Taking Notice: Judicial Notice and the “Community Sense” in Anti-Poverty Litigation

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TAKING NOTICE: JUDICIAL NOTICE AND THE "COMMUNITY SENSE" IN ANTI-POVERTY LITIGATION

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The doctrine of judicial notice is a part of the law of evidence that regulates how judges take into account facts that have not been proven by the parties through admissible evidence. A judge takes judicial notice when he or she accepts the truth of a matter without requiring evidence.[1] Therefore, when a judge 'notices' a

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[1] The following are examples of definitions of judicial notice from influential evidence texts:

"[Judicial notice is] where the Court is justified by general considerations in declaring the truth of the proposition *without requiring evidence* from the party." Wigmore, *Evidence*, Chadbourn Revision, vol. 9 (Boston: Little, Brown & Co., 1981) §2565 [emphasis in original].

"Judicial notice is the acceptance by a court or judicial tribunal, in a civil or criminal proceeding, without the requirement of proof, of the truth of a particular fact or state of affairs." John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) at 976.

"When a court takes judicial notice of a fact ... it declares that it will find that the fact exists, or direct the jury to do so, although the existence of the fact has not been established by evidence." Rupert Cross & Colin Tapper, eds., *Cross on Evidence*, 7th ed. (London: Butterworths, 1990) at 63.

"The subject of judicial notice, then, belongs to the general topic of legal or judicial reasoning. It is, indeed, woven into the very texture of the judicial function. In conducting a process of judicial reasoning, as of other reasoning, not a step can be taken without assuming something which has not been proved; and the capacity to do this, with competent judgment and efficiency, is imputed to judges and juries as part of their necessary mental outfit." James Thayer, *A Selection of Cases on Evidence at the Common Law* (Massachusetts: Charles W. Server & Co., 1982) at 279-80.

fact, that fact enters the process of legal judgment from outside the adversarial system. Judicial notice invokes questions about the practice of judging more broadly, as well as the meaning of legal principles such as the distinction between 'fact' and 'law,' the requirements of impartiality, and the adversarial system of trial.

The doctrine of judicial notice has an ambiguous relationship with practices that aim to incorporate information about the social context of the law. In some circumstances, judicial notice serves to buttress distinctions between 'law' and 'fact,' and to lend legal authority to dominant conceptions of 'truth' or 'common sense.' In other circumstances, judicial notice allows judges to 'notice' information that would not otherwise come before the court, expanding the background against which judgments are made. Judicial notice may function either to close or to open avenues for contestation and appeal. Judicial notice may enhance judges' power, and at the same time require judges to engage in critical self-reflection and intellectual humility.

This ambiguity arises from the nature of notice itself. However, there is also a great deal of disagreement about what exactly 'judicial notice' describes, and what its procedural impact is in practice. For example, judges and commentators disagree about the appropriate scope of judicial notice, whether it can be implicit or explicit, whether it happens by request of the parties or on a judge's own motion, whether judges can consult materials before deciding to take notice, and whether judicial notice is conclusive or can be rebutted with further evidence.[2] Judges take different approaches to judicial notice depending on the type of 'fact' in question, but in most cases the important question is

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"Courts will take judicial notice of the various matters enumerated below, these being so notorious or clearly established or susceptible of demonstration by reference to a readily obtainable and authoritative source that evidence of their existence is unnecessary." M.N. Howard, Peter Crane & Daniel A. Hochberg, eds., *Phipson on Evidence*, 14th ed. (London: Sweet & Maxwell, 1990) §2-06.

[2] For an overview of these issues, see John T. McNaughton, "Judicial Notice: Excerpts Relating to the Morgan-Wigmore Controversy" (1961) 14 Vand. L. Rev. 779. For contrasting theoretical perspectives on the doctrine, see Ian Binnie, "Judicial Notice: How Much Is Too Much?" (2003) Spec. Lect. L.S.U.C. 543; Claire L'Heureux-Dubé, "Re-examining the Doctrine of Judicial Notice in the Family Law Context" (1994) 26 Ottawa L. Rev. 551 [L'Heureux-Dubé, "Re-examining"].

whether the 'fact' is beyond reasonable dispute in some meaningful way.[3]

Many of the questions surrounding the doctrine of judicial notice are clearly visible in the work of Dugald Christie. In particular, Christie's legal and political advocacy work often called upon judges and lawyers to confront what he understood to be the real empirical facts in relation to issues such as poverty and access to justice. Christie challenged the justice system to shift its background information, to 'notice' different things and to take these into account. In this way, Christie's approach to law and justice highlights many of the issues that arise in relation to judicial notice.

In this article, I explore a theoretical approach to judgment and the doctrine of judicial notice that focuses on the link between the capacity for judgment and the shared experiences of communities. I focus on anti-poverty constitutional litigation in Canada as an example of a place where this link has broken down to reveal debates about the meaning of valid legal judgment. This study is undertaken in the spirit of critical self-reflection and attention to poverty exhorted by Christie in his legal and political work.

This article has four parts. First, I will describe the complex role of judicial notice in anti-poverty constitutional litigation to argue that the doctrine is importantly linked with a contextualized approach to legal judgment. Second, I will describe a theory of judgment, inspired by Hannah Arendt and developed by Jennifer Nedelsky, which invokes the concept of an "enlarged mentality." I will argue that the idea of the enlarged mentality creates a link between the validity of judgment and the communities that play some role in generating the judgment. This is significant for the doctrine of judicial notice because notice helps structure how judges should take account of the factual context of the law. Third, I will draw out some of the risks associated with this approach, specifically the strong reliance on the imagination of

[3] One authoritative statement of the test for judicial notice appears in *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863 at para. 48, 199 D.L.R. (4th) 193: "[A] court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy ... ."

the judge. Finally, I will explore how judicial notice can operate both to support and to undermine 'common sense' notions held by a judge. I argue that judicial notice thereby supports a self-reflective practice of judgment that can expand the role and meaning of social context information in constitutional interpretation. I argue that this theoretical perspective draws our attention to the pitfalls of thinking about social context in terms of judicial notice, but it also reveals that in the context of anti-poverty litigation, judicial notice carries the potential to provide a doctrinal mechanism for practising legal judgment that is valid across a wider part of Canadian society.

I. JUDICIAL NOTICE IN ANTI-POVERTY CONSTITUTIONAL LITIGATION

The puzzle of judicial notice is nowhere more interesting, and sometimes nowhere more troubling, than in the context of constitutional litigation concerning poverty. Like Christie's 2005 challenge to the taxation of legal services,[4] much 'anti-poverty' litigation seeks to challenge the injustices of poverty by resorting to constitutionally protected rights.

It is well established that constitutional interpretation must be undertaken using a "contextual approach."[5] This approach is particularly significant in the adjudication of anti-poverty claims because such claims often rely on a judge's access to knowledge about such things as the extent of poverty in Canada, its disparate impact on different communities, and the kinds of experiences faced by people in poverty. At the same time, anti-poverty litigants must overcome a significant barrier in the form of stereotypes that are applied to them in daily life and by the law.[6]

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[4] *Christie v. British Columbia (A.G.)*, 2005 BCSC 122, (*sub nom. Attorney General of British Columbia v. Dugald E. Christie*), 250 D.L.R. (4th) 728, 39 B.C.L.R. (4th) 17, rev'd 2005 BCCA 631, 62 D.L.R. (4th) 51, 48 B.C.L.R. (4th) 267, supplementary reasons, 2006 BCCA 59, 263 D.L.R. (4th) 582, 48 B.C.L.R. (4th) 322, rev'd 2007 SCC 21, 2007 D.T.C. 5229, 361 N.R. 322.

[5] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1.

[6] See Gwen Brodsky, "*Gosselin v. Québec*: Autonomy with a Vengeance" (2003) 15 C.J.W.L. 194; Judith Keene, "Claiming the Protection of the Court: *Charter* Litigation Arising from Government 'Restraint'" (1997) 9 N.J.C.L. 97;

Thus, an adequate understanding of the relevant social context may be very important to the outcome of a case concerning the constitutional rights of poor people.

However, when anti-poverty claims have come before the courts, the "contextual approach" has often not succeeded in bringing empirical realities about poverty to the centre of the analysis. In fact, the experiences of people in poverty have remained largely invisible to the courts. In these cases, substantive constitutional law has been impoverished by the failure to develop a conception of judicial notice that fully engages the requirements of the "contextual approach." In contrast, the best interpretation of judicial notice provides judges with the authority and obligation to seek out relevant social context information, and provides some guidelines for its use. This interpretation of judicial notice invokes a critical analysis about the community for whom the fact is relevant. Without sufficient consideration of this aspect of judicial notice, the doctrine can instead function to limit judicial consideration of social context.

Gosselin v. Québec,[7] the leading case on social and economic rights in Canada, provides an instructive example of the significant role judicial notice can play in shaping the court's treatment of social context information. In *Gosselin*, the Supreme Court of Canada was called upon to decide whether parts of the social assistance regime in Québec violated constitutionally protected rights. The regulations in question set the base amount of welfare for people aged 18 to 30 at about one third of the amount set for people over 30.[8] People under 30 could access the higher rate by participating in certain training programs,[9] but in fact about 88 percent of young adults earned only the lower amount.[10]

Mary Jane Mossman, "Choices and Commitments for Women: Challenging the Supreme Court of Canada in the Context of Social Assistance" (2004) 42 Osgoode Hall L.J. 615.

[7] *Gosselin v. Québec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, 221 D.L.R. (4th) 257 [*Gosselin* cited to S.C.R.].

[8] *Ibid.* at para. 6, McLachlin C.J.C.

[9] *Ibid.* at para. 7.

[10] *Ibid.* at para. 130, L'Heureux-Dubé J., dissenting.

The amount available to adults over 30 was about $460 per month,[11] which the legislature had "deemed to be the bare minimum for the sustainment of life."[12] The amount available to adults under 30 was about $170.[13] Louise Gosselin claimed that the regulation violated her constitutional rights to equality and security of the person.

On many issues, the judges of the Supreme Court of Canada were divided in complex ways. The question of whether and how to judicially notice social context information, although rarely explicitly addressed in the various judgments, turned out to be very significant. On the issue of section 15 equality rights, Chief Justice McLachlin, writing for the majority, found that the regulation was not discriminatory. One part of her analysis involved the question of whether adults under 30 suffer from "pre-existing disadvantage" in relation to employment. McLachlin C.J.C. wrote:

> Both as a general matter, and based on the evidence and our understanding of society, young adults as a class simply do not seem especially vulnerable or undervalued. There is no reason to believe that individuals between ages 18 and 30 in Québec are or were particularly susceptible to negative preconceptions. *No evidence was adduced to this effect, and I am unable to take judicial notice of such a counter-intuitive proposition. Indeed, the opposite conclusion seems more plausible,* particularly as the programs participation component of the social assistance scheme was premised on a view of the greater long-term employability of under-30s, as compared to their older counterparts.[14]

In this way, McLachlin C.J.C. declined to notice the vulnerability of young adults. In addition, McLachlin C.J.C. followed a previous case in which the court had noticed that adults under 45 are *not* disadvantaged in relation to employment. McLachlin C.J.C. held:

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[11] *Ibid.* at para. 7.
[12] *Ibid.* at para. 251, Bastarache J., dissenting.
[13] *Ibid.* at para. 7.
[14] *Ibid.* at para. 33 [underline in original, italics added].

> If anything, people under 30 appear to be advantaged over older people in finding employment. As Iacobucci J. also stated in *Law*, with respect to adults under 45 (at para. 101):
>
> It seems to me that the increasing difficulty with which one can find and maintain employment as one grows older is a matter of which a court may appropriately take judicial notice.[15]

On the basis of Justice Iacobucci's judicial notice in the *Law* case, McLachlin C.J.C. concluded that: "[T]he appellant has not established that people aged 18 to 30 have suffered historical disadvantage on the basis of their age. There is nothing to suggest that people in this age group have historically been marginalized and treated as less worthy than older people."[16]

The double-edged nature of judicial notice becomes readily apparent in these passages. On one hand, judicial notice has been invoked too comfortably and without clear justification. McLachlin C.J.C. has adopted as precedent past judicial notice of a 'fact,' (i.e. that it becomes increasingly difficult to find and maintain employment as one grows older) without explaining the applicability of this precedent to the present case. For example, McLachlin C.J.C. did not consider whether the different context of social assistance benefits, as opposed to an insurance-based scheme, might affect the factual framework needed to decide the case. Further, it is unclear what criteria were used to evaluate qualification for judicial notice in the first instance. Despite the fact that this 'fact' appears to play a fairly important role in the majority's section 15 decision, the judgment does not engage in any principled reflection on how this fact came to merit judicial notice. Commentators have pointed out that this 'fact' is subject to dispute in important ways, including refutation by figures accessible from Statistics Canada.[17]

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[15] *Ibid.* at para. 34. McLachlin C.J.C. is citing from *Law*, *supra* note 5. The *Law* case concerned a challenge to age-based allocation of survivor benefits under the Canada Pension Plan, in which surviving spouses under age 45 received fewer benefits than surviving spouses over age 45.

[16] *Ibid.* at para. 36.

[17] Natasha Kim & Tina Piper, "*Gosselin v. Québec*: Back to the Poorhouse ..." (2003) 48 McGill L.J. 749.

Further, as pointed out by Justice L'Heureux-Dubé in her dissenting judgment, the stated purpose of the legislative scheme was precisely to respond to high rates of unemployment among young adults, which in L'Heureux-Dubé J.'s view constituted a pre-existing disadvantage.[18] These criticisms speak to the dangers associated with judicial notice where it is invoked uncritically: Notice can incorporate incorrect or incomplete information about social context, with no opportunity for challenge or debate.

On the other hand, these passages from the majority's decision in *Gosselin* also reflect the ways in which significant social context information can be left out when judges uncritically *decline* to notice it. In constitutional rights litigation, it may be inadequate for a judge to reject a characterization of social context because it is "counterintuitive," without further discussion or investigation. Without inquiring into the empirical realities faced by young adults in Québec in the 1980s in relation to employment, the court may not be in a position either to 'notice' or turn away from any given factual claim.

The uncertainty surrounding the treatment of contextual information is particularly significant for anti-poverty litigation because of the high cost of litigation. When all social context information must enter the process through the litigants, low income parties must attempt to explain their experiences to the court, but are without the resources needed to marshal vast amounts of documentation and testimony. Judicial notice of social context information can have a large, or even determining, impact on whether anti-poverty claims are advanced before the court at all. In a context in which legal aid for civil matters is virtually non-existent[19] and funding for the Court Challenges Program has been cancelled,[20] the resources required to launch a constitutional challenge must be taken into account when evaluating any

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[18] *Gosselin*, *supra* note 7 at para. 137.

[19] For an overview of civil legal aid programs and their inadequacy for women's equality, see Lisa Addario, *Getting a Foot in the Door: Women, Civil Legal Aid and Access to Justice*, online: Status of Women Canada (1998) <http://www.swc-cfc.gc.ca/pubs/pubspr/footinthedoor/footinthedoor_e.html>.

[20] Government of Canada, *Backgrounder: Effective Spending*, online: Treasury Board of Canada Secretariat <http://www.tbs-sct.gc.ca/media/nr-cp/2006/0925_e.asp>.

proposal about judicial notice and social context information in constitutional cases.

Further, anti-poverty litigation initiates moments of great importance in the life of Canadian democracy and constitutionalism because it requires courts to consider the relationship between economic inequality or deprivation and human rights. In this context, where courts are asked to make decisions with broad social consequences, it is especially important to articulate and understand the principles underlying judicial notice and the treatment of social context information. The *Gosselin* decision marked a very significant moment in poverty related jurisprudence, because it was a rare instance in which the laws and administration of welfare benefits were subjected to scrutiny by appellate courts. In fact, it was the first time the Supreme Court of Canada was able to consider the relationship between constitutionally guaranteed human rights and the provision of welfare benefits. Throughout this article, I will return to the *Gosselin* case as an example of anti-poverty litigation, but also as a significant indicator of how legal principles and practices respond to realities of poverty in Canada.

II. LEGAL JUDGMENT THROUGH "ENLARGEMENT OF MIND"

By drawing attention to things that judges identify as outside the arena of adversarial dispute, judicial notice provokes queries about the practice of legal judgment, including: distinctions between 'fact' and 'law'; the requirements of judicial impartiality; the impact of the large gap between the class, race and gender composition of the Canadian bench as compared with Canadians living in poverty; and the capacity of legal institutions to respond to a heterogeneous social reality. To gain a greater understanding of what is at stake in relation to the doctrine of judicial notice and anti-poverty litigation, I approach these questions by situating the doctrine of judicial notice in relation to a theoretical approach to 'judgment' developed by Jennifer Nedelsky.[21]

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[21] Jennifer Nedelsky, "Embodied Diversity and Challenges to Law" (1997) 42 McGill L.J. 91 [Nedelsky, "Embodied Diversity"]; Jennifer Nedelsky, "Judgment, Diversity, and Relational Autonomy" in Ronald Beiner & Jennifer

Nedelsky argues that a central challenge to a theory of judgment is the issue of social diversity. She points to strong critiques of the concept of 'objectivity' as a measure of judgment.[22] These critiques, made by feminists and other theorists, demonstrate the inadequacy, impossibility and oppression associated with the concept of objectivity in judgment. In this context, Nedelsky asks how we can move beyond these critiques to "reconstruct norms of optimal decision making."[23] Nedelsky explores issues such as the relationship between judicial impartiality and the idea that the judiciary is not 'representative' of broader society.

In order to address these issues, Nedelsky has turned to the work of Hannah Arendt. By viewing Arendt's theory of judgment through the lens of *legal* judgment in a diverse society, Nedelsky argues that Arendt provides useful resources for thinking about judgment in general and legal judgment in particular.

Arendt's writings provide only an outline of her thought on judgment, as she did not live to write the full volume on this subject that she planned. However, there are some texts in which Arendt indicates the direction of her approach to judgment. These texts have generated debates among contemporary theorists who have explored the potential and pitfalls of Arendt's theory of judgment when applied in the context of political, aesthetic, and legal judgment.[24]

Arendt grounds her ideas on judgment in Kant's theory of aesthetic judgment, and his discussion of "taste."[25] There are two important reasons for this link. First, Arendt explores how judgment relates to the condition of plurality that characterizes

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Nedelsky, eds., *Judgment, Imagination and Politics: Themes from Kant and Arendt* (Lanham, Maryland: Rowman & Littlefield, 2001) 103 [Nedelsky, "Relational Autonomy"].

[22] Nedelsky, "Embodied Diversity", *ibid.*, Nedelsky describes critiques offered by Iris Young, Elizabeth Spelman, Carol Gilligan, and neurologist Antonio Damasio.

[23] Nedelsky, "Relational Autonomy", *supra* note 21 at 104.

[24] See the collection of texts in Beiner & Nedelsky, *supra* note 21.

[25] Immanuel Kant, *Critique of Judgment*, trans. by Werner S. Pluhar (Indianapolis: Hackett Publishing Company, 1987).

human existence.[26] Unlike other kinds of reasoning or the application of rules, judgment relates to a *particular* person or thing.[27] Like aesthetic taste, judgment can only be understood as a way of evaluating something in its particularity, as opposed to formulating rules that apply universally. Ronald Beiner summarizes the meaning of Arendt's interpretation of judgment when he writes: "This is what judgment means: to size up the unique particular that stands before one, rather than trying to subsume it under some universal scheme of interpretation or pregiven set of categories."[28]

Second, Arendt is interested in accounting for the *subjective* nature of judgment. Judgment, like taste, involves a subjective element. Like taste, judgment is not a matter of logical deduction or induction.[29] Judgments are not wholly objective truth claims, nor are they conclusions that can be reached by logical inference alone.

Thus, like many contemporary thinkers and the critics of objectivity noted above, Arendt recognizes the irreducibly subjective element of human judging. However, having recognized subjectivity, Arendt does not leave us to the dangers of arbitrariness and mere preferences. There is a sense in which my *taste* is *completely* private and non-communicable; I simply experience liking or disliking something. In contrast, Arendt shows how *judgment*, with its essentially subjective element, can nevertheless claim validity.[30]

The validity of a judgment is linked to a condition Arendt describes, following Kant, as an "enlarged mentality." According to Arendt, validity exists because when I judge, I practise an enlargement of mind in which I imagine justifying my judgment

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[26] Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1998).

[27] Hannah Arendt, *Lectures on Kant's Political Philosophy*, Edited and with an Interpretive Essay by Ronald Beiner (Chicago: University of Chicago Press, 1982) at 66 [Arendt, *Lectures*].

[28] Ronald Beiner, "Rereading Hannah Arendt's Kant Lectures" in Beiner & Nedelsky, *supra* note 21, 91 at 99.

[29] Arendt, *Lectures*, *supra* note 27 at 4.

[30] Ronald Beiner & Jennifer Nedelsky, "Introduction" in Beiner & Nedelsky, *supra* note 21 at vii, x.

to others, comparing my judgment to theirs. When I make a judgment, I claim that my judgment is valid across that community of judging others.

An enlarged mentality can be understood as a way for judges to free themselves from the constraints of their subjectivity. By considering how their subjective impression could be justified to others, judges are able to gain some objective insight into their own private opinions, feelings, and idiosyncrasies. Through reflection, the judge gains a certain kind of "disinterestedness" that is necessary for impartiality.[31] In this way, the enlarged mentality allows a judge to transform a private, subjective experience into something that holds meaning for others. Arendt argues:

> [Through an enlarged mentality] one is able to abstract from private conditions and circumstances, which, as far as judgment is concerned, limit and inhibit its exercise. Private conditions condition us; imagination and reflection enable us to *liberate* ourselves from them and to attain that relative impartiality that is the specific virtue of judgment.[32]

An enlarged mentality also allows for impartiality by adding perspectives to the *partial* subjective knowledge of the judge. A judge is always a member of communities,[33] and it is by referring to the perspectives of the other members of those communities that valid judgment occurs. By training the imagination to "go visiting," a judge can expand the perspectives that are taken into account when forming a judgment.[34]

Thus, according to Arendt, judgment is neither wholly subjective nor wholly objective. It involves intersections and transformations between privacy and publicity, thought and feeling, particularity and abstraction, communication and imagination, individuality and community, self and other. Judgment is a unique human capacity that is essentially linked to communities. This is the vision of judgment that is adopted by

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[31] Arendt, *Lectures*, *supra* note 27 at 73.

[32] *Ibid.* [emphasis in original].

[33] *Ibid.* at 75.

[34] *Ibid.* at 43. Arendt states that "[t]o think with an enlarged mentality means that one trains one's imagination to go visiting."

Nedelsky as a model that can generate new insights into legal judgment specifically. Nedelsky argues that Arendtian judgment can serve to rearticulate the requirements of judicial impartiality in a way that broadens the practice of judging. In a passage that has been cited with approval at the Supreme Court of Canada, Nedelsky writes:

> What makes it possible for us to genuinely judge, to move beyond our private idiosyncrasies and preferences, is our capacity to achieve an "enlargement of mind". We do this by taking different perspectives into account. This is the path out of the blindness of our subjective private conditions. The more views we are able to take into account, the less likely we are to be locked into one perspective ... . It is the capacity for "enlargement of mind" that makes autonomous, impartial judgment possible.[35]

This passage highlights some of the ways the "enlarged mentality" theory of judgment may be particularly relevant in the anti-poverty context, because it focuses on the need for valid judgments to take into account a broader range of perspectives. Judgment in a diverse society must be responsive to diversity in perspectives, including perspectives arising out of economic inequality and poverty.

Arendt-inspired theories of judgment also involve significant risks. For example, how is it possible for one's judging process to become genuinely "enlarged" by a process that takes place entirely within the imagination? What are the implications of measuring the validity of judgments about justice by a standard that emerges from a theory of aesthetic taste?[36] Theorists have taken up these questions, and many others, and there is certainly no consensus on the utility of Arendt's approach.

In this article, I leave unanswered those questions that are directed at Arendt's writings, and the interpretation of her works. Instead, I pull out the idea of judgment through enlargement of mind, inspired by Arendt and developed by Nedelsky. I engage

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[35] Nedelsky, "Embodied Diversity", *supra* note 21 at 107. Cited by McLachlin & L'Heureux-Dubé JJ. in *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para. 42, 161 N.S.R. (2d) 241 [*R.D.S.* cited to S.C.R.].

[36] George Kateb, "The Judgment of Arendt" in Beiner & Nedelsky, *supra* note 21, 121.

with the idea of enlargement of mind, not by deepening the theoretical discussion of judgment but by testing its usefulness as a way to rethink judicial notice.

Understanding judgment in terms of enlargement of the mind gives an important place to the doctrine of judicial notice, because the doctrine relates directly to how and when judges can reach outside of 'evidence' as they seek an enlarged mentality. It also offers a structure for guiding what judges are to do with the information and intuitions they possess as a result of their own life experiences.

III. IMPARTIALITY AND THE "COMMUNITY SENSE"

Arendt argues that an individual, subjective decision or feeling can only be transformed into a judgment if it can be communicated.[37] That is, in order to imagine how I might justify my judgment to others, I must have some sense of how I could communicate it to them, and on what terms they might understand or agree with me. These terms are called the *sensus communis*, or community sense. Arendt writes:

> This *sensus communis* is what judgment appeals to in everyone, and it is this possible appeal that gives judgments their special validity. The it-pleases-or-displeases me, which as a feeling seems so utterly private and noncommunicative, is actually rooted in this community sense and is therefore open to communication once it has been transformed by reflection, which takes all others and their feelings into account. ... [O]ne can never compel anyone to agree with one's judgments ... one can only "woo" or "court" the agreement of everyone else. And in this persuasive activity one actually appeals to the "community sense." In other words, when one judges, one judges as a member of a community.[38]

Thus, the community sense is the link between an individual feeling or evaluation, and a valid judgment. One way to understand the idea of the 'community' in Arendt's thought is to see it as very abstract, as the link between an individual and other human beings in general. In contrast, in the model of judgment developed by Nedelsky, those aspects of Arendt's thought in

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[37] Arendt, *Lectures*, *supra* note 27 at 69, 72.

[38] *Ibid.* at 72.

which the community sense is linked to *actual communities* are given priority. Given that the community sense is integral to generating *validity* in Arendt's view, there are important questions about this community: Who makes up the community? Whose shared sense provides the terms for communication? How do judges refer to the multiple communities of which they are a part? How is the "sense" of those communities determined?

The doctrine of judicial notice plays an important role in this regard, because it is one of the ways in which judges' use of common sense and context information is regulated.[39] The idea of the "community sense" as an integral part of judgment requires that assertions about 'common sense' should elicit critical thought about the community for whom that 'sense' is 'common.' In explaining the relevance of Arendt's theory to legal judgment, Ronald Beiner and Jennifer Nedelsky note that "the question of whose shared sense should be the reference point for judicial decision making is at the heart of the question of judicial legitimacy."[40] If, in making a judgment, I appeal to a "community sense" and imagine justifying my decision to others, it matters greatly who those others are.

Approaching judicial decision making from this perspective requires us to consider the relationship between judges, their communities, and their practices of judgment. Nedelsky states the questions in these terms: "To understand judicial impartiality we must ask who judges are, and with whom they imagine themselves to be in conversation as they make their judgments. Whom do they imagine persuading and on whom do they make claims of agreement?"[41]

It is important for Arendt that the community whose "sense" is referred to in judgment is co-extensive with the community for whom the judgment may be valid. Arendt writes that "claims to

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[39] Marilyn T. MacCrimmon, "What is 'Common' About Common Sense: Cautionary Tales for Travelers Crossing Interdisciplinary Boundaries" (2001) 22 Cardozo L. Rev. 1433; Christine Boyle & Marilyn MacCrimmon, "To Serve the Cause of Justice: Disciplining Fact Determination" (2001) 20 Windsor Y.B. of Access to Just. 55 at 78.

[40] Beiner & Nedelsky, "Introduction" in Beiner & Nedelsky, *supra* note 21 at xi.

[41] Nedelsky, "Embodied Diversity", *supra* note 21 at 107.

validity can never extend further than the others in whose place the judging person has put himself for his considerations."[42] In the context of legal judgment, this creates a link between the judge's use of common sense, and the identities of the people for whom the judgment is valid.

One community to whom judges do refer in coming to conclusions is their community of judicial peers and the legal profession.[43] It makes sense that judges would consider the perspectives of others in the legal community, because judges know their judgments will be scrutinized by that community. In this way, judges do engage in reflection and justification as part of the judging process. Judges are in actual and imagined conversation within this community when they make decisions. This conversation is supported by institutional mechanisms like appeal structures and the doctrine of *stare decisis* as well as the practical ways that judges and other legal professionals interact and share mutual frameworks for debate.[44]

However, this is insufficient to achieve impartiality. The community of judging others is too homogenous to provide an adequate perspective on questions of justice. As noted by Cory, J. in the case *R. v. S.(R.D.)*,[45] the Canadian community–that is, the community for whom judicial decisions must be valid–is distinctly *not* homogenous:

> Canada is not an insular, homogeneous society. It is enriched by the presence and contributions of citizens of many different races, nationalities and ethnic origins. The multicultural nature of Canadian society has been recognized in s. 27 of the *Charter*. Section 27 provides that the *Charter* itself is to be interpreted in a manner that is consistent with the preservation and enhancement of the multicultural heritage of Canadians. Yet our judges must be particularly sensitive to the need not only to be fair but also to appear to all reasonable observers to be fair to all Canadians of every race, religion, nationality and ethnic origin.[46]

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[42] Nedelsky, "Relational Autonomy", *supra* note 21 at 116.
[43] *Ibid.* at 114.
[44] MacCrimmon, *supra* note 39 at 1448.
[45] *R.D.S.*, *supra* note 35.
[46] *Ibid.* at para. 95.

The particularity and relative uniformity of the community of judges is made very evident in the context of judgments about poverty. There is a dramatic mismatch in the class, race and gender composition of the Canadian bench, as compared with the population of Canadians in poverty.

Indeed, the judiciary and the legal profession in Canada are homogenous communities relative to the population of Canada as a whole, and are disproportionately composed of certain social groups. A study in 2000 showed that approximately 20 percent of Canadian judges were women at that time.[47] In 1997, the Honourable Maryka Omatsu estimated that only 2 percent of Canadian judges were members of visible minorities, and identified herself as the first and only East Asian Canadian woman judge.[48] Assembling statistics from a 1990 study, Omatsu described just how socially homogenous the Canadian judiciary is: "[J]udges as a group are married, overwhelmingly male, of British or French ancestry, in their mid-fifties, Judeo-Christian, born into the middle or upper-middle classes, were successful lawyers, and had limited trial experience."[49]

In addition, once individuals become judges, they by definition enjoy a relatively high income and esteemed social role, making it even more difficult to investigate the meaning of social class in judicial practices.[50]

This information about the demographics of the Canadian judiciary indicates that if judges limit their practice of "enlarged mentality" to the community sense of their fellow judges, their perspective will be narrow indeed. If the validity of a judgment is tied to the community to whom judges imaginatively justify their decisions, many judicial decisions are too partial to apply validly to people in poverty.

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[47] Richard F. Devlin, A. Wayne MacKay & Natasha Kim, "Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards a 'Triple P' Judiciary" (2000) 38:3 Alta. L. Rev. 734 at 761.

[48] Maryka Omatsu, "The Fiction of Judicial Impartiality" (1997) 9 C.J.W.L. 1 at 3-4.

[49] *Ibid.* at 3-4 [citations omitted].

[50] Joan Brockman, "Aspirations and Appointments to the Judiciary" (2003) 15 C J.W.L. 138 at 163.

This notion supports the idea that a judge's community sense should be expanded to include the perspectives of those who will be affected by the judgment. Further, judges should specifically refer to the experiences of oppressed and marginalized people. In Mari J. Matsuda's speech on "multiple consciousness as jurisprudential method," she argues:

> The multiple consciousness I urge lawyers to attain is not a random ability to see all points of view, but a deliberate choice to see the world from the standpoint of the oppressed. That world is accessible to all of us. We should know it in its concrete particulars. We should know of our sister carrying buckets of water up five flights of stairs in a welfare hotel, our sister trembling at 3 a.m. in a shelter for battered women, our sisters holding bloodied children in their arms in Cape Town, on the West Bank, and in Nicaragua. The jurisprudence of outsiders teaches that these details and the emotions they evoke are relevant and important as we set out on the road to justice. These details are accessible to all of us, of all genders and colors. We can choose to know the lives of others by reading, studying, listening, and venturing into different places.[51]

Matsuda makes an argument that reaches beyond reconstructing judicial impartiality. However, the heart of Matsuda's argument is that when members of the legal community are attempting to broaden their understanding of the world, they should look first to the experiences of oppressed people. When building a common sense on which to base impartial judgment, we must include in the community everyone who will be affected by the judgment, with particular care to include those who are most marginalized.

IV. IMAGINATION AND DIALOGUE

In her writing on judgment, Arendt describes the process of developing an enlarged mentality as essentially dependant on the faculty of imagination. One *imagines* how one would judge from the perspectives of others. This element of the enlarged mentality has been criticized because it is not necessarily concerned with seeking out the perspectives of *actual others*.

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[51] Mari J. Matsuda, "When the First Quail Calls: Multiple Consciousness as Jurisprudential Method" (1989) 11 Women's Rts. L. Rep. 7 at 9.

For example, although they disagree on many points, Seyla Benhabib and Iris Young both argue that the best interpretation of the "enlarged mentality" is one in which this process is realized through actual dialogue. When discussing political morality, Benhabib writes:

> There is thus a fundamental link between a civic culture of public participation and the moral quality of enlarged thought. Enlarged thought, which morally obligates us to think from the standpoint of everyone else, politically requires the creation of institutions and practices whereby the voice and the perspective of others, often unknown to us, can become expressed in their own right.[52]

Young takes the requirement for actual dialogue a step further to argue that dialogue is essential because it allows people to understand collective social structures, in addition to the narratives of each individual person. Young argues:

> We make our moral and political judgments, then, not only by taking account of one another's interests and perspectives, but also by considering the collective social processes and relationships that lie between us and which we have come to know together by discussing the world.[53]

I argue with Benhabib and Young that the *actual* presence and voice of community members will be essential to enlarged thought and valid judgment. Therefore, in the context of anti-poverty litigation, making the views of impoverished litigants present to the court will be a priority. This actual dialogue cannot be established through judicial notice. Indeed, questions about dialogue also raise questions about the meaning of the law of standing, the availability of state-funded legal counsel, and the extent to which a judge has the authority or obligation to inquire beyond the submissions of counsel.

However, prioritizing the perspectives of marginalized communities does help to structure judicial notice because it creates an obligation for judges to be self-reflective about their

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[52] Seyla Benhabib, "Judgment and the Moral Foundations of Politics in Hannah Arendt's Thought" in Beiner & Nedelsky, *supra* note 21, 183 at 201.

[53] Iris Marion Young, "Asymmetrical Reciprocity: On Moral Respect, Wonder, and Enlarged Thought" in Beiner & Nedelsky, *supra* note 21, 205 at 224-25.

place in the community and their knowledge about the world. Judicial notice does not facilitate actual dialogue, but it may, for example, call on judges to consult empirical studies about social and economic conditions in Canada. Judicial notice might also require judges to be wary of too much certainty in 'common-sense' factual assertions.

The common sense that forms the background to legal judgment is formed by similarities in training.[54] "Similarities in training" in this context could simply mean shared life experience. However, in the context of legal judgment, "training" can have a more explicit reference to the schooling and practice requirements of the legal profession. Similarities in training generate a shared common sense, but at the same time "training" is what can open up a person to self-awareness and alternative perspectives. This view is optimistic that people can *learn* to engage with an enlarged mentality when they judge.

In Nedelsky's application of Arendt's thought to legal judgment, she also points to an important role for training and education in generating impartial judgment.[55] Nedelsky argues that exercising an enlarged mentality requires practice and experience. For example, she asserts that the more diverse our universities and law schools are, the more experience we will have in trying to justify our judgments to others that are not like ourselves in every way. If this diversity is supported by institutional capacity and a culture of respect, judges will become accustomed to the idea that their perspective is partial, and will develop skills in attempting to understand the perspectives of others. This argument supports measures that increase the diversity of the bench and the legal profession as a whole. Nedelsky writes:

> [I]f the faculties and student bodies of law schools, the practicing bar as well as the judiciary actually reflected the full diversity of society, then every judge would have had long experience in exercising judgment, through the process of trying to persuade (in imagination and actual dialogue) people from a variety of backgrounds and

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[54] Susan G. Drummond, "Judicial Notice: The Very Texture of Legal Reasoning" (2000) 15:1 C.J.L.S. 1.

[55] Nedelsky, "Embodied Diversity", *supra* note 21.

> perspectives. This would better prepare judges for judging situations about which they had no first- or even second-hand knowledge. It would vastly decrease the current likelihood of a single set of very limited perspectives determining the judgment.[56]

V. JUDICIAL NOTICE OF AND AGAINST COMMON SENSE

This discussion of how impartiality can relate to actual communities draws attention to the different ways that judicial notice can function in relation to common sense. First, judicial notice can work to uphold and reinforce common sense. Judicial notice allows judges to make sure the legal system does not produce results that are contrary to what everyone agrees is plainly the case.[57] This kind of judicial notice is based on what is indisputable, notorious, and known in the relevant community. Second, judicial notice can operate to displace or unseat common sense, where that common sense conflicts with an indisputable fact that can be accessed from a source of accepted accuracy.

For judicial notice *of* common sense, the need to identify the relevant community is clear. This is reflected in the law on judicial notice in Canada. For example, in *R. v. Potts*, the Ontario Court of Appeal considered the appropriateness of the trial judge's notice that Colonel By Drive in the city of Ottawa was the "property of the National Capital Commission." The Court of Appeal upheld the trial judge's notice, emphasizing that community notoriety of a fact can only be known by someone actually in that community – which may or may not include the judge:

> Where judicial notice of some matter is taken by a trial court, the trier of the facts (whether judge alone or jury) may or may not share the knowledge that is said to be common knowledge in the community or in a particular class of the community. If it happens that the court does share a personal knowledge of that which is commonly known in the community, well and good. If not, however, the matter may still be judicially noticed, but the court is put on its

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[56] *Ibid.* at 108.

[57] Edmund M. Morgan, "Judicial Notice" (1944) 57 Harv. L. Rev. 269.

> enquiry as to whether the matter is or is not one which may properly be made part of the case before it without formal proof thereof.[58]

The Supreme Court of Canada also addressed this question in *R.D.S.*, which concerned the legitimacy of the trial judge's comments about the relationship between Halifax police officers and black youths in her community. McLachlin and L'Heureux-Dubé JJ. took the importance of the community to a further level, giving specific community membership and expertise to the "reasonable person" in law:

> The reasonable person, identified by de Grandpré J. in *Committee for Justice and Liberty*, *supra*, is an informed and right-minded member of the community, a community which, in Canada, supports the fundamental principles entrenched in the Constitution by the *Canadian Charter of Rights and Freedoms*. Those fundamental principles include the principles of equality set out in s. 15 of the *Charter* and endorsed in nation-wide quasi-constitutional provincial and federal human rights legislation. The reasonable person must be taken to be aware of the history of discrimination faced by disadvantaged groups in Canadian society protected by the *Charter's* equality provisions. These are matters of which judicial notice may be taken.
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> ....
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> The reasonable person is not only a member of the Canadian community, but also, more specifically, is a member of the local communities in which the case at issue arose (in this case, the Nova Scotian and Halifax communities). Such a person must be taken to possess knowledge of the local population and its racial dynamics, including the existence in the community of a history of widespread and systemic discrimination against black and aboriginal people, and high profile clashes between the police and the visible minority population over policing issues: *Royal Commission on the Donald Marshall Jr. Prosecution* (1989); *R. v. Smith* (1991), 109 N.S.R. (2d) 394 (Co. Ct.). The reasonable person must thus be deemed to be cognizant of the existence of racism in Halifax, Nova Scotia. It

[58] *R. v. Potts* (1982), 134 D.L.R. (3d) 227 at para. 21, 66 C.C.C. (2d) 219 (Ont. C.A.), leave to appeal refused, [1982] 1 S.C.R. xi.

> follows that judges may take notice of actual racism known to exist in a particular society.[59]

Here, McLachlin and L'Heureux-Dubé JJ. refer to the *Charter* and to the history of social relations in Canada to establish criteria for deciding what community should be the basis for judicial notice when judges take notice of notorious facts, or of the relevant community sense. In Marilyn MacCrimmon's comment on the *R.D.S.* case, she points out that this judgment "provided guidelines for distinguishing between legitimate and illegitimate background knowledge by drawing on *Charter* rights and values and on the knowledge of the well-informed person in the community ... ."[60] MacCrimmon further argues that "[g]rounding legitimacy in the knowledge of the community also ensures that one aspect of legitimacy is that social context draws on empirical and other data available to the community."[61]

This focus on empirical information also leads to the second way that judicial notice can operate in relation to the common sense of a community: Judicial notice can work to *displace* common sense. The majority of judges in *R.D.S.* agreed that the reasonable person, against whom judicial impartiality will be measured, must be "informed."[62] This standard requires that judges too be well-informed in order to assure the impartiality of their decisions. As identified in *Potts* and *R.D.S.*, the common sense of the judge may, or may not, correspond with the common sense of the relevant community, and this obligates the judge to become informed. This process of noticing empirical information may serve to actually displace what the judge had previously assumed as part of her or his background knowledge.

Discussing this kind of phenomenon in her article on judicial notice, Justice Claire L'Heureux-Dubé writes:

> These fundamental facts comprise a prism of personal experience and understandings through which judges and jurors, as factfinders, both perceive and interpret that which is put before them. Not all

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[59] *R.D.S.*, *supra* note 35 at paras. 46-47.

[60] Christine Boyle *et al.*, "*R. v. R.D.S.*: An Editor's Forum" (1998) 10 C.J.W.L. 159 at 188.

[61] *Ibid.* at 189.

[62] *R.D.S.*, *supra* note 35.

> factfinders, however, will perceive the same circumstances in the same way. Moreover, while the prism held by most factfinders may constitute a perfectly adequate analytical framework in most situations, in certain contexts it may not accord with reality, and may therefore impede rather than advance the quest to find facts in a way that is reflective of how people really experience the world. In cases such as these, social framework evidence can play both a meaningful and a necessary role in re-aligning that prism with reality.[63]

Judicial notice of social frameworks can thus provide an important way for judges to be impartial, because it creates a method of evaluating and improving the background information against which decisions are made. It provides a way for judges to practise enlargement of mind.

Where, as L'Heureux-Dubé J. describes, the prism held by the fact-finder does not accord with reality, there is a clash between 'common sense' and social framework information. Another way to conceive of this clash is as a failure of consensus between communities. For example, in Susan Drummond's examination of theoretical underpinnings for judicial notice, she argues that this lack of consensus can open up an avenue for appeal on the basis of judicial notice:

> One could argue at the appeal level that what was taken as a form of general legal reasoning was in fact a reflection of one particular legal sensibility. One could argue that a judge took something to be a universal feature of human reasoning when in fact it merely reflects a local understanding. One could argue that a judge has not determined matters in accord with the sense that is commonly held, that is, the sense of the relevant local community. One could argue that the judge took insufficient notice of the way that local history or geography or culture or common sense is in contention with his or her common sense. One could argue these and related things at the appeal level even though the judge never acknowledged – nor may indeed have been aware – that these were the background assumptions which enabled him or her to come to a determination on the foreground.[64]

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[63] L'Heureux-Dubé, "Re-examining", *supra* note 2 at 559 [citations omitted].

[64] Drummond, *supra* note 54 at 11.

Judicial notice thus calls for attention to communities, and provides an opportunity to appeal where that attention falters.

The notion of a failure of consensus also draws attention to the ways in which judicial notice always evokes questions about disputability. From some perspectives, the requisite level of certainty about a fact in order to qualify for judicial notice is the key issue in relation to judicial notice. For example, the doctrine received an authoritative restatement by the Supreme Court of Canada in *R. v. Spence*,[65] in which consideration of the proper 'test' for judicial notice was a central part of the analysis. While these debates are not the focus of this paper, the idea of disputability is also important to the "community sense" for two reasons.

First, disputability and the failure of consensus point us towards legal procedures that allow, rather than foreclose, disputes about factual claims. As noted above, this means that judicial notice must always be accompanied by measures such as state-funded legal counsel and a robust doctrine of standing. However, it also affects the operation of the doctrine itself by, for example, encouraging an interpretation in which judges should give notice to parties before taking notice of material, allowing them the chance to dispute it. An example of such a procedure occurred in the sentencing decision of *Hamilton and Mason*.[66] While the trial judge's significant resort to judicial notice was strongly critiqued by the Court of Appeal, it was acknowledged that by keeping the parties informed and allowing them to make submissions on all points before taking notice, he had conducted the trial with "scrupulous" fairness.[67]

Second, the idea of disputability and the potential failure of community consensus demonstrate the importance of understanding the community sense in a way that is connected to the actual realities experienced by actual communities. Such communities experience disagreement, division, and competing

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[65] *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458, 259 D.L.R. (4th) 474.

[66] *R. v. Hamilton* (2003), 172 C.C.C. (3d) 114, 8 C.R. (6th) 215 (Ont. Sup. Ct. J.).

[67] *R. v. Hamilton* (2004), 241 D.L.R. (4th) 490 at para. 72, 186 C.C.C. (3d) 129 (Ont. C.A.).

narratives. To juxtapose the common sense of Canadian judges with the common sense of people living in poverty is illustrative of one kind of community boundary, but should not suggest that those communities are necessarily single and homogenous in their community sense. Social science evidence, government statistics, local knowledge, and personal narratives may each tell a different story about one community. Further, individuals and groups within communities will disagree about the 'facts' that characterize their lives. If judicial notice is best understood as connected to community sense, debates about and within those communities must also be made transparent and accessible.

The question of disputability is particularly important in the context of anti-poverty constitutional litigation, in which the 'facts' in question are very likely to be important to the outcome of the case, and also very *unlikely* to be 'indisputable.' The idea of the community sense tells us that, in this context, the doctrine of judicial notice is not about distinguishing between disputable and indisputable facts, but rather between legitimate and illegitimate background knowledge, with legitimacy being measured against the demands of the enlarged mentality.

VI. CONCLUSION

Dugald Christie's advocacy for access to justice in both legal and non-legal arenas intersected in many ways with issues relating to judicial notice. Much of Christie's work, including numerous legal challenges, concerned the ways in which procedural rules and rules of evidence play a major role in determining whether individuals have meaningful access to the law, and whether the law is capable of protecting the rights of all kinds of people. For Christie, it is clear that court rules and administrative procedures matter very much when asking questions about access to justice. While Christie focused his critical attention on other issues such as court delays, summary trials, and the taxation of legal services, the doctrine of judicial notice is a further example of an evidentiary rule that may play a significant role in the conduct of the law.

Christie's concerns also overlap with the doctrine of judicial notice because of his focus on empirical information and social

scientific observation. For example, Christie argues that attempts to address the question of delays in the justice system in British Columbia in the 1980s and 1990s were hampered by a lack of information about how long cases actually took to make their way through the court system from beginning to end, or what parts of the system were most likely to experience delays.[68] Moreover, Christie argues that there was either indifference or outright hostility towards his attempts to collect such information in a systematic way, and that judicial officials and leaders in the legal profession preferred to continue on the basis of untested assumptions. In contrast, Christie advocates for an approach based on empirical study:

> It seemed to me that there were a number of certainties unsupported by the evidence being postulated on the subject of delays in the courts. Yet upon investigation it appeared to me that very few facts were known. I was told, for example, that the problem of delays in the courts was being addressed and it was only a matter of time until new systems and reforms took their effect and the length of proceedings would diminish. ... Another commonly held belief was that most of the delay in court proceedings was attributable to the difficulty of obtaining a trial date. It seemed to me that these propositions and various others were capable of being tested against the evidence.[69]

Christie's approach to questions of access to justice also reflects the ways in which the doctrine of judicial notice provokes questions about the factual background of judicial decision-making, and the theoretical approaches available to think about this background. When Christie asks for legal professionals to engage in a process of deep self-reflection in order to understand their role in society, he is engaging with questions about how background knowledge, assumptions, and intuitions play a role in legal practice. In my view, this includes questions about the kinds of things that judges 'notice' about the world around them. I think the concerns raised by Christie about the legal system's capacity to respond to the injustices of poverty are very serious ones, and I

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[68] Dugald Christie, "Access to Law" (2007) 40 U.B.C. L. Rev. 487 at 490.
[69] *Ibid.* at 490.

have argued in this article that rethinking the doctrine of judicial notice may be one way to begin addressing this problem.

Judicial notice asks judges to reflect on the background information and common sense that they currently rely on, and to examine it critically through the lens of equality. The doctrine calls on judges to notice more about the world around them. Ultimately, the best interpretation of judicial notice requires notice of poverty.

The enlarged mentality theory of judgment helps us to see why this interpretation puts judicial notice in the service of impartiality. The idea of the enlarged mentality shifts the requirements of impartiality to require an active and inquisitive posture on the part of the judge, and further, draws attention to the importance of self-reflection in impartial judgment.

In this article, I have explored one facet of judicial notice that can help build a model of the doctrine that is supportive of this kind of judging practice. Judicial notice requires judges to be actively attentive to the content of their own common sense, and to critically examine the source of their knowledge and intuitions. Where there is insufficient overlap between the common sense of the judges' communities and the communities that are before the court or will be affected by the judgment, judicial notice calls on judges to broaden their base of reference. Sometimes, this will require judges to decline to notice something, or to require parties to provide evidence about something that may have been taken for granted in the past. Other times, this will mean introducing information from outside the adversarial process, to supplement the materials provided by the parties.

In exploring the relationship between communities and judicial notice, I found Nedelsky's appropriation of Arendt to be a very useful resource for thinking about how notice of social context information can buttress the impartiality and legitimacy of judicial decision making. However, the "enlarged mentality" approach to judgment also poses significant risks for those who would put legal reasoning in the service of social justice.

For example, in an unpublished lecture on judgment, Hannah Arendt herself wrote:

> Suppose I look at a specific slum dwelling and I perceive in this particular building the general notion which it does not exhibit directly, the notion of poverty and misery. I arrive at this notion by representing to myself how I would feel if I had to live there, that is, I try to think in the place of the slum-dweller. The judgment I shall come up with will by no means necessarily be the same as that of the inhabitants, whom time and hopelessness may have dulled to the outrage of their condition, but it will become for my further judging of these matters an outstanding example to which I refer.... Furthermore, while I take into account others when judging, this does not mean that I conform in my judgment to those of others, I still speak with my own voice and I do not count noses in order to arrive at what I think is right. But my judgment is no longer subjective either.[70]

Here, Arendt describes a process for incorporating the perspectives of people in poverty into the judgment process. In this passage, Arendt speaks directly to the question of how the "enlarged mentality" approach to judgment might work in judging poverty. Her description highlights the possibility of validity, but also raises important questions. Specifically, in this passage, Arendt explicitly allows the possibility that a poor person's views on poverty might be invalid specifically because of their experience of poverty; their poverty disqualifies them from valid judgment about their own situation.

For an anti-poverty advocate, this passage will be very troubling, and highlights the risks associated with staking so much on the imaginative capacity of judges. The idea that people in poverty cannot express valid judgments about poverty, or that the views of wealthier people are more impartial, finds echoes in the majority's decision in *Gosselin*. The doctrine of judicial notice, as I have described it in this article, invokes many of those same risks by placing the judge's capacity for self-reflection so centrally in the fact determination process. The mismatch between the community knowledge of the judge and that of a person living in poverty is likely to be very large indeed. This mismatch is powerful, and while it can be useful to acknowledge the damaging effects of poverty and marginalization on a community's capacity

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[70] Quoted in Ronald Beiner, "Introduction" in Arendt, *Lectures*, *supra* note 27 at 107-08.

for self-knowledge, it is not useful to overestimate judicial capacity to comprehend the 'true' meaning of other peoples' life circumstances.

However, there are three ways that the doctrine of judicial notice can move forward through these risks. First, the "enlarged mentality" as developed by Nedelsky requires attention to an actual community. In anti-poverty litigation, the relevant communities for evaluating facts will always include the communities of the litigants who have come to the court to assert their rights. The law of judicial notice supports this view, and provides a point of entry for reflection on how facts relate to communities. In contrast to Arendt's view as it appears in the passage quoted above, Nedelsky, and the doctrine of judicial notice, orient us *towards* rather than away from the concrete communities that may be the subject of judgment.

Second, as a doctrine about how to deal with facts, judicial notice does not replace other legal mechanisms that may also support enlargement of mind, but which require the concrete presence and participation of the people affected. These would include measures such as state funded legal counsel, legal doctrines on standing, costs, and the right to introduce expert evidence. Even within the doctrine of judicial notice, decisions about notice can be subject to appeal and can evolve over time. These factors reduce the opportunity for a judge to simply replace or discount the common sense of other people.

Finally, judicial notice, as an overarching approach to fact determination, provides a way to make this process more explicit. Judges do and will continue to rely on their own common sense and intuitions when they make decisions, and it is preferable that legal doctrines require this practice to be as transparent as possible. When judges are unaware of their resort to common sense information, it is more difficult for them to test its adequacy. Similarly, when claims by marginalized groups are rejected because of a gap in information that has not been filled by 'evidence,' constitutional law evolves according to things that may, or may not, be consistent with the underlying values of the legal system. When judicial notice takes its full role to facilitate

enlarged mentality, the risks of judicial imagination and discretion are seen in heightened profile for debate.

This interpretation of judicial notice focuses on the ways in which judicial notice provides judges with a way to live up to the demanding standards of knowledge that are placed on their role. In order to adequately interpret the constitutional rights of poor and marginalized people in Canada, we do not expect judges to have knowledge only of relevant legal principles and rules. Impartiality does not allow judges to base their judgments on untested assumptions, stereotypes, or in a vacuum of ignorance. Rather, we expect judges to grasp relevant empirical realities, and to take the steps that are necessary to avail themselves of the information that is needed to make sense of the law in context.