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Christine Boyle

The Role of the Judiciary in the Work of Madame Justice Wilson*

I. Introduction

I was delighted to be invited to speak at this conference, for a variety of reasons. Firstly, I admire and respect the work of the guest of honour. Secondly, I feel a Celtic connection with the Scottish theme, having grown up in Northern Ireland. Thirdly, it is a great pleasure of course to come home to Dalhousie.

The theme of the conference is a little ironic, given the fact that the concept of the democratic intellect is coupled with Madame Justice Wilson. Part of what was meant by the democratic intellect was that education should not be limited to a certain privileged class. John Reid tells us that, in laying the cornerstone of Dalhousie College in 1820, the Earl of Dalhousie declared that "this College of Halifax is...formed in imitation of the University of Edinburgh; its doors will be open to all who profess the Christian religion... to all, in short, who may be disposed to devote a small part of their time to study.[1]" But in 1820, the word "all" did not include women, among others, and Madame Justice Wilson would not have been permitted to study here in those days. Women were not to be "enlightened" in Scotland either for some time after this, the Scottish legal system, like other legal systems, struggling to exclude women from the benefits of higher education.[2]

In 1869, Sophia Jex-Blake and six other women, known as the Edinburgh 7, were not allowed to study at the Edinburgh Medical School. Lord Neaves, a member of the full bench of the Scottish Court of Session which heard their appeal, was of the view that the admission of women would "deteriorate our Universities in a way unknown to any period of their history."[3]

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1. John G. Reid, "Beyond the Democratic Intellect: The Scottish Example and University Reform in Canada's Maritime Provinces, 1870 -1933", in P. Axelrod and J.G. Reid, *Youth University and Canadian Society Essays in the Social History of Higher Education* (Kingston, Ontario: McGill-Queen's University Press, 1989), at 278.
2. Thus it is not surprising that, as far as I can tell, there are only male jurists, even in the twentieth century, in David M.Walker, *The Scottish Jurists*, (Edinburgh: W.Green & Son Ltd., 1985). Scottish jurist is defined, at 5, as a "man who has devoted his energies" etc.
3. See T.Brettel Dawson, *Relating to Law: A Chronology of Women and Law in Canada*, (North York, Ont: Captus Press, 1990), at 6.

At the same time, from 1868, Scottish universities had the right to return two Members to Parliament.[4] "[P]ersons of full age and not subject to legal incapacity" who were members of the General Councils of the universities were given the franchise. Leah Leneman has researched the story of the denial of that franchise to women, and the following is based on her account.[5] Women began to have access to universities in 1892. In 1906, 5 women graduates applied for voting papers and were refused. In true feminist tradition they sued the bastards. Lord Salvesen initially heard the case. It would have been disappointing, I suppose, if he had not said something daft and sure enough he did. Incapacity to vote "`did not arise from any underrating of the sex either in intellect or worth' [quoting Mr. Justice Willes] but was an exemption founded on motives of decorum and was a privilege of the sex."

Sometimes we are afraid of using present standards unfairly to judge people of former times. However, lots of people would have disagreed with such a view at the time. One writer in a women's suffrage journal responded that "[s]uch speeches ought only to be delivered to the diplodocus in the Natural History Museum".

However, the decision was upheld on appeal to the Court of Session. There had been concern that women would create a scene when the decision was handed down, but this did not occur. One court official said that the "ladies behaved like gentlemen". The case went next to the House of Lords[6] but was lost again, the court wondering how there was room for argument. In fact there was a good argument, directly connected with The Democratic Intellect, the theme of this conference. The appellants argued that the franchise was here not based on property or geographical location but on an "intellectual" test - a kind of intellectual democracy.

The point of this story is that there are at least some signs that the democratic intellect was not exactly democratic and did not always value intellect. In honouring Madame Justice Wilson I would like to

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4. One famous M.P. for the Scottish universities was John Buchan, Lord Tweedsmuir, later Governor General of Canada and author of *The Thirty Nine Steps*. See Madame Justice Wilson, "Literature and the Law", Shumiatcher lecture delivered at the University of Saskatchewan, March 13, 1987, at 35.

5. Leah Leneman "When Women Were Not `Persons': The Scottish Women Graduates' Case, 1906-08", (1991) (Part 1-April) *The Juridical Review* 109.

6. Two of the appellants, Chrystal Macmillan and Frances Simson, argued the case themselves, and there was a big reception for industrial and professional women in the Queens Hall afterwards. Chrystal Macmillan wrote in a letter later that it was "inspiring to have thousands of people cheer and wave for two or three minutes before they let one begin to speak...."

honour the centuries of women who would have been her judicial predecessors, whose intellect is lost to us and whose judgments she would no doubt have valued.

My topic is the role of the judiciary in the work of Madame Justice Wilson, but I am going to use a particular focus. I started with the famous lecture "Do Women Judges Really Make a Difference" delivered at Osgoode Hall Law School[7] and it helped me think of a question. What is it that women judges might make a difference to? One answer is the law, another is judging itself. These themes were very clear in Madame Justice Wilson's lecture. Another answer, however, is the concept of woman. When women judges make a difference to law, part of what they might make a difference to is law's contributions to the cultural meaning of womanhood. (The law does not of course do the job of making us women (and those of us who are men, men) alone - she is very much aware of the relatively minor role of law.[8] There are other influences, including religion and education.

A focus on what it means to be a woman does not take us away from the topic of the role of the judiciary. Madame Justice Wilson has made it crystal clear that the qualities of being womanly and judicial are not mutually exclusive. We may have indeed moved from an age when it seemed inconceivable that one could be a judge and a woman too to a time when more attention is being paid, via judicial education programmes, to the question that many conscientious judges struggle with - how to combine maleness and judging.

In addressing Madame Justice Wilson's role as a judge in contributing to the legal construction of woman, I'd like to start by asking whether the word woman changes the meaning of the word judge.

II. Woman Judge

I can detect at least two schools of thought. Judicial qualities could be seen as gender-neutral. Thus gender has nothing to do with being a judge, and the cultural figure of the judge has not been constructed as

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7. The Fourth Annual Barbara Betcherman Lecture, 1990, reprinted by the Society for the Reform of the Criminal Law.

8. In "Law in Society - The Principle of Sexual Equality", speech delivered in Winnipeg, Manitoba, April 8, 1983, she discusses the role of school, family and religion in constructing the meaning of gender and of attitudes toward sexual equality. For instance, she states, at 10, that "[r]esearch on picture books and school readers also discloses this kind of stereotyping of masculine and feminine characteristics to which the child is exposed from an early age. Indeed, by the time they reach 5 or 6 years old children are already conscious of the superior value placed on masculinity in our society."

masculine. It just so happens that in the Canadian legal system judges have been male in the past, and the inexorable increase in the number of women lawyers will in the fullness of time produce a gender-balanced judiciary. However that will not mean any change in the concept of judge itself. From this perspective, the phrase "women judges" is a superfluous and perhaps even rude reference to the bodies that some judges just happen to have, as pointless as say a reference to short judges or bald judges, or judges who did not attend Dalhousie law school.

The contrasting perspective is that the word woman is not superfluous. Thus the appointment of women to the bench is changing the meaning of judging itself. One's sex is not like baldness or shortness, if only for the simple reason that we do not have a history of laws which excluded such people from the legal profession. A gender-balanced judiciary will not just affect things like public confidence and increase fairness for the individual women in the legal profession, but will cause more fundamental change.

The view that 'woman' could change 'judge' could take two obvious and different forms. On the one hand the phrase "women judges" could form part of the sentence, a sentence I have actually heard spoken in British Columbia, "Women judges have no place in the Supreme Court of Canada." The other view is that woman could change what it means to be a judge in a positive way, could enrich the function of judging in a way of which people could be proud.[9]

The judge who may be most associated in the public mind with the latter view is Madame Justice Wilson. Although there is much debate within feminist communities about the pros and cons of her decisions, she is clearly linked with the idea that women judges could make a difference. In her speech, she does not only suggest that women judges could make a difference to such substantive areas as criminal (though interestingly not contract) law, she goes on to discuss the idea that women will have an impact on the process of judging itself.

In her views on judging she can be clearly located in the general intellectual debates of her time. A significant example in this context is that she thinks there is merit in the theories of Carol Gilligan on moral development. In her influential but controversial book, *In a Different Voice*,[10] Gilligan discusses the dominant moral ideology

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9. See generally Isabel Grant and Lynn Smith, "Gender Representation in the Canadian Judiciary" in *Appointing Judges: Philosophy, Politics and Practice*, (Toronto: Ontario Law Reform Commission, 1991), at 57.

10. Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development*, (Cambridge: Harvard University Press, 1982). There is an extensive body of literature, using and

(which can be expressed in judgments of course, as well as elsewhere) as involving a conception of self as individuated, autonomous, and independent, and as conceptualising community relationships as contractual, competitive, and adversarial.[11] She contrasts that with a different moral voice, not necessarily female, though heard through women's voices in her research, which stresses the conception of self as interconnected and relational. Such a conception favours intimacy and sensitivity to the needs of others. There are various ways of describing this contrast: morality of rights - morality of responsibility; ethic of justice - ethic of care; self defined through separation -self defined through connection.

An approach to judging based on ideas of responsibility, care and connection might well produce a different process as well as different substantive rules, in the words of Madame Justice Wilson herself: "The goal, according to women's ethical sense, is not seen in terms of winning or losing but rather in terms of achieving an optimum outcome for all individuals involved in the moral dilemma."[12] I should stress that these ideas, of linkage between women and an ethic of care, are quite controversial among feminists.[13] However, I think it is fair to say that Wilson joins with others in the legal profession in finding Gilligan's ideas, sometimes referred to as cultural feminism, influential. This kind of thinking has points of intersection with the vocabulary of communitarianism, with its emphasis on the role of communities in a person's identity.[14]

Another way in which 'woman' might change 'judge' is that there may be considerable emphasis on the background to a legal issue. She suggests that judges have to try "to enter into the skin of the litigant and make his or her experience part of your experience and only when you have done that, to judge."[15] This is consistent with a continuing emphasis in the feminist and critical approaches to law generally on the importance of context. Law already makes use of contextualized

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critiquing her ideas. See, e.g. Carrie Menkel-Meadow, "Portia in a Different Voice: Speculations on Women's Lawyering Process" (1985), 1 *Berkeley Women's L.J.* 39, and Joan M. Shaughnessy, "Gilligan's Travels" (1988), 7 *Law and Inequality* 1.

11. See generally Richard Devlin, "Nomos and Thanatos(Part B). Feminism as Jurisgenerative Transformation, or Resistance Through Partial Incorporation?" (1990), 35 *Dal.L.J.* 123, at 151.

12. *Supra*, note 7, at 10.

13. See, e.g. Catharine A.MacKinnon, *Toward a Feminist Theory of the State*, (Cambridge: Harvard University Press), at 51, and Devlin, *supra* 11, at 148-185.

14. See Donna Greschner, "Feminist Concerns with the New Communitarians: We Don't Need Another Hero" in Allan Hutchinson and Les Green, eds. *Law and the Community: The End of Individualism*, (Toronto: Carswell, 1989).

15. *Supra*, note 7, at 10.

reasoning, since legal issues are often debated in the context of the facts of a particular case. Judging is, to a certain extent, an exercise in contextualized reasoning, and administrative decision-making structures may result from an effort to institutionalise context. However, feminist theory teaches us that gender might be part of the context of some legal issues and teaches us to be suspicious of a level of abstraction which ignores gendered patterns in the real world. Madame Justice Wilson has been instrumental in putting such ideas on the national stage.

Lavallee[16] may be the best-known example of an attempt to take an approach in which gender is not abstracted out of the context. Angelique Lyn Lavallee was a woman who was acquitted of murder after shooting her abusive common law partner in the back of the head. In developing the principles of self-defence, the Supreme Court paid attention to the social, economic, historical and psychological context. Thus expert evidence was admitted on the battered woman syndrome, and the majority took judicial notice of the myths associated with battered women. This kind of approach had an obvious substantive impact. The Court abandoned the requirement of an imminent attack in self-defence. In other words, it may now be possible to engage in a pre-emptive strike in self-defence.[17]

Having said a little about woman judge, I want to move on to judging woman - Justice Wilson's contributions to the legal and social construction of woman.

III. Judging woman

The starting point, I think, for her, is the common humanity of men and women. "We are human beings first and foremost and only secondarily male and female."[18] Humanity is more basic than gender and fundamental to our claim to equality. While not completely uncontroversial,[19] it is not unusual at this stage in our intellectual history to link humanity and claims to equality.

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16. [1990] 4 W.W.R. 1.

17. It is difficult to say just how this will work out in practice, however, since the *Criminal Code*, R.S.C. 1985, c.C-46, s. 34, still speaks of "[e]veryone who is unlawfully assaulted".

18. " Law in Society - The Principle of Sexual Equality", speech in Winnipeg, Manitoba, April 8, 1983, at 9.

19. Michael Tooley, e.g. takes issue with the common assumption, in Western society, that no non-human animals are persons. "Decisions to Terminate Life and the Concept of a Person" in John Ladd, ed., *Ethical Issues Relating To Life and Death*, (Oxford: Oxford University Press, 1979, at 92). See generally, Stanley and Roslind Godlovitch, eds., *Animals, Men, and Morals*,

So, for instance, in her dissent in the provocation case of *Hill*[20], she stressed that while the sex of the accused is relevant as part of the context which helps us understand provocativeness, women and men have to meet a common standard of self-control as an aspect of equality of responsibility.[21] In her concurring judgment in *Towne Cinema Theatres Ltd.*[22], she used an approach to the "undue exploitation of sex" in obscenity offences which emphasised that persons and groups can be stripped of their humanity - the human dimension of life can be degraded to a sub-human or merely physical dimension.[23] The language is largely gender-neutral, but the idea is one that has only recently found expression in the law, that women, the focus of much pornography, are indeed human beings, whose degradation matters.

There are costs to an emphasis on common humanity, which sometimes can resemble a liberal notion of equality divorced from the context of the on-going social and economic subordination of women. Wilson concurred with Lamer's dissent in *Messier* v. *Delage*[24] where he expressed the view that while it used to be the case that an "ex-wife would, more often than not, remain a burden to her former husband indefinitely"[25] , now " women cannot on the one hand claim equal status without at the same time accepting responsibility for their own upkeep."[26] It was suggested that there are rare exceptions to this approach, for instance, a divorced woman in her sixties without training or skills who had been dependent during a long married life - such a woman may be "partially or totally unable psychologically ever to assume financial responsibility for herself."[27] Aside from exceptional cases, the ideal is the "emancipation of former spouses".[28]

(London: Taplinger, 1972). The argument has been made that both speciesism and racism attempt to justify discrimination on the basis of morally irrelevant criteria. T. Regan and Peter Singer, eds., *Animal Rights and Human Obligations*, (Englewood Cliffs, N.J.: Prentice-Hall, 1976).

20. [1986] 1 S.C.R. 313.
21. *Ibid.*, at 353.
22. [1985] 1 S.C.R. 494.
23. "[T]he undue exploitation of sex...is the treatment of sex which in some fundamental way dehumanizes the persons portrayed, and as a consequence, the viewers themselves." *Ibid.*, at 523.
24. [1983] 2 S.C.R. 401.
25. *Ibid.*, at 420.
26. *Ibid.*, at 421.
27. The language quoted with approval was from the Canada Law Reform Commission Working Paper No.12, *Maintenance on Divorce*, (Ottawa: Information Canada, 1975), at 30.
28. *Supra*, note 24, at 426. Some attention has been paid to the fact that emancipation may mean emancipation to relative poverty for women and relative affluence for men. See, e.g. Freda M. Steel, "Alimony and Maintenance Awards" in Sheilah L. Martin and Kathleen E. Mahoney,eds., *Equality and Judicial Neutrality*, (Toronto: Carswell, 1987), 155, at 163.

However it should be said that Madame Justice Wilson does not let her fundamental emphasis on common humanity lead to the assumption of common experiences of life for men and women. She is aware of both the reality of domination and of its connection to gender. Law both plays a role in creating this and should respond to it.

An understanding of the most extreme form of domination on an individual level was influential in *Pare*[29], in which she delivered the judgment of the Court. Pare had killed a child two minutes after indecently assaulting him. The issue was whether the murder was first degree, i.e. did the accused kill the child "while committing" the indecent assault.[30] The Court rejected the literal interpretation as acontextual, and found in the concept of unlawful domination a common theme uniting a particular class of first degree murder.[31] The murder represented an exploitation of power created by the underlying crime and made the entire course of conduct a "single transaction".[32] Of course, a recognition of domination does not at all require recognition that it could exist in structural forms associated with particular groups of people such as women.

Such recognition of group-based, rather than individual, political, social and economic hierarchies forms at least a part of her approach to section 15 of the *Charter*.[33] Again the approach is contextual. In *Andrews*[34] she said that the determination of whether a group falls into a category analogous to those enumerated in section 15 is " not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society."[35] As part of her case by case approach to equality, she, delivering the unanimous judgment of the Court in *Turpin*[36] , thought that "most but perhaps not all cases [of alleged discrimination] necessarily entail a search for disadvantage that exists apart from and independent of the particular distinction

29. [1987] 2 S.C.R. 619.
30. See what is now s.231(5) of the *Criminal Code*.
31. The present crimes in s. 231(5) are hijacking, sexual assault, kidnapping and forcible confinement, and hostage taking.
32. *Supra*, note 29, at 633.
33. The *Constitution Act*, 1982, R.S.C. 1985, en.by the *Canada Act*, 1982 (U.K.), c.11, as am. by the *Constitution Amendment Proclamation*, 1983, SI/84-102, Sch., in force June 21, 1984, Sch. B, *The Canadian Charter of Rights and Freedoms*.
34. [1989] 1 S.C.R. 143.
35. *Ibid.*, at 152.
36. [1989] 1 S.C.R. 1296.

being challenged."[37] A section 15 decision therefore usually involves a "search for indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political and social prejudice."[38]

Can such indicia of discrimination be found with respect to women? While there is a strong awareness of women as individuals[39] the view that they can, as a collectivity, seems implicit in the world-view of Madame Justice Wilson as expressed in her work as a whole. However, it is difficult to find one place where that idea is explicitly expressed. She concurred in the unanimous judgment delivered by Mr. Justice Dickson in *Action Travail des Femmes* v. *Canadian National Railway Co.*[40] . Here women were recognised as a disadvantaged group with respect to the employment situation and history at CN Railway. In *Lavallee* she quoted a U.S.case referring to women's long and unfortunate history of sex discrimination.[41]

The maintenance cases are of course relevant to the question of whether she approached legal issues bearing the inequality of women, as a disadvantaged group, in mind. In *Pelech*[42] , the question related to the finality of a maintenance agreement given the physical, psychological, and economic difficulties of the ex-wife. The need to compensate for gender-based inequality was contrasted with the need for finality. Madame Justice Wilson expressed herself as being in sympathy with the views of Matas J.A. in *Ross*[43] :

> ...we have not yet reached the stage where we can safely say that generally husbands and wives are equal, or nearly so, in earning capacity, or where we can necessarily say that generally the responsibilities of marriage have not disadvantaged the earning potential of the wife.[44]

However, she did not share the view that this required the courts to assume a supervisory role. This would "ultimately reinforce the very bias he seeks to counteract."[45] She therefore came to the conclusion

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37. *Ibid.*, at 1332. Thus persons charged outside of Alberta who did not have the right to elect trial by judge alone, did not constitute a disadvantaged group in Canadian society.
38. *Ibid.*, at 1332.
39. See, e.g. "One Woman's Way to the Supreme Court", remarks made at the Women Lawyer's Dinner, 22nd Australian Legal Convention, Brisbane, 1983.
40. [1989] 1 S.C.R. 1114.
41. *State* v. *Wanrow*, 559 P.2d. 548 (1977).
42. [1987] 1 S.C.R. 801. Wilson delivered the judgment of herself, Dickson C.J., McIntyre, Lamer and LeDain JJ.
43. (1984), 39 R.F.L. (2d) 51 (Man.C.A.).
44. *Ibid.*, at 64.
45. *Supra*, note 42, at 849.

that settlements should stand unless there existed some causal connection between the changed circumstances and the marriage.[46]

This presents a difficulty for those who are of the view that we need to work toward significant improvements in the lives and status of women. There is disagreement about how to achieve such improvements. Certain goals may be uncontroversial. For instance, it would be a good thing if women were safe in their homes and on the streets; it would be a good thing if divorce were not a pathway to poverty for women. Yet deciding on an appropriate and effective strategy, even one that will not cause more harm, is more or less a leap in the dark.[47] A shared concern about the disadvantages of being a woman can obviously produce different hunches about what is likely to produce change in the long-run.

So far I have touched on two basic threads in her work - the belief in a common humanity and recognition of disadvantage. But there are many other aspects, both descriptive and normative, of her judicial work, which tell us what it means to be a woman in her world-view.

A recent case provides a starting point. The law can take notice of the fact that men and women are biologically different, even though there are dangers involved. Thus in *Hess*[48], the old sex-specific offence of statutory rape was found not to infringe section 15 of the *Charter*. This was because rape, as legally-defined, could only be committed by males. This seems obvious on one level, but quite controversial on others, especially when one bears in mind, as Madame Justice Wilson did, that to be biologically female has been treated by law as justifying disadvantage.[49]

The Wilson majority in *Hess* did *not* adopt a liberal approach which made it seem so obvious to some that statutory rape was the paradigm offence which infringed section 15. Here old-fashioned liberals (concerned with the protection of male interests) and liberal feminists (concerned, and with good reason, that any biological distinction recognised by law will disadvantage women) could make

46. See also *Richardson* v. *Richardson*, [1987] 1 S.C.R. 857.

47. Catharine MacKinnon refers to some of the problems in "Reflections on Sex Equality Under the Law" (1991), 100 *Yale L.J.* 1281, at 1293."What if the stereotype - such as women enjoy rape-is not really true of anyone? What if, to the extent a stereotype is accurate, it is a product of abuse, like passivity, or a survival strategy, like manipulativeness? What if, to the degree it is real, it signals an imposed reality, like a woman's place is in the home? *What if the stereotype is ideologically injurious but materially helpful....*" Emphasis added.

48. [1990] 2 S.C.R. 906.

49. The most famous illustrations might be *Bliss* v. *Attorney-General of Canada*, [1979] 1 S.C.R. 183, and *Attorney-General* v. *Lavell*, [1974] S.C.R. 1349.

common cause. Rather, she referred to her own approach to discrimination in *Andrews* and clearly intended to base her analysis on a hierarchy rather than a differences approach. However, she did not go on to actually utilize her own approach, which she could have done by analysing the role of sexual assault in the subordination of young women, the issue of whether the law should facilitate male access to the sexuality of young women, and the social meaning of contraception according to which a good user of contraception can be seen as a bad girl[50]. Instead biology was a substitute for an analysis of the social disadvantage called for by *Andrews*. But the bottom line is clear. At least for some purposes, women, and men, have gendered bodies.

But it is also clear that women are far from being just their bodies. We can also find a strong sense of woman as moral actor with respect to those bodies. Her judgment in *Morgentaler*[51] refers to the right to reproduce or not to reproduce as "properly perceived as an integral part of modern woman's struggle to assert her dignity and worth as a human being."[52] A woman is not an entity justifiably treated as a means to an end, the passive object of decisions made by others, and thus deprived of her essential humanity. The concept of woman is evolving, in the sense that the rights that she bears as a human rights-bearing entity, are evolving to meet her needs and aspirations. Hence Wilson's judgment went beyond an analysis of whether the abortion process was fundamentally unjust in a procedural sense and found meaning for women, as women, in the *Charter* rights to liberty and security of the person.

A powerful, and liberal, image in the judgment is that of liberty and security as a fence surrounding the gendered individual. As well, woman is not only autonomous vis-a-vis the state, but can shape her own identity with respect to others by rejecting her inter-connectedness with the foetus. But if the core of the judgment is liberal it is a radical liberalism. The great aspirational *Charter* concepts are to be given a meaning that treat women's claims to them as serious. The approach is

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50. Cf. Catharine MacKinnon, "Introduction" (1981), 10 *Capital University Law Review* i at vi, n.21. "Arguably, the practice of coercive male sexual initiation towards women, particularly those perceived as vulnerable, targets young girls, even more than it does all women. This, together with women's lack of access to meaningful consent, which may vary with age (as well as economic resources and other factors) would criticize the social context of gender inequality that situates women and men nonsimilarly in the sexual arena. Such an argument would produce a very different conception of the injury of rape upon which to support a sex specific statutory prohibition...."
51. [1988] 1 S.C.R.30.
52. *Ibid.*, at 172.

not to construct, say, liberty, in a way that is responsive to male persons (e.g. persons who do not have to make decisions about foetuses growing inside their own bodies) and then, applying liberal notions of equality, allow women to have the same liberty. Rather, liberty is constructed from the ground up recognising that some persons with liberty claims will have to make such decisions.

It is trite of course to say that liberty has no pre-ordained meaning. It, and other concepts, are vessels, empty but with some shape, which have to be given content by the courts. In playing her role in this process, Madame Justice Wilson treats as significant the liberty claims of women.

> I believe that the decision whether or not to terminate a pregnancy is essentially a moral decision, a matter of conscience....The question is: whose conscience? Is the conscience of the woman to be paramount or the conscience of the state?[53]

Nevertheless, the bottom line in *Morgentaler* is that it is the conscience of the state once protection of the foetus becomes a pressing and substantial concern. The bright shining woman as autonomous moral actor with respect to reproductive decisions is an image that fades. Her essential humanity, reflected in her claims to liberty and security, fades as the foetus grows and the use of her body as a means to an end becomes more justifiable.

The fading woman in *Morgentaler* can perhaps be contrasted with the woman constructed in *Eve*[54] , who cannot be sterilized without her consent. However, it is difficult to say whether Wilson, in joining the unanimous judgment, expressed a view that is consistent, or a contrast, with *Morgentaler*. The state can force a woman to bear a child at *some* stage of the development of the foetus, but a court, in exercising its *parens patriae* jurisdiction, cannot force a woman with a mental disability *not* to have a child. So control is envisaged in one case but not the other. Another way of looking at it, however, is that both cases contemplate the possibility that because of state decisions, women may bear children that they did not exercise a moral choice to have.

This crucial aspect of womanhood - whether a woman is a person who is morally autonomous with respect to whether her body may be used for reproductive purposes - is of course still unsettled. *Tremblay* v. *Daigle*[55] , in which Wilson joined a unanimous Court, explicitly left

53. *Ibid.*, at 175-76.
54. [1986] 2 S.C.R. 388.
55. [1989] 2 S.C.R. 530.

open the question of whether a woman is a distinctive type of person who can be compelled to use her body to save the life of another (woman as ultimate altruist). The actual decision was that there were no substantive rights on which an injunction barring an abortion could be founded. That means that it is conceivable that a legislature could try to create such substantive rights, inevitably raising a constitutional issue. This basic question about the nature of womanhood in Canadian law would then have to be answered.

So all we can say at the moment is that a woman is a person whose constitutional status with respect to whether she can be forced to continue a pregnancy is uncertain. This sounds like a bit of familiar law, but I think it may have more significance as an aspect of psychological reality. I, as a woman, am a person of uncertain constitutional status. I may be living (and writing academic papers) in a community which expresses its respect for my essential humanity, my non-means-to-endedness, or I may not. Until I know the answer I lack crucial information about what woman really means.

However, while pregnant, consensually or otherwise, a woman is entitled to be free of discrimination on that basis. Again, Wilson joined a unanimous Court, which stated, in overruling *Bliss*[56], in *Brooks* v. *Canada Safeway*:[57]

> That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious....it is unfair to impose all of the costs of pregnancy upon one half of the population....[58]

The decision was explicitly influenced by the changing social and economic context.

> Over ten years have elapsed since the decision in *Bliss*. During that time there have been profound changes in women's labour force participation.[59]

and

> The Safeway plan was no doubt developed...."in an earlier era when women were openly presumed to play a minor and temporary role in the work-force".[60]

56. [1979] 1 S.C.R. 183.
57. [1989] 1 S.C.R. 1219.
58. *Ibid.*, at 1243, per Dickson C.J.
59. *Ibid.*, at 1243.
60. *Ibid.*, at 1244.

So not only does the case tell us that women are not fair game for discrimination on the basis of pregnancy, but that the work-force is made up of a variety of normal individuals of both genders and different reproductive conditions.

The image of women as workers outside the home is also clear in *Janzen*[61] , where again Wilson joined a unanimous Court, in recognising that sexual harassment is discrimination; that it is an abuse of sexual and economic power; that women face the greatest risk; and that this is an attack on their dignity and self-respect as a human being. The Court uses, as part of the academic context, Professor Aggarwal's argument that sexual harassment is used in a sexist society to "underscore women's difference from, and by implication, inferiority with respect to, the dominant male group" and " to remind women of their inferior ascribed status".[62]

One area of intense topical interest relates to the messages about women in the law of sexual assault. Such signals are very significant. A newcomer to Canada who noticed that some women had a stamp on their foreheads - lets say it was W for whore or OT for open territory - and that these women were sexually accessible to men irrespective of their wishes, might come to some quite obvious conclusions about what it means to be a woman in Canada. It would not help that other women had another stamp - say RHWSMP for respectible heterosexual woman with a single male partner- that they could have if they obeyed certain rules and therefore were only sexually accessible to one man. That observer might look in vain for a SAW stamp -sexually autonomous woman. We might not have such obvious ways of displaying the rules about the sexual accessibility of women, but they nevertheless can be found in our laws, e.g. those relating to questioning about sexual history, which have traditionally focussed on what kind of stamp to put on the complainant's forehead.

In her dissenting judgment in *Konkin*[63] , the issue was whether the complainant could be questioned about her sexual conduct after the alleged rape. The conviction of the accused had been overturned by the Alberta Court of Appeal because the trial judge had excluded this evidence as irrelevant. The majority of the Supreme Court agreed, but Wilson, Beetz and Chouinard dissented. The complainant was not to

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61. [1989] 1 S.C.R. 1252.
62. *Ibid.*, at 1285, quoting Arjun P. Aggarwal, *Sexual Harassment in the Workplace*, (Toronto: Butterworths, 1987). It is interesting that in both *Brooks* and *Janzen*, the role of Madame Justice Wilson was to join in the path-breaking judgments of Chief Justice Dickson.
63. [1983] 1 S.C.R. 388.

be subjected to a "humiliating and devastating inquiry at trial" into irrelevant evidence which had to do with the trauma of the rape rather than the guilt or innocence of the accused.

It should be said that the dissent in *Konkin* unsuccessfully tried to protect women from irrelevant questions, but was not based on an argument that questions about sexual conduct were never relevant. It is hard to say whether that flowed from the legislation of the day, which assumed that it could be relevant, so it is difficult to extrapolate from *Konkin* to the fascinating question of what a Wilson judgment in *Seaboyer*[64] would have held. In this recent case, the Supreme Court of Canada struck down, as inconsistent with an accused person's right to a fair trial, section 276 of the *Criminal Code*, which limits questioning about a complainant's sexual history.

One group of women who are particularly vulnerable to being labelled as sexually accessible is prostitutes[65]. They may have difficulty achieving legal recognition of their victimization. Can the law also label them criminals for communicating for sexual purposes? In dissent, with Madame Justice L'Heureux-Dube, in *Reference Re ss.193 and 195.1(1)(c) of the Criminal Code*[66] , Madame Justice Wilson said that the latest attempt by Parliament to do this was an unconstitutional infringement of freedom of expression. What image of women who do this kind of work can be found in her dissent? Prostitution is a degrading way to earn a living, yet prostitutes are not portrayed as victims but as economic actors with expression rights. Again the image of woman as holder of constitutional status is very clear.

Of all the Wilson cases, *Lavallee*[67] may be the richest source of messages about womanhood. First of all *Lavallee* conveys what I think is a radical message that women's lives are valuable and entitled to be protected, something I would not have taken for granted. It also raises the question of the connection between what it means to be a woman and what it means to be reasonable.

Lavallee was acquitted because of a successful self-defence argument. The core of self defence doctrine is the concept of reasonable-

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64. (1991), 83 D.L.R. (4th) 193 (S.C.C.). However, Wilson does say in *Konkin* that evidence of a pre- and post-offence pattern of conduct would be relevant, at 402.
65. See A.W. Burgess and L.L. Holmstrom, "The Prostitute" in A.W. Burgess and A. Lazare, eds. *Community Mental Health:Target Populations*, (Englewood Cliffs,N.J.: Prentice-Hall,1976).
66. [1990] 1 S.C.R. 1123.
67. [1990] 4 W.W.R.1 (S.C.C.) For a more comprehensive discussion see Donna Martinson, Marilyn MacCrimmon, Isabel Grant and Christine Boyle, "A Forum on *Lavallee* v. *R.*: Women and Self-Defence" (1991), 25 *U.B.C.L.R.* 23.

ness. It is trite to say that reasonableness is a very vague concept which will be given meanings in particular historical and cultural contexts. It is at least theoretically conceivable that in our time and place it would be seen as impossible to be a woman, to kill a man, and to be reasonable at the same time. Conversely it is theoretically possible for a woman always to be seen as reasonable if she kills a man. Since we are somewhat familiar with our own time and place, we would be surprised to find either of these extremes if we studied the law of self-defence. We might rather expect to find something in between, although it would be naive to expect the perfect balance. What I read Madame Justice Wilson, speaking for the majority,[68] as saying in *Lavallee* is that the content of the concept of reasonableness may have been tilted toward the end of the spectrum at which there is difficulty in being seen as a woman and being seen as reasonable at the same time. She says that 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". Further, it was noted that the factor of gender can be germane to the assessment of what is reasonable. Thus fact finders must attempt to decide what is reasonable for a person who belongs to a group, in this case women, who lack training in repelling a male assailant, who have suffered a long and unfortunate history of sex discrimination, who due to their size, strength and socialization, are typically no match for men in hand to hand combat, and who have personally suffered abuse at the hands of the deceased.

Whenever I have discussed *Lavallee* with students, I detect some tendency to see the case as an example of the subjectivisation of the objective test of reasonableness. In other words, assuming a spectrum of tests with objective at one end and subjective on the other, the reasonable man, or in more modern terms, the reasonable person test, is at the objective end, while the reasonable battered woman represents movement toward the subjective end. Those who approve an objective test in the first place express concern with this dilution. However, I see *Lavallee* as recognising that everyone is gendered and that a reasonable man test is no more or no less objective than a reasonable woman. Whatever the sex of the accused, the issue is, as stated by the majority, what (s)he reasonably perceived, given her situation and her experience. The point of *Lavallee* is not that we have to change our construction of reasonableness to suit women as a kind

68. Mr. Justice Sopinka concurred in the result.

of exception to the general rule, but that we have to be careful not to give meaning to concepts such as reasonableness, using a male model. The point is that womanhood and reasonableness are just as consistent as maleness and reasonableness.

Lavallee also touched on the duty to retreat issue. The reference was brief, and somewhat obscure, but the case seems to indicate that a woman does not have to retreat from her home rather than kill her abusive partner.[69] In other words, the law, while being gender-neutral, is not saying in *effect* that if you are a woman and you are battered you are the person who must abandon your home.[70] To my mind, this conjures up an image of a woman, albeit driven to desperation, who stands her ground, and defends herself. Cultural standards of appropriate male and female behaviour are deeply implicated in the legal approach to the issue.

I sense that to Madame Justice Wilson, the question was quite straightforward, the answer being found in our common humanity. Until *Lavallee* the law apparently said that "a man's home is his castle", and so there is no duty to retreat in the face of an attack.[71] *Lavallee* explicitly says that it is a woman's home too, thus rejecting gender stereotypes in this context. What those stereotypes might be is obvious. They could be crudely summarized as real men don't run away, but women do.

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69. The majority were dealing with the alternatives to self-help when they stated, at 29-30: "I emphasize at this juncture that it is not for the jury to pass judgment on the fact that an accused battered woman stayed in the relationship. Still less is it entitled to conclude that she forfeited her right to self-defence for having done so. I would also point out that traditional self-defence doctrine does not require a person to retreat from her home instead of defending herself.... A man's home may be his castle but it is also the women's home even if it seems to her more like a prison in the circumstances." What I understand by this is that the law has said that it is reasonable to stay in your home and kill an attacker rather than choose a safe retreat. What *Lavallee* does is suggest, quite fairly, that this applies to battered women too. Thus it would not be open to a fact finder to decide that it was unreasonable for a battered woman to kill her partner because she could instead have left her home. The judgment is not entirely clear about this, since, in the very next paragraph, the sentence appears. "If...the jury is satisfied that the accused had a reasonable apprehension of death or grievous bodily harm *and felt incapable of escape*, it must ask itself what the "reasonable person" would do in such a situation." (Emphasis added) If there is no duty to retreat from one's home, then the accused's feelings about the possibility of escape do not seem to be relevant. The law is not clear and for this reason alone it would appear that the Court will have to return to the issue of whether the reasonable person should chose a safe retreat over the use of deadly force.

70. As it did in *State* v. *Bobbitt* 415 So.2d.724(Fla.1982).

71. The few Canadian cases have held that there is no duty to retreat from one's home, but one Alberta case went on to say that the same approach would be taken even if the accused were not at home. This at least has the virtue of refusing to tilt self-defence doctrine toward the protection of those who are recognised by the legal system as having a home. See *R.* v. *Deegan* (1979), 49 C.C.C.(2d) 417.

One does not have to go far to find evidence of a connection between the rule that there is no duty to retreat from one's home and the social construction of masculinity. However, the origin of the rule may have had more to do with notions of property than with masculinity. The old English case that is usually cited in this context is *Semayne* in 1605.[72] It seems to be the source of the expression that a man's home is his castle, used in *Lavallee*. It is authority for the view that a man need not retreat from but can defend his home. Even though the word man is used and we might assume that the rule is designed to set standards of masculine behaviour, we should be careful not to project our knowledge of more modern gender roles back onto seventeenth century England. At various times in English history, men would have been away from home at war or doing other things and many women, particularly upper class women, would have been responsible for running homes and large estates. A legal norm of defending rather than retreating from a home might have had a lot to do with standards of behaviour for women as well as men and with the protection of property interests of absent males.

It is in more recent times that we can find clearer evidence that the law is being used to construct the idea of male virtue, what male honour requires. We find the expression "true man" in 19th century U.S. cases, for instance *Erwin* v. *State*.[73] "A true man, who is without fault, is not obliged to fly from an assailant, who by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm."[74]

What little literature there is supports the idea that what has been at stake in the development of the law on retreat is the construction of masculinity. J.H. Beale, in a 1903 article,[75] tells us that the notion of honour points in two directions. The "feeling at the bottom of the argument [that there should be no duty to retreat] is one beyond all law: it is the feeling that is responsible for the duel, for war, for lynching; the feeling that leads a jury to acquit the slayer of his wife's paramour; the feeling which would compel a true man to kill the ravisher of his daughter." However, Beale goes on to argue that a

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72. (1605), 77 E.R. 194 (K.B.).

73. 29 Ohio St. 95 (1876), at 103.

74. The U.S.Supreme Court quoted *Erwin* v. *State* with approval in the case of *Beard* v. *U.S.* 158 U.S. 550 (1895). *Erwin* hints at but does not tell us that it might also have something to do with reasonableness for white people as well as men, since it starts: "The plaintiff in error, a white man and not an Indian". This person, Babe Beard, was charged with murdering Will Jones, also referred to as a white person and not an Indian.

75. "Retreat from a Murderous Assault" (1903), 16 *Harv.L.R.* 567, at 581.

really honourable man would regret the cowardice of a retreat, but after the excitement of the contest was past, would regret the blood of a fellow - being on his hands even more. Even where there was a debate, both sides were couched in terms of male honour, and it is clear that the issue was seen from a male perspective.

It is difficult to be confident, since there are not very many self-defence cases, but it seems plausible that the rule that there is no duty to retreat is based on the idea that it would be cowardly, not manly, to retreat in the face of violence.

Conversely, expectations of appropriate womanly behaviour, in my view, might be the opposite. Indeed women might be expected not to get themselves in a situation where they would have to run away in the first place - run away in advance, so to speak.

Lavallee makes it clear that this double standard should not be reinforced by law, although it leaves us with a difficult question. Certainly, liberal notions of equality dictate that the rule, whatever it is, applies to all accused persons, irrespective of gender, but that sidesteps the question of what the law should be. Courts might depart from the present legal rule that there is not a duty to retreat, and promote instead a norm of non-violence as both manly and womanly.[76] My first reaction to this aspect of *Lavallee* was that the promotion of non-violence is one of the things I would expect women judges to bring to their work.

On reflection, however, I think that it is very important that the law says that part of what it means to be a woman is that one has no duty to retreat from violence in one's home. What was practically a throwaway line reveals a profound awareness of context. A law which said that you must retreat rather than defend yourself would ignore the reality that for battered women there is no safe place to which they can retreat.[77]

Ideally, of course, what I would like to see is a body of law which stressed both the manliness of non-violence and the safety of women. The significance of *Lavallee* lies for me in the fact that it challenges us to examine the content that we put into such flexible legal concepts as reasonableness and such cultural constructs as manliness in self defence and womanliness in judging.

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76. Indeed we might be experiencing a cultural shift toward the perception of non-violence as manly. I am thinking here of the events at Oka. Both the Canadian Army and the Mohawk Warriors claimed the virtue of a non-violent response to violence.

77. See "Forum on *Lavallee*", *supra*, note 67, at 65.

Conclusion

In conclusion, how can we as women see ourselves in the Supreme Court decisions of Madame Justice Wilson? I have tried to use ideological constructs as little as possible as devices for structuring description, presenting tensions and contrasts. However it seems to me that Wilson does what Professor Greschner advocates in her article "We Don't Need Another Hero".[78] She recognises women's separateness and equalness but also the fact that the self, particularly the judicial self, is partly constituted by the community context.

What I have tried to do instead is paint a picture. Her contribution to this picture is that women are workers, pregnant, moral decision-makers, albeit within limits, the speakers of constitutionally-protected speech, but primarily as human beings around whose lives major legal ideas such as liberty, equality, expression, and reasonableness have to be constructed.

She has helped us think about what it means to be a woman and about what it means to be a judge.

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78. *Supra*, note 14.

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