for them or what you think about the situation overall. This can help ameliorate their mental health challenges of dealing with essays, class readings, pro bono placements, or other law school obligations while working through a traumatic experience.

The law student instinct may be to hold back on support until all the sides of a story are told. In a friendship dynamic, however, this approach may be misguided; instead, it would be helpful to consider the purposes for which a friend is confiding in you. Rather than pursuing accountability for the alleged assailant, which may be someone's purpose if they were to report through formal mechanisms, talking to friends is reaching out for emotional support. In an environment that privileges the structuring of human relationships through procedural rules and the logic of precedent, the acceptance of lived reality may be unfamiliar ground. I would suggest that it is not necessary to ground your empathy in a legal claim. Part of being there means accepting that the situation might not involve going to court or otherwise following the trajectory we see in lecture. It means being a presence in someone's life when they feel alone, separate from a legal frame of prohibitions and concomitant sanctions.

Once you're past that step, providing support involves accepting your limits and acknowledging that you can be a confidant without having to fix everything. A challenge may be that your friend is not able to perfectly articulate what they need – they just need you. For example, when I've dealt with panic attacks or overwhelming anxiety in the past, I didn't know how to explain what sort of solution I wanted my friend to offer. And when the assault exacerbated these symptoms, I was too embarrassed about falling into depression again to articulate my needs. I just wanted my friends there. There are issues a friend may not be able to resolve, like trouble sleeping or difficulty concentrating or, in my case at least, recourse to unhealthy behaviour that I had used to cope in the past. You may not want to hear the details even though they want to share them, in which case it is acceptable to set boundaries for what



you find upsetting, especially if you've had similar experiences yourself and you don't feel comfortable revisiting them. Although it may seem annoying to have to deal with a friend who is overwhelmed, consider that you only have to deal with their memories, while they have to live with them. Law school is challenging. Sexual assault is also challenging. Having a network of support among other law students who appreciate the stress of law school, finding a summer job, securing an articling position, and other unique challenges at Osgoode can help a survivor work through the mental health difficulties that experiencing trauma can cause.

Here are some practical tips. People who've experienced sexual violence may appreciate compassion in the sense that there are answers they may not be able to give to your satisfaction. You may have to be comfortable with ambiguity. They may not necessarily recount details to see if it fits your conception of what it should have looked like for their anger to be justified. Be patient, and don't pressure them into participating in activities they're not ready for yet, whether the assault was recent or if they're dealing with the effects of it. Instead of being judgmental, assure them that it wasn't their fault, even though they didn't do what you think they should have done. You can show that you're willing to listen – even just letting them confide in you means more than you think. When you find yourself overwhelmed, it's understandable if you need to take some time to yourself or recommend other support, like a therapist or a support line, if you don't always have the emotional capacity to deal with them. Furthermore, although it may seem helpful to recommend legal recourse, medical treatment, or a particular type of therapy, let them control the situation. If they do report, you can be there for them. If they don't report, that doesn't reflect poorly on them or the veracity of what they've told you. It is not their responsibility to "stop" him by going to the police; if they are not the last, it will be of his own volition. Don't worry that they're broken. They may be a bit broken up, but they know where the pieces are and they've put themselves back together before.

Sabrina the Teenage Witch in Sabrina: The OCI Disaster. Then there's Russ performing a Mock Trial hat trick with ease (acting, playing an instrument AND mancing!), what an incredibly talented student body we have! I could go on all day.

Not to be forgotten, the songs were all incredible this year, each one equally as entertaining as the next. Rachel Fielding's billowy "Oh Blaney's, Blaney's" from Call Me One More Time still sends a shiver up my spine. Madeleine Brown and Vanessa Carroll's No Studyin' – the 3L Motto was a personal favourite. Ben Fulton's beat was so on point; it added a whole other layer to the song. Lape's smooth "shorty get down" still rings through my head. Bethany McKoy & Shakaira John brought the song home by reminding everyone how much their musical pairing will be missed next year. Can't imagine a Mock Trial without these two.

The dancing was so strong this year too, from Bye Bye Bye to the Mance—seriously, the choreography was so tight! The boys took the Mance to a whole other level.

I wish I had more time to talk about every number. Everything made an impression in some way: Kortney and Erica's playful take on Sabrina's aunts; Jordan Fine's super cool segue; Alessandra Hollands, John Wu, Victoria Mitrova and Justin Toh's awesome (and a little too real) light sabre fight; all the lovely ladies who beautifully sang The Time, Torn and Don't Go Chasing Bay Street Jobs; all the other ladies that absolutely rocked Don't Speak (amen!); the quirky beginning of Bye Bye Bye; the TTC reality depicted in 500 Miles; the party scene in National Geographic (again, things got real); the graphics and whole set-up of OJ (just brilliant). I

wish I could go into each in detail. The main takeaway is that every person who contributed to this show was brilliant, and it truly showed.

I think the best note to end this off on is Let's go to Pub Night Again, a number directed by Danielle Knight and Dan Cook that really got to the heart of Mock Trial – what having the most fun looks like, as a result of the hard work and creativity of some truly gifted people.

None of this would've been possible without the producers of the show: Brittany, Stephanie Marcello and Krista Antonio. On behalf of everyone, thank you for putting together a solid performance with grace and endless pizzazz. You guys worked so hard yet somehow made it look so easy.

And thanks to Obiter Dicta for printing this. Now, I can graduate.

Mamba Emeritus

- KAREEM WEBSTER

A great television series captivates you. It is intuitive—the thrills and suspense are sprinkled in methodically, and the more mundane parts of the season are purposeful. It knows its audience. Most importantly, a great television series knows when to end. If the show runs a little too long, in hindsight, it is probably as great a series as it could have been. Look at the critically-acclaimed series that have been iconic to this generation: The Sopranos, Breaking Bad, and The Wire. Now compare those shows to Dexter, Sons of Anarchy, and Entourage. Aside from the stark contrast in genres, these shows stayed well past their welcome. As fans, we are sad to see the shows devolve into cringe-worthy representations of what they once were. Go out on top, they say.

I have been watching Kobe Bryant since 1999. The “Kobe Bryant Show” has been one of the longest-running, exhilarating, edge-of-your-seat thrills that fans of the National Basketball Association (the “League”) has witnessed. Kobe Bean Bryant entered the League in 1996, making the 2015-2016 season his twentieth campaign—two decades which have been served in a Lakers uniform. He leads the Lakers all-time in (get ready for it):

- games played*
- minutes played*
- points*
- field goals made and attempted*
- three pointers made and attempted*
- two pointers attempted*
- free throws made and attempted*
- steals*
- usage percentage*

*courtesy of www.basketball-reference.com

I witnessed Kobe secure his first three championships. I watched every game of the Western Conference Finals between the Lakers and Kings, where the greatest playoff game (in my opinion) was played at Arco Arena. If my memory serves me correctly, it was a Sunday night, and the Lakers were visiting their state-and-division-rival Sacramento Kings in a deciding seventh game in a seven-game series. The odds of a road team winning Game Seven was slim-to-none. The Lakers, at that point, were back-to-back champions. The Kings had a championship-calibre roster: Vlade Divac, Chris Webber, Peja Stojakovic, Doug Christie, Mike Bibby, Hedo Turkoglu (yes, that Hedo), Bobby Jackson, and Scott Pollard. The Lakers had Kobe, Shaq, Derek Fisher, Rick Fox, and “Big Shot Bob” Robert Horry. The Lakers were a bit deeper, but the Kings had players on their bench who could score at will. As luck would have it, the game went to overtime. Kobe and Shaq combined for sixty-five points out of the total 112 team

points. Boom. The Lakers pulled off what seemed to be insurmountable with a 112-106 victory.

The Lakers would go on to sweep the Nets and claim their third championship in as many years.

Let’s turn back the clocks to 1996. The Charlotte Hornets made a franchise-altering move by trading their overall draft selection (Kobe) for Vlade Divac (who was a Laker at the time). Kobe’s highlights were few and far between in his rookie year, but he did manage to win the NBA Slam Dunk Competition. The keys to the castle were handed to Shaq, the gigantic free-agent acquisition that the Lakers landed that summer.

Fast forward to the 2004 season where a Lakers squad comprised of Kobe, Shaq, Karl Malone and Gary Payton were defeated by the Detroit Pistons in the finals.

This was the part of the Kobe Bryant Show that was one of those cliff-hanger season-finales. That offseason speculation ensued: was Phil, Kobe, or Shaq going to stay? It was like the show returned that season with a brand new cast, writers, and producers. Shaq was traded to Miami for Lamar Odom, Caron Butler, and Brian Grant. Payton and Fox were traded to Boston. Malone retired, after failing to win a championship.

The Show was taking a huge risk, losing viewership, and possibly at risk of losing its bona fide star. It got worse. The Lakers failed to make the playoffs the season following the shake-up. The next few seasons saw the Lakers bounced out of the playoffs in the first round. Then, it happened. Kobe wanted out. The star of the show was leaving. Possibly,

history shows that when a star leaves a series the show is on its deathbed. Think back to That 70’s Show, Two and a Half Men, and The X-Files. Maybe one or two seasons followed the star’s departure, but even then, ratings dropped.

The Lakers were able to pull off one of the greatest highway robberies by virtually acquiring Pau Gasol from Memphis for Kwame Brown and Marc Gasol (Pau’s brother). This trade instantaneously assuaged any concerns from Laker Nation that the team was in a rut. Kobe and Pau took the woeful Lakers to the NBA Finals in 2008, just four years removed from their last Finals appearance, and a few months after Kobe’s trade request. The Lakers would lose to the Celtics in six games, but the future looked promising for the purple and gold.

The League would witness the Lakers win back-to-back in the following two years. The Kobe Show pulled off an unprecedented move: facing damn near cancellation, the series witnessed a resurgence in ratings and was picked up for a few more seasons by the network. Kobe was voted most valuable player in 2008. The Lakers had a budding young star named Andrew Bynum.

Unfortunately, 2010 would be the final time Kobe would be in a position to win the NBA title.

David Stern (then commissioner) nixed a trade that would have brought Chris Paul to the Lakers. In 2012, Dwight Howard and Steve Nash landed in Los Angeles in what would be one of the most disastrous seasons in Lakers history. Not only was it riddled



with injury, but Kobe and Dwight had an (inevitable) falling out. The Lakers lost Dwight the following summer for nothing. In 2014, Pau left in free agency. Steve Nash retired. The Kobe Bryant Show lost all of its stars! By the way, Andrew Bynum never reached his potential and fizzled out of the League.

Was it time for Kobe to hang it up? Did the show run past its welcome?

A torn shoulder, fractured kneecap, torn Achilles tendon, bruised shin, sprained ankle, and fingers with arthritis were just some of the injuries that Kobe has experienced in his career. Somehow, Kobe was the highest paid player in the League. The show was paying its star a ton of money to finish poorly.

“The show was paying its star a ton of money to finish poorly.”

In the 2015-2016 season, an announcement came in November 2015. This season would be the last of the Kobe Bryant Show. Its final episode would air on 13 April 2016. There will be no playoffs. No chance at a championship.

There will be a lot of losing. Kobe is tired. His body is worn down. His production has plummeted.

This is not exactly the show going out on a high. This is a twenty-year series that has been successful for the majority of its tenure, but has had some bad seasons to finish. Nevertheless, if we appreciate the accomplishments in the aggregate; the highs were much more memorable than the lows. The highest high will resonate more than the lowest low and there were many more of the former than the latter.

The question that you have to ask yourself is, how many series last twenty seasons? The Simpsons and Law & Order come to mind. Sure, there were a couple of forgettable seasons, but so many more fantastic campaigns. There is no question that these two series will live in television lore for years and years. These shows were/are legendary.

The Kobe Bryant Show is legendary. There will never be another one like it. This season was fitting. Was it perhaps a year too late to come to the realization that it no longer appealed to viewers? Apparently not, as some of that appeal still lingers, albeit in a slower, less efficient, more fragile form.

Twenty seasons is a rarity, especially on one team. The Kobe Bryant Show is one that we were fortunate enough to view. Tune in on 13 April to see its well-deserved, emotional finale.

Blue Chippers or Volatile Goods? How Valuable is the First Overall Section in the NBA Draft?

- KENNETH LAM

Every decade or so, a supposedly “can’t miss” prospect out of high school or a National Collegiate Athletic Association (NCAA) Division I powerhouse attracts national attention and emerges as the crown jewel of a National Basketball Association (NBA) draft. For instance, in the 2000s, there was LeBron James, who was chosen first overall by Cleveland in the 2003 NBA draft. Likewise, in the 2010s, there is Andrew Wiggins, who was also selected first overall by the Cavaliers in the 2014 NBA draft (before being traded to the Minnesota Timberwolves prior to the 2014 to 2015 NBA season). Franchises that are able to get their hands on these generational talents—dubbed “program changers” by former Toronto Raptors General Manager (GM) Bryan Colangelo—can typically alter their fortunes in a hurry. Case in point, Cleveland, with 17 wins and 65 losses in the 2002 and 2003 season, finished last in the NBA standing (tied with the Denver Nuggets). Yet, even though the Cavaliers were in “full rebuilding mode” at the time, picking James first overall enabled the club to accelerate its progress in a non-linear fashion by rocketing the team from basement dwellers to not only legitimate contenders but a serious threat capable of contending for the title in only a few years. In fact, Cleveland reached the NBA Finals in the 2006–2007 season before bowing out to the eventual champion San Antonio Spurs in four games.

Still, being able to draft first overall is neither a necessary requirement nor a sufficient condition to winning championships as the recipe to a winning formula comes in various forms. Why? On one hand, in the 1980s, the consensus “program changer”—and arguably the best ever basketball player—is Michael Jordan, who guided the Chicago to six NBA titles via two separate three-peats within a span of eight seasons as the Most Valuable Player (MVP) of the NBA Finals: 1991 to 1993 and 1996 to 1998. Nevertheless, Jordan was chosen not first overall but instead third overall by the Bulls in the 1984 NBA draft. On the other hand, looking back, in the 1990s, the consensus “program changer” is Kobe Bryant, who led the Los Angeles Lakers to five NBA titles (a three-peat from 2000 to 2002 and a back-to-back from 2009 to 2010) en route to amassing more career regular season points than Jordan. Bryant was chosen a surprising thirteenth overall by the Charlotte Hornets (before being traded to the Lakers). All things being equal, however, teams prefer picking first simply because the probability of getting their hands on a “program changer” ought to be much better. But is this conclusion necessarily true when it comes to practice? Let us find out!

Rookie of the Year Winners:

Dating back to the inaugural NBA Draft in 1947, which include the three drafts held by the Basketball Association of America (BAA) from 1947 to 1949, there has been a total of sixty-nine first overall selections. To this date, this short list has produced twenty Rookie of the Year winners: (1) Ray Felix, chosen by the Baltimore Bullets in 1953; (2) Elgin Baylor, selected by the Minneapolis Lakers in 1958; (3) Oscar Robertson, picked by the Cincinnati Royals in 1960; (4) Walt Bellamy, drafted by the Chicago Packers in 1961; (5) Lew Alcindor, chosen by the Milwaukee Bucks in 1969; (6) Ralph Sampson, selected by the

Houston Rockets in 1983; (7) Patrick Ewing, picked by the New York Knicks in 1985; (8) David Robinson, drafted by the San Antonio Spurs in 1987; (9) Derrick Coleman, chosen by the New Jersey Nets in 1990; (10) Larry Johnson, selected by the Charlotte Hornets in 1991; (11) Shaquille O’Neal, picked by the Orlando Magic in 1992; (12) Chris Webber, drafted by the Orlando Magic in 1993; (13) Allen Iverson, chosen by the Philadelphia 76ers in 1996; (14) Tim Duncan, selected by the San Antonio Spurs in 1997; (15) Elton Brand, picked by the Chicago Bulls in 1999; (16) James; (17) Derrick Rose, drafted by the Chicago Bulls in 2008; (18) Blake Griffin, chosen by the Los Angeles Clippers in 2009; (19) Kyrie Irving, selected by the Cleveland Cavaliers in 2011; and (20) Wiggins. Based on this data, this means that the likelihood of getting a brand new NBA player who would go on to become the Rookie of the Year after his first season is only 28.98% (20/69) keeping in mind that the 2016 Rookie of the Year winner has not been announced at the time of my writing as the regular season does not end until 13 April 2016.

All-Star Game or All-NBA Team Selections:

Unlike the Rookie of the Year Award, it appears that the odds of unearthing a first overall pick being named to an All-Star Game or to an All-NBA Team fared better by a fair margin as forty-four players have been bestowed with such honours: (1) Felix; (2) Frank Selvy, drafted by the Baltimore Bullets in 1954; (3) Rod Hundley, chosen by the Cincinnati Royals in 1957; (4) Baylor; (5) Bob Boozer, selected by the Cincinnati Royals in 1959; (6) Robertson; (7) Bellamy; (8) Cazzie Russell, picked by the New York Knicks in 1966; (9) Jimmy Walker, drafted by the Detroit Pistons in 1967; (10) Elvin Hayes, chosen by the San Diego Rockets in 1968; (11) Alcindor; (12) Bob Lanier, selected by the Detroit Pistons in 1970; (13) Austin Carr, picked by the Cleveland Cavaliers in 1971; (14) Doug Collins, drafted by the Philadelphia 76ers in 1973; (15) Bill Walton, chosen by the Portland Trail Blazers in 1974; (16) David Thompson, selected by the Atlanta Hawks in 1975; (17) Earvin Johnson, picked by the Los Angeles Lakers in 1979; (18) Joe Barry Carroll, drafted by the Golden State Warriors in 1980; (19) Mark Aguirre, chosen by the Dallas Mavericks in 1981; (20) James Worthy, selected by the Los Angeles Lakers in 1982; (21) Sampson; (22) Hakeem Olajuwon, picked by the Houston Rockets in 1984; (23) Ewing; (24) Brad Daugherty, drafted by the Cleveland Cavaliers in 1986; (25) Robinson; (26) Danny Manning, chosen by the Los Angeles Clippers in 1988; (27) Coleman; (28) Johnson; (29) O’Neal; (30) Webber; (31) Glenn Robinson, selected by the Milwaukee Bucks in 1994; (32) Iverson; (33) Duncan; (34) Brand; (35) Kenyon Martin, picked by the New Jersey Nets in 2000; (36) Yao Ming, drafted by the Houston Rockets in 2002; (37) James; (38) Dwight Howard, chosen by the Orlando Magic in 2004; (39) Andrew Bogut, selected by the Milwaukee Bucks in 2005; (40) Derrick Rose, picked by the Chicago Bulls in 2008; (41) Griffin; (42) John Wall, drafted by the Washington Wizards in 2010; (43) Irving; and (44) Anthony Davis, chosen by the New Orleans Hornets in 2012. Hence, statistically speaking, the odds of being able to select an NBA All-Star or a member of an All-NBA Team with the first overall pick is actually a generous 63.77% (44/69). One explanation as to



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why there is a 34.79% difference (63.77% - 28.98%) when we contrast the probability of yielding a Rookie of the Year versus finding a player who would make an All-Star Game or an All-NBA Team is because of the restrictive fact that there is only one player who can be named the Rookie of the Year in every given season whereas multiple players can become an All-Star Game or an All-NBA Team in any given season.

Naismith Memorial Basketball Hall of Fame:

Compared to the Rookie of the Year award and selections to All-Star Game or All-NBA Team, the likelihood of unearthing a future Hall of Famer is clearly lower. Among the aforementioned sixty-nine first overall selections, there are only fourteen players who are voted into Springfield and have been named to at least one All-Star Game: (1) Baylor, (2) Robertson, (3) Bellamy, (4) Hayes, (5) Alcindor, (6) Lanier, (7) Walton, (8) Thompson, (9) Johnson, (10) Worthy, (11) Sampson, (12) Olajuwon, (13) Ewing, and (14) Robinson. Thus, mathematically speaking, the success rate of being able to obtain the NBA rights of a future Hall of Famer by way of the first overall selection is a mere 20.29% (14/69).

Cross-Sports Comparisons:

Focusing on trends while using numbers as supporting evidence, there is at least some resemblance in the patterns that we see between the NBA and the NHL as well as between the NBA and MLB. With respect to the NBA and the NHL, the likelihood of choosing a NBA Rookie of the Year (28.98%) / NHL Calder Memorial Trophy winner (18.87%) is better than the odds of selecting a future NBA Hall of Famer (20.29%) / a future NHL Hall of Famer (13.21%)! As for the NBA and MLB, the chance of picking an NBA All-Star (63.77%) / MLB All-Star (45.10%) is better than the likelihood of drafting a NBA Rookie of the Year (28.98%) / MLB Rookie of the Year (5.88%), which in turn is better than the odds of choosing a future NBA Hall of Famer (20.29%) / a future MLB Hall of Famer (1.96%).

Final Words:

Similar to my earlier analysis with Major League Baseball (MLB) and the National Hockey League (NHL), the probability of being able to locate a “program changer” come across an imperfect science irrespective of how we scrutinize the sixty-nine first overall selections in past NBA drafts. Shall we just do random selections then when it comes to utilizing the first overall pick in the NBA draft?

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