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Equality and Access to Justice in the Work of Bertha Wilson

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Increasingly, Canadians have sought to understand themselves as a community through the language of equality rights. There are several practical and theoretical consequences to this choice of language. One of the practical consequences is that a formal commitment to equality raises public consciousness with regard to material and social disparities and to some extent gives those who are excluded or marginalized at least a rhetorical claim to participation and a share in resources. However, another consequence is that while promoting a rhetoric of respect and individual dignity, equality discourse also places a disproportionate amount of power in the hands of elite groups, namely the courts, lawyers, and social groups who have access to courts and lawyers. The dissonance persists on a theoretical level. The recourse to the language of equality rights can be regarded as a shift away from a notion of community in which hierarchy is based on status and on the exploitation of need to a notion of community in which need is the occasion for the democratization of social and material goods. Conversely, equality rights discourse can also represent a shift to a notion of community in which hierarchy is the natural outcome of competition between individuals who share the same opportunities. What is confusing is that the language of equality rights retains tremendous force and power, and yet when translated into social arrangements, it can have contradictory practical consequences, and can signify contradictory visions of community.

The parallel with the Scottish debates concerning educational policy and the theory of the democratic intellect illustrates the point, and perhaps offers a lesson. At the center of the debates lay a very important social good, education, and, as well, a powerful social myth, what Robert Anderson in his essay on Scottish educational history calls the "myth of the lad of parts".[1] The myth symbolized the social diversity and democratic character of Scottish education in contrast to that of its more class conscious neighbour to the south. However,

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1. R. Anderson, "In Search of the 'Lad of Parts': the Mythical History of Scottish Education" (1985), 19 History Workshop: a Journal of Socialist and Feminist Historians 82.

eventually the myth was captured by a conservative social ideology that saw education not as a means of empowerment and eradicating class hierarchy but as a strategy to preserve social stratification by providing limited mobility for the few. In Anderson's account, Scottish educational policy in the nineteenth century entrenched the ideals of merit and equal opportunity in conjunction with an educational system based on competition for credentials which in practical terms were accessible only to the privileged. A few hardy male souls, at great cost to their health, were able to work their way up from the lower schools to the universities and professional classes. These `lads of parts' came to represent Scotland's commitment to the democratic character of Scottish education. They were proof that middle and upper classes had power, wealth and position because they deserved it. In the name of upholding standards, education became specialized and accessible only to those who managed to climb the ladder constructed of secondary schooling and entrance examinations. Meanwhile, the other side of the myth, its communitarian and egalitarian face which would have seen higher education accessible to all and produced a literate and articulate working class, was lost. Thus, in Anderson's account, the democratic tradition in educational policy had many contested meanings. On the one hand, it meant the social prosperity of every member of the community and their political enfranchisement in both substantive and procedural terms. On the other, it portrayed social progress and prosperity as the inevitable outcome of a process of social exchange in which the same rules apply to all. The former meaning required an attention to the diversity of individual and social needs, while the latter required a focus on the even handed application of uniform standards.

Anderson's deconstructive method as well as his story about the struggle over the meaning of equality in education is particularly relevant to the struggle within legal discourse over the meaning of equality rights. One can trace the same conflicting images of community and the same conflicting strategic options and practical consequences. Furthermore, Anderson's focus on the mythic power of the "lad of parts" invites speculation on the way cultural symbols are defined and deployed to maintain particular social structures and particular arrangements of power and wealth. If one examines legal discourse as a social and institutional practice through which cultural myths are produced and controlled, it is possible to argue that law is a way of organizing knowledge about the world that is founded on exclusion. Three gambits neatly dovetail to provide a framework

designed to perpetuate rather than challenge existing distributions of power: the epistemological move whereby knowledge of the particular is universalized and all other knowledges portrayed as subjective and partial, the normative move whereby the moral domain and the human self are defined in terms of the ideals of autonomy and disengagement, and the methodological move whereby abstract concepts like freedom and equality are invoked to preserve the freedom of social inequalities. It is only by unpacking the links between knowledge production, values, and methodology that one begins to see the shape that resistance might take.

This brings me to a critical question: what is a judge committed to substantive equality and access to justice in the substantive sense, to do? The answer is, she takes great risks, in particular, she counters the exclusionary epistemological, normative, and methodological moves of legal discourse wherever possible. The work of Bertha Wilson reveals the difficulty of that task. In preparing for this essay, I focused on those judgments in which I thought I could see most clearly the effort to transform established categories in order to make them more inclusive and responsive to the diversity of needs within the Canadian community. This involved looking not just at cases which explicitly address the content of equality, but also at decisions which reflect on the discursive and analytic moves required by litigation and the ways in which they silence less powerful groups and delegitimize their claims. Consequently, I would like to divide my remarks into three parts. In the first part, I shall examine the epistemological strategies embarked upon by Justice Wilson, in particular her challenge to the notion of law's objectivity. In the second part, I will discuss the normative commitment to equality that flows from an epistemology that situates knowledge and knowers in experience and history. And finally, I will look at the discursive and methodological moves employed by Justice Wilson.

I Epistemological Strategies: Who is this Ordinary Person anyway?

The ordinary person, once the reasonable man, might be said to be law's "lad of parts" insofar as it is the vehicle whereby the perspectives and interests of a particularly powerful group in Canadian society are presented as the perspectives and interests of all. The law relies on the ordinary person for objectivity. It is presumed that ordinary people act reasonably and that judges can determine what that means in a particular situation because they themselves are rea-

sonable people. Thus, they avoid imposing their own code of behaviour on litigants, but instead apply general principles of normal decent behaviour that pertain to all. While very few judges take time to examine how they arrive at their knowledge of those principles, an unarticulated epistemology of objectivism underlies judicial reliance on the reasonable or ordinary person. Epistemologies function in part as justificatory strategies. They explain why one knowledge claim is valid and another is not. Objectivism asserts that validity can only be achieved "through dispassionate, disinterested, value free, point of viewless, objective inquiry procedures."[2] Conversely, subjective, particularized, socially positioned claims are invalid; they do not count as truth. At most they are opinion. The rigidity of the objective/subjective dualism as well as its hierarchical positive/negative, universalist/particularist inter-relationship makes it very difficult to deconstruct. It signifies not merely the difference between truth and non-truth, but also the divide between moral legitimacy and moral arbitrariness. The judge who resolves conflicts objectively, acts according to principle rather than personal preference. If one departs from the objectivity of the ordinary person's perspective, one opens oneself up to being consigned to the negative `subjective' side of the dualism and to charges of being unprincipled, biased, or at best, if one is a litigant, someone whose flawed nature requires compassion or indulgence. Furthermore, a question about the notion of objectivity itself is a question about the moral legitimacy of legal decisions and the institutional and political legitimacy of courts. Thus any challenge to law's epistemology must ultimately confront the anti-democratic nature of the judicial institution. This is the problem which underlies the discussion of provocation in *R.* v. *Hill.*[3]

Gordon Hill was a teenager who fell asleep one night on the couch of his mentor in a voluntary "Big Brother" programme in Belleville, Ontario. According to his account, he awoke a few hours later to find Verne Pegg, his mentor in the programme, caressing him. In his shock, he struck Pegg with a hatchet and shortly afterwards, when Pegg threatened to kill him, Hill fatally stabbed him. Hill was sixteen at the time; Pegg was thirty two. Hill was convicted of second degree murder. On appeal, Hill argued that the trial judge misinstructed the jury on the defence of provocation which if successfully made out,

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2. Sandra Harding, "Feminism, Science, and the Anti-Enlightenment Critiques", in Linda Nicolson and Nancy Fraser (eds.), *Feminism/Postmodernism* (New York: Routledge,1990) at p. 87.
3. [1986] 1 S.C.R. 313, 25 C.C.C. (3d) 322 (Wilson J. dissenting)[hereinafter *Hill* cited to C.C.C.].

would have reduced the charge to manslaughter. What the trial judge said was that the jury was to consider first whether Pegg's words were "such as would deprive an ordinary person of self-control."[4] Only when the jury reached the next question, whether in fact Hill acted on the provocation and did so "on the sudden before there was time for his passion to cool",[5] could it consider "the mental, the emotional, the physical characteristics and the age of this accused."[6] The first question the law describes as objective; the second is considered subjective. Hill argued that age and sex should be factored in to the first question. Hill, in other words, challenged the claim to objectivity of the first question. He suggested that in order to make the first question truly objective, the jury should apply the standard of self control of an ordinary person of his age and sex.

The majority at the Supreme Court agreed but did not think that the judge needed to explicitly instruct the jury to that effect. So the appeal was dismissed and Hill's conviction for second degree murder upheld. The jury would have the "collective good sense"[7] to figure out that age, sex, race, and physical ability can be important "contextual consideration[s]"[8] in arriving at an objective determination of how the ordinary person would react.

Unfortunately, the case law on provocation is replete with examples of judges who collectively are presumed to have not only good sense but also expertise, consistently refusing to situate the ordinary person in anything but a white, male, heterosexual, able-bodied perspective. What are the options for a judge who wishes to challenge years of judicial common sense? She might say those cases were wrong but now we know better and can rely on the good sense of triers of fact generally to know better - the majority position. Or, she might challenge the artificiality of a notion of objectivity which factors in the particular attributes of the accused, and question the way in which we organize and give respect to some kinds of knowledge while disparaging others.

Justice Wilson in her dissent in *Hill* does neither. She agrees that the discussion has to be contextualized but not that we can rely on the good sense of the jury to do so without explicit instructions. Thus, she would send the question of Hill's guilt back to be determined at trial.

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4. *Ibid.* p. 343.
5. *Ibid.*
6. *Ibid.*
7. *Ibid.* p.335.
8. *Ibid.* p. 336.

However she is also careful to preserve the ordinary person's claim of objectivity and the legitimacy that this confers both on the judicial process and on Hill's behaviour. She suggests that there are two sides to the question regarding the ordinary person's self-control in the provocation defence. The first aspect focuses on the level of self control and is characterized as "objective" in order to ensure equality of responsibility. Thus Wilson J. leaves in place the link between objectivity and legitimacy, between the objectivist epistemological stance and the moral principle that all members of the community ought to be equally responsible for each other's physical security. The only exception that she would make to this "objective" stance is on account of age - and this because the law has traditionally recognized lesser abilities and lesser responsibilities for the young. Youth thus becomes a liability or disadvantage, something we should perhaps indulge on occasion, a manifestation of otherness. Justice Wilson refuses to place gender, race, or other particular attributes in the same paternalistic framework. However, she suggests that the second aspect of the ordinary person's self control involves assessing the gravity of the particular insult. This cannot be done without referring to the context in which the insult occurs, including the relationship between the parties, their age, culture, physical and mental attributes.

This approach might be described as taking the law on its own terms - leaving the formal distinction between objective and subjective and its epistemological and political significance in place - while creating a space for telling different sorts of stories about what ordinariness means, through the device of yet another distinction. By refusing to factor sex or race or culture into the objective question of what is the self control of an ordinary person, she avoids the paternalism of special categories of ordinariness for the enumerated and unenumerated "others" of equality discourse. More importantly, in a legal culture that links legitimacy with universalism, the preservation of the objective calculus of what constitutes self control, makes it possible for courts to take account of broader social commitments through the language of principle. One of the concerns raised by the *Hill* case is that the factual situation and resulting legal rule play into social tolerance of violence against gays and lesbians. Thus, contextualizing what ordinariness means in the Pegg-Hill situation must also mean taking account of law's responsibility in condoning homophobia and violence against gays and lesbians. One must ask the question, to what extent does *Hill* implicitly create an exception for assaults on homosexuals rather than a rule which permits more room

to consider the social factors which contribute to the vulnerability of defendants? An objective standard can serve to mask a balancing of social values and individual plight. However, because the balancing is submerged in the discourse of principle and reason, there is no way to directly speak to what is at stake. Thus, in *Hill*, Justice Wilson avoids the larger project of developing an epistemological stance which openly recognizes the social and historical positioning of individuals as well as the wider impacts of placing that positioning at the center of the decision.

One is left questioning whether that larger project can really be avoided. Can one actually unravel the connection between the accused's level of self control and the gravity of the insult, and thus maintain the objectivity of the former calculation apart from the subjective and contextual considerations of situation and relationship? I would suggest not. Rather, once one recognises the situatedness of what one has described as "objective", I think that one has to question the objective/subjective distinction itself, and in particular the moral and political consequences of labelling one set of perspectives objective, and the other subjective. However, I believe that Justice Wilson's decision in *Hill* reveals a willingness to raise such questions and she begins to develop answers in subsequent cases.

Perhaps the clearest glimpse of what an alternative epistemological stance might look like can be seen in *R.* v. *Morgentaler*,[9] a case dealing with the constitutionality of the abortion provisions in the Criminal Code. In *Morgentaler*, Justice Wilson for the most part leaves the normative framework of legal discourse intact. In finding that women's liberty interests are implicated in decisions about reproduction, she uses the language of privacy, autonomy and boundaries. In addition, she relies on the transparency to reason of moral principle as justification. The truth of the assertion that the state should not compel a woman to take a pregnancy to term is founded on the universal moral principle that human beings should not be used as means to a state ordained end. However, in explaining why the Constitution should protect those decisions from interference, a very different picture, not only of the self and social relationship but also of how knowledge is produced, emerges. She writes:

> This decision is one that will have profound psychological economic and social consequences for the pregnant woman. The circumstances

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9. [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385 [hereinafter *Morgentaler* cited to S.C.R.].

> giving rise to it can complex and varied and there may be, and usually are, powerful considerations militating in opposite directions. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well. Her response to it will be the response of the whole person. ...It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma.[10]

Epistemic justification is predicated not on a claim of universal rationality but on the subjective experience of the claimant in making a decision that has a multitude of personal, social and ethical consequences.

The questions raised by *Hill* and *Morgentaler* reassert themselves in *R.* v. *Lavallee*.[11] In that case, the issue on appeal is whether expert testimony is admissible to assist the trier of fact in determining whether an accused who has been in a battering relationship with her partner can claim self defence against a charge of killing her partner. The evidence was that the accused had shot her partner in the head as he was leaving the room after allegedly slapping and hitting her, and threatening to kill her if she did not kill him first. In order to make a successful claim of self defence under s. 34(2) of the *Criminal Code*, an accused must have acted reasonably. She must have reasonably apprehended death or grievous bodily harm at the hands of the deceased and she must have had a reasonable belief that she could not otherwise save herself from death or grievous harm other than by shooting the deceased. As in *Hill*, an objective standard of reasonable behaviour ensures fairness and equality in the application of the law.

Justice Wilson for the Court finds that the trial judge did not err in admitting expert testimony. In so doing she expands on what the standard of reasonableness entails. She points out that it has traditionally been described in terms of what "the ordinary man using ordinary care" might do in the same circumstances. However, she goes on to observe:

> ...If it strains credulity to imagine what the "ordinary man" would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however.

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10. *Ibid.* at 171.
11. [1990] 1 S.C.R. 852, 55 C.C.C (3d) 97 [hereinafter *Lavallee* cited to C.C.C.].

> The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical "reasonable man".[12]

Part of what is foreign is the historical reality of years of sex discrimination[13], "the cumulative effects of months or years of brutality"[14], the heightened sensitivity of the accused to the distinction between typical violence and non-typical life threatening violence in her partner's behaviour[15], physical disparities in size and strength[16], women's socialization and lack of physical training in dealing with aggression[17], and the psychological phenomena of learned helplessness and traumatic bonding[18]. Ultimately, the standard to be applied is not the "outsider's" standard but "what the accused reasonably perceived given her situation and experience."[19]

As in *Hill*, Justice Wilson preserves the claim of objectivity and reasonableness thus avoiding the paternalism of an exception or a special category of rationality for battered women that is different from ordinary reasonable behaviour. However, unlike *Hill*, she does not create an additional distinction in order to provide room for what the law would consider to be subjective considerations. Her assertion is that Lyn Lavallee acted reasonably, that rationality is a function of situation and experience, and implicitly, that there are different rationalities. There is no longer a single reasonable standard from which we can measure deviations and tack on exceptions or which we can correct for bias when we come across new information. In addition, individual plight is discussed in terms of broader social concerns. The case is easier than *Hill* because the two are not at odds. Lavallee's situation mirrors wider systemic imbalances between men and women, whereas Hill's claim threatens to reinforce the social marginalization and vulnerability of gays and lesbians. However, *Lavallee* provides the framework for having a fuller discussion of the intersections of difference entailed in Hill's defence and for using legal language to mediate rather than obscure differences.

What is not addressed, is the recurring question about legitimacy. *Lavallee* brings us to that threshold. At what point does the fracturing

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12. *Ibid.* p. 114.
13. *Ibid.* p.115.
14. *Ibid.* p.118.
15. *Ibid.* p. 119.
16. *Ibid.* p. 120.
17. *Ibid.* p. 120.
18. *Ibid.* pp. 122-23.
19. *Ibid.* p. 120.

of a monologic notion of reason also fracture its legitimizing function within the institutional and analytic frameworks of the legal system? More importantly, are there cultural, social, and historical differences that cannot be adapted to the discursive and analytic constraints of legal reasoning, that cannot be translated through analogy or expert evidence into an account that allows the judge to mediate between the litigant's circumstances and experiences, and social norms of responsibility and care?

An answer to this last question is provided by *R.* v. *Horseman.*[20] In *Horseman*, unlike *Hill*, *Morgentaler*, and *Lavallee*, there is a principle of interpretation that requires the judicial interpreter to examine the issue through the lens of the defendant's historical experience and cultural understandings. The defendant in *Horseman* was a member of the Horse Lakes Indian Band. His ancestors and those of the Band were a party to a Treaty in 1899 which established their right to "pursue their usual vocations of hunting, trapping and fishing"[21] within a certain area of land. In 1930, Canada and Alberta entered into an agreement dealing with the transfer of control over natural resources in Alberta from Canada to Alberta. Paragraph 12 of the Transfer Agreement provided that the "Indians of the Province ...shall have the right, which the Province hereby assures to them, of hunting, trapping, and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."[22] In 1983, Horseman shot and killed a grizzly bear in self defence within the treaty area. A year later, he sold the grizzly hide in order to purchase food for himself and his family. As a result, he was charged under the Alberta *Wildlife Act*[23] with trafficking in wildlife. Horseman based his defence on Treaty No. 8. He argued that the rights in Treaty No. 8 encompass the right to kill a grizzly bear for food on Crown lands or lands to which the Band has access or to sell the hide of such a grizzly bear in order to purchase food. He further argued that the 1930 Transfer Agreement did not derogate from the rights in Treaty No. 8.

The means by which provincial hunting laws are in general made applicable to what would otherwise be a federal jurisdiction under

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20. [1990] 1 S.C.R. 901 [hereinafter *Horseman*].

21. Treaty No. 8 (1899) [hereinafter Treaty No. 8].

22. Natural Resources Transfer Agreement [confirmed by the *Constitution Act 1930*], para. 12 [hereinafter 1930 Transfer Agreement].

23. R.S.A. 1980, c. W-9, ss. 1(s), 42. Section 42 states: "No person shall traffic in any wildlife except as is expressly permitted by this Act or by the regulations." Section 1(s) states: "...traffic means any single act of sellling, offering for sale, buying, bartering, soliciting or trading...".

91(24) of the *Constitution Act 1867* over Indians and Lands reserved for the Indians is through s. 88 of the *Indian Act.*[24]. The judicially formulated criterion for incorporation of provincial laws of general application under s. 88 has been described by Professor Marlee Kline as illustrative of the ethnocentric paradigm in judicial interpretation.[25] According to Professor Kline, it is ethnocentric because it takes the perspective of the predominantly Anglo-European Canadian legislature in determining whether a particular piece of provincial legislation singles out Indians and should therefore be struck down as an invasion of federal jurisdiction rather than incorporated and made applicable to Indians. However, an exception to incorporation under s. 88 is provided in favour of rights established in treaties. Any incorporation is subject to such rights. Furthermore, in *Nowegijick* v. *the Queen*[26] and *Simon* v. *the Queen*[27], an interpretive approach to treaties was set out which directed that they be understood in the sense that the First Nations understood them and that any ambiguities be resolved in favour of First Nations rather than of the Crown. Thus, in this narrow area, an effort has been made to reverse the ethnocentric paradigm, to stand in the place of the First Nations individual or group when construing a treaty term. In the hands of the majority, this explicit direction to recognize the situatedness of what is perceived as reasonable is ineffective. Justice Cory, writing for the majority, found himself unable to get around previous judicial interpretations of the 1930 Transfer Agreement that suggested the right to hunt for sport and commercial purposes was made subject to provincial game laws leaving only a right to hunt for food.[28] Justice Wilson, writing for a minority composed of herself, Chief Justice Dickson, and Justice L'Heureux-Dube, takes a much more vigorous approach to the interpretive direction in the treaty cases. She finds that the domestic versus commercial hunting distinction is culturally inappropriate from the First Nations perspective, that hunting for food or subsistence histori-

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24. R.S.C. 1970, c. I-6, s. 88. Section 88 states: "Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act."
25. M. Kline, "Silencing, Ethnocentricity, and Racism: The Paradigmatic Framework of *Jack and Charlie v. The Queen*," (unpublished).
26. [1983] 1 S.C.R. 387 [hereinafter *Nowegijick*].
27. [1985] 2 S.C.R. 387 [hereinafter *Simon*].
28. *Horseman, supra.* pp. 932-33.

cally entailed hunting for barter, and that the mention of "hunting for food" should not be interpreted to mean only hunting for direct consumption.[29]

The *Horseman* case raises serious questions about the potential of a shift in epistemological stance to transcend the divide in power and experience between different groups in Canadian society. It does so not only because of the tenacity of the ethnnocentric paradigm even when there is a clear direction to shift perspective, but also because ultimately such a shift, even if successful, is going to leave in place the overall structure of power. In the *Horseman* case, that structure is represented by the governing principle that, before 1982, it was open to the Crown to unilaterally extinguish the rights agreed to in treaties so long as it was done clearly. Horseman's argument that any derogation of rights by the Transfer Agreement is invalid because there was no approval or consent by the First Nations parties to Treaty 8 is acknowledged but then ignored. Justice Cory mentions Horseman's challenge to the Transfer Agreement,[30] but, after discussing the precedents, states:

> In addition, although it might well be politically and morally unacceptable in today's climate to take such a step as that set out in the 1930 Agreement without consultation with and concurrence of the Native peoples affected, nonetheless the power of the Federal Government to unilaterally make such a modification is unquestioned and has not been challenged in this case.[31]

Against that background, the area of interpretive leeway provided by the *Nowegijick* and *Simon* cases seems ultimately paternalistic. Indeed the non-listening/non-hearing represented by Justice Cory's statement exposes the futility of endeavouring to achieve a fundamental transformation of the arrangements of power through discursive strategies of persuasion, interpretation, and the inclusion of other voices and narratives.

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29. *Ibid.* pp. 912, 917-921.

30. *Ibid.* p. 932. Justice Cory summarizes Horseman's argument in this regard as follows. "Secondly, and most importantly, it is contended that the traditional hunting rights granted to Indians by Treaty No. 8 could not be reduced or abridged in any way without some form of approval and consent given by the Indians, the parties most affected by the derogation, and without some form of compensation or *quid pro quo* for the reducation in the hunting rights." Justice Corey suggests that there was in fact a form of *quid pro quo* provided in the extension of areas in which Indians could hunt and in the protection from provincial legislation afforded to means employed by Indians in food hunting. However, Justice Cory never addresses the consent issue raised by Horseman.

31. *Ibid.* p. 934.

II Normative Commitments of the situated knower

While an objectivist epistemology often serves to preserve a hierarchy of power, an epistemology based on partiality and a recognition of subjective truths makes it possible for a multitude of different understandings of community to become visible and claim authority. I say "possible" because I do not think that inclusion and a democratization of power necessarily flow from the deconstruction of objectivity.[32] Indeed, that is the ultimate lesson of *Horseman.* However, because the claim of objectivity has been deployed to consolidate privilege, it is critical in a struggle for social equality to contest that claim and expose its links with particular social structures. Thus, within a system that constructs certain positions as different from the normal or the ordinary or the reasonable, it becomes important to demonstrate that the normal and the ordinary and the reasonable are constituted by difference. Justice Wilson begins to do this in *Hill, Morgentaler, Lavallee,* and *Horseman.*

This alternative epistemological stance makes possible a rethinking of the normative assumptions about moral choice and the human self that underly equality theory. As in Justice Wilson's resistance to the limits of objectivism, one can trace in her equality jurisprudence the gradual evolution of an equality theory that is responsive to difference.

From the beginning of her judicial career, Justice Wilson has been particularly attuned to claims of exclusion and discrimination. As a member of the Ontario Court of Appeal, Justice Wilson, sometimes in dissent and sometimes with the support of one or more of her colleagues, wrote in favour of a young girl's claim for admission to a boy's hockey team,[33] for recognition of sexism as a basis for a wrongful dismissal suit,[34] and for acknowledgement of the contributions by common law spouses to the economic wealth of a common law relationship.[35] However, the case from that period which perhaps most clearly exemplifies her commitment to equality is *Bhadauria* v.

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32. A liberal analysis would claim the opposite and would put forward an adherence to at least an ideal of an objective foundation for knowledge as the *only* way to avoid a politics of domination. While I think epistemology and politics are linked, I do not think particular kinds of epistemologies stand in a necessary relationship with particular political visions.

33. *Re Ontario Human Rights Commission et al. and Ontario Rural Softball Association* (1979), 26 O.R. (2d) 134 (Wilson J. dissenting).

34. *MacDonald* v. *283076 Ontario Inc.* (1979), 26 O.R. (2d) 1 (*per curiam*).

35. *Becker* v. *Pettkus* (1978), 20 O.R. (2d) 105, 87 D.L.R.(3d) 101, *aff'd* [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257.

Board of Governors of Seneca College.[36] In that case, the plaintiff, Bhadauria, brought an action against Seneca College for damages resulting from the College's allegedly discriminatory treatment of her application for a teaching position. Bhadauria, a highly qualified woman of East Indian origin, failed to obtain an interview with the College for any of the several positions they had advertized. She alleged that the College's lack of response to her application was because of her ethnic origin. The issue on appeal was whether she had a cause of action, i.e. whether there is such a thing as a common law duty not to discriminate. Justice Wilson found in the affirmative. She conceded that all the cases in which a right not to be the object of discrimination was recognised are innkeeper cases dealing with refusal of accommodation and related services. However, rather than accept the inevitable ethnocentrism of a system built on precedent, she in effect proposed that it is possible to infer a more contemporary and inclusive understanding of what the harm of discrimination might consist of and how and where it might be experienced by looking at more recent expressions of public policy than the doctrine of innkeepers liability. In a unanimous decision for the Court, Justice Wilson found that Bhadauria had a cause of action which was strengthened by the commitments to equality expressed in the preamble to the *Ontario Human Rights Code*[37] rather than displaced by the *Code*'s creation of statutory remedies.

Justice Wilson's sensitivity to the claims of social groups who are particularly vulnerable to exploitation and mistreatment because of prejudice or lack of political voice has also characterized her work as a member of the Supreme Court of Canada. She has consistently endeavoured to put in place an analytic framework that is receptive to equality claims. For example, in a concurring set of reasons in *R.* v. *Big M Drug Mart*,[38] she advocated giving primacy to an effects based test of constitutional harm because of its importance in addressing systemic inequalities. Likewise, in *McKinney* v. *Board of Governors of the University of Guelph et al.*,[39] dissenting on other grounds, she argued against using the references in s. 15 to equality in relation to "law", to limit equality protection to legislative violations of the guarantee.[40]

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36. (1979) 27 O.R. (2d) 142, 105 D.L.R.(3d) 707, *rev'd* [1981] 2 S.C.R. 181, 124 D.L.R. (3d) 193 (hereinafter *Bhadauria)*.
37. R.S.O. 1970, c. 318.
38. [1985] 1 S.C.R. 295, 18 D.L.R.(4th) 321.
39. [1990] 3 S.C.R. 457, 76 D.L.R.(4th) 545 [hereinafter *McKinney* cited to D.L.R.].
40. *Ibid.* pp. 600-06.

Justice Wilson has also been responsive to the equality dimensions of other sections of the *Charter* and of other constitutional issues. In *Re Singh and Minister of Employment and Immigration*,[41] Justice Wilson's reasons provide for recognition under the *Charter* of the threat to personal security posed by the potentially devastating consequences of a denial of refugee status to a refugee claimant. Her stance not only expanded the kinds of injuries that s.7 security of the person will provide protection against, but also extended s. 7 of the *Charter* to one of the least powerful groups within the Canadian community, namely to those who are neither citizens nor permanent residents but are simply physically present in Canada. Likewise, in the course of her concurring reasons in *Morgentaler*, Justice Wilson again reveals a sensitivity to the equality dimension of s. 7 claim for reproductive self determination. She writes that women's struggle for a place in society has not been a struggle against state oppression but rather a struggle for legislative reforms "in a man's world" and for the translation of "women's needs and aspirations" into protected rights such as the right to reproduce or not to reproduce.[42] Finally, in her dissenting reasons in *McKinney*, Justice Wilson refuses to sustain the limitations on age discrimination protections in the Ontario *Human Rights Code*[43] because of their impact on workers without private pension schemes. She points out the high correlation of such schemes with unionization, the small proportion of the workforce covered by collective agreements, and the high proportion of immigrant and female labour in the unorganized sector.[44]

Justice Wilson's willingness to push at the boundaries of law and to respond to different perspectives when addressing issues of equality has been a recurrent theme throughout the course of her judicial career. I would like to suggest, however, that there is a significant coalescing of ideas which coincides with her last few years at the Court. Until this point, with the exception of *Bhadauria* which in effect exposes the systemic racism implicit in legal reasoning based on precedent and in the rules of statutory interpretation, Justice Wilson's equality jurisprudence is directed at a proceduralist notion of inclusion, e.g. the admission of females to male institutions and the recognition of the interests and injuries experienced by women and

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41. [1985] 1 S.C.R. 177,17 D.L.R. (4th) 422 (3-3 decision).
42. *Supra*. note 9 at 172.
43. S.O. 1981, c. 53.
44. *McKinney supra*. n. 39 pp. 626-27. See discussion infra. n. 74-80.

members of minority groups. While these cases represent important steps in the process of developing a jurisprudence that is more responsive to the diversity of the experiences of oppression within the Canadian community, they leave in place the essential features of how the law has conceived of equality. They do not challenge or seek to transform existing categories. They simply ask for admission, for a share in benefits, and for access to legal remedies. More importantly, they are predicated on a notion of sameness and same treatment which dovetails nicely with an objectivist epistemology. Hockey playing girls argue that there are objective standards of hockey playing excellence that should be applied to all players regardless of gender. The way in which the objective standards privilege male associated skills and behaviour and the wider social phenomenon of the underfunding and underencouragement of girls sports does not enter into the discussion. Furthermore, from this standpoint, hockey playing boys are theoretically entitled to play on girls teams for the same reasons. Thus, hockey playing girls unwittingly become law's latest lads of parts.

This vision of equality presumes a normative framework in which the human self is disembodied and separate from social connection, and thus interchangeable with any other human self in all its essential aspects. The moral point of view is universalized; it speaks to this essential, interchangeable self. One's entitlement to respect is based on the extent to which one is the same as everyone else. The particulars of one's social position and experience are inessential attributes, have nothing to do with one's humanity. However, as Seyla Benhabib points out, the universalism of traditional moral theories is "*substitutionalist* in that the universalism they defend is defined surreptitiously by identifying the experiences of a specific group of subjects as the paradigmatic case of the human as such."[45] As she goes on to point out, "[t]hese subjects are invariably white, male adults who are propertied or at least professional."[46]

The potentially devasting impact that an equality analysis which is predicated on a universalistic standpoint can have on socially marginalized groups has been chronicled with regard to women's social position by Gwen Brodsky and Shelagh Day. In particular, they detail the alarming number of men's sex equality challenges to legis-

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45. S. Benhabib, "The Generalized and Concrete Other" in Benhabib and Cornell, *Feminism as Critique* at p. 81.
46. *Ibid.*

lative attempts to ameliorate the social and economic disadvantage of women. As Brodsky and Day write,

> The theory of equality consistently advanced by male applicants' lawyers is that men have the right to be treated the same as women. This formal equality theory is relied upon repeatedly, even in the face of the most obvious sex-based differences.[47]

Equality within this framework is regarded as a value neutral principle which corrects irrational legislative classifications by measuring their inclusiveness or exclusiveness against their purposes. The focus is on the process by which the law achieves its ends, rather than the substantive choices made by the law. The cases in which Justice Wilson most clearly addresses the need to rethink this understanding of equality and give substance to the proceduralist notion of inclusion, are *Brossard (Ville de)* v. *Commission des droits de la personne du Quebec et al.*,[48] *Alberta Human Rights Commission* v. *Central Alberta Dairy Pool*,[49] *Andrews* v. *Law Society of British Columbia*,[50] and *R.* v. *Turpin*.[51]

Brossard, the first case in the equality quartet, arises under the section of the Quebec *Charter of Human Rights and Freedoms*[52] which protects against discrimination on the basis of civil status. The challenge was to a municipality's anti-nepotism hiring policy which barred all members of the immediate families of full time staff and councillors from employment with the town. Line Laurin, the complainant, had been disqualified from applying for a job as a lifeguard with the town because her mother was a full time secretary for the town police. Most of Beetz J.'s majority decision focuses on whether this is civil status discrimination, and then on whether, as such, it nonetheless fits within one of the exemptions in the Quebec *Charter*. Justice Wilson agrees with Beetz J.'s position that the anti-nepotism policy constitutes civil status discrimination and that it does not fit within the exemptions. However, she takes the trouble to write

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47. Gwen Brodsky and Shelagh Day, *Canadian Charter Equality Rights for Women: One Steps Forward or Two Steps Back*, (Canadian Advisory Council on the Status of Women: 1989) at p.61.

48. [1988] 2 S.C.R. 279, 53 D.L.R.(4th) 608 (Wilson J. concurring) [hereinafter *Brossard* cited to D.L.R.).

49. [1990] 2 S.C.R. 489, 72 D.L.R.(4th) 417 (unanimous) [hereinafter *Alberta Dairy Pool* cited to D.L.R.].

50. [1989] 1 S.C.R. 143,56 D.L.R.(4th) 3 (Wilson J. for the majority) [hereinafter *Andrews* cited to D.L.R.].

51. [1989] 1 S.C.R. 1296, 48 C.C.C.(3d) 8 (unanimous) [hereinafter *Turpin* cited to C.C.C.].

52. R.S.Q. 1977, c. C-12, s. 10.

separate concurring reasons to discuss the kinds of arguments that employers can make to come within the exemption for "a distinction, exclusion or preference based on the aptitudes or qualifications required in good faith for an employment", commonly known as a *bona fide* occupational requirement or *bfor* clause. Of particular concern to Justice Wilson is the municipality's argument that because of its status as a public body, impartiality in hiring is particularly important. Her discussion of the issue is much like her discussion of the ordinary person in *Hill* or of reasonableness in *Lavallee*. She frames it in terms of a rational connection between the municipality's purposes and the chosen hiring policy. However, she suggests that what might be regarded as rational, will be situation specific. As in *Lavallee*, she appears willing to move beyond a rigid objective/subjective dualism and to question, at least implicitly, the link between equality of responsibility and an objectivist epistemology. For example, she writes:

> ...Coming closer to home, could a municipality which felt under an obligation as a public body to hire members of minorities as opposed to having a totally white Anglo-Saxon or French-Canadian police force make the applicant's race or national origin a "qualification" within the meaning of s. 20? I believe that it could if it *bona fide* believed that the adoption of such a policy was required in order to satisfy its obligation to properly police its particular constituency.[53]

This is a departure from the notion of equality in terms of the uniform application of neutral standards and of same treatment, and from a notion of morality in terms of universalizability. The human self within this framework is a concrete and embodied self whose cultural and social positioning is acknowledged as an essential part of the development of a community's moral understandings. Difference is no longer an inessential atttribute or conversely, the justification for social inequalities. Instead, difference is the starting point for understanding how social structures create and sustain social disparities and needs. Thus, *Brossard* makes it possible to consider what has only been hinted at in the other decisions. If women's integration into society requires legislative reforms that specifically address women's current needs, and if systemic racism requires systemic remedies that set out to alter social, economic and legal structures, then a formal notion of equality will frustrate rather than support those positive strategies.

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53. *Supra.* n. 48 at p. 654.

This dilemma presents itself more fully in *Alberta Dairy Pool.* In that case, the Supreme Court revisits an issue which it had dealt with earlier in *Bhinder* v. *C.N.R. Co.*.[54] Like *Brossard,,* both *Bhinder* and *Alberta Dairy Pool* concerned the operation of human rights schemes and like the scheme in *Brossard,* both schemes had some form of the *bfor* exemption for employers who have been found to be in violation of one or more anti-discrimination protections. Bhinder was a Sikh who refused to wear a hard hat because his religion required him to wear a turban at all times. The majority at the Supreme Court, with Justice Wilson's concurrence, found that the employer's hardhat rule was a *bfor* and that the employer had no duty to accommodate Bhinder. In the aftermath of *Bhinder,* the CHRC described its impact as follows:

> The effect of the *Bhinder* decision is to ...put the Commission's ability to achieve its legislatively-defined objective in doubt. This can mean, for example, that workplaces may not have to be modified to enable disabled individuals to earn a livelihood; women who become pregnant and who require temporary modification of their duties may be forced from their jobs; persons who for religious reasons cannot work regular business hours may have difficulty finding employment. These are not merely hypothetical problems. Currently, the Commission is investigating 528 complaints alleging discrimination in employment. Potentially, 33% of the complaints which concern religion or disability and 5% of the complaints dealing with sex discrimination might be affected by the *Bhinder* decision.[55]

In *Alberta Dairy Pool,* Justice Wilson for a majority found that *Bhinder* was correctly decided in so far as a *bfor* exemption does not impose a duty to accommodate so long as the discrimination is direct discrimination. However, she went on to find that it was incorrect to apply that principle to cases of adverse effect discrimination. In the latter situation,

> ...the appropriate response is to uphold the rule in its general application and consider whether the employer could have accommodated the employee adversely affected without undue hardship.[56]

The significance of *Brossard* is that it recognised the need for situation-specific, positive remedies and ensured that human rights

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54. [1984] 2 S.C.R. 561 [hereinafter *Bhinder*].
55. Special Report to Parliament on the Effects of the *Bhinder* decision on the Canadian Human Rights Commission, February, 1986, at p. 4, cited in *Alberta Dairy Pool, supra.*, p. 432-33.
56. *Supra.* n. 49 at p. 436.

legislation would be interpreted in ways that would not interfere with those strategies. *Alberta Dairy Pool* goes further by finding that anti-discrimination protections in human rights codes require private actors to engage in positive action to overcome systemic barriers to equality. Furthermore, the logical link between equality norms and an objectivist epistemology has once again been challenged. While the equality of responsibility that Justice Wilson discussed in *Hill* remains as an ideal, the suggestion that it can be achieved by the uniform application of rules which are based on external truths apprehended through reason is no longer assumed to be incontrovertible. In fact, such rules are in some situations, identified as the cause of inequalities.

This approach is continued under the *Charter* in *Andrews* and in *Turpin*. In *Andrews*, McIntyre J. for the majority described the content of equality in terms of responding to the social and historical experiences of group disadvantagement rather than in terms of the Aristotelian principle of formal equality. Wilson J. expanded on this shift in understanding as it relates to discrimination against non-citizens, the central issue in *Andrews*. In so doing, she focused on the lack of political power of non-citizens and their consequent vulnerability to disadvantagement and exclusion. This concept of equality is directly tied in her reasons to a methodology that looks at "the context of the group in the entire social, political and legal fabric of our society",[57] and which concedes that different historical understandings of oppression will emerge with "changing political and social circumstances."[58] Again, equality is no longer a function of the neutral application of uniform standards or of the rationality of legislative distinctions that distribute benefits and burdens. Rather, it is directly tied to a substantive notion of political participation and to redressing the socio-structural conditions of inequality. The point is driven home in *Turpin* in which Wilson for the Court emphasizes that s. 15 is about "remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society"[59] rather than the "mechanical and sterile categorization process"[60] entailed in the similarly situated test of formal equality.

None of these cases provide us with the complete architecture of a reconceived notion of equality. Instead, they direct us to consider

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57. *Supra.* n. 50 at p. 32.
58. *Ibid.* at p. 33.
59. *Supra.* n. 51 at p. 35.
60. *Ibid.*

social and historical relationships between groups and to examine the substantive arrangements which produce or obstruct social prosperity and political self determination. They defer to the group's understanding of its own culture and needs rather than presuming a uniform set of priorities which is rooted in reality or in what the reasonable person would perceive as reality. The idea of a notional benchmark against which one can measure whether or not true equality has been achieved or of an equality formula which can be applied to any situation is relinquished in favour of an ongoing consideration of how our current social relationships affect the ability of different groups within the Canadian community to survive and flourish.

The difficulty of giving up the formulaic certainty of an equality calculus based on legislative rationality is illustrated by *R. v. Nguyen; R. v. Hess*[61], a judgement delivered in the final term of Justice Wilson's tenure as a Supreme Court judge. While a majority of the Court in reasons by Justice Wilson disposed of the case under s. 7 of the *Charter*, the decision was also the occasion for a discussion of the meaning of the *Andrews* and *Turpin* approach to equality. In *Hess*, Justice Wilson for the majority found that the crime of statuory rape set out in what was then s. 146(1) of the Criminal Code[62] violates s. 7 of the *Charter* by removing the defence of the mistake of fact as to the female complainant's age, and that the legislative provision cannot be justified as a reasonable limit under s. 1 of the *Charter*. MacLachlin J. in dissent also found that the provision violated s. 7 but would have "saved" it under s. 1. She then turned to the question of whether the provision could also survive a s. 15 challenge. She found that it violated s. 15 of the *Charter*, but again, that the violation of rights could be justified under s. 1.

MacLachlin J.'s discussion at the s. 15 stage rejects the interpretation of *Andrews* and *Turpin* which suggests that equality is exclusively about the socio-structural relationships which produce and sustain the exclusion of certain groups. She makes it clear that, at least with respect to the enumerated grounds in s. 15, there is no need to demonstrate the historical and social disadvantagement of the group represented by the claimant beyond describing the negative impact of the challenged law. Thus any sexual distinction which burdens men is constitutionally offensive and must be justified under s. 1 if it is to survive. The idea that inequalities are a function of complex social

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61. (1990), 59 C.C.C. (3d) 161 [hereinafter *Hess*].
62. R.S.C. 1970, c. C-34 [am. 1972, c. 13, s. 70; later s. 153(1); since re-en. R.S.C. 1985, c. 19 (3rd Supp.), s.1][now R.S.C. 1985, c. C-46].

relationships involving privilege and power is replaced by the more familiar idea that inequalities are a function of laws that irrationally single out groups. Furthermore, it appears that it is always irrational to single out a group or individual on the basis of one of the enumerated grounds in s. 15 in any way that has negative consequences. Thus, because the enumerated grounds in s. 15 are neutral, i.e. they do not necessarily link the enumerated characteristics to existing practices of domination, any attempt to address inequality by changing those practices is more than likely a violation of the anti-discrimination rights of the dominators. In light of the absurdity of this result, it is not surprising that Justice Wilson decided to explain why she could not agree with MacLachlin J.'s interpretation of s. 15.

Justice Wilson reasons take issue with MacLachlin J.'s assumption that any sexual distinction that has a negative impact will offend s. 15. Justice Wilson begins by recalling the position in *Andrews* "that it was not every difference in treatment that would result in inequality"[63] and the emphasis in *Turpin* on the importance of looking "not only at the impugned legislation that had created the challenged distinction but also at the larger social, political and legal context".[64] However, rather than embarking on the contextualized discussion suggested by the previous cases, she finds that the statutory rape provisions do not violate s. 15 of the *Charter* because the offence requires penetration, a physical act which only males are biologically capable of performing and which only women are biologically capable of having done to them. Justice Wilson bases the biological limits of penetration on a Code definition which equates sexual intercourse with penetration and which describes the latter as occurring "notwithstanding that seed is not emitted."[65] Her reasoning seems to represent a reversion to the pre- Charter equality analysis in *Bliss* v. *Attorney-General of Canada*.[66] In that case, Stella Bliss tried to argue that the provision of lesser benefits to pregnant women than to other workers under the *Unemployment Insurance Act*[67] violated the equality protections in the *Canadian Bill of Rights*. The Supreme Court in a decision by Ritchie J. found that "any inequity in between the sexes in this area is not created by legislation but by nature."[68] In effect, because only women can become pregnant, pregnancy discrimination does not raise

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63. *Supra*. n. 61 at p. 178.
64. *Ibid.*
65. *Criminal Code*, R.S.C. 1970, c.34, ss. 3(6) [rep. & sub 1980-81-82-83, c. 125, a. 5].
66. [1979] 1 S.C.R. 183.
67. S.C. 1970-71-72, c. 48.
68. *Supra*. n.62, p.190.

a sex equality issue, as long as all pregnant women are treated alike. So long as the law matches nature, any distinctions it makes are rational. According to this analysis, MacLachlin J.'s reasons in *Hess* are wrong because the statutory rape provision is consistent with what reasonable persons would agree is true about male and female biology. By limiting the class of accused persons to males, the legislation does not commit the error of underinclusiveness because females are biologically incapable of the act of penetration. Thus there is a rational connection between the sexual distinction which singles out men and the legislative purpose of criminalizing heterosexual intercourse with certain females. As long as law matches nature, a sex based classification will be rational. The fact that nature here is the creation of the Criminal Code's definition of sexual intercourse rather than some immutable external truth which the law merely reflects becomes buried in the classification exercise.

The circularity of this line of reasoning was criticized and rejected by the Court in *Andrews* and *Turpin*. In those cases there seemed to be an awareness of the ease with which a rational classification approach to equality can be manipulated by simply articulating the law's purpose in terms of the affected class, here by defining penetration in terms of something only men can do to women, and then stating the law's purpose in terms of preventing it from happening to young girls. In light of the commitment in *Andrew* and *Turpin* to move beyond an understanding of equality in terms of rational classification to an understanding aimed at redressing social disadvantagement, one would have expected the emphasis in *Hess* to have been on whether men are a socially disadvantaged group, on what the experiences of men and women in determining their sexual lives has been, and on whether the statutory rape offence perpetuates or ameliorates historical and social inequalities between men and women. As Professors Isabel Grant and William Black point out in a comment on *Hess*, the answers would not have been easily arrived at, particularly with regard to the exclusion of young males from protection.[69] In addition, the female stereotype

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69. W. Black and I. Grant, "Equality and Biological Difference" (1990), 79 C.R. (3d) 372. While female children are more often victims of sexual assault than male children, the latter figure significantly in the data collected on child sexual abuse. The Badgeley Report on Sexual Offenses Against Children in Canada (1984) found that one in two females and one in three males have been victims of one or more unwanted sexual acts. Statistics Canada's Juristat Service Bulletin, May 7, 1991 reports that about twice as many girls as boys are sexually assaulted. The characterization of the omission of young males from protection against rape as a s. 15 equality issue, would raise a question about remedies, namely should the Court remove the protection altogether, leaving all children at greater risk, or extend the protection to male

which underlies the statutory rape provision, that young women are passive, vulnerable victims unable to determine their sexual lives, might also complicate an assessment of the social impacts of the provision.[70]

Professors Grant and Black suggest that there are hints of such considerations in Justice Wilson's reasons. They mention her reference to "policy reasons" for limiting protection to females and to the prohibition of other forms of male experienced penetration, namely sodomy and buggery, elsewhere in the Code. I would agree with them that it would make much more sense to interpret Justice Wilson's decision in *Hess* as implicitly taking account of the larger social and historical contexts of sexual inequality. However, the absence of any such discussion is evidence of the tenacity of a concept of equality in terms of a comparison between law and truth rather than in terms of confronting and resisting practices of domination.

In spite of the troubling messages of the *Hess* decision, the equality quartet remains as the foundation of a jurisprudence that strives toward what writers have variously called social equality, substantive equality, or equality of result. At the core is the notion that equality is about the disadvantagement of social groups who are defined not simply by the fact that they share a personal characteristic but by the fact that the difference in question has been the occasion for the oppression and exclusion of the group generally from social participation. It follows from this that the concrete experiences of group oppression rather than the individual experience of denial or differential treatment by a particular law or practice, define and give legitimacy to equality claims.The approach taken by the equality quartet can be viewed as requiring both an epistemological and normative shift. It is an approach that challenges us to examine the epistemological move whereby particular knowledges are presented as universal

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children. The former results in equality of victimization and seems absurdly formalistic. The latter raises the spectre of courts exercising legislative functions. See *Schachter* v. *The Queen* (1988), 66 D.L.R. (4th) 635 (F.C.A.), lv. to appeal to S.C.C. granted Nov. 15, 1990 which dealt with the issue of remedies for unconstitutional underinclusiveness in the provision of legislative benefits.

70. Professor Frances Olsen, in "Statutory Rape: A Feminist Critique of Rights Analysis" (1984), 63 Texas Law Review 387, summarizes feminist objections to statutory rape laws as follows: "First, as an effort to control the sexual activities of young women, statutory rape laws are an unwarranted governmental intrusion in to their lives and an oppressive restriction on their freedom of action....Feminists' second common objection to statutory rape laws is ideological. Gender-based statutory rape laws reinforce the sexual stereotype of men as aggressors and women as passive victims. The laws perpetuate the double standard of sexual morality." *Ibid.* pp. 404-405.

truths, and to question the normative ideal of a disembodied, autonomous self. Looking back to the Ontario Hockey Association's exclusion of girls from boys hockey teams which began this account, the quartet seems to represent a crossing over into a different conceptual terrain.

However, difficult questions remain. Just as the underlying thesis of formal equality is a comparison which requires conformity with existing social arrangements, a shift to a social equality approach may also require conformity to a single and dominant notion of social prosperity which is equally assimilationist. In other words, if our project is access to justice through a more responsive equality discourse, at some point we have to examine the cultural and social norms embedded in our concept of disadvantagement which increasingly is presented as the benchmark of a social equality approach. The assumption so far, has been that experiences of difference can be mediated through language, and are in fact mediated through legal language by courts in equality litigation and in other litigation contexts where the participants speak from differing social positions. My analysis has examined the ways in which legal language and reasoning reinforce a social hierarchy based on difference. In addition, it examines the ways in which equality discourse might become less exclusionary and more effective in dismantling those hierarchies, in part through a focus on social disadvantagement rather than irrational classification. At a minimum, however, the transformative potential of equality discourse presumes an agreement with regard to the kinds of social goods that are fundamental to social prosperity. It is at this point that one is greeted with the same circularity that characterizes the formal equality riddle. The lack of certain social goods is the indicator of social disadvantagement. However, definition of the social goods which inform a particular culture's ideal of community is a quintessentially political process. Individual and group acceptance in the sense of belonging to the culture and sharing in its vision of human wholeness and prosperity, requires meaningful participation in the process of definition. To the extent that such participation is nonexistent or largely formal, those who are advantaged by current arrangements of political power will control the definition of disadvantagement. Within legal discourse the control is both institutionalized, in the sense that the courts and access to litigation remain in the hands of the privileged, as well as embedded in the strategems and categories of legal reasoning. Inclusiveness within this framework means assimilation or at least deference to those who ultimately control meanings, rather than empowerment in the process of self and

community definition. An equality discourse that seeks to challenge this seemingly unbreakable circle of power would have to place the focus on social disadvantagement in the context of a wider project to challenge the barriers to political self determination. In this respect, First Nations political struggles which have used not only the language of rights but also the language of self-government, title to land, and division of powers, and a multitude of different fora to pursue those claims, provide a useful strategic model.

III Methodological Strategies

In *Edmonton Journal* v. *Alberta (A.G.)*,[71] Justice Wilson takes time to discuss the significance of preferring a contextual rather than an abstract methodology in analysing the *Charter*. She writes:

> ...One virtue of the contextual approach, it seems to me, is that it recognizes that a particular right or freedom may have a different value depending on the context. It may be, for example, that freedom of expression has greater value in a political context than it does in the context of disclosure of the details of a matrimonial dispute. The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it.[72]

Contextualization is an effective strategy for counteracting the universalizing of experience implicit in an objectivist epistemology. It is one way of exposing what is left out by the assumption that there is one model for human ideals and one method for achieving them. The underlying suggestion in Justice Wilson's reasons in *Hill* and *Lavallee* that what appears to be reasonable is a function of social context is strengthened by her attentiveness to detail in the stories of the central actors. Thus in *Lavallee*, the suggestion that it was reasonable for Lyn Lavallee to defend herself by shooting Kevin Rust as he left the room is supported by a detailed account of Lavallee's actual situation as well as an exploration of the social phenomenon of male violence towards women.

This has two consequences. The first is that it provides a way of counteracting the negative effects of what Sandra Harding calls victimology.[73] While the social profile of violence reveals its gendered

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71. [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577 [hereinafter *Edmonton Journal* cited to D.L.R.].
72. *Ibid.* p. 584.
73. S. Harding, "Introduction: Is there a Feminist Method?" in Harding (ed.), *Feminism and Methodology* (Bloomington and Indianapolis: Indiana University Press, 1987), at pp. 1-14.

nature with women for the most part playing the role of victim, close attention to the stories of Lavallee and others shifts attention to the strength, ingenuity, and compassion of the women who manage to survive under extraordinary conditions of abuse. Thus, it is not a question of forgiving Lavallee because she was rendered helpless by her relation to Rust and to the sex/gender system, but of acknowledging that she was making sense of her individual and social position.

The second consequence of using a contextualized methodology is that it transforms the way we define legal issues. It does not simply correct an imbalance by adding some more voices to the debate over whose context should count the most in a particular legal dispute. Rather it changes the content of debate and the nature of the debate's resolution. In other words, a contextualized methodology is not "just method". It goes beyond being "just method" to the extent that it changes how we understand what is happening in a legal dispute. The *McKinney* case[74] provides an example. In *McKinney*, one of the issues faced by the Court was whether a provision in the *Ontario Human Rights Code* which limited the protection against age discrimination to those persons who are between the ages of 18 and 65 could be justified under s. 1 of the Charter as a reasonable limit on equality rights. The age based exception to the *Code* protection permitted among other things the enforcement of mandatory retirement at age 65. The occasion for the litigation was a series of challenges to the mandatory retirement policies of several various Ontario universities. While the other Justices who wrote reasons in *McKinney* extensively survey the social and economic interests in the name of which the respondents sought to justify the legislation, only Justice Wilson applies the same contextualized methodolgy to the interests which were represented by the equality protection. In so doing, she does not limit herself to the actual claimants before her but examines the impacts of the age limits on social groups other than university professionals. She points out that while it is true that mandatory retirement is often part of a larger package of employee benefits and makes it easier to design pension schemes, it is generally only a small proportion of workers, namely unionized workers, who are able to obtain such packages. Furthermore, the unorganized sector of the labour force is dominated by female, immigrant and unskilled workers who will have very few resources to fall back on if they are barred from employment after age 65. In effect, the substantial and compelling objective of the legislation is only substantial and compel-

74. *Supra.* n. 39.

ling if you are standing in the shoes of a small group of comparatively privileged workers. Justice Wilson goes on to point out that even in the organized sector, female workers often cannot acquire sufficient pension credits before age 65 to adequately provide for themselves on retirement, because "of the high incidence of interrupted work histories due to child bearing and child rearing."[75]

While introducing and giving substance to the interests of the constituents who are perhaps the most vulnerable to age discrimination does not solve the problem of whose interest should prevail in this situation, it might very well change how we regard a solution. Decisions such as *McKinney* no longer represent the triumph of individual rights or the triumph of community interests, but rather consist of a qualified and perhaps inherently limited and tentative resolution of social needs. Both the individual and the community become less monolithic, reveal themselves as complex intersections of interests. In addition, because the discussion is grounded in the actual social arrangements which have created the conflict, it can always be reopened. A discussion which is portrayed as a clash of abstract values or as a clash between abstract values and policy considerations, is much less likely to be renegotiated.

Justice Wilson is well aware of the risks of such an approach. In *Edmonton Journal* she observes that positions that are articulated in abstract, conceptual terms tend to be accorded more importance and authority. It becomes "difficult to imagine"[76] compromising them. However, it also becomes difficult to imagine solutions which take account of the practical impacts of what an infringement of the right or a judicial repeal of the legislation will mean. By contextualizing and grounding the discussion in individual and social realities, one may distort the context, leave out stories, or simply not understand what is being recounted. But at least one has moved away from the notion of a single authoritative account.

Finally, contextualization is integral to the development of a revised understanding of equality. The normative shift which takes place in Justice Wilson's most recent equality decisions is impossible without a contextualized methodology. In many ways, it is what replaces the similarly situated test rejected by *Andrews* and *Turpin.* Instead of a doctrinal formula, those cases present us with a method. We are in effect told that we will not understand what equality entails until we have listened to and examined the particular stories of the

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75. *McKinney*, p. 627.
76. *Supra.* n. 71 at p. 581.

claimants and the wider contexts within which they live. The reasons for decision make some references to human dignity, non-discrimination, and respect for individuals and groups, but we are left to determine what that means by paying attention to history and social experience. The openendedness is disconcerting. It generates a form of conceptual vertigo. What looks like equality in one situation, will, given a different spin, look like inequality. Meanwhile, however, the attention to context brings into solid focus the very concrete ways in which we experience social relationships. It provides another kind of sense or logic as the justification of particular outcomes.

IV A Conclusion and Some Beginnings

In this essay, I have tried to set out what I consider to be the potential of Justice Wilson's jurisprudence to confront our assumptions and to provide us with a more articulated vision of social justice. That potential presents itself in the form of courageous dissent, tentative glimpses, and careful argumentation. However, the most striking aspect of Justice Wilson's persistent effort to make justice both equal and accessible, is her search for new frameworks for understanding and celebrating difference. Within law, this means developing new epistemological, normative, and methodological understandings. I have left many questions unanswered. In particular, there is the question of what provides courts with institutional legitimacy if we can no longer justify decisions by reference to objective rational principles. Should we look more closely at court structures, accountability, and the composition of courts if we are going to take the position that historical and experiential differences count? Should we challenge the assumption that the concept of disadvantagement which lies at the heart of the social equality approach is somehow neutral, somehow transcends or cures the power imbalances between equality claimants and the institutions which define the content of an equality claim? Justice Wilson's decisions consistently refuse to obscure the systemic nature of inequality, and the participation of the structures of legal discourse in those systems. As a result, the questions she raises are complex and difficult, and yet they are never presented as impossible. On the contrary, by pushing us to re-examine assumptions, by bringing voices at the margins into the center, and by demanding answers that respond to the logic of context as well as the logic of principle, she has made available to us a new array of possibilities. No doubt she will continue that project as a writer, a jurisprudential

thinker, and a contributor to current discussions of equality and justice. So we find ourselves on her retirement from the Supreme Court of Canada, the beneficiaries not only of a legacy of insightful and compassionate decisions, but also of a whole new set of beginnings.