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Embodying Equality: Stigma, Safety and Clément Gascon's Disability Justice Legacy

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Embodying Equality: Stigma, Safety and Clément Gascon's Disability Justice Legacy

By Joshua Sealy-Harrington*

"You can never trust a drug addict."[1]

Gustavo Fring in *Breaking Bad* (Season 2, Episode 11)

I. Introduction

One theme explored in the critically acclaimed television series *Breaking Bad* was trust. Specifically, the primary character—Walter White—is initially constructed as trustworthy through various proxies: he is a high school teacher devoted to his wife and child. In contrast, the secondary character—Jesse Pinkman—is constructed as untrustworthy through alternate proxies: he is a high school drop out and, perhaps most significantly, addicted to crystal meth. Indeed, Jesse's addiction is repeatedly cited as the basis for why he cannot be trusted—a basis which, as the show proceeds, is rooted in ableist bias, not sound judgment. The proxy of addiction as a basis for distrust is demonstrated to be profoundly mistaken. And this is a mistaken belief held not only in our popular culture but also at our highest court.

* * *

Disability occupies a complex position in social justice politics and discourse. It is widely understood as a locus of inequality. Yet ableist language and norms are often subject to more lenient treatment due to the unique challenge they pose to the liberal order—specifically, due to the ways in which our theoretical aspirations for equality are tested by those who are constructed as genuinely unequal (under ableist standards) or those for whom inclusion comes at too great a cost (under ableist priorities).

Enter the Disability Justice movement. As Katie Eyer explains, this movement:

> . . . arose in response to the perceived limitations of the Disability Rights model

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[1] As stated by Gustavo Fring in Vince Gilligan, "Mandala", *Breaking Bad* (Sony Pictures, 2009).

> of disability liberation and especially concerns that the Disability Rights movement and its rights-based model do not adequately account for the experience of those who . . . have more stigmatized forms of disabilities (such as mental disabilities).[2]

This is a chapter about those "perceived limitations"—specifically, about how the enshrining of disability rights has not fundamentally altered the posture of pity our society holds towards disabled people,[3] nor has it translated into meaningful inclusion of people with mental disabilities under Canadian law.[4] These two sites of disability discourse—law and society—are co-constitutive, which Justice Gascon's story and jurisprudence highlight.

Justice Gascon has two disability justice legacies at the Supreme Court of Canada. One legacy is *embodied* in his personal narrative of disability. Another legacy is *jurisprudential* and seen in his legal reasoning. Those two legacies are discussed separately, but politically imbricated. Specifically, Justice Gascon's disability narrative pertains to societal attitudes on disability. And those attitudes are, in turn, reified through law by jurists who subscribe to them. As leading disability advocate Simi Linton instructs, with respect to sympathetic narratives of disabled people "overcoming" their conditions: "By focussing our attention on the individual and eliciting *sympathy or awe*, [we are] diverted . . . from thinking about how to change social conditions."[5] I highlight these connections in my analysis, and accordingly, attempt to implement Linton's timeless insight that "the personal is not only the political but the scholarly as well".[6] And I include introductory and concluding quotes from the television series *Breaking Bad* to tease at how the personal, political and scholarly dimensions of disability are immersed in popular culture—"how the books we read, movies we watch, the news that is reported instruct us to think about

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[2] Katie Eyer, "Claiming Disability" (2021) 101:2 B.U.L. Rev. 547, at 570, n 105.

[3] I use "disabled people" rather than "people with disabilities" throughout this chapter, though I acknowledge some people with disabilities prefer the latter. I adopt this language in line with Simi Linton's analysis of "forefronting disability" as a characteristic linked to a minority group who experience political marginalization. See Simi Linton, *My Body Politic* (Ann Arbor: University of Michigan Press, 2006), at 118 [hereafter "Linton"]. I also use "nondisabled" rather than "able-bodied" to centre disabled people and disrupt nondisabled people as normative. For some discussion on these linguistic choices, see Elizabeth F. Emens, "Framing Disability" (2012) 2012:5 U. Ill. L. Rev. 1383, at 1387-1388, n 12.

[4] I use "mental disabilities" as an umbrella term in this paper because it is the relevant statutory language for my analysis. That said, I acknowledge that there is immense variety both in the character and labelling of such disabilities, including "mental", "cognitive", "psychosocial" and "psychiatric" disabilities. For a recent discussion of this terminology in the American context, see Yaron Covo, "Gambling on Disability Rights" (2020) 43:2 Colum. J.L. & Arts 237, at 257-262.

[5] Linton, at 112 (emphasis added).

[6] Linton, at 115.

disability . . . how ideologies of the past continue to influence who is considered fit and who is not".[7]

This chapter's core argument is divided into two parts.

In Part II—A Tale of Two Pities—I examine two Supreme Court controversies concerning disability on the bench: (1) Gerald Le Dain J.'s forced "resignation" from the Court after his hospitalization for depression in 1988; and (2) Gascon J.'s anxiety attack while at the Court, which some also speculated was the covert reason for his resignation, announced three weeks earlier. While many claimed that a shift in public response to Le Dain and Gascon JJ. reflected a sea change in ableist attitudes in Canada, I argue that, in some ways, it also reflected a reconfiguration of how ableism persists in our national conscience—to use Linton's words, Le Dain J. reflects "sympathy" and Gascon J. reflects "awe".[8] I also note, though, how Gascon J.'s recent advocacy concerning mental health in the legal profession challenges that national conscience to reckon with the intersections between stigma, safety and equality.

In Part III—Majoritarian "Blind" Spot—I analyze the Supreme Court's latest disability discrimination precedent *Stewart v. Elk Valley Coal Corp.*,[9] and in particular, Gascon J.'s lone dissent, where he found a blanket drug policy at a coal mine discriminatory. After a brief outline of the Court's judgment, I summarize critical disability theory and use its lens to highlight the ideological undercurrents of disability law, both in *Stewart* and beyond.

I conclude with praise for Gascon J.'s disability justice legacies. We have a long way to go with respect to disability justice in Canada. But both on and off the bench, Gascon J. has planted various seeds from which a broader conception of disability justice may flourish in our society's attitudes and laws concerning disability. Further, I draw brief parallels between the Court's *internal* disability politics and its *external* disability law. Lastly, I note how constructing disability as "less than", as something to be punished or avoided, is fundamentally incapable of promoting disability justice—an insight from Gascon J.'s story and, as I later explain, in my story as well.

II. A TALE OF TWO PITIES: DISABILITY POLITICS AT THE SUPREME COURT OF CANADA

> No other symbol of disability is more beloved by Americans than the cute and courageous poster child—or more loathed by people with disabilities themselves.
>
> [. . .]
>
> The belief that disability could be overcome led to the rise of the other ruling image of disability: the inspirational disabled person. It is another model deeply moving to most nondisabled Americans and widely regarded as oppressive by most disabled

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[7] Linton, at 119.

[8] Linton, at 112.

[9] [2017] S.C.J. No. 30, 2017 SCC 30 (S.C.C.) [hereinafter "*Stewart*"].

> ones . . . Many disabled people even use a derisive nickname for such people: 'supercrips.'"[10]

Two events at the Supreme Court—and the public discourse that followed them—provide a lens through which to examine the perceived evolution of attitudes about disability in Canada.[11] Those events illustrate how, rather than shifting away from an ableist perspective, the modality of ableism within Canadian society has reconfigured from *incapacity* (in the case of Le Dain J.) to *resilience* (in the case of Gascon J.). I describe both attitudes as ableist because each, in distinct ways, reifies ableist hierarchy. To presume the incapacity of a disabled judge directly implies their unsuitability. In contrast, to applaud a disabled judge's resilience indirectly implies that their disability was a barrier to be overcome,[12] rather than an element of human diversity that legitimately informs the judicial function.[13] Both attitudes, therefore, reflect a broader ideology of *pity*—that is, a response to misfortune.[14] I briefly outline these events for two reasons: (1) to challenge the dominant narrative that Gascon J.'s experience at the Court reflects unqualified progress in Canadian attitudes towards disability; and (2) to set the stage for demonstrating how these attitudes towards disability are not only *politically* relevant, but *legally* as well. Indeed, the dynamic of accommodation between the Court (an "employer") and its judges ("employees"), can be seen as an ideological microcosm of the Court's

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[10] Joseph Shapiro, *No Pity: People with Disabilities Forging a New Civil Rights Movement* (New York: Three Rivers Press, 1993), at 12, 16 (emphasis added) [hereinafter "Shapiro"].

[11] Another Supreme Court Justice—William Stevenson—is reported to have resigned due to reasons relating to disability, with "little sympathy" from the Court. See Sean Fine, "Supreme Court Justice Gascon releases a statement on his health after his disappearance", *The Globe and Mail* (May 14, 2019), online: <https://www.theglobeandmail.com/canada/article-supreme-court-justice-gascon-releases-statement-on-his-health-after/>. But I limit my discussion to Le Dain and Gascon JJ. because of certain specific parallels I draw out in the chapter.

[12] See, *e.g.*, Linton, at 112.

[13] As Simi Linton explains: "I had gotten to this place not by denying my disability or, implausibly, 'overcoming' it, but by sailing headlong into it. Making sense of it had become the most meaningful thing I could do." Linton, at 120. And as McLachlin and L'Heureux-Dubé JJ. have opined, it is "inevitable and appropriate that the differing experiences of judges assist them in their decision-making process". See *R. v. S. (R.D.)*, [1997] S.C.J. No. 84, [1997] 3 S.C.R. 484, at 501 (S.C.C.).

[14] As Simi Linton writes:

> I always tried to appear upbeat; I guess I was trying to convince people that disability is no big deal. Also, I learned that if I said out loud that I was angry that there was only one bathroom I could use, or that I had a class scheduled in an inaccessible location, people would look sad and say things like: "Oh, that must be so hard," "Oh, how terrible, you must feel awful." But it was more complicated than that. They felt sorry, I felt angry.

Linton, at 27.

jurisprudence of disability rights in the employment law setting.

1. Justice Gerald Le Dain (1988)

In 1988, Le Dain J. was diagnosed with depression. Out of concern for his mental health, Cynthia Le Dain (his wife) asked Brian Dickson C.J.C. if Le Dain J. could have a "short reprieve".[15] And Dickson C.J.C.—hailed as a progressive jurist who "pushed our [anti-discrimination] law significantly forward" and displayed "remarkable empathy for victims of discrimination"[16]—forced Le Dain J. off the Court within weeks of discovering his disability.[17]

The consequences for Le Dain J. were dire. The severity of his symptoms intensified and his condition "rapidly became almost critical",[18] eventually resulting in his hospitalization.[19] In the words of one former law clerk, Le Dain J.'s treatment was "appallingly discriminatory".[20] In his daughter's words: "It was devastating to him. His identity — his life, in a sense, had been taken away from him."[21] And in his own words, to his family: "I have let you all down."[22] Le Dain J. retired at

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[15] Bonnie Brown, "One Judge Down", *CBC News* (January 12, 2018), online: <https://www.cbc.ca/radio/sunday/the-sunday-edition-january-14-2018-1.4471379/he-didn-t-have-a-choice-how-depression-cost-gerald-le-dain-his-supreme-court-post-1.4471385>. Though it is said in Dickson C.J.C.'s biography that, to the contrary, Le Dain J.'s recovery "would be slow at best". See Robert Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press, 2003), at 431.

[16] Robert J. Sharpe, "The Constitutional Legacy of Chief Justice Brian Dickson" (2000) 38:1 Osgoode Hall L.J. 189, at 207-209.

[17] Bonnie Brown, "One Judge Down", *CBC News* (January 12, 2018), online: <https://www.cbc.ca/radio/sunday/the-sunday-edition-january-14-2018-1.4471379/he-didn-t-have-a-choice-how-depression-cost-gerald-le-dain-his-supreme-court-post-1.4471385>. Technically, Dickson C.J.C. did not have the legal authority to remove Le Dain J. from the bench (see *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 9). But given Le Dain J.'s vulnerable state, I consider it appropriate to refer to such a circumstance as a "forced" resignation.

[18] Bonnie Brown, "One Judge Down", *CBC News* (January 12, 2018), online: <https://www.cbc.ca/radio/sunday/the-sunday-edition-january-14-2018-1.4471379/he-didn-t-have-a-choice-how-depression-cost-gerald-le-dain-his-supreme-court-post-1.4471385>.

[19] Bonnie Brown, "One Judge Down", *CBC News* (January 12, 2018), online: <https://www.cbc.ca/radio/sunday/the-sunday-edition-january-14-2018-1.4471379/he-didn-t-have-a-choice-how-depression-cost-gerald-le-dain-his-supreme-court-post-1.4471385>.

[20] Sean Fine, "Supreme Court Justice Gascon releases a statement on his health after his disappearance", *The Globe and Mail* (May 14, 2019), online: <https://www.theglobeandmail.com/canada/article-supreme-court-justice-gascon-releases-statement-on-his-health-after/>.

[21] Bonnie Brown, "One Judge Down", *CBC News* (January 12, 2018), online: <https://www.cbc.ca/radio/sunday/the-sunday-edition-january-14-2018-1.4471379/he-didn-t-have-a-choice-how-depression-cost-gerald-le-dain-his-supreme-court-post-1.4471385>.

[22] Bonnie Brown, "One Judge Down", *CBC News* (January 12, 2018), online: <https://www.cbc.ca/radio/sunday/the-sunday-edition-january-14-2018-1.4471379/he-didn-t-have-a- choice-

sixty-three, with twelve more years of eligibility remaining at the Supreme Court of Canada.[23]

Justice Le Dain "was one of Canada's most conscientious and respected jurists".[24] Indeed, his career included being a lawyer, a law professor at McGill, a law dean at Osgoode Hall, and a Federal Court of Appeal judge, where he served for nine years before his elevation to the Supreme Court of Canada.[25] Despite all this, however, the request for Le Dain J.'s accommodation was, seemingly, inconceivable in the eyes of our nation's highest judicial officer.

In one sense, Dickson C.J.C. was concerned with the Court's *operations*—namely, a backlog of cases in respect of which the Court "simply could not afford to wait"[26] (a Court, I would add, of nine judges who not infrequently sit on panels of seven, or even five—and a Court which, after the *Nadon Reference*,[27] was limited to eight judges for almost a year[28]). But according to one of Le Dain J.'s law clerks (Richard Janda, now a professor at McGill Law), Dickson C.J.C. was also concerned with *optics*—namely, how public awareness of a disabled Supreme Court justice might impact the Court's reputation.[29] Indeed, this concern rose to such heights that Le Dain J. was designated as having taken "no part in the judgment" in the landmark

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how-depression-cost-gerald-le-dain-his-supreme-court-post-1.4471385>, at 2m:58s.

[23] *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 9(2).

[24] "Justices Gerald Le Dain and Clément Gascon both suffered from depression. But the similarities end there", *CBC News* (May 17, 2019), online: <https://www.cbc.ca/radio/sunday/the-sunday-edition-for-may-19-2019-1.5140027/justices-gerald-le-dain-and-cl%C3%A9ment-gascon-both-suffered-from-depression-but-the-similarities-end-there-1.5140048>.

[25] Bonnie Brown, "One Judge Down", *CBC News* (January 12, 2018), online: <https://www.cbc.ca/radio/sunday/the-sunday-edition-january-14-2018-1.4471379/he-didn-t-have-a-choice-how-depression-cost-gerald-le-dain-his-supreme-court-post-1.4471385>.

[26] Bonnie Brown, "One Judge Down", *CBC News* (January 12, 2018), online: <https://www.cbc.ca/radio/sunday/the-sunday-edition-january-14-2018-1.4471379/he-didn-t-have-a-choice-how-depression-cost-gerald-le-dain-his-supreme-court-post-1.4471385>.

[27] *Reference re Supreme Court Act, ss. 5 and 6*, [2014] S.C.J. No. 21, 2014 SCC 21 (S.C.C.).

[28] Sean Fine, "Supreme Court Justice Gascon releases a statement on his health after his disappearance", *The Globe and Mail* (May 14, 2019), online: <https://www.theglobeandmail.com/canada/article-supreme-court-justice-gascon-releases-statement-on-his-health-after/>. Though the Court was said to be under a particularly demanding workload at the time of Le Dain J.'s depression. See Kira Makin, "A rare view into 1980s top court", *The Globe and Mail* (December 4, 2004), online: <https://www.theglobeandmail.com/news/national/a-rare-view-into-1980s-top-court/article18438961/>.

[29] Bonnie Brown, "One Judge Down", *CBC News* (January 12, 2018), online: <https://www.cbc.ca/radio/sunday/the-sunday-edition-january-14-2018-1.4471379/he-didn-t-have-a-choice-how-depression-cost-gerald-le-dain-his-supreme-court-post-1.4471385>.

decision *Ford v. Quebec*,[30] despite the reasons being, according to Professor Janda, "based almost entirely on Le Dain's draft".[31] This is significant. Chief Justice Dickson took no issue with *privately using* the product of Le Dain J.'s research, analysis and labour, but objected to *public knowledge* of that use. In other words, while Dickson C.J.C.'s apparent motivation was preserving the Court's reputation, a collateral consequence included actively maintaining the ableist myth that mental disability is somehow incompatible with the judicial office. Why not, instead, recognize the fact of Le Dain J.'s contribution, and thus, dispel the myth? To conceal that fact is not only ableist, but a lie.[32]

There is a bitter irony in Le Dain J.'s career. Despite his many accolades, he is perhaps best known for his work as the chair of the Commission of Inquiry into the Non-Medical Use of Drugs in the 1970s[33]—a commission which, in 1972, recommended treating drug addiction as a health issue rather than a crime.[34] This was a prescient recommendation. Indeed, in 2021—almost 50 years later—the Canadian government's latest proposed drug legislation is explicitly framed in these terms.[35] And so, an early advocate for drug policy consistent with disability justice was himself one of the most high-profile victims of disability discrimination in Canadian history, based on pressure exerted by one of Canada's most celebrated progressive jurists.

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[30] *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712 (S.C.C.).

[31] Bonnie Brown, "One Judge Down", *CBC News* (January 12, 2018), online: <https://www.cbc.ca/radio/sunday/the-sunday-edition-january-14-2018-1.4471379/he-didn-t-have-a-choice-how-depression-cost-gerald-le-dain-his-supreme-court-post-1.4471385>. Though Dickson C.J.C.'s biography provides, to the contrary, that "Le Dain's draft provided the basic elements of the judgment, but much work remained" : Robert Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press, 2003), at 432.

[32] "Justices Gerald Le Dain and Clément Gascon both suffered from depression. But the similarities end there", *CBC News* (May 17, 2019), online: <https://www.cbc.ca/radio/sunday/the-sunday-edition-for-may-19-2019-1.5140027/justices-gerald-le-dain-and-cl%C3%A9ment-gascon-both-suffered-from-depression-but-the-similarities-end-there-1.5140048>.

[33] Bonnie Brown, "One Judge Down", *CBC News* (January 12, 2018), online: <https://www.cbc.ca/radio/sunday/the-sunday-edition-january-14-2018-1.4471379/he-didn-t-have-a-choice-how-depression-cost-gerald-le-dain-his-supreme-court-post-1.4471385>.

[34] *Final Report of the Commission of Inquiry into the Non-medical Use of Drugs* (Ottawa: Health Canada, 1973) (Gerald Le Dain), online: <https://publications.gc.ca/site/eng/9.699765/publication.html>. See also Bonnie Brown, "One Judge Down", *CBC News* (January 12, 2018), online: <https://www.cbc.ca/radio/sunday/the-sunday-edition-january-14-2018-1.4471379/he-didn-t-have-a-choice-how-depression-cost-gerald-le-dain-his-supreme-court-post-1.4471385>.

[35] Bill C-22, *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, 2nd Sess., 43rd Parl., 2021, s. 20 amending s. 10.1(a) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 ("problematic substance use should be addressed primarily as a health and social issue").

Le Dain J. died in 2007, without ever speaking publicly about the circumstances behind his premature "resignation".[36]

2. Justice Clément Gascon (2019)

The disability story of Gascon J. was, unlike Le Dain J.'s, widely publicized. I was studying at Maxx Café near Columbia Law School on May 8, 2019 when I first read the police report: Gascon J.—for whom I had recently completed two clerkships—was missing.[37] In an hour that felt like an eternity, I frantically refreshed my Twitter feed anxiously awaiting an update. And then a further police report: he was safely found. My heart rate gradually subsided as I breathed an immense sigh of relief. But what had happened?

On May 14, Gascon J.—who, as a Supreme Court justice, felt it "incumbent . . . to offer certain explanations"[38]—issued a public statement explaining what transpired, and by necessity, disclosing his disability:

> For over twenty years, I have been dealing with a sometimes insidious illness: depression and anxiety disorders. This is an illness that can be treated and controlled, some days better than others. On the afternoon of Wednesday, May 8, affected both by the recent announcement of a difficult and heart-rending career decision and by a change in medication, I conducted myself in an unprecedented and unaccustomed manner by going out without warning and remaining out of touch for several hours. I can neither explain nor justify what I understand to have been a panic attack, and I wish to apologize most profusely to all those who suffered as a result. This health issue has been taken care of and treated with the necessary medical support. I confirm that I am in good health, and am fully capable of performing my duties as a judge.[39]

The response from the Court was unreservedly supportive. In the words of Richard Wagner C.J.C.:

> The statement made by Justice Gascon earlier today takes courage. My colleagues and I are very proud of Justice Gascon, and he has my full support and confidence. I look forward to seeing him back on the bench this week.[40]

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[36] Bonnie Brown, "One Judge Down", *CBC News* (January 12, 2018), online: <https://www.cbc.ca/radio/sunday/the-sunday-edition-january-14-2018-1.4471379/he-didn-t-have-a-choice-how-depression-cost-gerald-le-dain-his-supreme-court-post-1.4471385>.

[37] "Ottawa police looking for missing Supreme Court Justice Gascon, family concerned", *660 News* (May 8, 2019), online: <https://www.660citynews.com/2019/05/08/ottawa-police-looking-for-missing-supreme-court-justice-gascon-family-concerned-2/>.

[38] Supreme Court of Canada, Press Release (May 14, 2019), online: <https://decisions.scc-csc.ca/scc-csc/news/en/item/6595/index.do>.

[39] Supreme Court of Canada, Press Release (May 14, 2019), online: <https://decisions.scc-csc.ca/scc-csc/news/en/item/6595/index.do>.

[40] Sean Fine, "Supreme Court Justice Gascon releases a statement on his health after his disappearance", *The Globe and Mail* (May 14, 2019), online: <https://www.theglobeandmail.

In contrast with Dickson C.J.C.'s treatment of Le Dain J., Wagner C.J.C.'s backing was, of course, a welcome shift in response. Indeed, commentators specifically noted the "stark contrast"[41] in the Court's institutional responses 31 years apart, calling it a "dramatic" shift and a "watershed moment".[42]

That said, I also noticed ableist speculation at the time about Gascon J.'s mental health episode and retirement from the Court. Some noted, while commenting on Gascon J.'s disappearance, that "judges face huge pressures",[43] seemingly implying that this episode related to the demands of Gascon J.'s work. Yet, as he explained in his public statement, his disappearance was *not* a consequence of a stressful workload.[44] Indeed, Gascon J.—a former commercial law partner—was no stranger to heavy workloads. Rather, his disappearance was caused by a panic attack induced by a change in medication and his recent "heart-rending" decision to leave the Court,[45] a decision over which he described himself as being "in mourning".[46] Likewise, some speculated that his retirement related to disability.[47] But this too reflects ableist speculation. When announcing his retirement *three weeks before* his disappearance,[48] Gascon J. cited "personal and family reasons".[49] And to assume

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com/canada/article-supreme-court-justice-gascon-releases-statement-on-his-health-after/>.

[41] "Justices Gerald Le Dain and Clément Gascon both suffered from depression. But the similarities end there", *CBC News* (May 17, 2019), online: <https://www.cbc.ca/radio/sunday/the-sunday-edition-for-may-19-2019-1.5140027/justices-gerald-le-dain-and-cl%C3%A9ment-gascon-both-suffered-from-depression-but-the-similarities-end-there-1.5140048>.

[42] Sean Fine, "Supreme Court Justice Gascon releases a statement on his health after his disappearance", *The Globe and Mail* (May 14, 2019), online: <https://www.theglobeandmail.com/canada/article-supreme-court-justice-gascon-releases-statement-on-his-health-after/>.

[43] Sean Fine, "Supreme Court Justice Gascon releases a statement on his health after his disappearance", *The Globe and Mail* (May 14, 2019), online: <https://www.theglobeandmail.com/canada/article-supreme-court-justice-gascon-releases-statement-on-his-health-after/>.

[44] Supreme Court of Canada, Press Release (May 14, 2019), online: <https://decisions.scc-csc.ca/scc-csc/news/en/item/6595/index.do>: "On the afternoon of Wednesday, May 8, *affected both by the recent announcement of a difficult and heart-rending career decision and by a change in medication*, I conducted myself in an unprecedented and unaccustomed manner by going out without warning and remaining out of touch for several hours" (emphasis added).

[45] Supreme Court of Canada, Press Release (May 14, 2019), online: <https://decisions.scc-csc.ca/scc-csc/news/en/item/6595/index.do>.

[46] Cristin Schmitz, "SCC's Gascon encourages lawyers and judges to talk openly about anxiety, depression", *The Lawyer's Daily* (October 22, 2019), online: <https://www.thelawyersdaily.ca/articles/16078/scc-s-gascon-encourages-lawyers-and-judges-to-talk-openly-about-anxiety-depression>.

[47] This speculation was, for example, volunteered to me and other friends I have discussed the controversy with.

[48] "Supreme Court of Canada's Clement Gascon stepping down for family reasons", *The Globe and Mail* (April 15, 2019), online: <https://www.theglobeandmail.com/canada/article-

that personal and family reasons *means* reasons related to his disability is ableist. Myriad alternate explanations exist that do not depend on presupposing that Gascon J.'s disability impaired his judicial capacity. Worse, this ableist explanation not only distorts, but inverts Gascon J.'s stated explanation: he said disappointment about leaving the Court (alongside a change in medication) precipitated his anxiety attack, yet these speculators claimed just the opposite—that it was his anxiety that precipitated his departure from the Court. All this speculation, in my view, reflects a pernicious tendency of nondisabled people hypothesized long ago by disability rights advocate Harlan Hahn: "a strong capacity to internalize the threat posed by a disability and to project those feelings onto a disabled individual".[50]

Given the above, I was—and remain—ambivalent with respect to the public discourse emerging from Gascon J.'s mental health episode. On one hand, it was genuinely heartening to see so much support from both the Court and the broader public for Gascon J. But at the same time, ableist narratives as to the incompatibility of the judicial office and disability were nevertheless present. Of course, anxiety and depression *can* negatively impact one's judicial performance. But that narrative was being *assumed* in this case, at times, in direct contradiction with Gascon J.'s express statements (as well as in contradiction with how, for example, anxiety can, depending on the metrics chosen, *improve* one's legal work[51]). It is, more specifically, the cultural resonance of the assumed link between Gascon J.'s disability, his workload, and his departure from the Court, that I am calling ableist.

In any event, Gascon J. has, since his retirement, been an active and passionate voice for mental health awareness in the legal profession. In his words: "The decision to speak so publicly about it is the decision that [he's] taken in [his] life as a judge that has provoked the most reactions by far... by far."[52] He joined a Quebec

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supreme-court-of-canadas-clement-gascon-stepping-down-for-family-2/>.

[49] "Supreme Court of Canada's Clement Gascon stepping down for family reasons", *The Globe and Mail* (April 15, 2019), online: <https://www.theglobeandmail.com/canada/article-supreme-court-of-canadas-clement-gascon-stepping-down-for-family-2/>.

[50] Harlan Hahn, "The Politics of Physical Differences: Disability and Discrimination" (1988) 44:1 J. of Social Issues 39, at 45.

[51] See, *e.g.*, Clément Gascon, "Shedding the Stigma" (Spring 2020) The Advocates' J. 30, at 33; Amanda Steger, "Mental Health in the Legal Profession – Views from the Bench" (February 6, 2020), *Health Law Matters* (blog), online: <https://healthlawmatters.squarespace.com/home/2020/2/6/mental-health-in-the-legal-profession-views-from-the-bench>.

[52] Cristin Schmitz, "SCC's Gascon encourages lawyers and judges to talk openly about anxiety, depression" *The Lawyer's Daily* (October 22, 2019), online: <https://www.thelawyersdaily.ca/articles/16078/scc-s-gascon-encourages-lawyers-and-judges-to-talk-openly-about-anxiety-depression>. See also Clément Gascon, "Shedding the Stigma" (Spring 2020) The Advocates' J. 30, at 30:

> Throughout my 17-year career as a judge, I have rendered or participated in hundreds of decisions. The decision that I have heard the most about and that, by far, gave rise to the

bar working group concerning mental health awareness[53] and has delivered multiple remarks to the bar on "shedding the stigma" linked to disability.[54] In this respect, Gascon J.'s disability justice advocacy is not limited to anxiety and depression. To the contrary, he is generating awareness around the under-explored addiction to work[55] that pervades what we often interpret as "high performance" in the law.[56] At his appointment ceremony in 2014, Gascon J. shared an anecdote about his wife:

> Marie-Michelle often says that I am a hopeless workaholic. She suggested that appointing me to the Supreme Court was like appointing an alcoholic president of the [Liquor and Control Board of Ontario].[57]

But in 2020, Gascon J. revisited this comment in oral remarks to The Advocates' Society:

> [L]et's be honest: being a workaholic is not a virtue; it is an addiction. And, as with all addictions, it has to be taken care of, failing which it can lead to bigger

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> greatest number of reactions, comments and confidences from the legal community, namely from lawyers and fellow judges—and from others as well—is my decision to say publicly, on May 14, that I have been dealing with chronic anxiety and depression for more than 20 years.

[53] Cristin Schmitz, "SCC's Gascon encourages lawyers and judges to talk openly about anxiety, depression" *The Lawyer's Daily* (October 22, 2019), online: <https://www.thelawyersdaily.ca/articles/16078/scc-s-gascon-encourages-lawyers-and-judges-to-talk-openly-about-anxiety-depressionhttps://www.thelawyersdaily.ca/articles/16078/scc-s-gascon-encourages-lawyers-and-judges-to-talk-openly-about-anxiety-depression>.

[54] See, *e.g.*, Clément Gascon, "Shedding the Stigma" (Spring 2020) The Advocates' J. 30; Amanda Steger, "Mental Health in the Legal Profession – Views from the Bench" (February 6, 2020), *Health Law Matters* (blog), online: <https://healthlawmatters.squarespace.com/home/2020/2/6/mental-health-in-the-legal-profession-views-from-the-bench>.

[55] While it is beyond the scope of this paper, I acknowledge that the idea of addiction to work (or, workaholism) is contested (see, *e.g.*, Mara Tyler, "Work Addiction" (December 19, 2017), *Healthline* (blog), online: <https://www.healthline.com/health/addiction/work>; Mark Griffiths, "Is 'Workaholism' Really a Genuine Addiction?" (November 4, 2019), *American Addiction Centres* (blog), online: <https://rehabs.com/pro-talk/is-workaholism-really-a-genuine-addiction/https://rehabs.com/pro-talk/is-workaholism-really-a-genuine-addiction/>). Further, I note that, though characterizing certain modes of over-work as an addiction may reveal certain important dynamics (*e.g.*, one's tendency or desire to be busy, despite interpersonal consequences), it can also obscure others (*e.g.*, financial pressure).

[56] See, *e.g.*, Erin Durant, "How to Better Support a High Performing Workforce and Yourself During the Pandemic" (February 21, 2021), *LinkedIn* (blog), online: <https://www.linkedin.com/pulse/how-better-support-high-performing-workforce-yourself-erin-durant/>; Eilene Zimmerman, "The Lawyer, the Addict", *The New York Times* (July 15, 2017), online <https://www.nytimes.com/2017/07/15/business/lawyers-addiction-mental-health.html>.

[57] "Webcast of the Ceremony in Honour of the Honourable Clément Gascon" (October 6, 2014), at 56m:38s, online (video): *Supreme Court of Canada* <https://www.scc-csc.ca/judges-juges/webcast-webdiffusion-ceremonies-clement-gascon-eng.aspx>.

problems.[58]

In this way, Gascon J. is not only shining much-needed light on anxiety and depression in the legal profession; he is also challenging the pernicious expectations that pervade our professional and institutional culture.

3. *Plus ça change, plus c'est la même chose*: From Poster Child to Supercrip

> The "supercrip" is the flip side of the pitiable poster child. It is just as hurtful . . . because it implies that a disabled person is presumed deserving of pity—instead of respect—until he or she proves capable of overcoming a physical or mental limitation through extraordinary feats.[59]

The public discourse surrounding the Le Dain/Gascon disability controversies centres on the progress made in the last thirty years.[60] Le Dain was *immediately and silently* pressured off the Court, whereas Gascon was *publicly supported* by his colleagues and the broader public. I agree that this shift in reception reflects a sort of progress. But I do not think it reflects a categorical pivot from an ableist to non-ableist lens. Rather, I believe this shift is characterized more accurately as a reconfiguration to a lens that nevertheless continues to be ableist, and thus, continues to warrant scrutiny—an analogue of what Reva Siegel labels "preservation-through-transformation",[61] but in the context of ableist discourse.[62]

As the introductory quote for this section explains, ableism is not singular in its representation of disability. Instead, ableism constructs a variety of harmful narratives in which disability remains legible as a taxonomy of hierarchical difference. To be clear, not all narratives are equivalent in the harms they cause for disabled people. But being alert to the multiplicity of ableist narratives better equips

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[58] Clément Gascon, "Shedding the Stigma" (Spring 2020) The Advocates' J. 30, at 33.

[59] Shapiro, at 16.

[60] "Justices Gerald Le Dain and Clément Gascon both suffered from depression. But the similarities end there", *CBC News* (May 17, 2019), online: <https://www.cbc.ca/radio/sunday/the-sunday-edition-for-may-19-2019-1.5140027/justices-gerald-le-dain-and-cl%C3%A9ment-gascon-both-suffered-from-depression-but-the-similarities-end-there-1.5140048>; Sean Fine, "Supreme Court Justice Gascon releases a statement on his health after his disappearance", *The Globe and Mail* (May 14, 2019), online: <https://www.theglobeandmail.com/canada/article-supreme-court-justice-gascon-releases-statement-on-his-health-after/>.

[61] Reva B. Siegel, "'The Rule of Love': Wife Beating as Prerogative and Privacy" (1996) 105 Yale L.J. 2117, at 2178-2187.

[62] While Shapiro's description of the "poster child" and "supercrip" dates to 1993, the persisting resonance of his analysis of "pity" is reflected in how contemporary scholars continue to draw on his work when discussing the dominant images of disability. See, *e.g.*, Samuel R. Bagenstos, "Disability Rights and the Discourse of Justice" (2020) 73 S.M.U. L. Rev. F. 26, at 32, n 27; Jasmine E. Harris, "The Frailty of Disability Rights" (2020-2021) 169 U. Pa. L. Rev. Online 29, at 47, n 73; Yaron Covo, "Gambling on Disability Rights" (2020) 43:2 Colum. J.L. & Arts 237, at 293, n 323.

us for critically scrutinizing how ableism "evolves in form as it is contested".[63]

Justice Le Dain's disability narrative engages the "pitiable poster child".[64] The poster child "tug[s] at our hearts"[65] to generate a particular mode of sympathy for disabled people contingent on the "pity" of their misfortune and the urgency of curing them to ensure a certain brand of societal "progress".[66]

But how can Le Dain J.—a disabled *adult*—reflect the narrative of a poster *child*? And in what way is his story one reflecting *sympathy*—as I signalled in the introduction—when he was treated so mercilessly? The explanation comes not from the reality of who Le Dain J. was, but rather the fiction that reality disrupted. As Joseph Shapiro explains: "There were never poster adults."[67] Indeed, under the poster child narrative, disability is "unmentionable in adults" precisely because disabled adults complicate the benevolent paternalism animating the poster child script[68]—and who could disrupt that script more emphatically than Le Dain J., the antithesis of how society conceptualizes disability: an esteemed lawyer, commission chair, law professor, law dean, and Supreme Court justice. When Dickson C.J.C. cited concerns about the Court's "reputation" if Le Dain J.'s condition were made public, I would argue that Dickson C.J.C.'s material concern, more precisely, was about shocking the ableist national conscience, which "seems to proclaim that the only socially acceptable status of disabled people is their early childhood",[69] and certainly not on our highest court. To locate *disability* in what is perceived to be the pinnacle of *ability*, would trigger the "existential anxiety" theorized by Hahn[70]—the othering of disabled people as inferior is not only disrupted, but inverted, when they occupy positions of power and influence. Viewed through this lens, Le Dain J.'s story—one of grave mistreatment—nevertheless distills to a mode of sympathy because the basis for his mistreatment was the seeming necessity of maintaining the misfortune of his condition.

Justice Gascon's disability narrative, in contrast, gestures at the "supercrip". The supercrip can be understood as the inverse of the poster child; whereas the poster child is *ordinary* in *succumbing* to disadvantage, the supercrip is *extraordinary* in

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[63] Reva Siegel, "Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action" (1997) 49:5 Stan. L. Rev. 1111, at 1113.

[64] Shapiro, at 16.

[65] Shapiro, at 12.

[66] Shapiro, at 15.

[67] Shapiro, at 15.

[68] Shapiro, at 15.

[69] Shapiro, at 22, citing Evan Kemp Jr., "Aiding the Disabled: Not Pity, Please", *The New York Times* (September 3, 1981), online <https://www.nytimes.com/1981/09/03/opinion/aiding-the-disabled-no-pity-please.html>.

[70] Harlan Hahn, "The Politics of Physical Differences: Disability and Discrimination" (1988) 44:1 J. of Social Issues 39, at 43-44.

overcoming it.[71] To be clear, Gascon J. *is* an inspiration, to me and many others. But, to be frank, he inspired me long before any disclosure of disability, with his rigour, kindness and integrity. What the "supercrip" image produces, however, is the same set of "paternalistic assumptions"[72] as the poster child. That someone may rarely "overcome" a presumed-to-be-debilitating disability does not displace the ableist norm; rather, it paradoxically reinforces ableist norms by strictly dichotomizing legible disabled scripts as "either an object of pity or a source of inspiration".[73] Specifically, the pity/inspiration dichotomy reifies ableist logics by: (1) obstructing "normal interaction between nondisabled and disabled people"[74] (with disabled people's individuality being pre-ordained); and (2) locating the success of disabled people in their individual characteristics (*e.g.*, will and resilience), rather than in the structural conditions (*e.g.*, resources and support) that shape their lives.[75]

Fundamentally, Le Dain J.'s sympathy and Gascon J.'s awe both, in distinct ways, fail to disrupt society's "fear" of disability. In Shapiro's words:

> Fear, disabled people understand, is the strongest feeling they elicit from nondisabled people. Fear underlies compassion for the poster child and celebration of the supercrip. . . . The disabled serve as constant, visible reminders to the able-bodied that the society they live in is a counterfeit paradise, that they too are vulnerable. We represent a fearsome possibility. So society shields itself from this fearsome possibility by distancing disabled people and treating them as social inferiors.[76]

Justice Gascon's public engagement on disability is, to be clear, worthy of much celebration. But this is not because of his accomplishments *despite* disability (as the supercrip image conveys), but rather, *independent of* or perhaps even *because of* his disability.[77] I clerked with Gascon J. for two years. And I was astonished at the similarities between my experience working in his chambers, and the experience

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[71] Shapiro, at 16.

[72] Shapiro, at 19.

[73] Shapiro, at 30. See also Linton, at 197-198 for additional critique and analysis of disability "inspiration".

[74] Shapiro, at 18.

[75] Shapiro, at 19-20.

[76] Shapiro, at 38 [internal quotations to Robert F. Murphy, *The Body Silent: The Different World of the Disabled* (New York: W. W. Norton and Company, 2001) removed]. See also Harlan Hahn, "The Politics of Physical Differences: Disability and Discrimination" (1988) 44:1 J. of Social Issues 39, at 43: "Probably the most common threat from disabled individuals is summed up in the concept of existential anxiety: the perceived threat that a disability could interfere with functional capacities deemed necessary to the pursuit of a satisfactory life."

[77] Relatedly, see Simi Linton's commentary on Homer Avila, a one-legged dancer: "He found something in his body that I saw when I first met him, that it was an interesting-looking body and one that moved well. Not moved well 'despite' its limitations, but a body that had something to say." Linton, at 211.

described by those who had worked with Le Dain J., who likewise had anxiety and depression. Hard work. Compassion. Empathy.[78] While listening to a documentary on Le Dain J., it almost felt as if I were in a parallel universe listening to a documentary on Gascon J. The crucial anti-ableist insight from the Le Dain and Gascon JJ. controversies, I would argue, is not that a select few jurists may overcome anxiety and depression, but rather, that we must abandon the idea that anxiety and depression are incompatible with the judicial office in the first place. Further, that disability should be represented in the judiciary is only more compelling when it is "inevitable and appropriate that the differing experiences of judges assist them in their decision-making process"[79] and when disability provides a rich set of experiences for judges to draw from. As I will now explain, it may be precisely these experiences that shaped Gascon J.'s progressive insights with respect to disability discrimination in his own jurisprudential legacy. This is, I suggest, where his embodied and jurisprudential legacies may collide.

III. MAJORITARIAN "BLIND" SPOT: DISABILITY LAW AT THE SUPREME COURT OF CANADA

Two years before his panic attack, Gascon J. had already left his disability justice mark at the Court jurisprudentially. His lone dissent in *Stewart v. Elk Valley Coal Corp.*[80] was lauded by various legal scholars.[81] And according to one scholar, that

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[78] Bonnie Brown, "One Judge Down", *CBC News* (January 12, 2018), online: <https://www.cbc.ca/radio/sunday/the-sunday-edition-january-14-2018-1.4471379/he-didn-t-have-a-choice-how-depression-cost-gerald-le-dain-his-supreme-court-post-1.4471385> at 1m:46s ("Just the level of insight, the level of rigor, and the level of humanity that he brought to every judgment that he wrote or participated in, to me, are . . . timeless virtues").

[79] *R. v. S. (R.D.)*, [1997] S.C.J. No. 84, [1997] 3 S.C.R. 484, at 501 (S.C.C.) (per McLachlin and L'Heureux-Dubé JJ.).

[80] *Stewart.*

[81] See, *e.g.*, Jennifer Koshan, "'Majoritarian Blind Spot'? Drug Dependence and the Protection Against Employment Discrimination" (June 20, 2017), ABlawg (blog), online: <http://ablawg.ca/wp-content/uploads/2017/06/Blog_JK_Stewart.pdf>, at 1 ("I find Justice Gascon's decision most persuasive and most in keeping with a broad, generous approach to interpreting human rights legislation."); Brandyn Rodgerson, "The Lone Dissenting Voice: How the *Stewart* Dissent Shaped Canadian Discrimination Law" (2021) 103 S.C.L.R. (2d) at 169 ("Gascon J., writing for himself, wrote an impassioned, articulate and convincing dissent"); Jon Soltys & Daniel W. Dylan, "Accommodating the Unknown: Balancing Employee Human Rights with the Employer Duty to Ensure Safety: A Dialogue on *Stewart v Elk Valley* and the *Cannabis Act*" (2020) 9:1 Can. J. Hum. Rts. 57, at 71 ("We largely agree with Justice Gascon's analysis of the Tribunal's decision in *Stewart*"); Nadia Pronych, *Stewart v. Elk Valley Coal Corp.: The Rehabilitation of Addiction Disability Law in Canada* (LLM Thesis, University of Western Ontario, 2020), online: *Electronic Thesis and Dissertation Repository* 7437 <https://ir.lib.uwo.ca/etd/7437>, at 159 ("Justice Gascon's reasoning is most in line with the law on discrimination and reasonable accommodation, human rights principles and a broad, generous approach to interpreting human rights legislation"); Faisal

dissent, by virtue of its uptake in subsequent legal decisions, "has changed the landscape of addiction law".[82]

For context, I first summarize the majority, concurring and dissenting opinions in *Stewart*. Second, I conduct a critical disability theory analysis. I begin by outlining characteristic arguments and commitments in critical disability theory. Then, I draw on those arguments and commitments to critique the three opinions in *Stewart*. That critique highlights the ways in which Gascon J.'s dissent thoughtfully engaged with the nuances of disability injustice, and suggests that his insights may be linked to his personal experience with disability[83]—a fact supportive of ensuring that calls for judicial diversity account not only for race, gender, sexuality and class, but disability as well.[84]

1. The Majority, Concurrence and Dissent in *Stewart*

Stewart is the latest Supreme Court precedent on disability discrimination. It concerned the legality of a "no free accident" policy at a coal mine of the Respondent, Elk Valley. Specifically, the policy—as implemented, not as

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Bhabha, "Stewart v. Elk Valley: The Case of the Cocaine-Using Coal Miner" (Paper delivered at the OBA Institute 2018: Exploring the Evolving Definition of Disability and Evidence to Support It, February 6, 2018), online: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1330&context=all_papers>; Nora Parker, "Judicial Biography: Justice Clément Gascon" (October 12, 2019), *The Court* (blog), online: <http://www.thecourt.ca/justiceclementgascon/>:

> Justice Gascon, in this decision, pierces through the logical inconsistencies and legal errors of the Tribunal, the lower courts, and his colleagues on the Court. He defends the rights of marginalized individuals that ought to fall within the scope of the *Act*. As one commentator wrote, "Justice Clément Gascon of the Supreme Court of Canada just did something startling, and excellent. He wrote a dissent in *Stewart v. Elk Valley Coal Corp.* that drives some truck-size holes through a sloppy majority decision from Chief Justice McLachlin. Too bad he stands alone, but he certainly stands out. And his decision is a relief."

[82] Nadia Pronych, *Stewart v. Elk Valley Coal Corp.: The Rehabilitation of Addiction Disability Law in Canada* (LLM Thesis, University of Western Ontario, 2020), online: *Electronic Thesis and Dissertation Repository* 7437 <https://ir.lib.uwo.ca/etd/7437>, at 14. See also Brandyn Rodgerson, "The Lone Dissenting Voice: How the *Stewart* Dissent Shaped Canadian Discrimination Law" (2021) 103 S.C.L.R. (2d) at 169 ("Taken together, the trend of jurisprudence since the release of *Stewart* has channeled Gascon J.'s dissent, ensuring that irrelevant factors — like an addict's choice — do not taint the analysis").

[83] Though, to be clear, I am not purporting to be *certain* of Gascon J.'s judicial philosophy, or the various experiences or insights that inform his legal analysis. Rather, I am commenting on the alignment between his analysis in this case and CDT and wondering aloud about the implications this might have for judicial diversity.

[84] Indeed, disability is often an afterthought in "diversity" discussions, which compounds its political marginalization. See, *e.g.*, Linton, at 117.

written[85]—automatically terminated any employee (though with the opportunity to reapply after treatment) if they: (1) tested positive for drugs after an accident; and (2) failed to provide advance notice of their addiction, which would trigger access to a subsidized drug rehabilitation program.[86] The Appellant—Ian Stewart—was terminated under the policy because he had a non-fatal accident (breaking the mirror on a truck[87]), tested positive for cocaine[88] and never disclosed his cocaine addiction in advance. However, no one was hurt and there was no finding that Stewart was impaired at work,[89] only that he used cocaine on his days off.[90] Additionally, Stewart was ostensibly unaware he was disabled, itself a symptom of his disability, thereby foreclosing access to the advance notice provisions in the policy.[91] Before the Alberta Human Rights Commission (the "tribunal"), Stewart argued: (1) that the policy was *prima facie* discriminatory; and (2) that the policy could not be justified as providing reasonable accommodation for his disability.

The tribunal disagreed. It found that the policy was not *prima facie* discriminatory because Stewart was terminated for having drugs in his system at work, not because he was drug dependent—his drug *use*, not his drug *addiction*.[92] It also held, in the alternative, that if the policy were *prima facie* discriminatory, that it was nevertheless justified for preserving safety at the mine.[93]

The finding of no *prima facie* discrimination was upheld by the Alberta Court of Queen's Bench and a majority of the Alberta Court of Appeal. That said, the analysis across the various decisions differed markedly.[94] Further, the Court of Queen's Bench found, in the alternative, that if Elk Valley did *prima facie* discriminate against Stewart, it failed to justify that discrimination (because the advance notice

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[85] As described below, the policy actually required individual assessment of employees. But, in practice, this aspect of the policy was not followed.

[86] *Stewart*, at paras. 1, 10 (*per* McLachlin C.J.C.) and 60-61 (*per* Gascon J., dissenting but not on this point).

[87] *Bish v. Elk Valley Coal Corp.,* 74 CHRR 425, 2012 AHRC 7, at para. 8 (Alta. H.R.C.).

[88] *Stewart*, at para. 2.

[89] *Stewart*, at paras. 2 (*per* McLachlin C.J.C.) and 66 (*per* Gascon J., dissenting but not on this point).

[90] *Stewart*, at para. 2. For a case with similar—though not identical—facts in the American context, see *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003).

[91] *Stewart*, at para. 61.

[92] *Bish v. Elk Valley Coal Corp.*, 74 CHRR 425, 2012 AHRC 7, at para. 122 (Alta. H.R.C.). See also Faisal Bhabha, "Stewart v. Elk Valley: The Case of the Cocaine-Using Coal Miner" (Paper delivered at the OBA Institute 2018: Exploring the Evolving Definition of Disability and Evidence to Support It, February 6, 2018), online: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1330&context=all_papers> at 5.

[93] *Stewart*, at paras. 7-10.

[94] *Stewart*, at paras. 69-73.

provisions were inaccessible to him). Lastly, the Court of Appeal dissent disagreed with the tribunal on both issues; it found that the policy was *prima facie* discriminatory and that Elk Valley's inaccessible and harsh sanctions were unjustified in the circumstances.[95]

The further appeal to the Supreme Court of Canada distilled into two key issues under the *Human Rights, Citizenship, and Multiculturalism Act*:[96] one concerning *discrimination* (stage one of the analysis) and a second concerning *justification* (stage two of the analysis).

Regarding stage one, the Court was unanimous on the three-step test for *prima facie* discrimination (*i.e.*, a protected ground, harm and the protected ground contributing to that harm), the characterization of drug dependence as falling within the protected ground of disability (step 1) and the characterization of termination as a form of harm (step 2). Accordingly, the only disputed issue was whether Stewart's drug dependence contributed to his termination (step 3).

Regarding stage two, those judges who considered this stage— *i.e.*, the concurrence and dissent—were, likewise, unanimous that there was only one disputed issue, namely whether reasonable accommodation required some form of individual assessment in this case.[97] The majority did not reach stage two of the analysis, as it concluded its analysis at stage one.[98]

Having summarized the only disputed issues before the Court— *i.e.*, whether Stewart's addiction contributed to his termination and whether reasonable accommodation required individual assessment—I now summarize the analysis in each opinion.

The majority—written by McLachlin C.J.C. and representing six of the nine judges on the Court[99] —held that the tribunal reasonably found the policy not to be *prima facie* discriminatory. In her view, the tribunal's analysis— *i.e.*, that Stewart's drug dependence was not a factor in his breach of the drug policy—was sound.

The concurrence—written jointly by Moldaver J. and Wagner J. (as he then was)—disagreed. On issue one, they held that the tribunal's analysis was unsound because Stewart's *drug dependence* was inextricable from his *drug use* and thus his violation of the *drug policy*. It followed, in their view, that his dependence contributed to his termination, and thus, that his termination was *prima facie* discriminatory. However, on issue two they found that the tribunal appropriately concluded that Elk Valley's policy was justified in the circumstances. This was

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[95] *Stewart*, at para. 76.

[96] R.S.A. 2000, c. H-14; *Stewart*, at para. 3.

[97] *Stewart*, at paras. 52 (*per* Wagner and Moldaver JJ.), 124, 126 (*per* Gascon J.).

[98] *Stewart*, at para. 47.

[99] The judges who concurred with McLachlin C.J.C.'s majority opinion were Abella, Karakatsanis, Côté, Brown and Rowe JJ.

because: (1) the policy's stringency was required to deter dangerous behaviour in a "safety-sensitive environment";[100] and (2) the accommodations provided— *i.e.*, the opportunity to reapply for the position after successful subsidized rehabilitation— were sufficient.[101] In their view, the tribunal reasonably concluded that deviating from the "no free accident" policy would have imposed "undue hardship" on Elk Valley.[102]

Lastly, the dissent—written by Gascon J.—agreed with the concurrence on *prima facie* discrimination (stage one), but disagreed on justification (stage two). In particular, he held the tribunal's finding— *i.e.*, that Elk Valley reasonably accommodated Stewart—was unsound. This was because: (1) alternate strict sanctions— *e.g.*, a lengthy unpaid suspension—could provide sufficient deterrence and should have been considered alongside other sanctions in Stewart's individual circumstance;[103] and (2) the accommodations provided by Elk Valley were, in law, not accommodations at all. In his view, the mere opportunity to reapply was not properly understood as an *employment* accommodation since it existed outside the employment relationship.[104] Further, Gascon J. held that the advance notice provisions could not be understood as an accommodation *for Stewart* because he was in denial about his dependence, itself a symptom of his disability.[105]

Justice Gascon's dissent displays noteworthy compassion for the experience and condition of Stewart specifically and disabled people generally. For example, Gascon J. emphasizes Stewart's long and unblemished career at Elk Valley.[106] Moreover, Gascon J.'s reasons repeatedly highlight how "stigmas surrounding drug dependence . . . sometimes impair the ability of courts and society to objectively assess the merits of [disability] discrimination claims".[107] Indeed, he calls this a "majoritarian blind spot"[108] that "effectively excluded Mr. Stewart, a drug-

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[100] *Stewart*, at para. 55.

[101] *Stewart*, at para. 56.

[102] *Stewart*, at para. 55.

[103] *Stewart*, at para. 144. As he explained earlier in his reasons, "I fully appreciate the safety-sensitive environment at the workplace of Elk Valley, and how that environment motivates strict drug policies for employees. Nevertheless, such policies, even if well intentioned, are not immune from human rights scrutiny" (at para. 62).

[104] *Stewart*, at para. 139.

[105] *Stewart*, at paras. 134, 138. To provide disabled people with "accommodations" inaccessible to them by virtue of their disability is, of course, a Catch-22. This is a familiar dilemma for disabled people. See, *e.g.*, Linton, at 124; Shapiro, at 29.

[106] *Stewart*, at para. 64.

[107] *Stewart*, at para. 58.

[108] I discuss the ableist connotations of this metaphorical use of "blindness", below at 223–225.

dependent person, from the scope of human rights protections".[109] As I will now show through a critical disability theory analysis, Gascon J.'s divergence from the majority and concurring opinions is no mere intellectual disagreement; rather, it reflects a distinct ideological lens, which he brought to his critically informed analysis of disability and human rights.

2. Critical Disability Theory Analysis

To analyze the opinions in *Stewart* through the lens of critical disability theory, I first introduce the theory and then rely on its insights to identify the ideological undercurrents informing the courts' divisions. This, in turn, informs why disability diversity is legally and politically relevant to the composition of Canadian courts.

(a) Critical Disability Theory

Critical Disability Theory (CDT) is not monolithic. Nonetheless, it can be helpfully characterized by certain arguments and commitments. With that in mind, each of the points below is not *essential* to CDT scholarship, but is *typical* of it. I foreground these principles with some depth before discussing *Stewart* to prime the reader against internalized ableist bias that may influence their analysis of addiction. And as the citations below make clear, the insights that follow concerning CDT are not my own, but rather, largely summarize the brilliant insights of Richard Devlin and Diane Pothier in the introduction to their text, *Critical Disability Theory*[110]—I am indebted to their analysis in my own.

Similar to other critical theories, CDT reframes the discourse around disability from one focussed on *individuals* (*i.e.*, biomedical impairments) to a discourse of *systems* (*i.e.*, "deep structural economic, social, political, legal, and cultural inequality"[111]). This paradigm shift is astutely captured by Linton, who uses a wheelchair: "If I want to go to vote or use the library, and these places are inaccessible, do I need a doctor or a lawyer?"[112]

Explicit discussion of systems reveals the "able-bodied norms" embedded within

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[109] *Stewart*, at para. 59.

[110] Richard Devlin & Diane Pothier, *Critical Disability Theory* (Vancouver: UBC Press, 2006) [hereinafter "Devlin & Pothier"]. For another general overview of CDT, see Melinda C. Hall, "Critical Disability Theory" (September 23, 2019), *Stanford Encyclopedia of Philosophy* (blog), online: <https://plato.stanford.edu/entries/disability-critical/>.

[111] Devlin & Pothier, at 1, 14. See also Harlan Hahn, "The Politics of Physical Differences: Disability and Discrimination" (1988) 44:1 J. of Social Issues 39, at 39-40; Elizabeth F. Emens, "Integrating Accommodation" (2008) 156:4 U. Pa. L. Rev. 839, at 882. Simi Linton calls this "redefining the 'problem' of disability. What is the problem? Where is it located? Who can fix it?" See Simi Linton, "What is Disability Studies?" (2005) 120:2 PMLA 518, at 518.

[112] Linton, at 120. See also 54: "The problem, as I came to understand it, was not that I couldn't walk; it was that society was configured for those who do walk, see, hear, etc. It would take me a while longer to learn how entrenched the patterns of discrimination are. . ."

our society,[113] *e.g.*, efficiency and productivity.[114] And, with those norms laid bare, CDT enables us to challenge them with a view to influencing how we interpret both disability and law, thereby empowering disabled people to "more fully participate in contemporary society".[115] CDT scholars have various disagreements. But they unite in their "commitment to advancing the social status and equality rights of persons with disabilities".[116] In this way, CDT is a "self-consciously politicized theory"[117] that challenges the prevailing notion of Canadian exceptionalism that animates our chauvinist self-image.[118]

First, with respect to *disability*, CDT presents a reconceptualized framework—"not just questions of impairment, functional limitations, or enfeeblement" but "issues of social values, institutional priorities, and political will".[119] That is, disability is, most fundamentally, about "questions of power".[120] Law can be understood as a system of rules.[121] And CDT asks, with disability in mind: "what is the nature of those rules, who constructed them, and whose interests they serve"[122]—"disruptive questions . . . that once asked publicly make it more difficult to keep the process of exclusion invisible".[123] In many cases, the extent—or even the existence—of one's disability is contingent on external factors. Consider design. With a ramp, use of a wheelchair is not disabling. And at a table with no chairs, use of a wheelchair is, in fact, *enabling*. Or consider resources. With

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[113] Devlin & Pothier, at 2. See also Linton, at 82-83: "If disabled people can invent new definitions of sexual ability, the *cultural norm* is called into question" (emphasis added).

[114] Devlin & Pothier, at 2, 18.

[115] Devlin & Pothier, at 2.

[116] Devlin & Pothier, at 8.

[117] Devlin & Pothier, at 8.

[118] See, *e.g.*, Devlin & Pothier, at 1. One instructive example of Canadians' misplaced pride in relation to disability justice is medical assistance in dying, which various disability advocates have severely criticized. See, *e.g.*, Andray Domise, "Canada's proposed expansion of assisted-death threatens to push the mentally ill out the door", *The Globe and Mail* (February 13, 2021), online: <https://www.theglobeandmail.com/opinion/article-canadas-proposed-expansion-of-assisted-death-threatens-to-push-the/>; Aislinn Thomas, "MAID in Canada: a radical response to changes in medically assisted dying" (August 12, 2021), *artseverywhere* (blog), online: <https://www.artseverywhere.ca/maid-in-canada/>.

[119] Devlin & Pothier, at 9. See also Harlan Hahn, "The Politics of Physical Differences: Disability and Discrimination" (1988) 44:1 J. of Social Issues 39, at 40.

[120] Devlin & Pothier, at 9. See also Devlin & Pothier, at 2; Harlan Hahn, "The Politics of Physical Differences: Disability and Discrimination" (1988) 44:1 J. of Social Issues 39, at 41.

[121] H.L.A. Hart, *The Concept of Law*, 3rd ed. (Oxford: Oxford University Press, 2012), at 79-99.

[122] Simi Linton, "What is Disability Studies?" (2005) 120:2 PMLA 518, at 519.

[123] Linton, at 234.

appropriate public support, an expensive disability is manageable. But without that support, that same disability *is made* catastrophic; it is not so innately.[124]

Beyond factors like design and resources, what a society considers a *disability* is inextricable from the norms of *ability* it subscribes to—and, in particular, what a society values "at certain socio-political conjunctures".[125] For example, shifting ideological norms over time pertaining to gay and transgender identity have altered their characterization as disabilities under the *Diagnostic and Statistical Manual of Mental Disorders*[126] (just as "shift[s] in expert consensus" have "completely revised" how addictions are construed as disabilities[127]). These examples illuminate one aspect of what CDT scholars call the "social construction" of disability[128]—that is, the incapacity for an exclusively medical discourse to exhaust our analysis of the boundaries and consequences of disability.[129] Simply put, a medical discourse is incomplete because to be disabled depends not only on the individual but "the social organization of society", including the "stigmatization" that society deploys[130] and the "performance benchmarks" that society validates[131] (benchmarks which, due to

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[124] See, *e.g.*, Devlin & Pothier, at 6: "Neo-liberal policies of downsizing and retrenchment, for example, have resulted in increased marginalization and impoverishment of many persons with disabilities." See also Simi Linton, "What is Disability Studies?" (2005) 120:2 PMLA 518, at 518, referring to "the ways that disability has been *made* exceptional" (emphasis added).

[125] Devlin & Pothier, at 5.

[126] For a discussion of the complex ideological relationship between sexuality, gender identity and disability, see Jasbir Puar, "Disability" (2014) 1 Transgender Studies Q. 77. And for an anecdote describing homophobia in the medical community from the perspective of a disabled person, see Linton, at 34-35.

[127] Faisal Bhabha, "Stewart v. Elk Valley: The Case of the Cocaine-Using Coal Miner" (Paper delivered at the OBA Institute 2018: Exploring the Evolving Definition of Disability and Evidence to Support It, February 6, 2018), online: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1330&context=all_papers>, at 2.

[128] Devlin & Pothier, at 14. See also Simi Linton, "What is Disability Studies?" (2005) 120:2 PMLA 518, at 518: "Disability studies introduces a disability reading to a range of subject matter. We prod people to examine how disability as a category was created to serve certain ends and how the category has been institutionalized in social practices and intellectual conventions."

[129] Put concisely by Simi Linton: "What disability yields you in the social arena is what makes the difference in your life, not what works or what doesn't." Linton, at 238-239.

[130] Devlin & Pothier, at 7. As Faisal Bhaba notes: "Social stigma, moral judgment and shame can distort the way the public, and in turn, public policy, treats . . . disabilities" such as addictions. See "Stewart v. Elk Valley: The Case of the Cocaine-Using Coal Miner" (Paper delivered at the OBA Institute 2018: Exploring the Evolving Definition of Disability and Evidence to Support It, February 6, 2018), online: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1330&context=all_papers>, at 3.

[131] Devlin & Pothier, at 5-6.

their taken-for-granted nature, may render the discrimination experienced by disabled people unnoticeable or even unintelligible[132]). This socially imperceptible discrimination, because it is linked to pervasive public policy norms,[133] explains why public attitudes are "a crucial component of the surroundings with which disabled people must contend"[134] (and the importance of those attitudes is why I begin this chapter with Le Dain and Gascon JJ.'s stories and the public response to them).

Given how pervasive norms can conceal the operation of ableist systems, CDT scholars recognize the "importance of voice"[135] and the ways in which "personal experiences of disability" can critically inform disability analysis[136] by disrupting the "so-called objective knowledge base".[137] Indeed, I have witnessed this first-hand, with one colleague who was highly skeptical of disability accommodations on exams, until they experienced a concussion and realized the extent to which they *still* underperformed with the additional time they were granted. In this way, CDT tends to be "skeptical of liberalism" (*e.g.*, its "ontological weaknesses", its "structural assumptions", its fetishization of choice) and instead embraces an "embodied theory"—one that "emerges from the bottom up, from the lived experiences of persons with disabilities".[138]

Second, with respect to *law*, CDT seeks "genuine inclusiveness, not just abstract rights".[139] In other words, CDT expands its gaze beyond *individual* impairment to

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[132] Devlin & Pothier, at 7.

[133] As Simi Linton explains: ". . . it didn't seem to be anybody's fault that a doorway was too narrow, or there were steps, or there was no way to use public transportation; these seemed to be just facts of life, random incidents, not governed by any principle". Linton, at 27.

[134] Harlan Hahn, "The Politics of Physical Differences: Disability and Discrimination" (1988) 44:1 J. of Social Issues 39, at 40.

[135] Devlin & Pothier, at 8.

[136] Devlin & Pothier, at 8.

[137] Linton, at 64.

[138] Devlin & Pothier, at 9, 16-17. As a nondisabled person writing on disability, I strive to draw extensively from disabled voices in formulating my own views and scholarship to respect what Simi Linton calls "the importance of disabled people speaking for [themselves]". Linton, at 81. I could, of course, simply not write on disability at all. But, for now, I am striving to research, write and teach in alliance with disabled scholars, to answer Linton's call that it is "the responsibility of the nation" to promote disability justice (Linton, at 244). That said, I am also, as Linton suggests, candid about my "subject position vis-à-vis the idea of disability" (Simi Linton, "What is Disability Studies?" (2005) 120:2 PMLA 518, at 520). For a discussion between disabled people about the merits of nondisabled participation in disability studies, see Linton, at 140.

[139] Devlin & Pothier, at 2.

political marginalization, which has significant consequences for what one will label disability "discrimination".

To begin, an individual frame logically leads to policy responses of "prevention" (*e.g.*, selective abortion), "treatment" (of the individual, not the social conditions) and "rehabilitation" (*i.e.*, tolerating disability),[140] all of which reify a "hierarchy of difference".[141] In contrast, CDT acknowledges how prevention, treatment and rehabilitation can be good, but recognizes that they are incomplete, and should be grappled with delicately insofar as they "buy into a framework of charity and pity rather than equality and inclusion"[142]—"bare survival rather than . . . genuine participation".[143]

Grappling with difference leads to CDT's philosophical challenge to liberal ideals.[144] Specifically, CDT views disability as particularly salient for disrupting assumptions under liberalism[145] insofar as: (1) disability is etymologically hierarchical,[146] *i.e.*, nondisabled/disabled, normal/abnormal, us/them;[147] and (2) impair-

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[140] Devlin & Pothier, at 10. See also Simi Linton, "What is Disability Studies?" (2005) 120:2 PMLA 518, at 518 ("[T]he focus is on individuals . . . [T]he emphasis is on changing them (us) . . . to fit into the existing social structure").

[141] Devlin & Pothier, at 10. See also Linton, at 82, 99, 114.

[142] Devlin & Pothier, at 10. As Simi Linton writes: "My biggest fear was that I would start working with a therapist and would find that underneath her professional accepting veneer she would be like the people on the street that I loathed, that she would see me as an unfortunate. An object of pity. She would make me smaller, not bigger." Linton, at 36.

[143] Devlin & Pothier, at 11. See also Simi Linton, "What is Disability Studies?" (2005) 120:2 PMLA 518, at 518, referring to the "work to naturalize disabled people—remake us as full citizens whose rights and privileges are intact, whose history and contributions are recorded, and whose often distorted representations in art, literature, film, theater, and other forms of artistic expression are fully analyzed"; Linton, at 112: "By focussing our attention on the individual and eliciting sympathy or awe, these articles diverted us from thinking about how to change social conditions."

[144] While an exhaustive account of "liberalism" is beyond the scope of this chapter, those ideals salient to Devlin and Pothier's CDT summary include: emphasizing the individual by assuming the sovereignty of the self, thereby privileging liberty, autonomy and choice while rejecting necessary relations of dependency (at 16-17); assuming "that language is a relatively transparent neutral medium through which we communicate" (at 7); pursuing "equality of opportunity for some" rather than substantive equality for all (at 8-9) by ignoring rather than confronting difference (at 12); and conceptualizing disability as "misfortune or bad luck" (at 9) that people are not meant to "suffer" (at 11). This all explains the unique challenge of disability, and how it, as Simi Linton explains, "disrupt[s] cherished domains" and "debunk[s] ideas held sacred". See Simi Linton, "What is Disability Studies?" (2005) 120:2 PMLA 518, at 518.

[145] Devlin & Pothier, at 2, 11, 19.

[146] Devlin & Pothier, at 4. See also Elizabeth F. Emens, "Integrating Accommodation" (2008) 156:4 U. Pa. L. Rev. 839, at 881: "Indeed, the etymology of 'disability' suggest that

ment can be unavoidably material (*e.g.*, the inability to see, the feeling of pain).[148] All of these considerations explain how disability—unlike, for example, race or gender—poses a unique challenge to the existing liberal order.[149] While the "utopian" liberal society may maintain race and gender, it would abolish disability to limit "suffer[ing]".[150] And while race and gender justice arguments may explain the long-overlooked value women and racialized people offer to society, the "irretrievably ableist discourses"[151] of efficiency and productivity make the translation of this argument to certain disabilities more difficult. Fundamentally, many disabilities render people poor market subjects within a neoliberal order.[152] As such, disability is singular in the extent to which it "demands a coming to terms with difference".[153]

Moreover, an individual frame tacitly supports allocating responsibility for disability to *disabled people*, rather than the *disabling society*.[154] In contrast, CDT provides that "questions of responsibility and accountability can be resolved only through the joint efforts of both those who are disabled and those who are

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something is missing that needs to be made up for, filled in, supplied." Relatedly, Simi Linton notes how "invalid" denotes "not valid". See Linton, at 240.

[147] Devlin & Pothier, at 5, 11.

[148] See Linton, at 84. Elizabeth Emens describes this unavoidable materiality astutely:

> Few disability scholars or activists embrace a pure social model. Most recognize that not all disability is culturally constructed, but that culture still creates much of the disability associated with what we consider impairments. This middle-ground position recognizes that there can be pain or difficulty associated with disability, and that sometimes disability does require more resources or more support than other states of being, but still emphasizes that much of what makes disability disabling is the way the world is currently constructed.

See Elizabeth F. Emens, "Integrating Accommodation" (2008) 156:4 U. Pa. L. Rev. 839, at 882.

[149] And a challenge that cannot be evaded by shifting from "disability" to "impairment". Indeed, impairment, too, is "ideologically loaded, a medicalized discourse that assumes a perfect norm and the impaired (read defective) other". Devlin & Pothier, at 7. See also, Simi Linton, "What is Disability Studies?" (2005) 120:2 PMLA 518, at 520-522.

[150] Devlin & Pothier, at 11.

[151] Devlin & Pothier, at 18.

[152] Credit to Daniel Del Gobbo for this crucial point. And on the imbrication of law, economy and politics more generally, see Jedediah Britton-Purdy, Amy Kapczynski & David Singh Grewal, "How Law Made Neoliberalism" (February 22, 2021), *Boston Review* (blog), online: <http://bostonreview.net/law-justice/jedediah-britton-purdy-amy-kapczynski-david-singh-grewal-how-law-made-neoliberalism>.

[153] Devlin & Pothier, at 12.

[154] Devlin & Pothier, at 12. See also Harlan Hahn, "The Politics of Physical Differences: Disability and Discrimination" (1988) 44:1 J. of Social Issues 39, at 39-40.

non-disabled".[155] This very question of allocation—in particular, financial allocation—undergirds the Supreme Court's distinct treatment of disability discrimination as "a fairly modest challenge" that it could accept (*e.g.*, *Eldridge*[156]) and the more "fundamental" challenges it has rejected (*e.g.*, *Eaton*[157] and *Auton*[158]).[159]

The views on disability and law described above explain "why context is so important" to CDT.[160] How one analyzes disability is crucially informed by the particular disability in question, from which various practical and ideological consequences may follow.[161] Moreover, the significance of any one disability is

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[155] Devlin & Pothier, at 13.

[156] *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624 (S.C.C.). The appellants argued that the failure to provide funding for sign language interpreters for deaf persons when receiving medical services violated s. 15 of the *Charter*. They argued that, because of the communication barrier that existed between deaf persons and health care providers, they received a lesser quality of medical services than hearing persons. The Court granted a declaration that the failure to provide sign language interpreters was unconstitutional and directed the province of British Columbia to administer the *Medical and Health Care Services Act* and the *Hospital Insurance Act* in a manner consistent with s. 15.

[157] *Eaton v. Brant County Board of Education,* [1996] S.C.J. No. 98, [1997] 1 S.C.R. 241 (S.C.C.). The respondents, parents of a 12-year-old girl with cerebral palsy, sought judicial review of a decision to place their child in a special education class rather than in her neighbourhood school on the basis that this decision violated s. 15 of the *Charter.* The Court found that the decision did not impose a burden or disadvantage on the child, nor did it constitute the withholding of a benefit or advantage, and therefore did not constitute a violation of s. 15.

[158] *Auton (Guardian at litem of) v. British Columbia (Attorney General),* [2004] S.C.J. No. 71, 2004 SCC 78 (S.C.C.). The petitioners, children with autism and their parents, alleged that the province of British Columbia's failure to fund applied behavioural therapy for autism violated s. 15 of the *Charter*. The Court found that the treatment was not a benefit prescribed or required by law, and therefore the decision not to fund it did not violate s. 15. The Court further found that the relevant comparator group was "a non-disabled person or a person suffering a disability other than a mental disability (here autism) seeking or receiving funding for a non-core therapy important for his or her present and future health, which is emergent and only recently becoming recognized as medically required" (at para. 55), and that there was no evidence that the government's approach to funding applied behavioural therapy was different from its approach to funding other comparable and novel therapies for the comparator group.

[159] Devlin & Pothier, at 13-14. See also Simi Linton, "What is Disability Studies?" (2005) 120:2 PMLA 518, at 518: "When they . . . cost more money than some would like, disability studies encounters resistance."

[160] Devlin & Pothier, at 9.

[161] For example, one's perspective on where disability is located between the individual and society may depend on their particular condition, with conditions that cause significant pain or incapacity favouring a *less* social model, cognizant of disabilities' frequent social *and*

itself contingent on context.[162] For example, the "sight" of blind and non-blind people may vary in pitch darkness—indeed, a blind person may "see" *better* in darkness given their familiarity with alternate techniques of spatial interpretation.[163] And what any one disability signifies for a given person varies between individuals as well.[164] Relatedly, the analysis of disability injustice is impossible without the social context in which any given disability operates,[165] and in particular, one's political perspective on the relative duties of the individual and the state with respect to the substantive equality of disabled people.[166]

All the above, unsurprisingly, has profound implications for legal reasoning. According to CDT, the "psychic prison"[167] of ableism limits the judiciary's ability to recognize the pervasive discrimination we tolerate in Canadian society against disabled people pursuant to "the ideology of productivity and efficiency".[168] What

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material origins. See generally: Tom Shakespeare, "Materialist Approaches to Disability" in *Disability Rights and Wrongs Revisited*, 2nd ed. (Routledge, 2014).

[162] Devlin & Pothier, at 11.

[163] An example of how "blindness provides unique ways of understanding the world to which sighted people have no access". See Subini Ancy Annamma, Darrell D. Jackson & Deb Morrison, "Conceptualizing color-evasiveness: using dis/ability critical race theory to expand a color-blind racial ideology in education and society" (2017) 20:2 Race Ethnicity and Education 147, at 154. Similarly, an illustration of how "[t]he ways that our bodies are configured and the ways that our sensory systems function all affect how we move through space and perceive the world". See Simi Linton, "What is Disability Studies?" (2005) 120:2 PMLA 518, at 522. Linton's discussion of Hellen Keller is particularly astute at complicating the dominant perspective of blindness and understanding:

> I had never thought about how you can feel abstractness.
>
> Hellen Keller did. In an essay called "The World I Live in," Keller, the uber-blind woman, wrote: "Ideas make the world we live in, and impressions furnish ideas." She instructs the sighted on how she gains access to such large and complex ideas as beauty, incongruity, and power with her hands. "Remember," she says, "that you, dependent on your sight, do not realize how many things are tangible."

See Linton, at 217.

[164] As Simi Linton writes: "I didn't know what 'paralyzed' meant. Not for me." Linton, at 4.

[165] Linton, at 117.

[166] By "substantive equality", I mean "ensuring that laws and policies do not impose subordinating treatment on groups already suffering social, political, or economic disadvantage" (including potential positive obligations on the state). This contrasts with "formal equality", meaning merely treating "likes alike". See Jonnette Watson Hamilton & Jennifer Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the Charter" (2015) 19:2 Rev. Const. Stud. 191, at 194-195.

[167] Devlin & Pothier, at 14.

[168] Devlin & Pothier, at 18.

is "liberty" in an inaccessible environment? What is "choice" to someone with drug dependence? What is "autonomy" to someone coerced into medical assistance in dying? These are just some of the double-binds that CDT can highlight and liberalism may obscure.[169] And those double-binds are even greater in the context of mental disability, where ideas about "rationality and reasonableness" are not only culturally dominant,[170] but specifically instrumentalized in law.[171] *Stewart*—which, as discussed above, concerned one such mental disability (drug dependence)—is a highly instructive example of how CDT generates insights into the "objective" process of reasoning our courts *perform* in the disability arena.

(b) Critical Disability Analysis

Viewed through a liberal lens, *Stewart* simply reflects three distinct interpretations of human rights. Yet, viewed through the lens of CDT, *Stewart* reveals the unavoidable political controversy of fitting disability rights within a liberal legal order predicated on ableist norms.

(i) Majority Opinion

Chief Justice McLachlin finds the tribunal's analysis— *i.e.*, that the "no free accident" policy was not *prima facie* discriminatory—reasonable.[172] But this analysis is embedded in ideology. In her own words, a decision is "reasonable" if it is "acceptable" and "defensible".[173] And, of course, what one is willing to accept or defend turns on one's perspective as to what disability means and how the law should interact with it.

The Chief Justice sets the stage by emphasizing the safety risks implicated: Stewart "worked in a mine"; its "operations were dangerous"; there is "great importance" in "maintaining a safe worksite".[174] These are all, of course, true. But given the Chief Justice's sole focus on the first stage of analysis (*i.e.*, *prima facie*

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[169] Devlin & Pothier, at 17. See also Harlan Hahn, "The Politics of Physical Differences: Disability and Discrimination" (1988) 44:1 J. of Social Issues 39, at 43: "In a society that appears to prize liberty more than equality, and that tends to equate freedom with personal autonomy rather than with the opportunity to exercise meaningful choice, the apprehensions aroused by functional restrictions resulting from a disability often seem overwhelming."

[170] Devlin & Pothier, at 5.

[171] See, *e.g.*, *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, 2015 SCC 5, at para. 99 (S.C.C.): "To establish a *rational* connection, the government need only show that there is a causal connection between the infringement and the benefit sought 'on the basis of *reason* or logic'" (emphasis added); *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65, at para. 85 (S.C.C.): "a *reasonable* decision is one that is based on an internally coherent and *rational* chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (emphasis added).

[172] *Stewart*, at para. 5.

[173] *Stewart*, at para. 27.

[174] *Stewart*, at para. 1.

discrimination), her emphasis on safety is curious. Does safety inform whether Stewart's drug dependence contributed to his violation of the drug policy (relevant to stage one, discrimination), or rather, whether the stringent drug policy was warranted in the circumstances (relevant to stage two, justification)? Similarly, the Chief Justice cites the hypothetical of nicotine-addicted employees breaching a no smoking in the workplace policy as a further example where practical circumstances demand adverse effects for disabled people.[175] But this confuses the analysis. Does the example of not permitting smoking in an office belie how nicotine addiction contributes to one's cigarette cravings? Clearly it does not. Rather, and more sensibly, this example simply illustrates how an employer may fashion reasonable limits on where and how a nicotine addiction may be accommodated.

The Chief Justice accepts that "[a]ddiction is a recognized disability"[176]—itself, an insight of CDT.[177] She also accepts that Stewart's termination related to drugs, if not drug addiction—he was fired, not for being in an accident, but testing positive for drugs afterwards.[178] Despite these findings, though, the Chief Justice upholds the tribunal's severance of Stewart's drug addiction from his termination:

> I find no basis for interfering with the decision of the Tribunal. The main issue is whether the employer terminated Mr. Stewart because of his addiction . . . or whether the employer terminated him for breach of the Policy prohibiting drug use unrelated to his addiction because he had the capacity to comply with those terms . . . This is essentially a question of fact, for the Tribunal to determine. After a thorough review of all the evidence, the Tribunal concluded that the employer had terminated Mr. Stewart's employment for breach of its Policy. The Tribunal's conclusion was reasonable.[179]

Buried in the legal rhetoric above is a particular understanding of disability and discrimination, and more broadly, a particular ideological perspective that privileges individuals over systems. Implicit in the Chief Justice's articulation of the issue is the view that residual capacity to make "conscious choices"[180] places any consequences that may follow from those "choices" outside the purview of discrimination. But what is "choice" in the context of drug dependence?[181] Few

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[175] *Stewart*, at para. 42.

[176] *Stewart*, at para. 3. See also Faisal Bhabha, "Stewart v. Elk Valley: The Case of the Cocaine-Using Coal Miner" (Paper delivered at the OBA Institute 2018: Exploring the Evolving Definition of Disability and Evidence to Support It, February 6, 2018), online: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1330&context=all_papers>, at 2.

[177] See, *e.g.*, Rebecca Bunn, "Conceptualizing Addiction as Disability in Discrimination Law: A Situated Comparison" (2019) 46:1 Contemporary Drug Problems 58.

[178] *Stewart*, at para. 2.

[179] *Stewart*, at para. 5 (emphasis added).

[180] *Stewart*, at para. 10.

[181] For recent Supreme Court jurisprudence critiquing reliance on "choice"—though in

addictions *completely* exhaust free will. Consequently, the Chief Justice is both giving and taking: she accepts addiction as a disability *in form*, but rejects addiction as a disability *in substance*. She writes that "the nature of the particular disability at issue—in this case, addiction—does not change the legal principles to be applied".[182] But I think, to the contrary, that is *precisely* what happened in this case. Indeed, the Chief Justice at one point outright concedes that she is motivated by practical concerns about policy enforcement:

> If an employee fails to comply with a workplace policy for a reason related to addiction, the employer would be unable to sanction him in any way, without potentially violating human rights legislation.[183]

Given that she describes the contribution criterion as "whether at least one of the reasons for the adverse treatment was the employee's addiction",[184] the Chief Justice's analysis is internally contradictory.[185] She accepts that human rights law requires only that addiction be "one of the reasons" for a termination, but simultaneously claims that human rights should not prevent terminating an employee who violates workplace policy "for a reason related to addiction".[186] This is an "addiction exception" that cannot be separated from judicial apprehension about substantive recognition of disability equality.[187] And so, to fully appreciate the Court's reasoning process, it must be viewed in concert with the cultural

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the context of women's subordination—see *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, 2020 SCC 28, at paras. 86-92 (S.C.C.). And for my favourite critique of choice in legal theory, see Patricia Williams, *The Alchemy of Race and Rights* (Cambridge, Mass.: Harvard University Press, 1991), at 31:

> In our legal and political system, words like "freedom" and "choice" are forms of currency. They function as the mediators by which we make all things equal, interchangeable. It is, therefore, not just what "freedom" means, but the relation it signals between each individual and the world. It is a word that levels difference.

[182] *Stewart*, at para. 22.

[183] *Stewart*, at para. 42 (emphasis added).

[184] *Stewart*, at para. 43 (emphasis added).

[185] Faisal Bhabha is, at points, softer in his critique: "It is difficult to explain or justify this analysis given the current state of the law on this subject and the explicit statements in the majority judgment with respect to the 'factor' test." See Faisal Bhabha, "Stewart v. Elk Valley: The Case of the Cocaine-Using Coal Miner" (Paper delivered at the OBA Institute 2018: Exploring the Evolving Definition of Disability and Evidence to Support It, February 6, 2018), online: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1330&context=all_papers>, at 13.

[186] And as Justice Gascon notes in dissent: ". . . terminating an employee 'for a reason related to addiction' . . . is precisely what it means for that addiction to be 'a factor' in the employee's harm". *Stewart*, at para. 93.

[187] Jennifer Koshan, "'Majoritarian Blind Spot'? Drug Dependence and the Protection Against Employment Discrimination" (June 20, 2017), ABlawg (blog), online: <http://ablawg.ca/wp-content/uploads/2017/06/Blog_JK_Stewart.pdf>, at 5: "Does the majority truly accept

construction of drug users and addicts as untrustworthy.[188] Indeed, in light of the inclusion of both "physical disability" and "mental disability" in the applicable statute[189] and the Court's rejection of any hierarchy between those two forms of disability,[190] the Chief Justice's reading out of addiction can be understood as a form of judicial activism[191] (akin to the judicial "backlash" on the *Americans with Disabilities Act* witnessed south of the border[192]).

To see how the Court covertly implemented an addiction exception, an analogy is instructive. If a law firm had a "no pregnancy" policy, there is little chance the Chief Justice would tolerate such a policy on the basis that becoming pregnant typically involves choices made by parents. Even if a tribunal had found such a policy non-discriminatory at first instance, I highly doubt the Chief Justice's "considerable deference"[193]—that this is "essentially a question of fact, for the Tribunal to determine"[194] and that the tribunal reached its conclusion only after "a thorough review of the evidence"[195]—would be similarly employed.[196] This is, in

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that addictions constitute a protected ground of discrimination at step one of the test?"

[188] For example, see Jon Soltys & Daniel W. Dylan, "Accommodating the Unknown: Balancing Employee Human Rights with the Employer Duty to Ensure Safety: A Dialogue on *Stewart v Elk Valley* and the *Cannabis Act*" (2020) 9:1 Can. J. Hum. Rts. 57, at 80: "Given the broad range of addiction and substance use, problems may arise if employees involved in disciplinary level misconduct, who use intoxicating substances recreationally, seek to characterize their use as a fully-fledged addiction and disability."

[189] *Stewart*, at para. 3.

[190] See *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] S.C.J. No. 55, [1996] 3 S.C.R. 566, at paras. 30-32 (S.C.C.); See also Faisal Bhabha, "Stewart v. Elk Valley: The Case of the Cocaine-Using Coal Miner" (Paper delivered at the OBA Institute 2018: Exploring the Evolving Definition of Disability and Evidence to Support It, February 6, 2018), online: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1330&context=all_papers>, at 2.

[191] Though I acknowledge the malleability of that term, and its contested utility in critiquing judicial reasoning. See, *e.g.*, Emmett Macfarlane, "What we're talking about when we talk about 'judicial activism'", *Maclean's* (February 23, 2015), online: <https://www.macleans.ca/politics/what-were-talking-about-when-we-talk-about-judicial-activism/>.

[192] See generally Matthew Diller, "Judicial Backlash, the ADA, and the Civil Rights Model" (2000) 21:1 Berkeley J. Emp. & Lab. L. 19. See also, Elizabeth F. Emens, "Framing Disability" [2012] 2012:5 U. Ill. L. Rev. 1383, at 1386.

[193] *Stewart*, at para. 20.

[194] *Stewart*, at para. 5.

[195] *Stewart*, at para. 5.

[196] Similarly, Faisal Bhabha writes: "While couched in the deferential language of reasonableness administrative review, the majority were content to endorse what is at its core a formal equality frame and an underlying decision that in many ways mischaracterizes addictions disability." See Faisal Bhabha, "Stewart v. Elk Valley: The Case of the

other words, an ableist double standard.[197] And if this example strikes you as distinguishable (as it did for one informal reviewer), reflect on why logics of choice provide a defensible explanation for discrimination in the context of addiction, but not pregnancy—particularly when, in many cases, choice rhetoric is arguably more problematic in the context of addiction.

What is striking in the Chief Justice's reasons is how the *principles* she describes consistently protect against disability discrimination, while her *application* of those principles does not. For example, she acknowledges that "[d]iscrimination can take many forms, including 'indirect discrimination', where otherwise neutral policies may have an adverse effect on certain groups".[198] But the relatively straightforward impact of a drug policy on drug dependent people is not recognized as such an "adverse effect". Additionally, the Chief Justice acknowledges that "intent on behalf of an employer is not required to demonstrate *prima facie* discrimination".[199] Yet she considers the "most important piece of evidence" Elk Valley's termination letter, which framed Stewart's termination in respect of his policy breach.[200] This evidence speaks to Elk Valley's stated intent. But it provides limited insight as to the indirect discrimination at the heart of this appeal.[201]

Cocaine-Using Coal Miner" (Paper delivered at the OBA Institute 2018: Exploring the Evolving Definition of Disability and Evidence to Support It, February 6, 2018), online: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1330&context=all_papers>, at 20.

[197] Choice is not the only tension in the Chief Justice's reasons. While it is beyond the scope of this paper, a juxtaposition of McLachlin C.J.C.'s reasons in *Stewart* with her earlier reasons in *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union*, [1999] S.C.J. No. 46, [1999] 3 R.C.S. 3 (S.C.C.) [hereinafter "*Meiorin*"] is, I think, illuminating. McLachlin C.J.C.'s analysis in *Stewart* concerned *disability* and safety (a drug policy at a mine). And she *upheld* the policy with a narrow, liberal emphasis on safety, practicality, individuals, choice and intent—that is, formal equality (see Gascon J.'s dissenting reasons, at para. 90). In stark contrast, her analysis in *Meiorin* concerned *sex* and safety (a fitness policy for forest fighting). And she *rejected* the policy with a broad, critical emphasis on inclusion (at paras. 36, 41, 68), ideology (at para. 41), systems (at paras. 29, 39, 42), coercion (at paras. 36, 40) and effects (at paras. 47-49)—that is, substantive equality (at para. 42). One wonders aloud the extent to which this disparity is itself an example of how the Chief Justice's lived experiences may have shaped her judicial ideology.

[198] *Stewart*, at paras. 24, 45.

[199] *Stewart*, at para. 24.

[200] *Stewart*, at para. 29.

[201] Worse, the letter includes what Faisal Bhabha calls a "backhand slap", by being "hopeful" that Stewart will find the "personal resolve" to overcome his addiction. See Faisal Bhabha, "Stewart v. Elk Valley: The Case of the Cocaine-Using Coal Miner" (Paper delivered at the OBA Institute 2018: Exploring the Evolving Definition of Disability and Evidence to Support It, February 6, 2018), online: <https://digitalcommons.osgoode.yorku.

At base, the Chief Justice's analysis turns on social context, as CDT explains. She holds that it was reasonable for a tribunal to conclude that Stewart's drug dependence "did not diminish his capacity to comply with the terms of the Policy".[202] But where drug dependence *by definition* diminishes one's capacity to abstain from drug use (as experts defined at first instance),[203] her conclusion can only be logically reached through an alternate understanding of what dependence—and thus, what disability—really means. The Chief Justice holds that "[i]t cannot be assumed that Mr. Stewart's addiction diminished his ability to comply with the terms of the Policy".[204] But whether such a presumption can indeed be made turns on how one conceptualizes addiction. According to the Chief Justice, an addiction might not diminish one's capacity to abstain from drug use. In contrast, the concurrence and dissent—to which I turn next—conclude that it must. As such, their disagreement is not so much *legal*, but *social*—in turn, affirming CDT's core insight that disability is, fundamentally, about the negotiation of power: in general, the power wielded by nondisabled people over disabled people; and in this case, the power wielded by the Supreme Court over some of the most vulnerable people in our society.

Indeed, lurking in the Chief Justice's majority opinion is not simply a distinct perspective on the social context of disability, but, more perniciously, an outdated myth of drug addiction.[205] To affirm that Stewart's drug addiction never "contributed" to the drug use that precipitated his termination,[206] the Chief Justice tacitly endorses the myth that Stewart's drug use was simply an immoral exercise of will.[207] As he was not "effectively deprive[d]"[208] of conscious agency, the logic

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ca/cgi/viewcontent.cgi?article=1330&context=all_papers>, at 17. Indeed, Bhabha considers it "bewildering that eight justices of the Supreme Court were content to uphold a decision as reasonable that was so clearly laced with prejudice and contempt for the afflicted worker" (at 17). Nadia Pronych similarly critiques the Chief Justice's reasons for "faulty legal reasoning" and departing from "fundamental human rights laws and principles as well as the modern scientific understanding of addiction". See Nadia Pronych, *Stewart v. Elk Valley Coal Corp.: The Rehabilitation of Addiction Disability Law in Canada* (LLM Thesis, University of Western Ontario, 2020), online: *Electronic Thesis and Dissertation Repository* 7437 <https://ir.lib.uwo.ca/etd/7437>, at 13.

[202] *Stewart*, at para. 34.

[203] *Stewart*, at para. 49 (per McLachlin C.J.C.), 117 (per Gascon J., dissenting but not on this point).

[204] *Stewart*, at para. 39.

[205] Rebecca Bunn, "Conceptualizing Addiction as Disability in Discrimination Law: A Situated Comparison" (2019) 46:1 Contemporary Drug Problems 58, at 59-60.

[206] *Stewart*, at para. 46.

[207] As Faisal Bhabha notes, addiction is "associated with people and behaviours that are generally despised and viewed as a personal moral failure". See Faisal Bhabha, "Stewart v. Elk Valley: The Case of the Cocaine-Using Coal Miner" (Paper delivered at the OBA

goes, his general dependence on cocaine may have been immaterial to his use in this instance. But one cannot reach this conclusion without first subscribing to a liberal conception of disability mediated through a logic of "autonomy" and "choice" that a critical conception would complicate with a social and structural lens.

In this way, CDT helps us pierce through the jurisprudential text to the ideological subtext animating the Chief Justice's opinion: no *free* accident for Stewart, and yet, Stewart's *free* will to resist drug addiction—an analysis baked in liberal thought, which inverts the Chief Justice's progressive analysis of sex discrimination in *Meiorin*.[209] In that case, the Court considered a general fitness requirement for forest firefighters that adversely affected women due to their lower average aerobic capacity. And McLachlin J. (as she then was) authored the Court's unanimous opinion finding, unlike in *Stewart*, that the general requirement *prima facie* discriminated against women.[210] As legal scholar Faisal Bhabha explains:

> Just as strenuous physical testing did not directly target female firefighters, a strict drug policy need not directly target drug addicts. It only needs to have an acute,

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Institute 2018: Exploring the Evolving Definition of Disability and Evidence to Support It, February 6, 2018), online: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1330&context=all_papers>, at 4. See also Nadia Pronych, *Stewart v. Elk Valley Coal Corp.: The Rehabilitation of Addiction Disability Law in Canada* (LLM Thesis, University of Western Ontario, 2020), online: *Electronic Thesis and Dissertation Repository* 7437 <https://ir.lib.uwo.ca/etd/7437>, at 9. And for an explicit jurisprudential reliance on this myth, see *British Columbia (Public Service Agency) v. British Columbia Government and Service Employees' Union*, [2008] B.C.J. No. 1760, 2008 BCCA 357, at para. 11 (B.C. C.A.): "The fact that alcohol dependent persons may demonstrate *"deterioration in ethical or moral behaviour"*, and may have a greater temptation to steal alcohol from their workplace if exposed to it, does not permit an inference that the employer's conduct in terminating the employee was based on or influenced by his alcohol dependency" (emphasis added).

[208] *Stewart*, at para. 39.

[209] Faisal Bhabha similarly contrasts McLachlin C.J.C.'s different analyses in *Meiorin* (concerning women) and *Stewart* (concerning addiction). See Faisal Bhabha, "Stewart v. Elk Valley: The Case of the Cocaine-Using Coal Miner" (Paper delivered at the OBA Institute 2018: Exploring the Evolving Definition of Disability and Evidence to Support It, February 6, 2018), online: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1330&context=all_papers>, at 20-21.

[210] Though, to be fair, one could argue—unpersuasively, in my view—that the Chief Justice's distinct analyses between *Meiorin* and *Stewart* are not *ideological*, but *circumstantial*, given that both decisions involved her deferring to the tribunal decision below, which simply reached opposite conclusions on whether the general policy at issue was *prima facie* discriminatory. Indeed, Jon Soltys and Daniel Dylan argue that the Chief Justice's leniency to the tribunal in *Stewart* may have been contingent on the pre-*Vavilov* administrative law framework. See Jon Soltys & Daniel W. Dylan, "Accommodating the Unknown: Balancing Employee Human Rights with the Employer Duty to Ensure Safety: A Dialogue on *Stewart v Elk Valley* and the *Cannabis Act*" (2020) 9:1 Can. J. Hum. Rts. 57, at 72. However, I think her analysis has deeper ideological source than simply her views on deference.

> indirect impact on members of the protected group to be considered discriminatory. Because women are less likely to meet the strenuous physical standard, the firefighting standard was *prima facie* discriminatory. It requires no logical leap to similarly consider that because a drug addict is less likely to meet the zero-tolerance drug policy, the policy is *prima facie* discriminatory. There appears no explanation for the Court's departure from the established equality framework except that the majority simply chose not to view addicts in the same light as other equality seekers.[211]

I would add to this that Chief Justice's "rhetorical register"[212] also markedly differs between the two judgments. In *Stewart*, her analysis is, as Faisal Bhabha notes, "couched in . . . deferential language".[213] But in *Meiorin*, her language, in contrast, displays far more critical flair. She notes how "[c]oncerns about economic efficiency and safety, shorn of their utilitarian cloaks, may well operate to discriminate against women".[214] She refers to "imbalances of power", "discourses of dominance", "assimilationist . . . systems" and "transformation".[215] And she dissects terms like "neutral"[216] and "normal",[217] even acknowledging how the interpretation of "neutrality" is contingent on the adjudicator tasked with its definition.[218] Where was this critical inspiration when a disabled claimant was before her?[219]

The foregoing critique demonstrates the value of a critical lens when interrogating "neutral" legal analysis. Benjamin Oliphant, for example, astutely describes *what* courts are doing with addictions *doctrinally*:

> . . . they have redefined the scope of the prohibition on discrimination, either

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[211] Faisal Bhabha, "Stewart v. Elk Valley: The Case of the Cocaine-Using Coal Miner" (Paper delivered at the OBA Institute 2018: Exploring the Evolving Definition of Disability and Evidence to Support It, February 6, 2018), online: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1330&context=all_papers>, at 21.

[212] Kendall Thomas, "The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick" (1993) 79:7 Va. L. Rev. 1805, at 1811.

[213] Faisal Bhabha, "Stewart v. Elk Valley: The Case of the Cocaine-Using Coal Miner" (Paper delivered at the OBA Institute 2018: Exploring the Evolving Definition of Disability and Evidence to Support It, February 6, 2018), online: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1330&context=all_papers>, at 20.

[214] *Meiorin*, at para. 36.

[215] *Meiorin*, at para. 41, citing Shelagh Day & Gwen Brodsky, "The Duty to Accommodate: Who Will Benefit?" (1996) 75 Can. Bar. Rev. 433, at 462.

[216] *Meiorin*, at paras. 27, 29, 32-33.

[217] *Meiorin*, at para. 41.

[218] *Meiorin*, at para. 34.

[219] The absence of such a lens is perhaps even more disappointing given "the parallels between depictions of women as passive and assumptions about the passivity of disabled people". Linton, at 64.

> without averting to this fact or acknowledging it openly. If the courts believe that, contrary to the Supreme Court's own human rights code jurisprudence, the legal landscape has been changed to require something more than the mere factual connection between prohibited ground and a formal disadvantage of some sort in order to shift the burden to the respondent, they have an obligation to say so explicitly and justify this claim. Instead, courts appear to be clandestinely undermining a stable line of Supreme Court jurisprudence and may be effectively reducing the scope of unlawful discrimination in the process.[220]

But to understand *why* courts are shifting legal standards for addictions demands an appreciation of *ideology*—the "psychic prison"[221] of ableism that, in general, shapes our jurisprudence, and in particular, shaped a Supreme Court majority in *Stewart*. Disability scholars often critique how the medical community proposes *medical* solutions for *political* problems.[222] And I would argue that the same can be said of the legal community, which often proposes *doctrinal* solutions to what are fundamentally *political* problems.

(ii) Concurring Opinion

Justices Moldaver and Wagner hold that the tribunal: (1) unreasonably found the policy not *prima facie* discriminatory, but (2) reasonably found Elk Valley's accommodation sufficient.[223]

The concurring opinion is brief—just 10 paragraphs. But critical insights can nevertheless be gleaned from its reasoning process.

On *prima facie* discrimination, Moldaver and Wagner JJ. viewed the link between drug addiction and violating the drug policy as self-evident. In their words, "Stewart's impaired control over his cocaine use was *obviously connected* to his termination for testing positive for cocaine after being involved in a workplace accident".[224] Yet they were reviewing the same tribunal reasons and record as the

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[220] Benjamin Oliphant, "*Prima Facie* Discrimination: Is *Tranchemontagne* Consistent with the Supreme Court of Canada's Human Rights Code Jurisprudence" (2012) 9 J.L. & Equal. 33, at 65.

[221] Devlin & Pothier, at 14.

[222] Linton, at 65.

[223] *Stewart*, at para. 48.

[224] *Stewart*, at para. 50 (emphasis added). Faisal Bhabha holds a similar view: "The dissent highlighted the disregard for *obvious* adverse effects caused by a zero-tolerance drug policy on an individual who, as a drug addict, fits squarely within the protected category of disability." See Faisal Bhabha, "Stewart v. Elk Valley: The Case of the Cocaine-Using Coal Miner" (Paper delivered at the OBA Institute 2018: Exploring the Evolving Definition of Disability and Evidence to Support It, February 6, 2018), online: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1330&context=all_papers>, at 10. Bhabha likewise refers to the contribution of Stewart's drug addiction to his drug use an "obvious fact" (at 13) and describes the Majority's conclusion to the contrary as an "illogical distinction between being an addict and taking drugs" (at 15).

Chief Justice. What, then, informs this disagreement? Distinct characterizations of disability, as CDT would predict. Whereas the Chief Justice conceptualized addiction as *potentially* impairing ("in some cases"),[225] Moldaver and Wagner JJ. viewed it as *certainly* impairing,[226] consistent with how drug dependency was, indeed, defined at first instance by expert witnesses.[227]

On justification, Moldaver and Wagner JJ. held it was appropriate for the tribunal to conclude that Elk Valley's "no free accident" policy was reasonably necessary to preserve the "deterrent effect" needed to ensure safety at the mine.[228] Like the Chief Justice,[229] Moldaver and Wagner JJ. reached this conclusion based on their perspective as to whether Elk Valley's stringent policy was "acceptable" and "defensible".[230] And so, their ideology with respect to promoting safety (at Elk Valley) on one hand and promoting inclusivity (for disabled people) on the other hand cannot be extricated from their weighing of these conflicting concerns. Simply put, their analysis "prioritizes the safety of many over the equitable treatment of one", which two scholars labelled "perhaps . . . the most utilitarian and practical approach to balancing workers' rights within dangerous worksites"[231] (though this frames safety and inclusivity in antagonistic terms, which relies on its own assumptions[232]). Regardless, as with any exercise in weight, there is less an analytically *right* or *wrong* answer than there is an answer that follows from one's values and beliefs—here, the "fears of safety risks" that leads to "[m]uch . . . disability based discrimination".[233] Indeed, to consider the harm of greater

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[225] *Stewart*, at para. 39.

[226] *Stewart*, at para. 49.

[227] *Stewart*, at para. 49. To be fair, CDT makes room for the contingency of disability. One's drug dependence, for example, need not define them, or all their actions. But CDT's acknowledgment of such contingency would be unlikely to extend to drug dependence being unrelated to drug use in this case, especially given CDT's political commitment to substantive equality for disabled people, who experience systemic discrimination in the context of employment. See generally Dianne Pothier, "Tackling Disability Discrimination at Work: Toward a Systemic Approach" (2010) 4:1 McGill J.L. & Health 17.

[228] *Stewart*, at para. 53.

[229] *Stewart*, at para. 27.

[230] *Stewart*, at para. 54.

[231] Jon Soltys & Daniel W. Dylan, "Accommodating the Unknown: Balancing Employee Human Rights with the Employer Duty to Ensure Safety: A Dialogue on *Stewart v Elk Valley* and the *Cannabis Act*" (2020) 9:1 Can. J. Hum. Rts. 57, at 79.

[232] I elaborate on this point briefly, below at 247.

[233] Samuel R. Bagenstos, "The Americans with Disabilities Act as Risk Regulation" (2001) 101:6 Colum. L. Rev. 1479, at 1479. See also Nadia Pronych, *Stewart v. Elk Valley Coal Corp.: The Rehabilitation of Addiction Disability Law in Canada* (LLM Thesis, University of Western Ontario, 2020), online: *Electronic Thesis and Dissertation Repository* 7437 <https://ir.lib.uwo.ca/etd/7437>, at 7.

accommodation "undue"[234] is an unavoidably weighted inquiry.[235] And this inquiry corresponds with political instincts: how, as Simi Linton notes, "the impulse to protect is strong, but not to accommodate".[236] This leads us to Gascon J.'s dissent, the ideology reflected in his opinion and the promise of a more inclusive society that dissent has left in its wake.

(iii) Dissenting Opinion

Justice Gascon's dissent is a critically inspired interrogation of the law and politics of disability justice.

At the outset, Gascon J.'s opinion notes the political character of disability, and how this dispute specifically engages societal reticence to grappling with the complex equality considerations posed by addiction:

> Drug dependence is a protected ground of discrimination in human rights law. Its status as such is settled, and none of the parties dispute this. Still, stigmas surrounding drug dependence — like the belief that individuals suffering[237] from it are the authors of their own misfortune or that their concerns are less credible than those of people suffering from other forms of disability — sometimes impair[238] the ability of courts and society to objectively assess the merits of their discrimination claims. These stigmas contribute to the "uneasy fit of drug addiction and drug testing policies in the human rights arena" noted by the [tribunal] below.[239]

Justice Gascon's emphasis on stigma is important and responds to a longstanding hurdle in disability advocacy.[240] Whereas the Chief Justice begins her reasons with

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[234] *Stewart*, at para 55.

[235] In Faisal Bhabha's words: "undue hardship analysis involves difficult decision making and does not offer a predictable course to an acceptable result". See Faisal Bhabha, "Stewart v. Elk Valley: The Case of the Cocaine-Using Coal Miner" (Paper delivered at the OBA Institute 2018: Exploring the Evolving Definition of Disability and Evidence to Support It, February 6, 2018), online: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1330&context=all_papers>, at 21.

[236] Linton, at 187.

[237] As an aside, I also note that reference to suffering from conditions in the context of disability studies, like metaphorical use of blindness, may be considered ableist. See, *e.g.*, "I Don't Suffer From Blindness. I Suffer From Ableism" (2017), *The Mighty* (blog), online: <https://themighty.com/2017/04/how-ableism-causes-suffering-for-people-with-disabilities/>.

[238] As a further aside, "impairment", too, has a complex relationship with disability studies. See, *e.g.*, Tom Shakespeare, "Materialist Approaches to Disability" in *Disability Rights and Wrongs Revisited*, 2nd ed. (Routledge, 2014), at 21-26.

[239] *Stewart*, at para. 58.

[240] Shapiro, at 20; See also Harlan Hahn, "The Politics of Physical Differences: Disability and Discrimination" (1988) 44:1 J. of Social Issues 39, at 41, 43. Indeed, one can arguably trace judicial apprehension about more permissive *prima facie* discrimination standards to

safety,[241] Gascon J. begins with *stigma*[242] and revisits it later in his reasons as well.[243] In so doing, he anchors distinct priorities that inform his analysis of both disability and discrimination.[244] Indeed, Gascon J. is explicit as to how those priorities shape the stakes of the appeal: that disabled people fall into a "majoritarian blind spot" when "improper considerations . . . effectively exclude[]" them "from the scope of human rights protections".[245]

Given the critical orientation of this chapter, I would be loath to not, in a brief aside, interrogate Gascon J.'s metaphorical use of blindness in his opinion, which is both problematic and generative. This may seem like a tangent. But, to the contrary, the use of ableist language *even in* Gascon J.'s progressive disability judgment speaks to the pervasiveness of ableism in our culture—a culture which, as I have explained, is prerequisite to the evolution of our legal norms.

The metaphorical use of blindness is often critiqued by disability justice advocates for substituting disability for undesired,[246] or more specifically here, blindness for ignorance.[247] Indeed, that is precisely how the metaphor was invoked by Gascon J.: to critique those *blind to*—that is, *unaware of*—how ableist stigma

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earlier addiction decisions. See, *e.g.*, Benjamin Oliphant, "*Prima Facie* Discrimination: Is *Tranchemontagne* Consistent with the Supreme Court of Canada's Human Rights Code Jurisprudence" (2012) 9 J.L. & Equal. 33.

[241] *Stewart*, at para. 1.

[242] *Stewart*, at para. 58.

[243] See, *e.g.*, *Stewart*, at paras. 101, 119, 135, 136.

[244] As Faisal Bhabha writes: "Gascon J. adopted a very different tone and context for considering the relevant legal issue." See Faisal Bhabha, "Stewart v. Elk Valley: The Case of the Cocaine-Using Coal Miner" (Paper delivered at the OBA Institute 2018: Exploring the Evolving Definition of Disability and Evidence to Support It, February 6, 2018), online: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1330&context=all_papers>, at 13.

[245] *Stewart*, at para. 59. In Faisal Bhabha's words: "Without saying it directly, Gascon makes a damning accusation against his colleagues on the bench." See Faisal Bhabha, "Stewart v. Elk Valley: The Case of the Cocaine-Using Coal Miner" (Paper delivered at the OBA Institute 2018: Exploring the Evolving Definition of Disability and Evidence to Support It, February 6, 2018), online: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1330&context=all_papers>, at 14.

[246] Subini Ancy Annamma, Darrell D. Jackson & Deb Morrison, "Conceptualizing color-evasiveness: using dis/ability critical race theory to expand a color-blind racial ideology in education and society" (2017) 20:2 Race Ethnicity and Education 147, at 153. Simi Linton also critiques the use of disability as a metaphor in art. See Linton, at 112.

[247] Naomi Schor, "Blindness as Metaphor" (1999) 11:2 Differences 76, at 77-78; See also Subini Ancy Annamma, Darrell D. Jackson & Deb Morrison, "Conceptualizing color-evasiveness: using dis/ability critical race theory to expand a color-blind racial ideology in education and society" (2017) 20:2 Race Ethnicity and Education 147, at 154; Linton, at 213.

compromises their human rights analysis in the context of drug dependence.[248] Such uses of blindness as metaphor are inappropriate and rightly criticized.

But Gascon J.'s metaphorical use of blindness is also intellectually generative in three ways. First, on *discourse*, Gascon J.'s metaphorical use of blindness speaks to the insidious ways in which ableist language continues to shape our cultural associations with disability—"[t]he almost irresistible pull of metaphor when talking about blindness".[249] Second, on *precision*, Gascon J.'s metaphorical use of blindness carries a passive connotation that "locates the problem . . . within an individual".[250] In so doing, it casts the majority as simply "victim to" an unawareness of addiction, rather than—perhaps more provocatively—active participants in disability discrimination through "purposeful" evasion.[251] Indeed, evading grappling with the human rights implications of addictions is precisely what the "addiction-exception" accomplishes. Third, on *scope*, Gascon J.'s metaphorical use of blindness stimulates a related question: whether blindness metaphors are always problematic. For example, the metaphors of "blind justice"[252] (in law) and "blind grading"[253] (in law school) introduce a seemingly distinct disability metaphor—not "blindness" *as ignorance*, but rather *as objectivity*.[254] One could argue, that such metaphoric uses simply continue to trade in "thoughtless associations of blindness

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[248] *Stewart*, at paras. 58-59. While Gascon J.'s particular invoking of disability metaphor associates blindness with ignorance, some scholars question whether such metaphors need always carry negative connotations. See, *e.g.*, Elizabeth F. Emens, "What's Left in Her Wake: In Honor of Adrienne Asch" (2014) *Hastings Center Report* at 20.

[249] Naomi Schor, "Blindness as Metaphor" (1999) 11:2 Differences 76, at 81. Indeed, Jennifer Koshan while reviewing this chapter helpfully noted that my reference's to Gascon J.'s disability justice "vision" likewise used harmful disability metaphors. Credit to her for the exclusion of those metaphors in this final draft.

[250] Subini Ancy Annamma, Darrell D. Jackson & Deb Morrison, "Conceptualizing color-evasiveness: using dis/ability critical race theory to expand a color-blind racial ideology in education and society" (2017) 20:2 Race Ethnicity and Education 147, at 154.

[251] Subini Ancy Annamma, Darrell D. Jackson & Deb Morrison, "Conceptualizing color-evasiveness: using dis/ability critical race theory to expand a color-blind racial ideology in education and society" (2017) 20:2 Race Ethnicity and Education 147, at 154.

[252] Doron Dorfman, "The Blind Justice Paradox: Judges with Visual Impairments and the Disability Metaphor" (2016) 5:2 Cambridge J. Int'l. & Comp. L. 272, at 275.

[253] Elizabeth F. Emens, "What's Left in Her Wake: In Honor of Adrienne Asch" (2014) *Hastings Center Report*, at 20; See also Doron Dorfman, "The Blind Justice Paradox: Judges with Visual Impairments and the Disability Metaphor" (2016) 5:2 Cambridge J. Int'l. & Comp. L. 272, at 284.

[254] Doron Dorfman, "The Blind Justice Paradox: Judges with Visual Impairments and the Disability Metaphor" (2016) 5:2 Cambridge J. Int'l. & Comp. L. 272, at 282-283.

with ignorance".[255] But do they? And must they always?[256] An alternate reading could interpret such uses as a distinct metaphor illuminating "the paradoxical relationship between blindness and insight".[257] Blindness can be *ignorance*, but also "*the veil of* ignorance", from which justice is said to follow.[258] Indeed, on this latter understanding, "sightedness *is* blindness" as "seeing is an impediment in the quest for true vision".[259] Justice Gascon's use of disability as a metaphor in his opinion is unfortunate. But it also provides an opportunity for further reflection on the pervasive character of ableism and the various ways it is reinscribed in our law and society.[260]

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[255] Elizabeth F. Emens, "What's Left in Her Wake: In Honor of Adrienne Asch" (2014) *Hastings Center Report*, at 20.

[256] Professor Elizabeth Emens summarizes a discussion with Adrienne Asch on this very subject in her published tribute to Asch:

> Adrienne and I once debated whether disability metaphors could ever be neutral, or even positive, rather than offensive. The disputed phrase was "blind grading," the typical term for keeping students' identities anonymous during exam grading, common in law schools and elsewhere. Adrienne essentially argued that the word "blind" there meant ignorant, which was insulting, since blindness bore no relation to ignorance. With far less certainty, I wondered aloud if using the word "blind" to describe intentional obstructing of one's view of certain facts might not be a neutral or even slightly positive invocation of the metaphor of blindness. She aptly cited the long history of thoughtless associations of blindness with ignorance, and I agreed that those who say "blind grading" are not thoughtfully engaging with the potential virtues of blindness but likely participating in that unthinking tradition. I continued, however, to press the question of whether blindness could ever be used as metaphor in a constructive or neutral manner. We never resolved the matter.

See Elizabeth F. Emens, "What's Left in Her Wake: In Honor of Adrienne Asch" (2014) *Hastings Center Report*, at 20.

[257] Naomi Schor, "Blindness as Metaphor" (1999) 11:2 Differences 76, at 80. Outside the legal context, the phrase "love is blind" also has an ambivalent relationship with the vice/virtue of blindness. See Naomi Schor, "Blindness as Metaphor" (1999) 11:2 Differences 76, at 84. For more discussion on the ambivalent treatment of blindness in "Western culture and art", see Doron Dorfman, "The Blind Justice Paradox: Judges with Visual Impairments and the Disability Metaphor" (2016) 5:2 Cambridge J. Int'l. & Comp. L. 272, at 277.

[258] Doron Dorfman, "The Blind Justice Paradox: Judges with Visual Impairments and the Disability Metaphor" (2016) 5:2 Cambridge J. Int'l. & Comp. L. 272, at 283.

[259] Naomi Schor, "Blindness as Metaphor" (1999) 11:2 Differences 76, at 88. See also 92: ". . . where prejudice is present in fiction, as in Jane Austen's *Pride and Prejudice*, there is moral blindness and where vision is present, there is moral judgment. Prejudice is a visual disturbance, it forms a cataract-like film that prevents accurate vision, that clouds judgment."

[260] The author is indebted to Elizabeth Emens for the depth of this discussion regarding disability as metaphor. As one of her poetic comments on an earlier draft observed: "Isn't it part of the complexity of ableism, how it seeps into everything, a recognition which makes victories less total and losses less dispiriting?"

These points on metaphor aside, Gascon J. does not shy away from the safety concerns animating the majority's holding and Elk Valley's "no free accident" policy. Rather, he acknowledges the "safety-sensitive environment" at Elk Valley,[261] but still insists that "such policies, even if well intentioned, are not immune from human rights scrutiny".[262] In other words, he is live to how even purportedly well-intentioned discrimination demands critical interrogation.[263]

As noted earlier, CDT views social context as crucial to the enterprise of progressive disability analysis. And it is no surprise, therefore, that Gascon J.'s critical opinion begins by highlighting context in the dispute passed over in the majority and concurring opinions. In particular, Gascon J. more comprehensively outlines the political stakes of the dispute by outlining: (1) Stewart's "long career with Elk Valley" and "clean disciplinary record";[264] (2) the unilateral implementation of the policy on Elk Valley's employees without the agreement of their union and its accommodation for only those employees aware of their disability;[265] (3) that Stewart was not proven to be high at work and had apparently used cocaine "21 hours before the incident";[266] and (4) how *the text* of the policy actually required individualized assessment, whereas its *implementation* imposed "automatic termination".[267] Some liberal jurists might consider some or all of these considerations irrelevant to the narrow analysis demanded in law. But CDT, to the contrary, understands disability as, at base, a question of power. It therefore follows that social context informing the power dynamics at play— *i.e.*, the fact that Stewart was a diligent worker for nine years and seemingly sober at the time of the incident and the fact that Elk Valley unilaterally imposed the policy without union consent and then did not even abide by that policy's terms—likewise inform the justice implications in the appeal.[268] Indeed, *Stewart* is not simply a case about disability hierarchy in isolation, but rather, its imbrication with labour hierarchy. As such, the

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[261] *Stewart*, at para. 62.

[262] *Stewart*, at para. 62.

[263] Indeed, far from well-intentioned, Faisal Bhabha calls Elk Valley's treatment of Stewart "clearly laced with prejudice and contempt". See Faisal Bhabha, "Stewart v. Elk Valley: The Case of the Cocaine-Using Coal Miner" (Paper delivered at the OBA Institute 2018: Exploring the Evolving Definition of Disability and Evidence to Support It, February 6, 2018), online: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1330&context=all_papers>, at 17.

[264] *Stewart*, at para. 64.

[265] *Stewart*, at para. 65.

[266] *Stewart*, at para. 66.

[267] *Stewart*, at para. 67.

[268] As Jon Soltys and Daniel Dylan observe: the tribunal's decision in *Stewart* "ignore[d] the power imbalance inherent in employer-employee relationships, which both employment and human rights legislation strive to address". See Jon Soltys & Daniel W. Dylan, "Accommodating the Unknown: Balancing Employee Human Rights with the Employer

majority's ruling does not merely attenuate protections for disabled people, but moreover, "augments the power imbalance inherent in employer-employee relationships".[269]

It is, likewise, unsurprising that Gascon J.—unlike the majority and concurring judges—provides a detailed summary of the inconsistent approaches to *prima facie* discrimination evident in the decisions below.[270] This is relevant for two reasons: (1) those inconsistencies complicate the Chief Justice's claim of simply agreeing with or deferring to those irreconcilable decisions; and (2) those inconsistencies signal the judicial discomfort with disability equality that CDT specifically anticipates and critiques, especially in the context of particularly stigmatized disabilities like addiction. Despite the established test for discrimination requiring only that a protected ground be "a factor" in the resulting harm, the Court of Queen's Bench demanded a "*causal* factor", while the Court of Appeal required a "*real* factor".[271] Some may simply attribute this to confused jurisprudence, or mere semantics. But CDT would, I suggest, argue that such confusion traces its genealogy to politics, namely the sense that *something more* must be needed to recognize discrimination in the context of certain disabilities—the very stigma Gascon J. flagged in the introductory paragraph to his opinion.

With those preliminary matters addressed, Gascon J. then turns to his analysis of *prima facie* discrimination.

By emphasizing discriminatory *effect* over *intent*,[272] Gascon J. sets out not only the proper jurisprudential framework, but from a CDT perspective, a framework, more importantly, with the capacity to engage with the systemic considerations foundational to disability justice.

Moreover, by centring effects, Gascon J. more rigorously critiques the tribunal's

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Duty to Ensure Safety: A Dialogue on *Stewart v Elk Valley* and the *Cannabis Act*" (2020) 9:1 Can. J. Hum. Rts. 57, at 74.

[269] Jon Soltys & Daniel W. Dylan, "Accommodating the Unknown: Balancing Employee Human Rights with the Employer Duty to Ensure Safety: A Dialogue on *Stewart v Elk Valley* and the *Cannabis Act*" (2020) 9:1 Can. J. Hum. Rts. 57, at 82.

[270] *Stewart*, at paras. 69-73. Likewise, Faisal Bhabha described these as "multiple judgments" with "a variety of analytical approaches". See Faisal Bhabha, "Stewart v. Elk Valley: The Case of the Cocaine-Using Coal Miner" (Paper delivered at the OBA Institute 2018: Exploring the Evolving Definition of Disability and Evidence to Support It, February 6, 2018), online: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1330&context=all_papers>, at 9. Moreover, as Nadia Pronych observes, this variety of approaches was reflected in preceding lower court jurisprudence as well. See Nadia Pronych, *Stewart v. Elk Valley Coal Corp.: The Rehabilitation of Addiction Disability Law in Canada* (LLM Thesis, University of Western Ontario, 2020), online: *Electronic Thesis and Dissertation Repository* 7437 <https://ir.lib.uwo.ca/etd/7437>, at 10-12.

[271] *Stewart*, at para. 73 (emphasis added).

[272] *Stewart*, at para. 80.

analysis. According to the Chief Justice: "The Tribunal could not have been clearer — 'Mr. Stewart's disability was not a factor in his termination.'"[273] But with particular focus on effect, Gascon J. dissects the tribunal's analysis to reveal how when it *said* disability was "not a factor", what it *meant* was either that Elk Valley did not intentionally discriminate against Stewart due to his addiction,[274] or that Stewart retained residual control over his choice to use drugs.[275] And it is for this reason that Gascon J.'s opening statement concerned with "effectively exclud-[ing]"[276] drug-dependent people from human rights is so astute.[277] Few employers are misguided enough to admit ableist malice when terminating an employee and few addictions wrest all agency from an individual. It therefore follows that, to require either an admission of ableism or the negation of agency for *prima facie* discrimination based on addiction is, in Gascon J.'s words, to "effectively erase addiction from the scope of legal disability".[278]

The majority and dissent can be understood better when they are viewed through distinct ideological lenses. As mentioned, CDT "invites us to revisit the analytical and strategic utility" of ideas like "choice".[279] And the majority and dissent can be seen as rejecting and accepting that invitation, respectively. The Chief Justice affirmed the tribunal's analysis, which held that Stewart's residual "capacity to make choices" immunized Elk Valley from human rights scrutiny.[280] Justice Gascon could not have disagreed more fervently: "[a] complainant's choices are irrelevant to contribution".[281] As such, the majority and dissent can be seen as reflecting distinct perspectives on meaningful inclusion and accommodation. Similarly, CDT's emphasis on systems rather than individuals is reflected in this judicial divide. As Gascon J. notes, reliance on choice constructs "a sort of contributory fault defence in discrimination cases".[282] In this way, his analysis unveils the ableist norms

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[273] *Stewart*, at para. 36.

[274] *Stewart*, at para. 112.

[275] *Stewart*, at paras. 88-89.

[276] *Stewart*, at para. 59.

[277] Faisal Bhabha shares this concern: "It may be that most addicts will be presumed to exercise sufficient choice with respect to their behaviour, which could make human rights protections essentially unavailable." See Faisal Bhabha, "Stewart v. Elk Valley: The Case of the Cocaine-Using Coal Miner" (Paper delivered at the OBA Institute 2018: Exploring the Evolving Definition of Disability and Evidence to Support It, February 6, 2018), online: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1330&context=all_papers>, at 11.

[278] *Stewart*, at para. 118.

[279] Devlin & Pothier, at 16.

[280] *Stewart*, at para. 34.

[281] *Stewart*, at para. 97.

[282] *Stewart*, at para. 97. Though an analogy with contributory fault understates the

inherent in uncompromising drug policies and challenges the Court to understand the scope of disability justice more broadly. Indeed, he explicitly describes "choice" hurdles as "normatively undesirable".[283] Just as CDT strives to allocate greater responsibility on our *disabling society* than *disabled people*, Gascon J. rejects logics of choice for placing "a burden *on complainants* to avoid discrimination, rather than *on employers* not to discriminate"[284]—yet another collision of liberal thought with ableist consequences. And when Gascon J. notes how this Court has, in other cases, resoundingly rejected "drawing superficial distinctions between protected grounds . . . and conduct inextricably linked to those grounds"[285] (*e.g.*, sexual orientation and activity), he gestures, again, towards the ways in which stigma may be corrupting the majority's analysis.[286]

As a final point concerning *prima facie* discrimination, Gascon J.'s focus on effects explains his objection to the Chief Justice's analysis, specifically her conflation of the separate discrimination and justification stages. As noted earlier, the Chief Justice's analysis tacitly endorses an "addiction exception" to disability rights, which Gascon J. "take[s] issue with" for "import[ing] justificatory considerations . . . into the *prima facie* discrimination analysis",[287] with the "effect of denying human rights protections to a vast majority of drug-dependent people".[288] As such, Gascon J. more explicitly pushes the analysis towards the grappling with societal mores demanded by disability justice, and encouraged by CDT. The Chief Justice gestures at the idea of employees claiming a right to smoke in the office as a shocking example to bolster her analysis.[289] In contrast, Gascon J. insists that employers justify the ableist consequences of their policies—even ostensibly trite policies—to avoid short-circuiting the discrimination analysis in favour of unques-

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consequences here, since such a finding merely *decreases* liability, rather than *negating* it (see, *e.g.*, *Deloitte & Touche v. Livent Inc. (Receiver of)*, [2017] S.C.J. No. 62, 2017 SCC 63, at para. 106 (S.C.C.)). The author thanks Jonnette Watson Hamilton for this valuable insight.

[283] *Stewart*, at para. 99.

[284] *Stewart*, at para. 99 (emphasis added). A majority also made this point in *Fraser*, albeit in the context of women's subordination. See *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, 2020 SCC 28, at para. 80 (S.C.C.).

[285] *Stewart*, at para 100.

[286] According to Faisal Bhabha, Gascon J.'s point here "highlighted the hypocrisy in the majority's judgment in light of the fact that the Court has always refused to draw distinctions between protected grounds and conduct inextricably linked to those grounds". See Faisal Bhabha, "Stewart v. Elk Valley: The Case of the Cocaine-Using Coal Miner" (Paper delivered at the OBA Institute 2018: Exploring the Evolving Definition of Disability and Evidence to Support It, February 6, 2018), online: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1330&context=all_papers>, at 15.

[287] *Stewart*, at para. 93.

[288] *Stewart*, at para. 102.

[289] *Stewart*, at para. 42.

tioned hegemonic norms. Indeed, failing to walk through a human rights analysis for nicotine-addicted employees is precisely what leads to the misleading persuasiveness of the Chief Justice's example. True, a receptionist smoking in a poorly ventilated office as they greet clients seems like an undue burden on their employer. But *smoking in the office* is simply an *unreasonable* accommodation one receptionist might seek for their addiction. In contrast, occasional smoke breaks—like occasional bathroom breaks— *reasonably* accommodate a nicotine-addicted receptionist's disability.[290]

Shifting to Gascon J.'s analysis of reasonable accommodation, he is, again, firm in his commitment to advancing disability justice. Like Moldaver and Wagner JJ., Gascon J. defines the terms of engagement in unavoidably political language: whether "the employer 'could not have done anything else *reasonable* or *practical* to avoid the negative impact' on the employee".[291] And so, while their disagreement is in one sense *legal* (the concurrence upholding the tribunal's finding of reasonable accommodation, the dissent not), it is more fundamentally *ideological* (as to when individual assessment may be sacrificed on the altar of safety). Justices Moldaver and Wagner considered safety a trump—in effect, where safety is implicated, individual assessment may be dispensed with to maintain deterrence.[292] In contrast, Gascon J. insisted on social context—specifically, he held that "[t]o determine what 'reasonable or practical' alternatives are available to it, an employer must engage in an individualized analysis",[293] thereby placing the individual, and the policy, in the relevant social conditions.

I agree with Gascon J.,[294] but I can see why this position may concern some people. Must we accommodate, for example, commercial airline pilots whose disability poses an increased risk to public safety with potentially devastating consequences?[295] Helpfully, however, Gascon J.'s position was not animated by

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[290] The author is indebted to Archana George for discussion on this point to flesh out the analysis.

[291] *Stewart*, at para. 125 (emphasis added).

[292] *Stewart*, at para. 53.

[293] *Stewart*, at para. 126.

[294] As does Faisal Bhabha, who describes reasonable accommodation as a "mandatory reconciliation exercise" for testing the "possibility of compromise". See Faisal Bhabha, "Stewart v. Elk Valley: The Case of the Cocaine-Using Coal Miner" (Paper delivered at the OBA Institute 2018: Exploring the Evolving Definition of Disability and Evidence to Support It, February 6, 2018), online: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1330&context=all_papers>, at 18.

[295] For an American example where the Supreme Court specifically considered visually impaired pilots, see *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999)—an astonishing case where the Court held that correctible visual impairment is effectively a disability *in fact* but not *in law*. In fact, the airline refused to hire the petitioners because of their visual impairment. But *in law*, that refusal did not relate to "disability", because it could be

disregard for safety. Rather, in his view: (1) it was incumbent on the employer to assess whether deterrence could be achieved through alternate sanctions (*e.g.*, a lengthy unpaid suspension);[296] (2) safety must be balanced against Stewart's "unique capabilities and inherent worth and dignity";[297] and (3) the accommodations identified by the tribunal as "constitut[ing] appropriate accommodation" were conceptually flawed, thereby warranting appellate intervention.[298] Indeed, the tribunal's reliance on the policy's provision for advance disclosure of disability before an accident—when Stewart's unawareness of his disability was itself a symptom of his addiction—is not simply illogical, but ableist. Such reasoning not only imposes *a burden* on disabled complainants, but in the case of Stewart, who was unaware of his disability, an *impossible* one.[299] Again, Gascon J. pointed out the ways in which such reasoning constructs an addiction exception:

> Bearing in mind that those suffering from addiction are routinely unaware of their drug dependence, this amounts to, in effect, removing all human rights protections for such individuals. In other words, it says: you only get human rights protections if you ask, though we know, due to your disability, that you will not.[300]

Even more critically, Gascon J.'s reasons then note the stigma was informed, not simply by ableism, but sanism, *i.e.*, prejudice against *mentally* disabled people, specifically.[301] In Gascon J.'s words:

> This insensitivity arises disproportionately in the context of addictions, likely because of the stigma associated with them. We would never demand that an employee with a physical disability complete an unattainable physical activity to access accommodation. Still, that is precisely what Elk Valley, in a psychological context, did to Mr. Stewart here. He could never have sought accommodation for a disability he did not know he had.[302]

All of which raises, in my view, one further provocation in the spirit of CDT. All three judgments—even Gascon J.'s dissent—hold "safety" in opposition to other interests, *e.g.*, dignity and inclusivity. But recall that certain mentally disabled people may often be unaware of their disability. Does it not follow, then, that this lack of awareness is, itself, a safety risk? And if harsh punishments reinforce ableist stigma and stigma in turn shames disabled people into unawareness (or, alternatively, into non-disclosure of known addictions to employers[303]), might those harsh

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corrected—a perverse "Schrödinger's disability" paradox.

[296] *Stewart*, at para. 144.

[297] *Stewart*, at para. 140, citing *Meiorin*, at para. 62.

[298] *Stewart*, at para. 131.

[299] *Stewart*, at paras. 134, 138.

[300] *Stewart*, at para. 134.

[301] *Stewart*, at para. 134.

[302] *Stewart*, at para. 135.

[303] See Jon Soltys & Daniel W. Dylan, "Accommodating the Unknown: Balancing

punishments counterintuitively decrease, rather than increase, our collective safety?[304] Is a liberal frame, yet again, missing the forest for the trees, even in this portion of Gascon J.'s dissent? How best to preserve safety at a mine is, of course, a complex social issue. But I think CDT—which strives to complicate our understanding of disability, law and life—would interrogate it. Indeed, it is only in the complex social setting of power that disability takes on meaning. And as the above section displays, Gascon J.'s opinion—at least, far more than the majority and concurrence—grappled with that setting head on: sanist stigma, Stewart's long and disciplined career, Elk Valley's foisted unilateral policy (which it did not even follow) and Stewart's seeming sobriety at the time of the accident. All facts considered solely in Gascon J.'s opinion.

Why was Gascon J. singular in his analysis of the disability injustice in this case? Recall that CDT "emphasize[s] the importance of voice".[305] And I would suggest that, while there is no guarantee that one's identity prescribes any particular ideology, Gascon J.'s personal experience with disability may have informed his empathetic analysis.[306] Navigating the world as a disabled person can provide certain insights into the pervasive ableist norms that contribute to a "common experience" with discrimination[307]—what Linton calls "the vantage point of the

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Employee Human Rights with the Employer Duty to Ensure Safety: A Dialogue on *Stewart v Elk Valley* and the *Cannabis Act*" (2020) 9:1 Can. J. Hum. Rts. 57, at 79: "Conversely, but equally problematic, are arguments in support of zero-tolerance addiction policies, which may only serve to drive addicted employees 'underground' and away from proactive disclosure to the employer."

[304] For example, scholars have argued that criminalizing HIV non-disclosure in the context of sexual activity can "exacerbate the discrimination and stigma that make disclosure so difficult". See, *e.g.*, Kim Shayo Buchanan, "When Is HIV a Crime? Sexuality, Gender and Consent" (2015) 99:4 Minn. L. Rev. 1231, at 1234.

[305] Devlin & Pothier, at 8.

[306] As Simi Linton explains, in her own experience: "It was, of course, the same world I had always lived in, but when I was a nondisabled person I hadn't recognized the ways that world had favored me. I had always taken it for granted. . ." Linton, at 3.

[307] Shapiro, at 24. Though the commonality of this experience is, of course, qualified through an intersectional lens that accounts for, among other things, race, gender, class and sexuality (on intersectionality, see Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) 1:8 U. Chi. Leg. F. 139). Such considerations, for example, explain the stratified vulnerability *within* disabled communities in relation to medical assistance in dying. See, *e.g.*, Linton, at 126. Further, disability itself is diverse (mental vs. physical, less vs. more stigmatized, visible vs. invisible), complicating the extent to which disability generates a common experience. See Linton, at 51. Though Linton does, nonetheless, also discuss the general "commonalities" in disabled people's experiences (at 80).

atypical".[308] And sensitivity to those norms can influence what one is willing to *accept* or *defend* when balancing conflicting values of safety and inclusivity—that is, sensitivity to ableist norms is crucial to critical analysis of disability discrimination and accommodation.

Canada's first woman Supreme Court Justice Bertha Wilson asked: "Will Women Judges Really Make a Difference?"[309] Specifically, she noted how "[i]n some areas of the law . . . a distinctly male perspective is clearly discernible",[310] that such "presuppositions about the nature of women and women's sexuality . . . are little short of ludicrous",[311] and that increasing women's representation will make a difference, optically (*i.e.*, the symbolic effect of recognizing women's competence for the judiciary),[312] experientially (*i.e.*, the distinct experience of women lawyers appearing before women judges, rather than men)[313] and "perhaps" even substantively (*i.e.*, in the judicial decision-making process).[314] Likewise, in the specific context of discrimination, critical race scholar Russell Robinson has persuasively demonstrated how "outsiders on average perceive allegations of discrimination through a fundamentally different framework than insiders".[315] Disability is also a lived experience that can shape one's views, and in turn, one's jurisprudential instincts. As Elizabeth Emens explains:

> The biggest obstacle for disability law continues to be attitudes toward disability . . . More broadly, anecdotal and empirical accounts demonstrate a striking gap between the ideas about disability pervasive in mainstream society—what I call the "outside" view—and the ideas about disability common in the disability community—

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[308] Linton, at 81.

[309] Bertha Wilson, "Will Women Judges Really Make a Difference?" (1990) 28:3 Osgoode Hall L.J. 507 [hereinafter "Wilson"]. For more recent scholarship on gender and judging, see, *e.g.*, Jennifer L. Peresie, "Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts" (2005) 114:7 Yale L.J. 1759; Sean Rehaag, "Do Women Refugee Judges Really Make a Difference? An Empirical Analysis of Gender and Outcomes in Canadian Refugee Determinations" (2011) 23:2 Can. J. Women & L. 627.

[310] Wilson, at 515.

[311] Wilson, at 515.

[312] Wilson, at 517.

[313] Wilson, at 518.

[314] Wilson, at 522. See also Wilson, at 519-520 ("Carol Gilligan . . . sees the difference as going much deeper than that. In her view, women think differently from men, particularly in responding to moral dilemmas . . . There is merit in Gilligan's analysis.") McLachlin C.J.C., likewise, views her experiences as a woman as relevant to her judicial role. See "What's the state of Canada's courts? With Beverly McLachlin" (August 3, 2021), *Open to Debate* (podcast), online: <https://podcasts.apple.com/us/podcast/whats-the-state-of-canadas-courts-with-beverly-mclachlin/id1441042667?i=1000530835583&1=tr>.

[315] Russell Robinson, "Perceptual Segregation" (2008) Colum. L. Rev. 1093, at 1104.

what I call the "inside" view.[316]

I would argue that Gascon J.'s dissent in *Stewart* is a testament to the value of the "inside" view—that it demonstrates how disabled judges, too, can "make a difference". Indeed, *Stewart* may be seen as a microcosm of how all subordinated groups can make a difference through greater representation within institutions that exercise power inseverable from their ideological constitution.

However, in making this point I want to be clear that, with respect to ideology specifically—not alternate concerns such as optics and experience—representation is a *means*, not an *end*. My modest point is that, on average, greater representation of disability within the judiciary should promote greater empathy for the experience of disabled people within Canadian courts, and in turn, greater justice for disabled people in Canadian society.[317] And so, while I support the appointment of more disabled judges, it is not because of any essential idea about the politics of all disabled people, but rather, an acknowledgment that judgment *is always political*, and that politics *are always informed* by a complex dynamic of identity and ideology. Indeed, in this prevailing "diversity moment" (where even blatantly racist institutions are embracing identity politics[318]), careful scrutiny is needed to root out "strategies of obfuscation" that cynically deploy "diversity" to reify existing power structures and resist structural change[319]—yet more "preservation-through-transformation"[320] to be alert for.

Additionally, I believe that disability justice—like all forms of justice—will be advanced most importantly, not in the courts, but in mass politics.[321] That said, as we have witnessed—especially in the United States[322]—courts themselves can be

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[316] Elizabeth F. Emens, "Framing Disability" (2012) 2012:5 U. Ill. L. Rev. 1383, at 1389.

[317] On the role of emotion/empathy in law, see generally Emily Kidd White, "Till Human Voices Wake Us: The Role of Emotions in the Adjudication of Dignity Claims" (2015) 3 J. of L. Religion & State 201; Daniel Del Gobbo, "Lighting a Spark: Feminism, Emotions, and the Legal Imagination of Campus Sexual Violence" (2021) 44:2 Dal LJ ___ [forthcoming].

[318] See, *e.g.*, Natasha Lennard, "'Woke' CIA Ad Is No Reason to Throw Out the Language of Liberation" (May 4, 2021), *The Intercept* (blog), online : <https://theintercept.com/2021/05/04/cia-woke-ad/>; Rebecca Jennings, "Who are the black squares and cutesy illustrations really for?" (June 3, 2020), *Vox* (blog), online: <https://www.vox.com/the-goods/2020/6/3/21279336/blackout-tuesday-black-lives-matter-instagram-performative-allyship>.

[319] See generally Enzo Rossi & Olúfémi O. Táíwò, "What's New About Woke Racial Capitalism (and What Isn't)" (December 18, 2020), *Spectre* (blog), online: <https://spectrejournal.com/whats-new-about-woke-racial-capitalism-and-what-isnt/>; Rinaldo Walcott, "The End of Diversity" (2019) 31:2 Public Culture 393.

[320] Reva B. Siegel, "'The Rule of Love': Wife Beating as Prerogative and Privacy" (1996) 105 Yale L.J. 2117, at 2178-2187.

[321] See generally Dean Spade, "Laws as Tactics" (2011) 21 Colum. J. Gender & L. 40.

[322] "SCOTUS, Politics, and the Law" (October 9, 2020), *The Dig* (podcast), online: <https://www.thedigradio.com/podcast/scotus-politics-and-the-law/>.

weaponized against mass politics, thereby leaving the composition of our courts a relevant concern for social change, even for those skeptical of the judiciary. Indeed, *Stewart* is instructive in this regard. Justice Gascon's opinion, if it had been in the majority, would not have solved disability injustice across Canada. But it would have still been material. Employment is a systemic site of ableist discrimination.[323] And human rights are one mechanism—among many—that can improve the material realities of disabled life in Canada. It may seem trite—or perhaps naïve—but more empathy for that life on the judiciary matters.

IV. CONCLUSION: JUSTICE GASCON'S DISABILITY LEGACIES IN LIFE AND IN LAW

> Old Yeller was the best, most loyal dog that ever was. I mean everybody loved that mutt.[324]
>
> Saul Goodman in *Breaking Bad* (Season 5, Episode 12)

Approaching the end of the *Breaking Bad* series, the lawyer of the two main protagonists—Saul Goodman—notes how Jesse, a meth addict, displays profound loyalty, and even likens him to Old Yeller, the paradigmatic figure of loyalty in literature. As I noted at the beginning of this chapter, Jesse is, throughout the series, presumed to be untrustworthy due to his addiction. Yet by the series' conclusion, there are few if any characters in the series less susceptible to the corrupting influence of power and greed. Not only *could you* trust the drug addict—it was, arguably, *only* Jesse who could be trusted in the end.

* * *

As is often the case with bigotry, prejudicial scripts of analysis mislead more than clarify. And these scripts are especially pernicious in the context of mental disability. As Michael Perlin explains:

> Sanism is as insidious as other "isms" and is, in some ways, more troubling, since it is largely invisible and largely socially acceptable. Further, sanism is frequently practiced, consciously or unconsciously, by individuals who regularly take liberal or progressive positions decrying similar biases and prejudices that involve sex, race, ethnicity or sexual orientation. Sanism is a form of bigotry that "respectable people can express in public."[325]

The immense force with which sanist beliefs continue to pervade our society make Gascon J.'s disability justice legacy even more significant. In speaking publicly about his experience with anxiety and depression, Gascon J. embodied disability in a manner that stimulated crucial dialogue within the legal profession

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[323] Shapiro, at 27; Dianne Pothier, "Tackling Disability Discrimination at Work: Toward a Systemic Approach" (2010) 4:1 McGill J.L. & Health 17.

[324] As stated by Saul Goodman in Vince Gilligan, "Rabid Dog", *Breaking Bad* (Sony Pictures, 2013).

[325] Michael L. Perlin, "On 'Sanism'" (1993) 46 S.M.U. L. Rev. 373, at 374-375.

about both mental health and our inhospitable culture of overwork. And in writing his dissent in *Stewart*, Gascon J. challenged both his colleagues—and broader society—to grapple with a distinct and more inclusive conception of disability justice in Canada. Justice Gascon has, therefore, left an indelible mark in Canadian disability justice both through *his life* and in *the law*.

When Le Dain J. disclosed his disability to Dickson C.J.C., the Chief Justice felt that the "public was not ready" for a disabled Supreme Court Justice.[326] And so, in a sense, one could say that Dickson C.J.C. felt that Le Dain J.'s disability could not be "reasonably accommodated"—that to grant his short reprieve would cause "undue hardship" to the Supreme Court of Canada. With the benefit of hindsight, this position is plainly ableist. And Wagner C.J.C.'s support for Gascon J. is not only a welcome shift in the fight for greater acceptance and understanding of disability, but moreover, a narrative that illustrates both the unavoidably political operation of courts, and how political shifts relate to evolving legal norms. Like art, law imitates life.[327]

On that note: I had my first panic attack on July 7, 2019—a year after clerking for Gascon J., and two months less a day after his panic attack in Ottawa. It provided me with long-overdue perspective on my own experiences of anxiety in the past, as well as on those of others. I had always been known by friends—and had known myself—as profoundly *non*-anxious; calm, cool and collected across circumstances. Yet following my panic attack, I was able to revisit various moments in my life—the shaking hands, excusing myself from the room—that presented signs of an unidentified anxious avoidance. Indeed, I have come to realize the particular way this avoidance compounded. Convinced of my stoicism, I became invested in maintaining the illusion of calm in the face of mounting evidence of anxiety—that is, I *avoided my avoidance*. And so, like Stewart, the belated appreciation of my condition was not unrelated to anxiety, but rather the direct consequence of it and the stigma it carries.

My own story, and those of Le Dain, Gascon and Stewart lead me to believe that a posture of punishment cannot promote disability justice. Some informal reviewers noted that, to many people, addictions occupy a distinct normative setting from other disabilities. For that reason, they cautioned me against analyzing *disability generally* in the context of a critical analysis of *addiction* (especially addiction to illegal substances). But I think it is precisely in the stigmatic context of addictions where we can best see the intersection of ableism and analysis. Of course, different disabilities have different practical and normative considerations, just as different

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[326] "Justices Gerald Le Dain and Clément Gascon both suffered from depression. But the similarities end there", *CBC News* (May 17, 2019), online: <https://www.cbc.ca/radio/sunday/the-sunday-edition-for-may-19-2019-1.5140027/justices-gerald-le-dain-and-cl%C3%A9ment-gascon-both-suffered-from-depression-but-the-similarities-end-there-1.5140048>.

[327] Rebecca West, *The Meaning of Treason* (New York: Viking, 1947), at 63: "The law, like art, is always vainly racing to catch up to experience."

people have different experiences of and perspectives on disability—I accept all of this. But hard cases launch us past the tip of the iceberg (judicial text) to reveal its broader subaquatic structure (judicial ideology). The difficulties they raise are the very ideological tensions I seek to highlight in my analysis. And those tensions include the false promise of punishment. We cannot punish our way to safety. Indeed, punishment of disability systemically serves to reinforce the very stigmas that conceal its presence—that prevent the essential "coming to terms with difference"[328] that CDT demands.

So long as disability is constructed as less than, ableism will be legitimized as an inevitable consequence of hierarchy. The challenge, therefore, is to call for a new construction that is neither subordinate to nor ignorant of human difference and which affirms dignity across difference in a manner that is genuinely emancipatory for all. We have a long road ahead. But Gascon J.—both in life and in law—has left a legacy for disability jurists, scholars and activists to carry forward in the ongoing pursuit of disability justice. He inspires me, not as a disabled judge,[329] but as a compassionate human being, who early in my legal career exposed me to great depths of humility and integrity. And to think, just three decades ago, the Chief Justice of Canada, the pinnacle of our "justice" system, would have considered such a kind, intelligent and thoughtful man unfit for the Court—poor judgment, one might say.

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[328] Devlin & Pothier, at 12.

[329] Simi Linton has insightful reflections on disability and inspiration. After discussing Homer Avila, a dancer who "lost one leg and gained wings" (at 196), she wrote:

> All of this makes me think of altering my perspective on bravery and inspiration. Maybe it would be legitimate for me to say that Homer . . . or any of the lot of us, *is* brave for defying expectations and struggling to make this life possible. That when our actions are purposeful, our art exciting, or our words meaningful, we *do* inspire.

Linton, at 198.