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What's The Difference? Interpretation, Identity and *R.* v. *R.D.S.*

Lawyers hanker after authority. Whether it be in enforcing the law or justifying law's institutional power, there is an almost desperate yearning to establish and maintain the legitimacy of law and, therefore, of themselves, in a social world in which the whole notion of *authority* is challenged and undermined. When it comes to matters of legal interpretation, jurists and judges still crave some method that will ground or trace back an interpretation to a foundational or ultimate source that can confer authority on one particular interpretation over another. However, recent jurisprudential debate has done fatal damage to the notion that meaning can ever be uncontroversially located in the text itself or its author's intentions: the "death of the author" is part of the larger critical claim that there is no one to challenge or to speak in the name of because "to refuse to arrest meaning is finally to refuse God and his hypostases, reason, science, the law."[1] Nonetheless, in casting interpretation as an open practice of creative re-construction, a non-foundational approach is not to be taken as claiming that the identity of legal operatives in law's language game is somehow unimportant or irrelevant. To ignore entirely the fact that *someone* is speaking is as much a mistake as depending exclusively on who is speaking to determine meaning.

While there is no value at all in trying to re-install the author as the authoritative linchpin in the interpretive process, it is possible and desirable to ensure that the identity of judges and jurists makes a difference in how adjudication is understood and performed. Notwithstanding "the death of the author," the writer as an historical figure remains relevant: his or her particular importance and role will shift and vary with the task at hand. This approach to interpretation, which we call "non-fundational," accepts that there is no Theory of Interpretation that can govern or underwrite the particular interpretation of specific texts, that texts only meaning in concrete settings, and thus that it does matter

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1. R. Barthes, "The Death of the Author" in R. Barthes, *Image, Music, Text*, trans. S. Heath (London: Fontana Collins, 1977) 142.

who is reading and writing those texts.[2] This is particularly so when the notion of a *text* is extended to include social and cultural practices as well as traditional documents and judicial opinions.[3] But the identity of the judge counts in a way that is very different from the espoused by the traditional foundationalist view. In contrast to traditional understandings of interpretive practice, the non-foundational critique that we adopt works to problematize rather than prioritize any claim to authoritative interpretation: the ambition, therefore, is not to obliterate authors, but to reorientate them as one—and only one among many—non-privileged participants in the continuing process of negotiating texts and giving meaning to them in the context of people's lives.

Accordingly, in this short essay, we will defend the claim that not only are legal writing and reading important, but the identity of those who write and read is important. In order to get at and explicate the difference between authors and writers, we will re-pose and re-answer Michel Foucault's famous and characteristically enigmatic question, "what difference does it make who is speaking?"[4] His whole essay can be read as an outright dismissal of the need for or relevance of authors in the interpretive enterprise—in effect, an indifference to the difference that difference might make, if any, in who is writing or speaking. While we want to hold on to his general claim that discourse creates as much as it is created, we also want to supplement it by showing that there is a different notion of difference that is at work in understanding fully the hermeneutical problematic—a serious interest in the kind of difference that difference might make in who is writing or reading. In short, by

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2. By "non-foundational," we mean to indicate that any foundations that are claimed to be in place to guarantee truth, coherence, etc. are provisional and contingent. These transient grounds and foundational arguments are rhetorical in nature and function; it is interpretation all the way down. Accordingly, the purpose of a non-foundational critique is not to show that any particular interpretation is illegitimate or that all interpretations are equally legitimate. On the contrary, the purpose is to call into question the grounds on which a particular interpretation is claimed to be authoritative or determinative. To this end, a non-foundational critique is not something that can be used in the practice of interpretation: it has no particular substantive or political agenda that can be simply followed or enforced. Recognizing that politics is itself ungroundable in any final or definitive way, all it can do is to underline the fact that all interpretations involve choice and that all meaning is provisional and unstable. As such, a non-foundational approach does not constitute a method by which texts can be interpreted, but more a critical reminder of how the closure of textual meaning is not possible. It cannot tell judges or jurists what to do, it can only caution them against claims that they make for what they do. See A. Hutchinson, *It's All in the Game: A Non-Foundational Account of Law, Politics and Adjudication* (forthcoming, Duke University Press 1998).

3. See C. Geertz, *The Interpretation of Cultures: Selected Essays* (NY: Basic Books, 1973) and *Local Knowledge: Further Essays in Interpretative Anthropology* (NY: Basic Books, 1983).

4. M. Foucault, "What Is An Author?" in M. Foucault, *The Foucault Reader* (New York: Pantheon Books, 1984).

reference to the juristic reflections of Bertha Wilson and the judicial opinions in *R.D.S.*, we will draw a distinction between the metaphysical claim of "difference" and a political understanding of "difference." It is through the metaphysical death of the author that the political writer (and reader) comes to life. It is in this important sense that it matters and makes a difference who is speaking (and reading) legal and social texts.

I. *Making The Difference*

In 1982, Bertha Wilson was the first (and is still only one of three) woman appointed to the Supreme Court of Canada. In a later influential essay in which she confirms the importance of judicial impartiality, she seeks to answer a pressing question for the legal and general community—will women judges really make a difference? Surveying a considerable amount of legal literature, she comes to the opinion that "a distinctly male perspective is clearly discernible" in many areas of law, especially criminal law which is "based on presuppositions about the nature of women's sexuality ... that are little short of ludicrous." In order to combat this bias, she endorses institutional efforts to re-educate and sensitize male judges to these problems. However, she insists that it would be necessary to appoint increasing numbers of women judges if any genuine or substantial progress were to be made. Wilson argues that the appointment of women judges will not only provide important role models for women and alter the dynamics of courtroom demeanour, but it could also "establish judicial neutrality through a countervailing female perspective." Drawing on Gilligan's idea that women have a "different voice," and frame moral decisions differently from men, Wilson suggests that women judges will bring a different experience to the task and responsibility of judging:

> The universalistic doctrine of human rights must include a realistic concept of masculine and feminine humanity regarded as a whole, that human kind *is* dual and must be represented in dual form if the trap of an asexual abstraction in which *human being* is always defined in the masculine is to be avoided. If women lawyers and women judges through their differing perspectives on life can bring a new humanity to bear on the decision-making process, perhaps they *will* make a difference. Perhaps they will succeed in infusing the law with an understanding of what it means to be fully human.[5]

From a non-foundationalist perspective, we want both to agree and disagree with Wilson's impassioned and confident belief in the transfor-

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5. B. Wilson, "Will Women Judges Really Make A Difference?" (1990) 28 Osgoode Hall L.J. 507 at 515, 521-22. See also C. Gilligan, *In A Different Voice: Psychological Theory and Women's Development* (Cambridge, Mass: Harvard University Press, 1982).

mative power of women judges (and, by implication, judges who are from other excluded or disadvantaged groups). If Wilson is making the metaphysical claim that women will have a necessary and consistent impact on the law and craft of judging by virtue on their ontological status and essential experience as women, we want to disagree. This is simply one more way to rehabilitate the discredited author as the authoritative pivot in the interpretive game of law. However, if Wilson is making the very different political claim that the appointment of women judges will increase the likelihood that women's different social experiences will be brought to bear on judicial decision-making, we want to agree—this abandons the search for interpretive foundations and emphasizes the social context in which writing and reading take place. In non-foundationalist terms, the identity of those involved in the interpretive process is neither the beginning nor end of the fixing of meaning; context will influence and be influenced by such participation. It is not the *will* in "perhaps they will make a difference" that should be stressed, but the *perhaps*.

For Wilson, the identity of the judge seems to be paramount because the authority of their performance will be derived from the authenticity of the experience from which it arises: the silenced voice of oppression will speak truth to a complacent or complicit world. Apart from the fact that identity is not fixed or identical among members of a particular gender (or any other category), the difficulty with such a foundationalist position is that it falls back on a very crude notion of interpretation in which identity is entirely determinative of interpretation. It suggests that texts or judgments need not be read in any serious or engaged way, but can be assessed and authorized by reference to the identity of their author. In the same way that judgments by women or blacks can be valorized and praised, so judgments by men or whites can be stigmatized and dismissed. The problem with this so-called identity politics is that it de-politicizes politics by turning it into a metaphysical issue; it repeats the essentialist error of creating a world based on the timeless and global truths of black, female, and gay lives. While to deny entirely racial or sexual identities is to fool ourselves and court complicity, to accept them entirely is to ignore their ideological production and, therefore, the possibilities for their political transformation. It is not useful to claim that "*woman's point of view*" and "woman's voice" must be released if society is to give women "what [they] really want" and "on [their] own terms."[6] This is likely to

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6. C. MacKinnon, *Feminism Unmodified: Discourses On Life and Law* (Cambridge, Mass: Harvard University Press, 1987) at 88, 91, 160, 195, 83 and 22. See, also, R. Colker, "Feminism, Sexuality and Self: A Preliminary Inquiry into the Politics of Authenticity" (1988) 68 Boston U.L. Rev. 217 and West, "Jurisprudence and Gender" (1998) 55 U. Chi. L. Rev. 1.

ensure the continued dominance of white and male voices against which other voices will always vie for attention and whose importance will be reinforced at the very moment of their greatest threat.

In making this argument, it is important to understand "identity" in a non-foundationalist sense. In contrast to Wilson's Gilliganesque understanding, identity is performative and, therefore, is not a foundational base from which expressive excursions are made and made meaningful; a constituted identity is (re)shaped by and through its continuing performances. Identity or difference is not indifferent to the context of time and place. Identity is relative, not intrinsic; fluid, not fixed; perspectival, not neutral; and protean, not perfected. Nevertheless while people are not fundamentally fixed by their experience of race, gender and class, they are distinctively marked by such social categorizations. As such, identity is a temporary location in the interplay of difference that comprises life's game. As people (re)constitute themselves in their lived relations with others, so judges (re)constitute themselves in their participation in law's language game. However, like everything else, that experience is itself always and already the product and subject of interpretation. It cannot escape interrogation by masquerading as its own grounding: "[b]elief in the truth of Experience is as much an ideological production as belief in the experience of Truth."[7] Consequently, while it may be true that oppressed groups have an understanding about oppression that others do not have, that is no reason for privileging that account as a more truthful representation of reality. However, it is still vital to include the standpoint of the oppressed "not because it has any special access to the truth, but because what is taken as truth is incomplete or distorted without the views of the oppressed."[8] Having lived a life of exclusion, the oppressed are likely to understand oppression better.

In some circumstances and locations, identity alone may speak louder than any words of explanation or indignation. The influence that more women and black judges can have as role models in law and society generally should not be under-estimated. Moreover, as Wilson insists, the fact that women become a more regular presence in the courtroom will help to transform the demeanour and dynamics of legal advocacy. But the ineffable impact of identity cannot always be relied upon to get the job

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7. D. Fuss, *Essentially Speaking: Feminism, Nature and Difference* (New York: Routledge, 1989) 114.

8. R. Chang, "Toward An Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space" (1993) 81 Cal. L. Rev. 1241 at 1281. See also Matsuda, "Looking to the Bottom: Critical Legal Studies and Reparations" (1997) 22 Harv. C.R.- C.L. L. Rev. 323 and J.C. Williams, "Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory," [1991] Duke L.J. 296.

done: it can only be one tactic in a more complex strategy of politicization. The force of identity is important, but only when it is understood as a contingent and dynamic distillation of what has been done, is being done and will be done. While identities affect individuals' choices and actions, the choices made and actions taken affect those individual's identities. As an important site for social discipline, identities are to be constantly struggled over and frequently transformed; they do not represent a psychic space of authentic self. In understanding action and identity as inseparable and mutually reconstituting, it becomes possible to grasp race, gender, sexual orientation and class as thoroughly historical and, therefore, inescapably political in character. There is nothing essential or natural about people's identities. While experienced as real, they are always constructed and, therefore, always reconstructible. In a non-foundational account, therefore, the political challenge is to transform relations "by continually rethinking who we are and why we are making the choices we make so we can free ourselves from the belief that our selves are constructed by our identities."[9]

Accordingly, the claims that identity is or is not essential to an informed interpretation miss the point. While they do not collapse into each other (for this would truly be a perversion of any institutional ideal), it is simply not the case that a person's identity and background are irrelevant to their interpretive activity as writers and readers. Who people are cannot be entirely divorced from what they do or say. It is a conceit of established groups (white, male, heterosexual, etc.) to maintain that a cold objectivity is the only touchstone of true knowledge. Too often that objectivity has turned out to be little more than these groups' own partial interest in philosophical garb. The privileging of abstraction over experience, detachment over commitment, and objectivity over situatedness has not served to generate neutral knowledge, but to neutralize challenges to existing orthodoxy. Of course, we do not suggest that political identity always supersedes reflective rigour in assessments of interpretive meaning and effect. We only want to make the otherwise neglected point that ideas and interests are neither unrelated nor are they related in any fixed or general way. The problem lies in the vain effort to deny such affiliation between ideas and identity. Effective judges and jurists are neither hubristic philosopher kings nor enslaved courtesans—they dwell on the threshold between apartness and alignment.[10]

In all debate around interpretation and identity, the mistake is to maintain that one is superior to or negates the other. The real challenge

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9. M.J. Frug, *Postmodern Legal Feminism* (New York: Routledge, 1992) 107.
10. E. Said, *Representations of the Intellectual: The 1993 Reith Lectures* (New York: Pantheon Books, 1994) 22.

is to recognize and fathom their relation: making personal identity into the trump card of the legal interpretation debate is no better than pretending that identity can only have a corrupting influence. In today's society, identity and difference ought neither to be deified nor demonized in the name of authoritative interpretation or social justice. While it might be possible some day and in some place to ignore questions of identity, this is most certainly not possible today in North America generally and the legal community particularly. If society were rid of discrimination and had achieved a genuine state of equality, the appointment of women (visible minorities, gays, etc.) to élite institutions (white, male, etc.), like the Supreme Court of Canada, might not be so urgent or desirable. However, the fact is, of course, that society is still very much marked by discrimination and inequality. Accordingly, to be a woman (visible minority, gay, etc.) is still to be the object of persecution because of, and not in spite of, one's identity. Unfortunately, the courts are no less culpable than any other institutions in this history. Consequently, the experience of being a woman (visible minority, gay, etc.) remains critical to a full understanding of what it is to be a woman (visible minority, gay, etc.). That is why women (visible minority, gay, etc.) judges are required in today's society.

II. *The Difference of* R.D.S.

Of course, the proof of the pudding is in the eating — theoretical reflection needs to be accompanied by practical illustration.[11] The arena of judicial decision-making is important in this regard because it is where individual

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11. There is little better supporting evidence for the non-foundationalist account of the relation between personal identity and judicial performance than the careers of Bertha Wilson herself and her colleagues, Beverly McLachlin and Claire L'Heureux-Dubé, on the Supreme Court of Canada. While there is nothing that they have done interpretively as judges that could not have been done by their male counterparts, the fact that they have done them as women judges cannot be politically underestimated. Their identities as women have never been entirely irrelevant, but their precise effect and importance have varied tremendously, depending on the context, among them and within themselves. At times, their identities as women have been important; at other times, their separate politics have weighed more heavily than their shared identities. While each of them has occasionally brought her own identity as a woman directly into the judicial performance, they have deployed it in different ways. Indeed, a survey of their judgments underlines the extent to which their experience as women and their own understanding of what it means to be both a woman and a judge are very different. See, for example, *Morgentaler et al.* v. *The Queen*, [1988] 1 SCR 30 at 161 per Wilson J.; *Lavallee*, [1990] 1 SCR 852 at 856 per Wilson J.; *Symes*, [1993] 4 SCR 695 per McLachlin at 832 and L'Heureux-Dubé at 776; *R.* v. *Seaboyer*, [1991] 2 SCR 577 at 597 per McLachlin and at 643 per L'Heureux-Dubé; and *R.* v. *Carosella*, [1997] 1 SCR 88 at 80 at 114 per L'Heureux-Dubé.

and group stories are interpreted and where identity plays a key but finessed and subtle role. A particularly compelling example is the recent and controversial decision in *R.D.S.* v. *R.* A black youth was charged with assaulting and resisting a peace officer engaged in the lawful execution of his duty. The only two witnesses at trial were the accused himself and the white police officer. Their accounts of the relevant facts differed greatly and the case turned on credibility. At trial, the case came before the Honourable Corrine Sparks, the only black female judge in Nova Scotia. Justice Sparks indicated that, without accepting everything that the accused had said, there were portions of his evidence which she found believable and which had raised a doubt in her mind as to the Crown's case. Consequently, she concluded that the Crown had not discharged its evidentiary burden to prove all the elements of the offences beyond a reasonable doubt.

The Crown launched an appeal on the basis that certain remarks made by Justice Sparks raised a reasonable apprehension of bias. In particular, in response to the Crown's rhetorical inquiry as to why the police officer would indicate that the event occurred as he had relayed them to the court if they did not, Justice Sparks stated that she was not saying that this police officer had misled the court, although police officers have been known to do that in the past. She further stated that she was not asserting that the police officer had overreacted, but that police officers have been known to overreact in dealing with non-white groups. She stated that this indicated a state of mind that was questionable and that probably the situation in this particular case was that of a young police officer who had overreacted. Also, Justice Sparks stated that she accepted the accused's evidence that he was told to shut up or he would be under arrest and that this seemed to be in keeping with the prevalent attitude of the day. Justice Sparks concluded her reasons by stating that, based upon her comments and based upon all of the evidence, she had no other choice but to acquit the accused. The Crown appealed this decision to the summary conviction appeal court, which held that Justice Sparks' comments reflected a reasonable apprehension of bias; a new trial was ordered. That decision was appealed to the Nova Scotia Court of Appeal and upheld. A final appeal was then made to the Supreme Court of Canada.

The decision of the Supreme Court in this case can be utilized as a springboard for undertaking an examination of the linkages that are generated between interpretation and identity in instances of judicial reasoning and authorship. In *R.D.S.*, these connections are all the more poignant because the salient facts reveal the workings of non-foundationalist forces within the legal estate. As such, they are likely to be considered suspect and perhaps unacceptable to foundationalists. In

other words, the jurisprudential claim can be made that, while race functioned as a key element of identity and contributed to the trial judge's interpretation of the facts before her, it also simultaneously defined the nature of the criticisms levelled at that interpretation by foundationalists. This subtle and fascinating dynamic lies at the heart of what the judges of the Supreme Court attempted to grapple with, frame and interpret in their divided opinions. Moreover, the judges themselves split along foundationalist/non-foundationalist lines in the opinions they rendered with regard to the alleged reasonable apprehension of bias on the part of Judge Sparks. The judges in the minority join in the foundationalist chorus of criticisms levelled against Justice Sparks on the basis that her (racial) identity wrongly played a role in the adjudication of the case before her. On the other hand, the judges that presented the majority decisions, while also maintaining that Justice Sparks' racial identity was drawn upon in the process of her judicial interpretation of the facts presented in evidence, took a more non-foundationalist position. They argued that identity was a valuable facet of adjudication in a multicultural society: the reasonable apprehension of bias revolved around the reasonable person's perception with regard to the judge's impartiality in any given case, not the unattainable and fictitious standard of judicial neutrality.

Writing for the dissent, Justice Major stated that the appeal should consider two points—whether or not the trial judge properly instructed herself on the evidence and whether her comments (and usage of racial identity in constructing a framework for the interpretation of the facts before her) could cause a reasonable observer to apprehend bias. Justice Major answered the first question in the negative, stating that Judge Sparks' comments were tantamount to "stereotyping all police officers as liars and racists." He also went so far as to state that "[t]he issue is whether there was evidence before the court upon which to base a finding that *this* particular police officer's actions were motivated by racism. There was no evidence of this presented at the trial."[12] Justice Major then proceeded to answer the second question positively, asserting that Justice Sparks' comments would lead the reasonable observer to apprehend bias. In addressing the role which a judge's personal and group identity-producing experiences can play within the largely interpretive process of adjudication, Justice Major states that:

12. *R.D.S.* v. *R.*, [1997] 3 S.C.R. 484, 151 D.L.R. (4th) 193 at 202 [hereinafter *R.D.S.* cited to D.L.R.).

> The life experience of this trial judge, as with all trial judges, is an important ingredient in the ability to understand human behaviour, to weigh the evidence, and to determine credibility. It helps in making a myriad of decisions arising during the course of most trials. It is of no value, however, in reaching conclusions for which there is no evidence.[13]

Finally, Justice Major offers a brief commentary about the nature and characteristics of the adversarial system. He argues that the system does not permit judges to become self-initiated investigators of relevant facts concerning a case before them.

In so doing, he leaves little doubt that he subscribes to a strong foundationalist stance on questions about the relevance of identity and the attainability of judicial neutrality. Indeed, Justice Major would number among those who would find very controversial Bertha Wilson's initial claim that the identity of the judge has any relevance at all. While he concedes that certain judges, like Judge Sparks, have allowed their own particular biases and prejudices to intrude into their decision-making, he views this as a perversion of the requirement that judges act with impartiality. For him, the solution to bad judges who allow their male or racial perspective to affect their judgment is most certainly not to appoint more bad judges who will only be able to counteract that partiality by introducing countervailing perspectives of their own. In Major's understanding of the world, impartiality demands that judges are appointed who understand that the duty to apply legal rules in an objective and detached manner. However, such a stance is very hard to sustain in a post-realist world of legal interpretation and adjudication. The questions of what "rules" mean, and what it means to "apply" them, are always contestable and never innocent of the judge's values and involvement: adjudication is a political practice. Nevertheless, it is equally problematic to insist, as Wilson does, that the identity of judges is all-important. Indeed, while Wilson deserves to be applauded for her commitment to appoint more women judges, she is mistaken in her justification for doing so; it is as flawed to treat identity as all-important as it is to contend that it is unimportant.

By contrast Justices L'Heureux-Dubé and McLachlin take an approach that is much more non-foundational and nuanced. They do not commit themselves to an unsustainable either/or position in terms of the relevance and status of identity. To them, what must be attained by judges is not neutrality, but impartiality. While they do not expressly connect their conclusions to a non-foundationalist account of interpretation and identity, they state that:

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13. *Ibid.* at 203-04.

> In our view, the test for reasonable apprehension of bias established in the jurisprudence is reflective of the reality that while judges can never be neutral, in the sense of purely objective, they can and must strive for impartiality. It therefore recognizes as inevitable and appropriate that the differing experiences of judges assist them in their decision-making process and will be reflected in their judgments, so long as those experiences are relevant to the cases, are not based on inappropriate stereotypes, and do not prevent a fair and just determination of the cases based on the facts in evidence.[14]

In light of this guiding principle, Justices L'Heureux-Dubé and McLachlin have little difficulty in concluding that Judge Sparks' comments were an entirely appropriate recognition of the facts in evidence. However, they do not slip into the foundationalist error of assuming that judges' resort to their racial experience will always be useful or legitimate: it is a matter of contextual judgment and institutional appropriateness. In commenting on the nature of judging in a multicultural society, the two women state that judges will invariably approach their tasks from their varied perspectives. In line with these observations, there is much to recommend the non-foundationalist approach to gender or racial identities—perspectives on reality that do not derive from the machinations of the dominant culture can generate interesting and beneficial impacts on the substance of authoritative interpretations. With specific regard to common law adjudication and racial representations, the claim is that the personal and group experiences of racial discrimination, which have over time helped to frame identity, ought to be recognized as a legitimate (and indispensable) resource that judges can draw upon in deciding cases. Moreover, the identities produced as a result of such experiences constitute a valid pool of knowledge that invariably aids in the adjudicative process. Indeed, Justices L'Heureux-Dubé and McLachlin state that:

> [Judges] will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench. In fact, such a transformation would deny society the benefit of the valuable knowledge gained by the judiciary while they were members of the Bar. As well, it would preclude the achievement of a diversity of backgrounds in the judiciary. The reasonable person does not expect that judges will function as neutral ciphers; however, the reasonable person does demand that judges achieve impartiality in their judging.[15]

Of course, the foundationalist retort, as evidenced by Major's dissent would be that the adjudicative process must be neutral and objective for

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14. *Ibid.* at 206-07.
15. *Ibid.* at 209.

the legitimacy of authoritative interpretations to be protected. However, this claim is not only difficult to defend as a matter of jurisprudential insight, it is also an ideal that has been extremely detrimental to the experiences and realities of individuals and groups that exist outside the conceptual and societal boundaries of the dominant culture. This is because what has in the past and still today (despite the occasional "Corrine Sparks" within the judiciary) masquerades as judicial neutrality has been no more than the identity-based interpretations of white males, drawn from the realities and idiosyncrasies of the dominant culture; this has worked to the injurious exclusion of all experiences outside that very limited ambit. Taken to its logical conclusion, the foundationalist claim amounts to little more than a defence of "judicial neutrality" as a means to maintain the interpretive hegemony currently enjoyed by this dominant culture within the adjudicative process of authoritative authorship. Such a position can only foreclose the validation of hitherto externalized experiences and identities situated separately from the dominant culture.

With regard to judicial objectivity and its desirability, the progressive internalization of non-dominant culture experiences and, therefore, identities will in all likelihood lead to a much desired re-definition of objectivity itself. The challenge is to produce an account that is more inclusive of perspectives drawn from socially disadvantaged positions and experiences. In other words, legal subjectivity will be subject to a continuing process of partial deconstruction as a result of such an internalization which, in turn, will give rise to a contingent process of a more inclusive reconstruction. Through such an engagement, the "reasonable person"—that fictional epitome of legal and adjudicative standards—will come to resemble less and less a white and male individual. Lady justice will cease to wear blindfolds and get a pair of in-focus spectacles as well as a socially-attuned hearing aid. Again, while interpretation and identity may not be fixed in mutual exclusivity, neither do they relate through constant and identical connections. Thus, on the one hand, the claim can be maintained that judicial neutrality is utterly fictitious. However, on the other hand, it would be both naive and undesirable to expect all judges that possess non-dominant culture experiences and identities to produce mirrored judgments. It is the force of a non-foundational approach that shared group experiences do not foreclose individual diversity. Accordingly, Judge Corrine Sparks can be understood to have delivered a sound and fair judgment in which she drew upon the knowledge and experience of racial discrimination, making it apparent that race does matter and that black judges can and will make a difference.

III. *The Difference Made*

What such a non-foundational perspective implies for the practice of judging in actual cases is, of course, open to interpretation. But it does suggest certain intimations. First, it highlights the important general issues that frame questions of identity and interpretation in adjudication—should the basis for the inclusion of disadvantaged voices within the law's authoritative discourse be the likely impact of such voices and should the level of inclusion be indexed against the likely level of impact? From a non-foundational perspective, these questions can only be answered resoundingly in the negative. The key issue is not the likelihood of impact, but the presence of voice. In contemporary society, it is enough that individuals and groups draw their legitimacy from the simple fact that they exist and are members of that society. It is anathema that such legitimacy should only be conferred upon them by the dominant social forces on the basis of pre-conceived notions as to usefulness. Moreover, this all occurs within a legal framework which is quite self-evidently alienating and which does little more than serve the interests of such dominant social forces. If the overall legal framework is to be utilized successfully for the progressive reduction of domination as well as the progressive acquisition and sharing of advantage, disadvantaged voices must be given space and time to claim the authorship of downtrodden viewpoints. The official forum for the telling of marginalized stories cannot continue be held hostage to self-serving inquiries into the benefits to be gained from such courses of action, especially if the dominant culture has pre-defined the "benefits."

Another important implication of a non-foundational perspective on interpretation and identity is that, because politics and history are always the context for theoretical engagement, it is the case that hermeneutical strategies have implications for politics and history. At the least, a non-foundational critique might oblige judges and jurists to assume greater responsibility for their interpretations; there is no theory of interpretation that can relieve them of the burden of choice and justification. Mindful that it "is impossible, now more than ever, to disassociate the work we do . . . from a reflection on the political or institutional conditions of that work,"[16] judges and lawyers might begin to re-think and re-work the expectations and performances of their judicial task. Recognizing adjudication for the playful activity it is, judges and jurists might experiment further with both the substance of decisions made and the way that the judicial game is played. Of course, none of this in itself will necessarily

16. J. Derrida, "The Principle of Reason: a University in the Eyes of Its Pupils" (1983) 13 Diacritics 17.

occasion an institutional conversion to a progressive politics. However, it might embolden or embarrass some into assuming a judicial posture that is more willing to address the real issues that divide and plague society—economic deprivation, public illiteracy, sexual violence, education, racial hatred and other such issues. While unrelenting analyses of oppression and performances of textual radicalism will not in themselves bring an end to such problems, they can contribute to that goal. By opening up legal texts and social contexts from the hold of traditional interpretive strategies, it might be possible to make them available for interested attempts at more democratic appropriation. Furthermore, establishing an alliance between lawyers and the dispossessed might create public openings for the dispossessed to re-establish their own culture in their own lives. This, in turn, might enrich and transform the lives of judges and lawyers.

There are, of course, risks with such a non-foundationalist strategy which insists that no political action can be vouchsafed and no particular consequences can be promised. The major risk is that it will be seen to harm the cause of racial, feminist or gay justice. By deconstructing authorial authority and intention, it might be seen "to remove the very levers against power at the moment they have been seized by those who have lacked them."[17] However, the hazards of clinging to a foundationalist faith—for that is what it is—are much greater and more damaging than the risk of taking a non-foundationalist gamble. If some special authenticity and derivative authority is to be bestowed upon the black judge as black judge, there is no consistent or logical way that the same authority cannot be claimed by the white judge as white judge: consistency and logic are vital standards in the metaphysical almanac. In a world in which the vast majority of judges remain white, male and heterosexual, this would be counter-productive for it would undermine the excellent critical work done in prying judicial texts free of their limiting authorial circumstances and making them available for transformative reading. To return to the traditional practice of author-based interpretation would be regressive. It devalues and trivializes the crucial role of the black, woman or gay critic to that of faithful decoding and technical retrieval. Traditional hermeneutics has to leave the critic to stand obediently aside and allow the authoritative voice of (white, male, heterosexual) authorial experience to speak for itself in imparting Truth to the world.

This is a foundationalist trap that a non-foundational sensibility can help critics of racism, sexism and homophobia to avoid. There is little to

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17. M. Minow, "Partial Justice: Law and Minorities" in A. Sarat & T. Kearns, eds., *The Fate of Law* (Ann Arbor: University of Michigan Press, 1991) at 58.

be gained and much to be lost in re-inscribing the epistemology of transcendence that is the hallmark of traditional hermeneutics.[18] The idea of transmitting authentic human experience through a transparent textual medium for direct and respectful consumption by the popular masses is a travesty of any emancipatory project. By claiming authenticity and authority for previously excluded voices in the name of a transformative politics, the debilitating metaphysics of ontology are given precedence over the politics of struggle. Not only will the interpretive monarch be returned to power, but such a restoration will have been effected with the help and blessings of democratic critics. Yet, it is only in the dark kingdom of the blind that such one-eyed upstarts can feign regal right. At best, the author (and reader) is a puppet-monarch whose every move is choreographed and staged by the dominant élite. The triumph of a truly democratic politics will only occur when the interpretive monarchy is finally deposed and, in its place, a polity of truly equal readers and engaged writers is established.

To be clear, none of this is to be taken to imply that women, black and gay judges will not make a difference. The point is that any difference will be political, not metaphysical, in orientation and consequence. While there are not, and cannot be any metaphysical certainties, the institutional chances of transforming law and judging are greatly improved. The appointment of women judges, black judges and gay judges will increase the likelihood that a different perspective will be brought to bear upon the adjudicative process: outcasts "invent . . . new moral identities for themselves by getting semantic authority over themselves."[19] In the same way that there is nothing to prevent white, male, heterosexual judges from acting to transform themselves and the law, there is nothing to guarantee that white judges, black judges and gay judges will not continue the existing traditions of law and judging. But the more likely impact will be that the experience of such traditional outsiders will work its way into the adjudicative exercise and, in one way or another, its doctrinal product. Moreover, the very existence of these diverse judges within the ranks of judicial authority might well have important political consequences for the overall perception as well as the practice of the courts' work. As with any game, the introduction of new and different players will begin in different, inconsistent and unpredictable ways not only to influence the style in which the existing game is played, but also to transform the kind of game that adjudication is and becomes.

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18. T. Moi, *Sexual/Textual Politics: Feminist Literary Theory* (London: Methuen, 1985).
19. R. Rorty, "Feminism And Pragmatism" (1990) 30 Mich. Q. Rev. 231 at 249.

For example, the impact of Thurgood Marshall on the U.S. Supreme Court has been enormous: his presence and self-identification as a black man was a huge part of that impact. Yet this effect was never assured. In strictly doctrinal terms, there is nothing that he did that could not have been effected by a white judge, blessed with a similar political imagination and political will. However, it was the fact that he did it that was so important. His experience as a black man meant that it was more likely (not certain) that he would understand and champion the history and hopes of black Americans. It was more likely, because of that experience, that he would possess the political vision that he had. Moreover, it meant that his judgments would be more likely to be received differently (in positive and negative ways) than those of white judges. In short, the significance of his judicial career is not the result of his ontological identity as a metaphysical Black Author or Reader. It is a political story about a political writer in a political world whose signification will always be political: he played the game, as much as he could, on his terms, not those of others.

Of course, it is ludicrous to suggest that race or ethnicity ought to be the *sole* criterion of judicial merit or achievement. But it is equally mistaken to believe that it should not count at all. Race should not prevent a contribution, but affects its weighting and interpretation. As recent events have shown, while Thurgood Marshall is a black man, not all black men are Thurgood Marshall. The debacle over the appointment of Clarence Thomas and his subsequent judicial career underlines this. In contrast to the Du Bois-Marshall orthodoxy of affirmative action that prevails, Thomas opts for the Booker T. Washington line that it is equal opportunity, not equal treatment that blacks need. In a developing series of judgments, Thomas has articulated a reading of the Constitution that draws little or no distinction between laws designed to subjugate a race and those that favour a race in order to make up for past discrimination. While a couple of his white colleagues, Justices Stevens and Ginsburg, have tended to uphold the legacy of Marshall, Thomas has drawn upon his own experience to argue that "government sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice."[20] Nevertheless, whatever the political evaluation of his developing and distinct judicial position, Thomas's career ought to have demonstrated emphatically the weakness of identity

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20. See for example, *Adarand Constructors* v. *Pena*, 115 S. Ct. 2097 at 2119. See also *Missouri* v. *Jenkins*, 115 S. Ct. 2038 and *Miller* v. *Johnson*, 115 S. Ct. 2475. See generally G. Loury, *One by One from the Inside Out: Essays and Reviews on Race and Responsibility in America* (New York: Free Press, 1995) and Rosen, "Moving On" *The New Yorker* (29 April 1996) 66.

politics: there is no necessary connection between identity and interpretation. Nonetheless, it also ought to have shown that the appointment of black, women and gay judges will at the very least put questions of identity under the public and intellectual spotlight. In this way, what it means to play the judicial game "with authority" will always be open to political contestation.

Conclusion

By way of conclusion, it can be reasserted that the relationship between people's identity and their contribution is contextual in the sense that it will vary depending upon the historical circumstances and social conditions of its performance. The fact that "the author is dead" does not mean that the creator or interpreter of a text is no longer vital or relevant, only that they are no longer God. Biography still counts, but not in a predetermined or formulaic way. The life and texts of judges (and jurists) interact in complex and unstable ways. The value of any contribution to the struggle for a better world can never be fixed by its maker's identity: there is no one authentic experience of anything that deserves authority purely by dint of that experience alone. The weight to be attached to any contribution may well be affected by the circumstances of its making and reception: identity is neither entirely dispensable nor completely determinative. All interpreters, judicial or otherwise, are cultural imposters if they claim to write for or on behalf of their social class or group. As non-foundationalist critics, we have sought to deny any *necessary* connection between identity and interpretation, but not to efface the historical and contingent relation between identity and interpretation. This is the difference between "writing" and "authorship." Such a claim is not a slight to racial identity or, more importantly, to racial suffering. It is a recognition of identity, but of one that is contingent and therefore transformable, not certain and fixed. In this, the minority judgment in *R.D.S.* is to the non-foundationalist point.