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Kent Roach



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# Justice Bertha Wilson: A Classically Liberal Judge

**Kent Roach**[*]

## I. INTRODUCTION

Bertha Wilson will be remembered as the first woman to sit on the Supreme Court. Historians will look to her decisions in *R. v. Morgentaler*[1] and *R. v. Lavallee*[2] as signs that, to paraphrase Justice Wilson's famous speech, she really did make a difference as the first woman judge to sit on the Supreme Court.[3] It is undeniable that Justice Wilson made a difference. It is very likely that Justice Wilson's gender and her experiences with discrimination[4] shaped her personality and her approach to judging. Nevertheless, in this essay, I will argue that Justice Wilson's approach to judging was most influenced by her classical liberalism that defended the rights of the individual against the power of the state. Justice Wilson was a feminist, but first and foremost, she was a liberal.

Justice Wilson's classical liberalism is evident in her decisions about criminal justice and the *Canadian Charter of Rights and Freedoms.*[5] In many of these decisions, she sided with the individual over the state. She expressed a preference for tests that would encompass individuals in all their idiosyncrasies and would require the state to establish subjective fault. In some of these cases, Justice Wilson reached decisions that favoured women, but in others she made decisions that arguably put women at risk. Justice Wilson was a principled judge in the sense that she did not tailor her judgments to obtain results that would benefit

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[*] Professor of Law and Prichard and Wilson Chair in Law and Public Policy, University of Toronto. I thank Jamie Cameron for helpful comments on an earlier draft.

[1] [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.) [hereinafter "*Morgentaler*"].

[2] [1990] S.C.J. No. 36, [1990] 1 S.C.R. 852 (S.C.C.) [hereinafter "*Lavallee*"].

[3] Bertha Wilson, "Will Women Judges Really Make a Difference?" (1990) 28 Osgoode Hall L.J. 507.

[4] Ellen Anderson, *Judging Bertha Wilson: Law as Large as Life* (Toronto: University of Toronto Press, 2001), chapters 3, 4 and 7.

[5] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

certain groups including women. Befitting her experience as a Bay Street lawyer where sub-clauses and commas can make all the difference, she carefully engaged with the text and the purposes of the laws that she interpreted.

In the first part of this essay, I will address the question of what is a classical liberal. I will focus on Justice Wilson's judgment in *Morgentaler* which, to my mind, epitomizes her philosophical approach. Although this landmark judgment is influenced by feminism in the sense that Justice Wilson writes from the perspective of a woman, I will argue that it is ultimately grounded in classical liberalism. More than any other judgment, *Morgentaler* reveals the essence of Justice Wilson's approach to judging.

Following the structure of her judgment in *Morgentaler*, this essay will then examine how classical liberalism informed Justice Wilson's approach to the procedural protections owed to the individual and the substantive content of the criminal law. Although Justice Wilson criticized the approach taken by her colleagues in *Morgentaler* as merely procedural, Justice Wilson's own procedural decisions were firmly grounded in liberal principles. The culmination of her principled and moralized approach to procedure can be seen in her ringing concurrence in *Law Society of British Columbia v. Andrews*[6] where she justified extending equality protections to the non-enumerated group of non-citizens on the grounds that their right to equal concern and respect was likely to be neglected and ignored by legislatures. The *Andrews* approach to equality also illuminates Justice Wilson's approach to criminal law because she was well aware that those accused of crime are themselves an unpopular group and that other disadvantaged groups were overrepresented in their numbers.

With respect to the substantive content of the criminal law, Justice Wilson's liberal and individualist approach meant that she favoured wherever possible a subjective approach to fault that took into account all the characteristics and idiosyncrasies of the individual. At the same time, Justice Wilson was a principled judge who respected clear decisions by Parliament to employ objective standards to limit the ambit of defences. In cases such as *R. v. Hill*[7] and *Lavallee*, she grappled with the difficult problem of how objective standards should be applied in a contextual manner that was fair to all.

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6 [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143 (S.C.C.) [hereinafter "*Andrews*"].

7 [1986] S.C.J. No. 25, [1986] 1 S.C.R. 313 (S.C.C.).

Finally, I will examine how Justice Wilson's classical liberalism informed her unflinching and rigorous approach to the *Oakes*[8] standard of justification. Justice Wilson did not share the ambivalence towards the state that is found in the section 1 jurisprudence of many of her colleagues, including Chief Justice Dickson and Justices Lamer and La Forest.[9] Her approach was frequently a dissenting one, but it served as a pole star that helped ensure that the Court never lost sight of the fact that section 1 of the Charter required the state to justify why it was necessary to infringe rights. I will argue that this approach to section 1 was ultimately grounded in liberal principles that stressed the importance of protecting all individuals from the state.

## II. *MORGENTALER* AND THE CORE OF CLASSICAL LIBERALISM

By a classical liberal, I mean a person who places a premium on individual freedom and liberty and who holds state incursions on liberty to strict standards of justification. A liberal can be contrasted with a communitarian who places a premium on the ability of the state to articulate its collective values and to protect itself from danger. All feminists are concerned with the historical and contemporary disadvantages of women in society, but there can be liberal and less liberal feminists.[10] A liberal feminist would see the individual as the fundamental building block of society and would have concerns about injustice to any individual. A less liberal communitarian or radical feminist would see groups as the fundamental building block of society and would be more enthusiastic about using state power, including criminal law, to rectify the disadvantages suffered by groups such as women. Such a feminist might be less likely to conclude that an individual has suffered an injustice at the hands of the state if the state

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[8] *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

[9] For an account of the Court at that time, see R.J. Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press, 2003).

[10] Liberal and conservative approaches to the criminal law are well known and symbolized in the famous debate between H.L.A. Hart and Lord Devlin: see H.L.A. Hart, *Law, Liberty and Morality* (Oxford: Oxford University Press, 1963) and Lord Devlin, *The Enforcement of Morals* (Oxford: Oxford University, 1965). Feminists reject classical liberalism or classical conservatism, but they do differ in their orientation towards the state and their focus on the individual or the group as most important social actor. Catherine MacKinnon has written that "[l]iberal feminism takes the individual as the proper unit of analysis and measure of the destructiveness of sexism. For radical feminism, although the person is kept in view, the touchstone for analysis and outrage is the collective 'group called woman'": Catherine MacKinnon, *Towards a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989), at 40.

was acting to ameliorate the disadvantages of a group or to protect vulnerable groups from harm.

Justice Wilson, with her emphasis on the rights of all individuals and the rights of the accused, stands at the liberal end of the spectrum while the second woman appointed to the Supreme Court, Justice Claire L'Heureux-Dubé, stands at the communitarian end with her skepticism about many rights claims by the accused and her deference towards the state's crime control interests. The differences between the two distinguished jurists are well illustrated in *R. v. Martineau*,[11] where Justice Wilson agreed with Justice Lamer that the stigma and penalty of a murder conviction required that the Crown prove the accused knew that the victim was likely to die. In a dissenting opinion, Justice L'Heureux-Dubé argued that negligence was a sufficient fault level even for murder and that the "concern that these offenders not endure the Mark of Cain is, in my view, an egregious example of misplaced compassion". [12] In *R. v. Swain*,[13] Justice Wilson concluded that the accused's Charter right to control his or her own defence, as well as the equality rights of those with mental disorders, would be violated if the Crown was allowed to argue that the accused was insane and should be detained on that basis before the accused had been convicted on the merits. Justice L'Heureux-Dubé dissented on the basis that the traditional rule that allowed the Crown to raise the insanity defence before the accused was convicted was consistent with the principles of fundamental justice which, in her view, included social protection against dangerous people who were insane when they committed a crime. The fact that both Justice Wilson and Justice L'Heureux-Dubé were feminists who equally wished to counter the historical subordination of women and other disadvantaged groups should not obscure the deep philosophical differences between the two jurists.

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[11] [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.) [hereinafter "*Martineau*"].

[12] For a remarkably candid defence of Justice L'Heureux-Dubé's frequent dissents in criminal law matters, her concerns that the Court's decisions favoured the individual accused too much over the collective interests of the community and the discovery of the truth in the criminal justice system, her sympathy for crime victims and the job of Crown prosecutors and her use of s. 15 of the Charter as a shield for the crime control activities of the state, see Claire L'Heureux-Dubé, "The Charter of Rights and the Administration of Criminal Justice in Canada: Where We Have Been and Where We Should Go" (2006) 3 Ohio State Journal of Criminal Law 473. For a rebuttal of Justice L'Heureux-Dubé's view, see Peter Sankoff, "Generally Speaking Canada is Going in the Right Direction: A Response to Justice L'Heureux-Dubé" (2006) 3 Ohio St. J. Crim. L. 491.

[13] [1991] S.C.J. No. 32, [1991] 1 S.C.R. 933 (S.C.C.) [hereinafter "*Swain*"].

Justice Wilson's most important decision was likely her concurring judgment in *Morgentaler*, which found that Canada's 1969 law restricting abortions unless approved by a hospital committee and performed in a hospital was an unjustified violation of section 7 of the Charter. Justice Wilson criticized Chief Justice Dickson and Justice Beetz for stressing the procedural flaws in the legislation that made the defence to the crime of having or performing an abortion apply in an arbitrary manner in different parts of Canada. Justice Wilson was concerned with the merits of the abortion issue and she was not embarrassed to cite American substantive due process precedents such as *Roe v. Wade*[14] as support for her view that women should have freedom of choice at least in the first trimester of her pregnancy. The differences between Justice Wilson and her colleagues were far from academic. For example, Justice Wilson's approach would have likely invalidated a bill that was defeated by a tied vote in the Senate that would have imposed criminal regulation on even early abortions.[15]

The part of Justice Wilson's judgment that caught headlines and cemented her reputation as a feminist judge was her statement that "It is probably impossible for a man to respond, even imaginatively," to the dilemma of an unwanted pregnancy "not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma."[16] To be sure, this passage reflected the experience of women,[17] but it was not a pro-choice statement as contended by some

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[14] 410 U.S. 113 (1973).

[15] F.L. Morton, *Morgentaler vs. Borowski* (Toronto: McClelland and Stewart, 1992), chapter 23.

[16] *Morgentaler*, *supra*, note 1, at 171.

[17] Justice Wilson added that

> the history of the struggle for human rights from the eighteenth century on has been the history of men struggling to assert their dignity and common humanity against an overbearing state apparatus. The more recent struggle for women's rights has been a struggle to eliminate discrimination, to achieve a place for women in a man's world, to develop a set of legislative reforms in order to place women in the same position as men (pp. 81-82). It has <u>not</u> been a struggle to define the rights of women in relation to their special place in the societal structure and in relation to the biological distinction between the two sexes. Thus, women's needs and aspirations are only now being translated into protected rights. The right to reproduce or not to reproduce which is in issue in this case is one such right and is properly perceived as an integral part of modern woman's struggle to assert <u>her</u> dignity and worth as a human being.

*Id*., at 172 (emphasis in original).

who criticized Justice Wilson as a judicial activist.[18] Rather it was a prelude to Justice Wilson's conclusion that the abortion law infringed a woman's freedom of conscience. One sometimes neglected implication of this ruling was that it protected a woman's decision whether *or not* to have an abortion. It did not matter to Justice Wilson as a liberal whether a woman decided to have or not have an abortion, and she respected the woman's right to make her own decisions for her own reasons. Although the abortion issue obviously had a profound affect on women as a group, it was ultimately for Justice Wilson a matter of individual conscience and freedom. The context was abortion, but the principle was freedom.[19]

The liberalism that drove her *Morgentaler* judgment is best captured in Justice Wilson's statement that:

> The *Charter* is predicated on a particular conception of the place of the individual in society. An individual is not a totally independent entity disconnected from the society in which he or she lives. Neither, however, is the individual a mere cog in an impersonal machine in which his or her values, goals and aspirations are subordinated to those of the collectivity. The individual is a bit of both. The *Charter* reflects this reality by leaving a wide range of activities and decisions open to legitimate government control while at the same time placing limits on the proper scope of that control. Thus, the rights guaranteed in the *Charter* erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass. The

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[18] See, for example, Robert Hawkins & Robert Martin, "Democracy, Judging and Bertha Wilson" (1995) 41 McGill L.J. 1; F.L. Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ont.: Broadview Press, 2000); Robert Bork, *Coercing Virtue: The Worldwide Rule of Judges* (Toronto: Vintage, 2002). For my own arguments that these critics of judicial activism discount the anti-majoritarian role of judicial review, and that they have highly positivist and unrealistic views of adjudication that conceive of unfettered discretion as the only alternative to following clear, black-letter law, see Kent Roach, *The Supreme Court on Trial* (Toronto: Irwin Law, 2001), at chapters 5 and 6.

[19] As Justice Wilson eloquently explained:

> The idea of human dignity finds expression in almost every right and freedom guaranteed in the *Charter*. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue. These are all examples of the basic theory underlying the *Charter*, namely that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.
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> Thus, an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in *Singh*, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.

*Morgentaler*, *supra*, note 1, at 166.

> role of the courts is to map out, piece by piece, the parameters of the fence.[20]

Although some commentators have struggled to reconcile this expression of liberalism with the feminist aspects of the decision, they need only have looked at Justice Wilson's decisions on matters of criminal law and procedure.[21] Justice Wilson saw most criminal and immigration matters[22] as ones that involved the state as the sole antagonist of the individual.[23] To borrow from her spatial analogy in *Morgentaler*, Justice Wilson undertook the task of constructing the fence that would protect the individual from the state. As will be seen, section 1 of the Charter provided a means to allow the state to hop over the fence, but Justice Wilson insisted on a high fence that would require the state to demonstrate the necessity for incursions on the rights of individuals.

## III. PROCEDURAL PROTECTIONS FOR THE INDIVIDUAL

One of the foundations of Justice Wilson's liberalism was her sense that individuals were protected by rights and that the state had special obligations to protect and respect the rights of the individual. In 1988, she decided a case in favour of Janise Marie Gamble, a woman who had been convicted as an accomplice in the first degree murder of a police officer in 1976 and had been sentenced to life imprisonment without

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[20] *Id*., at 164.

[21] Writing in 1991, Christine Boyle recognized that "the core of the judgment is liberal", albeit a "radical liberalism", that took into account the circumstances of women and took their rights seriously: Christine Boyle, "The Role of the Judiciary in the Work of Madame Justice Wilson" (1992) 15 Dal. L.J. 241, at 251-52. Writing at the same time, Danielle Pinard similarly concluded that "for Justice Wilson, the dignity of the individual is fundamental. It includes the liberty to make decisions, to live one's life in accordance with one's values": Danielle Pinard, "The Constituents of Democracy: The Individual in the Work of Madame Justice Wilson" (1992) 15 Dal. L.J. 81, at 91. [hereinafter "The Constituents of Democracy"]. See also Philip Bryden, "The Democratic Intellect: The State in the Work of Madame Justice Wilson" (1992) 15 Dal. L.J. 65, at 90.

[22] See, for example, *Singh v. Canada* (*Minister of Employment and Immigration*), [1985] S.C.J. No. 11, [1985] 1 S.C.R. 177 (S.C.C.) [hereinafter "*Singh*"].

[23] *Irwin Toy v. Quebec* (*Attorney General*), [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927. Note that Wilson J. generally did not have the ambivalence demonstrated by McLachlin J. when in *RJR-MacDonald Inc. v. Canada* (*Attorney General*), [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199 (S.C.C.) she recognized that the singular antagonist model could be broken down by considering the rights of victims. But see *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 (S.C.C.) [hereinafter "*Keegstra*"], where Wilson J. joined with a majority over a strong dissent by McLachlin J. in holding that violations of freedom of expression and the presumption of innocence had been justified under s.1 of the Charter.

eligibility for parole for 25 years. Gamble had committed a robbery with her husband (who subsequently killed himself with a drug overdose), another man and another woman. The case could have been seen as one in which two women were literally taken along for a deadly ride with dominant and perhaps abusive men,[24] but Justice Wilson presented the case through the lens of procedural fairness and the obligations of the state to give the individual the benefit of a reasonable doubt.

Gamble was sentenced under new first degree murder provisions that were introduced when Canada abolished the death penalty. The killing, however, took place when Gamble could theoretically have been sentenced to death. The older capital murder provisions were in some aspects more beneficial to the accused than the newer ones because they had a maximum of only 20 years ineligibility for parole, and they would require that Gamble's own act have caused or assisted in causing the death of the police officer. Gamble did not shoot the police officer. Justice Wilson found that Gamble's rights under section 7 of the Charter had been violated by the continuing adverse effects of having been convicted and sentenced under a law not in force at the time the crime was committed. She granted Gamble's request for *habeas corpus* and declared her eligible for parole. Chief Justice Dickson dissented on the basis that the Charter could not be applied retroactively to a 1976 conviction and on the basis that Gamble had not suffered harm by being convicted under the wrong law.

Although her approach could be characterized as giving a convicted murderer the benefit of a technicality, the case raised for Justice Wilson the special obligations of the state to treat the accused fairly. She stressed that it was because of "the Crown's error that we cannot know for sure what would have happened to the appellant had she been tried under the proper law. She should accordingly be given the benefit of any doubt".[25] The bedrock principle for Justice Wilson was that the individual was to be given the benefit of the doubt. That said, she attempted to reconcile her judgment with prior holdings that the Charter could not be applied retroactively by focusing on the ongoing and contemporary effects of the 1976 conviction on Janise Gamble's liberty.

The very next year, Justice Wilson dealt with a case involving another woman charged with first degree murder, Sharon Turpin. Turpin

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[24] Richard Pound, *Unlucky to the End: The Story of Janise Marie Gamble* (Montreal: McGill-Queen's, 2007).

[25] *R. v. Gamble*, [1988] S.C.J. No. 87, [1988] 2 S.C.R. 595, at 647 (S.C.C.).

and two men were charged with killing her husband. Under the *Criminal Code*[26] as it applied in Ontario at that time, all accused charged with murder had to be tried by a judge and jury. Perhaps fearing how a jury might react to allegations that she arranged to have her husband killed, Sharon Turpin argued that she should have a right to a judge-alone trial under the right to a jury trial in section 11(f) of the Charter. She also argued that she should have a right to a judge-alone trial under the equality rights in section 15 of the Charter because if she had been tried in Alberta, she would have had the option of a judge-alone murder trial under the Code. Justice Wilson ultimately rejected both of Turpin's arguments, but her reasoning was consistent with her liberal principles as well as with her careful attention to the text and purpose of the law.

Although she eventually concluded that section 11(f) of the Charter did not provide a Charter right to a non-jury trial, much of Justice Wilson's judgment focused on whether the accused could waive his or her Charter right to a jury. She rejected Australian and American authority and Canadian statutory authority on the basis that "[i]n denying the individual's ability to waive his or her right to a jury trial these cases advance a collective interest in the utilization of a jury in serious criminal charges".[27] This conclusion accorded with her sense that the purpose of Charter rights was to protect individuals. Social interests had to be justified by the state under section 1 of the Charter. She stressed that: "It will be for the accused and his or her counsel and not for the courts to decide which course will be in the best interests of the accused in any given case."[28] Justice Wilson had little time for benevolent paternalism. She recognized that women would chronically be victimized by such paternalism, but the larger and liberal principle was that all individuals should be able to make decisions for themselves.

As in *Morgentaler*, Justice Wilson stressed in *Turpin* the idea that rights created a zone of freedom in which each individual was able to make decisions. This was classical liberalism in the sense that it took individuals as ends in themselves. Justice Wilson was no doubt keenly aware that women had been denied the benefits of making judgments about what was in their own best interests throughout the ages. Nevertheless, she defended liberal principles as ends in themselves. She

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[26] R.S.C. 1985, c. C-46 [hereinafter "Code"].

[27] *R. v. Turpin*, [1989] S.C.J. No. 47, [1989] 1 S.C.R. 1296, at 1320 (S.C.C.) [hereinafter "*Turpin*"].

[28] *Id*., at 1322.

would not impose her own judgments about what was best when any person was exercising a constitutionally protected freedom.

Justice Wilson's principles informed her approach to judging, but they also had to be anchored in the text of the law. She felt comfortable concluding that an individual could waive Charter rights because they were intended for the benefit of the individual. At the same time, however, Charter rights were not a blank slate on which a judge could write her own principles into the law. Although Sharon Turpin could waive her right to a jury trial, she could not claim a Charter right to a non-jury trial because there was "nothing in s. 11(*f*) to give the appellants a constitutional right to elect their mode of trial or a constitutional right to be tried by judge alone so as to make s. 11(*f*) inconsistent with the mandatory jury trial provisions of the *Criminal Code*".[29] Although it may be fashionable in some quarters to criticize the Court's and especially Justice Wilson's approach to the early interpretation of the Charter as one of judicial activism aided and abetted by the work of legal academics,[30] Justice Wilson was a careful lawyer guided by the text of the Charter. In *Turpin*, she concluded that neither the purpose nor the text of the Charter supported a right to a judge-alone trial. In the absence of such a Charter right, the provisions of the *Criminal Code* requiring trial by jury would prevail even though they enforced collective interests in jury trials to the detriment of individual accused such as Sharon Turpin.

Turpin had one more argument to make, and it was based on section 15 of the Charter. She argued that her equality rights were denied because she would have had the option of a judge-alone trial had she been tried in Alberta. Justice Wilson concluded that Sharon Turpin had been denied the equal benefit of the law compared to an accused in Alberta because she had no choice as to her mode of trial.

> A choice as to having or not having a jury trial (even though limited by the overriding determination by the trial judge), based upon the advantages of one mode of trial over the other because of a wide range of factors, such as: the nature and circumstances of the killing, the amount of publicity, the reaction in the community, the size of the community from which the jury is being drawn and even the preference of defence counsel with respect to trying to convince a jury or a judge of the defence version of the facts (or leave them with a

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29 *Id*., at 1330.

30 See *supra*, note 18.

> reasonable doubt), indicates that having that choice must be considered a benefit. The absence of that benefit in Ontario must be considered a disadvantage.[31]

In this passage, Justice Wilson recognized that the benefit of the jury trial could in some circumstances be a disadvantage for the individual accused, especially a woman accused of hiring someone to kill her husband. That said, Justice Wilson's focus was not on the empirical question of whether an accused could be disadvantaged by a jury trial. Rather she focused on the fact that Turpin would have had more freedom if she had been tried in Alberta where judge-alone trials were possible in murder cases. The principle was liberty and freedom. Freedom for all individuals would assist women like Sharon Turpin.

The conclusion that Turpin had been denied an equal benefit extended to similarly situated accused in Alberta, however, did not end the equality rights analysis. As she had with respect to section 11(f) of the Charter, Justice Wilson returned to the text of the Charter. The text of section 15 of the Charter required that the broadly worded equality rights be denied with discrimination. She stressed that section 15 "mandates a case by case analysis as was undertaken by this Court in *Andrews* to determine 1) whether the distinction created by the impugned legislation results in a violation of one of the equality rights and, if so, 2) whether that distinction is discriminatory in its purpose or effect".[32] On the issue of discrimination, she concluded that those charged with murder outside Alberta "do not constitute a disadvantaged group in Canadian society within the contemplation of s. 15".[33]

Justice Wilson's conclusion that section 15 was not violated in *Turpin* followed from the Court's landmark decision in *Andrews*[34] to stress the need for a finding of discriminatory effects or purposes for a section 15 violation. Justice Wilson's concurring judgment in *Andrews*, like her *Morgentaler* judgment, went to the heart of the matter. Again, she was not afraid to cite American constitutional law and theory in support of her conclusions despite the interest at that time in using socialist and Tory touches as a means to distinguish Canadian political culture from American political culture.[35] In *Andrews*, she had concluded

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31 *Turpin*, *supra*, note 27, at 1330.

32 *Id*., at 1334.

33 *Id*., at 1333.

34 *Andrews*, *supra*, note 6.

35 See Gad Horowitz, *Canadian Labour in Politics* (Toronto: University of Toronto Press, 1968); Patrick Macklem, "Constitutional Ideologies" (1988) 20 Ottawa L. Rev. 117.

that non-citizens were an analogous group that should be added to section 15 because they were vulnerable to discrimination. She cited both the famous *Carolene Products*[36] footnote 4 and supportive academic commentary in the United States. She stressed:

> that the range of discrete and insular minorities has changed and will continue to change with changing political and social circumstances. For example, Stone J. writing in 1938, was concerned with religious, national and racial minorities. In enumerating the specific grounds in s. 15, the framers of the *Charter* embraced these concerns in 1982 but also addressed themselves to the difficulties experienced by the disadvantaged on the grounds of ethnic origin, colour, sex, age and physical and mental disability. It can be anticipated that the discrete and insular minorities of tomorrow will include groups not recognized as such today. It is consistent with the constitutional status of s. 15 that it be interpreted with sufficient flexibility to ensure the "unremitting protection" of equality rights in the years to come.[37]

Justice Wilson's minority centred approach to section 15 of the Charter was likely influenced by her feminism. At the same time, her own experience as an immigrant and newcomer to Canada also likely made her acutely aware of the difficulties faced by non-citizens and other outsiders.

Justice Wilson's approach to section 15 was also influenced by its text. The broad test that found equality rights were violated whenever similarly situated persons were not subject to the same treatment did not fit with the text of section 15 of the Charter, which required that equality rights be violated with discrimination. She was also concerned that such an expansive reading of equality rights would have the effect of diluting the obligations of the state under section 1 of the Charter to justify limits on Charter rights. Justice Wilson's concerns about disadvantaged minorities was an inclusive concern, and it laid the basis for the eventual recognition of gays and lesbians as a discrete and insular minority in need of protection from majoritarian politics.

The Court's more restrained and focused approach to equality rights in *Andrews* may seem inevitable today, but it was vigorously contested at the time it was decided. Many lower courts had emphasized the value of equal treatment of all, and this was particularly true in the context of any unequal application of the criminal law. Justice Wilson recognized

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36 *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

37 *Andrews*, *supra*, note 6, at 152.

that her conclusion in *Turpin* went against the grain of considerable lower court authority,[38] but she nevertheless concluded that the idea that the same criminal law should apply throughout Canada did not accord with either the text or the purpose of section 15 of the Charter. Although she was well aware of the disadvantages that Sharon Turpin might suffer as a result of being required to face a jury trial for the alleged murder of her husband, Justice Wilson concluded that neither the text nor the purpose of sections 11(f) or 15 of the Charter supported a right to a trial by judge alone.

Justice Wilson's most famous procedural decision was her decision in *Singh v. Canada* (*Minister of Employment and Immigration*)[39] that the refugee determination procedures in immigration law violated section 7 of the Charter because they did not provide the applicant with an oral hearing. Consistent with liberal principles, she rejected the government's claims that the proceedings were non-adversarial. Justice Wilson stressed that the "greatest concern about the procedural scheme … is not, therefore, with the absence of an oral hearing in and of itself, but with the inadequacy of the opportunity the scheme provides for a refugee claimant to state his case and know the case he has to meet".[40] Although some refugee applicants may learn of the Minister's case through a formal appeal, others may not. In this sense, Justice Wilson was sensitive to unequal treatment among members of a vulnerable group.

Justice Wilson's liberalism was also revealed in her rejection in *Singh* of any idea that the non-citizen's interests could be reduced to the status of a privilege revocable by the state as opposed to a right. She also rejected the idea that administrative convenience could, as a "utilitarian consideration",[41] serve as a justification under section 1 of the Charter for a violation of section 7 rights. She viewed the procedural issue through the philosophical premises that the interests of the individual should be understood as rights, while the interests of the state as a representative of the majority should not overwhelm the rights of the individual.

Although Justice Wilson stressed the substantive flaws in the abortion law in *Morgentaler*,[42] she was concerned with the procedural

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38 *Turpin*, *supra*, note 27, at 1334.

39 *Supra*, note 22.

40 *Id*., at 214.

41 *Id*., at 218.

42 *Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.).

protections of the individual in many criminal law and immigration law cases. Her approach was informed by a conviction that the accused deserved the benefit of the doubt from the state and that individuals should have the freedom to choose how to exercise their rights.

## IV. SUBSTANTIVE PROTECTIONS FOR THE INDIVIDUAL

Like Brian Dickson, Bertha Wilson never practised criminal law but was able to make a significant mark on that branch of the law. Justice Wilson's classical liberalism found a natural home in her defence of principles of subjective fault. These principles required the state to establish beyond a reasonable doubt that a particular accused, with all of his or her idiosyncrasies and frailties, was at fault. As with the procedural protections examined in the last section, however, Justice Wilson's approach was disciplined by attention to the relevant text and purposes of the law.

Justice Wilson's fullest defence of the principles of subjective *mens rea* came in her decision in *R. v. Tutton*[43] which dealt with the *Criminal Code*'s definition of criminal negligence as showing wanton or reckless disregard for the life or safety of others. She held that the provision should be interpreted as requiring some subjective fault because Parliament had not clearly displaced the common law presumption of subjective fault. In some respects, Justice Wilson's decision is mainly of historical interest because the objective standard would be applied today.[44] That said, however, Justice Wilson's judgment remains a powerful defence of principles of subjective fault.

*Tutton* dealt with a difficult case in which deeply religious parents believed that their diabetic child had been cured by God and stopped giving him his prescribed insulin. They were charged with causing their son's death by criminal negligence. The Ontario Court of Appeal had sought to respond to the exigencies of the case by holding that a subjective standard of fault should be applied to failures to act while the objective standard should be applied to acts of commission. The Supreme Court rejected this distinction, but was divided 3-3. Justice Wilson, with the concurrence of Chief Justice Dickson and Justice La Forest, concluded that a subjective standard should apply in all cases of criminal negligence. Justice McIntyre, with the concurrence of Justice

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43 [1989] S.C.J. No. 60, [1989] 1 S.C.R. 1392 (S.C.C.) [hereinafter "*Tutton*"].

44 *R. v. Creighton*, [1993] S.C.J. No. 91, [1993] 3 S.C.R. 3 (S.C.C.).

L'Heureux-Dubé, concluded that an objective standard should apply. It is significant that Justice Wilson and Justice L'Heureux-Dubé disagreed in this case. Justice Lamer agreed that an objective standard should apply, but would have used an individuated standard tailored to some of the personal characteristics of the accused such as the accused's age and education. He failed to address whether a person's religious beliefs were relevant to administering this modified objective standard.

Justice Wilson argued that Parliament's definition of criminal negligence was ambiguous. Although the reference to negligence pointed in the direction of an objective standard, the reference to wanton and reckless disregard suggested a need to prove some subjective advertence to the risk to life or safety. In the face of this ambiguity, she concluded that the presumption of subjective fault for criminal offences articulated in pre-Charter cases such as *R. v. Sault Ste. Marie (City)*[45] and *R. v. Pappajohn*[46] should apply. Making specific reference to the controversial *Pappajohn* defence of a subjective but not necessarily reasonable mistake of fact, Justice Wilson concluded that: "To require, as does my colleague, that all misperceptions be reasonable will, in my view, not excuse many of those who through no fault of their own cannot fairly be expected to live up to the standard of the reasonable person".[47] Justice Wilson's invocation of *Pappajohn* in 1989 is significant. The decision had attracted sustained scholarly criticism from feminist scholars since it had been decided. The critiques focused on the effects of the defence of honest but unreasonable mistake of fact in sexual assault cases and the focus of the defence on the perspective of the accused as opposed to the victim.[48] In *Tutton*, however, Justice Wilson invoked the controversial case for the broader proposition that subjective standards were best suited to ensuring that all accused were treated fairly.

Justice Wilson stated that she was "cautiously sympathetic to attempts to integrate elements of subjective perception into criminal law standards that are clearly objective", but she rejected Justice Lamer's modified objective approach on the grounds that it would inevitably be both under and over inclusive when compared to a subjective standard.

She explained:

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45 [1978] S.C.J. No. 59, [1978] 2 S.C.R. 1299 (S.C.C.).

46 [1980] S.C.J. No. 51, [1980] 2 S.C.R. 120 (S.C.C.) [hereinafter "*Pappajohn*"].

47 *Tutton*, *supra*, note 43, at 1417.

48 See, for example, Toni Pickard, "Culpable Mistakes and Rape: Harsh Words on *Pappajohn*" (1980) 30 U.T.L.J. 415.

> One problem with attempts to individualize an objective standard is that regard for the disabilities of the particular accused can only be applied in a general fashion to alter the objective standard. It seems preferable to me to continue to address the question of whether a subjective standard (a standard, I might add, that in its form is applied equally to all and consistent with individual responsibility) has been breached in each case than to introduce varying standards of conduct which will be only roughly related to the presence or absence of culpability in the individual case. Varying the level of conduct by factoring in some personal characteristics may be unavoidable if the court is faced with a clearly objective standard but it should, in my opinion, be avoided if the more exacting subjective test is available as a matter of statutory interpretation. I have no doubt that factors such as the accused's age and mental development will often be relevant to determining culpability but under a subjective test they will be relevant only as they relate to the question of whether the accused was aware of or wilfully blind to the prohibited risk and will not have to be factored in wholesale in order to adjust the standard of conduct that is expected from citizens.[49]

Although she was a leader in individuating objective standards to make them fairer to those who might be neglected under a simple reasonable person standard,[50] these statements make clear that an individuated reasonable person standard was a definite second best to a fully subjective standard for Justice Wilson. A subjective standard was the most consistent with "the principles of equality and individual responsibility which should pervade the criminal law".[51] As Danielle Pinard has recognized, Justice Wilson's attraction to subjective *mens rea* was related to her concern for the dignity of individuals on their own terms.[52]

Justice Wilson's commitment to fault principles was also well demonstrated in two decisions dealing with a provision that made it an offence subject to life imprisonment for a man to have sex with a girl under 14 years of age. She approached this issue not from the perspective of either the girl's wishes or her need for protection from the risks of sexual intercourse, but rather from the perspective of whether it

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49 *Tutton*, *supra*, note 43, at 1418-19.

50 See the discussion of *R. v. Hill*, [1986] S.C.J. No. 25, [1986] 1 S.C.R. 313 (S.C.C.) [hereinafter "*Hill*"] and *Lavallee*, [1990] S.C.J. No. 36, [1990] 1 S.C.R. 852 (S.C.C.), *infra*, at notes 58-71.

51 *Tutton*, *supra*, note 43, at 1418.

52 *Pinard*, *supra*, note 22, at 105.

was fair to impose the criminal sanction without proof of fault. Justice Wilson concluded that the no-fault offence violated section 7 of the Charter because it did not respect the dignity of the accused and treated him as a means for the achievement of social objectives:

> Our commitment to the principle that those who did not intend to commit harm and who took all reasonable precautions to ensure that they did not commit an offence should not be imprisoned stems from an acute awareness that to imprison a "mentally innocent" person is to inflict a grave injury on that person's dignity and sense of worth. Where that person's beliefs and his actions leading up to the commission of the prohibited act are treated as completely irrelevant in the face of the state's pronouncement that he must automatically be incarcerated for having done the prohibited act, that person is treated as little more than a means to an end. That person is in essence told that because of an overriding social or moral objective he must lose his freedom even although he took all reasonable precautions to ensure that no offence was committed.[53]

In this passage, Justice Wilson suggests that principles of fault are necessary to treat accused persons as ends in themselves and not as instruments in the deterrence of harmful conduct. As in *Morgentaler*, her approach suggested the need for the law to respect how the individual exercised his capacity to reason and to make choices.

Consistent with her concern for the exceptional case as exemplified by a focus on subjective fault, Justice Wilson posited a case in which the accused genuinely believed that the girl was over 14 years of age. In addition, she cast doubt on the idea that deterrence concerns could justify a no-fault offence under section 1 when she argued that "punishing the mentally innocent with a view to advancing particular objectives is fundamentally unfair. It is to use the innocent as a means to an end. While utilitarian reasoning may at one time have been acceptable, it is my view that when we are dealing with the potential for life imprisonment it has no place in a free and democratic society".[54] Although Justice Wilson may have been willing to accept the use of objective liability standards in this particular context, much of the logic of both her insistence on the proof of fault under section 7 of the Charter and her rejection of deterrence under section 1 was rooted in her concern

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53 *R. v. Hess*; *R. v. Nguyen*, [1990] S.C.J. No. 91, [1990] 2 S.C.R. 906, at 918 (S.C.C.).

54 *Id*., at 924.

about the need to respect the individual as a person who can make autonomous choices and is worthy of respect.

Justice Wilson's approach stands in contrast to that of Justice McLachlin, the third woman appointed to the Court, who dissented and held that the section 7 violation was justified as a reasonable limit under section 1 of the Charter that was necessary to deter sexual activity with girls under 14 years of age. Justice McLachlin stressed that there was a limit to how much older a girl was and the minimum costs for the accused of ascertaining the girl's true age or desisting from sexual intercourse. She also suggested that the "lack of culpability" of an accused who did not know that the girl was under 14 years of age could be reflected in a diminished sentence because the statutory rape offence, while punishable by life imprisonment, did not have any mandatory minimum penalty. Justice Wilson responded to this last argument bluntly:

> Justice McLachlin recognizes that there is something troubling about subjecting someone who has made a genuine mistake of fact to life imprisonment. She feels that mental innocence may be taken into account when sentencing the accused. … this serves to highlight the weaknesses of arguments upholding the linking of life imprisonment to an absolute liability offence. … one cannot leave questions of mental innocence to the sentencing process. … Reliance on prosecutorial or judicial discretion to mitigate the harshness of an unjust law will provide little comfort to the mentally innocent and cannot, in my view, serve to justify a fundamentally unsound provision.[55]

Justice Wilson rejected the idea that the prospect of benevolent prosecutorial or judicial discretion could save a law that violated the rights of a mentally innocent person not to be convicted of a criminal offence.

There was also an intriguing difference of opinion between Justice Wilson and Justice McLachlin over the issue of equality. Justice Wilson rejected the accused's argument that the offence violated section 15 of the Charter because it only applied to males. In contrast, Justice McLachlin took a more formal approach to equality which accepted that the male-only offence violated section 15 of the Charter but then held that the violation was justified under section 1 of the Charter. Justice Wilson stressed that section 15 should accommodate the biological reality that only females can become pregnant. Formal equality was just

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[55] *Id*. (emphasis in original).

not realistic when pregnancy was in issue. Justice Wilson's conclusion that section 15 was not violated was also consistent with the idea that she has expressed in *Andrews* and *Turpin* that equality rights protected only groups vulnerable to discrimination and that men did not constitute such a group.

Men may not, for Justice Wilson, have merited protection under section 15, but this was no excuse for not protecting their rights under section 7 of the Charter. She stressed that men accused of statutory rape were entitled to the same degree of protection under section 7 as all accused. She concluded that "one could not seek to justify the infringement of section 7 by pointing to the accused's sex and by saying that because he is a man he is not entitled to the full protection of s. 7. It is no more open to the government to make this argument than it would be open to it to suggest that a woman procuring an abortion was not entitled to the full protection of s. 7 because she was a woman."[56] These statements were made at a time in the early 1990s when concern about sexual violence was at a very high level. Some serious consideration was given to the use of the override the next year when the Supreme Court struck down a "rape shield" restriction on the admissibility of a complainant's prior sexual activity in sexual assault cases.[57] The statements were also made before DNA exonerations indicated that some men had been wrongly convicted of sexual assault. Justice Wilson took a strong and, in progressive circles, unpopular stance on the importance of the section 7 rights of those accused of sexual assault because she was committed to liberal principles that required the state to respect the rights of all accused people.

Justice Wilson's defence of the principles of subjective fault was not absolute or unqualified. As discussed above, she seemed to accept that objective fault principles could be used in the statutory rape context. Moreover, she recognized in *Tutton* that Parliament was entitled to displace subjective fault standards if it did so clearly. Even when Parliament clearly imposed standards of reasonableness with respect to the defences of provocation and self-defence, however, Justice Wilson would attempt to apply those objective standards in a manner that was sensitive to the different circumstances that different individuals found

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[56] *Id*., at 932-33.

[57] *R. v. Seaboyer*; *R. v. Gayme*, [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577 (S.C.C.). See generally Julian Roberts & Renate Mohr, eds., *Confronting Sexual Assault* (Toronto: University of Toronto Press, 1994); Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999), at chapter 5.

themselves in. To be sure, she did not convert objective standards to subjective standards. Justice Wilson paid too much attention to the text and purpose of the law to undertake such a crude strategy. Nevertheless, she did move objective standards in the direction of subjective standards. This approach was consistent with her concern about protecting all individuals from the state.

One of Justice Wilson's most sophisticated judgments was her dissent in *R. v. Hill*.[58] The case involved a claim by a 16-year-old that he was provoked when his adult "Big Brother" made sexual advances to him. The judge instructed the jury to consider whether an ordinary person would have lost self-control in the circumstances without reference to the accused's age or gender. Chief Justice Dickson dismissed the accused's appeal from a murder conviction for the majority of the Court. He reasoned that the jury could be trusted to apply the appropriate ordinary person standard. Justice Wilson dissented and would have overturned Hill's murder conviction and ordered a new trial.

Justice Wilson related the text of the provocation defence with its reference to an ordinary person with its purpose which she saw as being to require uniform standards of self-control. She reasoned:

> The objective standard … may be said to exist in order to ensure that in the evaluation of the provocation defence there is no fluctuating standard of self-control against which accuseds are measured. The governing principles are those of equality and individual responsibility, so that all persons are held to the same standard notwithstanding their distinctive personality traits and varying capacities to achieve the standard. The success of a provocation defence rests on establishing the accused's act as one which any ordinary person might have done in the circumstances and not upon eliciting the court's compassion for an accused whose act was unjustified but who could not control himself in the way expected of an ordinary person. It is evident that any deviation from this objective standard against which an accused's level of self-control is measured necessarily introduces an element of inequality in the way in which the actions of different persons are evaluated and must therefore be avoided if the underlying principle that all persons are equally responsible for their actions is to be maintained.[59]

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58 *Hill*, *supra*, note 50.

59 *Id*., at 343-44.

The only exception to the universalism of the objective standard was for the age of the accused. The law had long recognized that the same standards of self-control could not be expected of young persons as adults. Other personal characteristics such as gender or race should not be considered in determining the appropriate level of self-control. Unlike Chief Justice Dickson, Justice Wilson would not rely on the common sense of the jury to ensure that the correct standard was applied. Age was for her the only factor that justified lowering the level of self-control that the objective standard demanded of all persons.

Justice Wilson concluded that Hill's gender was, however, relevant in placing the act or insult into context. She reasoned that such a use of personal characteristic does not "undermine the objective standard because it is done purely for the purpose of putting the insult into context and assessing its gravity"; in her view, "[t]he objective standard and its underlying principles of equality and individual responsibility are not … undermined when" factors such as gender or race "are taken into account only for the purpose of putting the provocative insult into context".[60] Although this approach to placing the insult in context runs the risk of incorporating irrational and excessive responses to homosexual advances, it would still be disciplined by the refusal to factor Hill's gender into the level of self-control required by the objective standard. In other words, the issue for Justice Wilson was how an ordinary person would respond to homosexual advances and not how an ordinary man would respond to them.

The ordinary person is of course an artificial construct, but it would for Justice Wilson include both men and women. The excessively violent responses of some men to homosexual advances would be balanced off by the non-violent responses of some women to homosexual advances. Justice Wilson refused to incorporate understandings of masculinity that would promote a lack of self-control or an inclination to violence. All people were bound by equal standards of conduct that made them responsible for their actions, but in some cases, the trier of fact could not understand the full meaning of the act or insult without considering personal characteristics that were relevant to the specific act or insult. In the case of a homosexual advance, the accused's gender required consideration even though it should not affect the level of self-control demanded by the law.

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60 *Id*., at 346-47.

Justice Wilson's careful approach in *Hill* to how and when the accused's personal characteristics would be relevant when applying objective standards of conduct has unfortunately not won the day. Both the approach taken by Chief Justice Dickson for the majority of the Court in *Hill* and that taken by the majority of the Court in the subsequent *R. v. Thibert*[61] case run the risk that personal characteristics other than age will erode the level of self-control expected of the accused. In particular, they invite consideration of how an ordinary man would react to the break-up of a relationship or to sexual advances by another man. The Court's open-ended approach on these issues runs the real risk that violent images of masculinity will undermine objective standards of self-control. The Court's undisciplined approach to the provocation defence has raised concerns that it will excuse unacceptable violence and that the courts have effectively eroded the purposes of the ordinary person standard.[62] Although Justice Wilson had a preference for subjective standards of fault, she took Parliament's use of objective standards seriously.[63] Moreover, she attempted to factor in personal characteristics of the accused in a principled manner that was consistent with the text and purpose of the objective standard in the provocation defence.

Justice Wilson's best-known attempt to have objective standards reflect the personal characteristics of the accused was her landmark decision in the self-defence case of *R. v. Lavallee*.[64] *Lavallee* dealt with whether expert evidence of battered woman's syndrome was admissible in a case in which a battered woman shot her spouse in the back of the head after the spouse had threatened her. The Court held that the expert evidence was admissible and affirmed the jury's acquittal. Nevertheless, it would be a mistake to conclude that Justice Wilson's judgment tied self-defence to whether or not a woman manifested battered woman's syndrome. Indeed, she specifically warned that "the fact that the appellant was a battered woman does not entitle her to an acquittal.

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61 [1996] S.C.J. No. 2, [1996] 1 S.C.R. 37 (S.C.C.).

62 Wayne Gorman, "Provocation: The Jealous Husband Defence" (1999) 42 Crim. L.Q. 478.

63 My colleague Dean Mayo Moran has argued that Justice Wilson's approach in *Hill*, *supra*, note 50, discounts that the principle that ignorance of the law is no excuse would apply equally to subjective approaches. Mayo Moran, *Rethinking the Reasonable Person* (Oxford: Oxford University Press, 2003) at 234-36. In my view, Justice Wilson's approach in *Hill* was dictated more by the fact that Parliament had clearly displaced a subjective approach by requiring that the act of provocation be such as to deprive an ordinary person of the power of self-control rather than any inherent preference for objective over subjective standards.

64 *Lavallee*, *supra*, note 50.

Battered women may well kill their partners other than in self-defence. The focus is not on who the woman is, but on what she did … Ultimately it is up to the jury to decide whether, in fact, the accused's perceptions and actions were reasonable."[65] Justice Wilson was too much of a liberal individualist, not to mention a careful judge, to ever delegate the question of whether a person acted in self-defence to the diagnostic decisions made by health care professionals. Past battering should not be ignored, but the ultimate question was whether the accused's actions were reasonably justified.

Justice Wilson recognized the legitimacy of Parliament's decision to require that the accused not only subjectively apprehend death or grievous bodily harm and subjectively believe that violent self-defence was necessary for self-preservation, but also that there be a reasonable basis for such beliefs. She did not convert self-defence into a subjective defence, even though her judgment in *Tutton* suggests that she believed that a subjective approach was best suited to ensuring that all accused in all their particularities were treated fairly. Nevertheless, she attempted to adapt Parliament's clearly articulated objective standards to the particular context of battered women.

In determining whether the accused had a reasonable apprehension of death or grievous bodily harm, Justice Wilson rejected the idea[66] that an assault would have to be underway or imminent for the accused to have a reasonable apprehension of death or grievous bodily harm. She stressed that section 34(2) of the *Criminal Code* did not on its terms require an imminent attack. As discussed above, Justice Wilson took the text of the law seriously and she was concerned that the lower courts had read in restrictions to the defence that were not contemplated in the text that Parliament had enacted.

An additional issue in *Lavallee* was whether the accused believed on reasonable grounds that she could not otherwise preserve herself from death or grievous bodily harm. This part of the self-defence test was the most challenging because it engaged the standard of reasonable conduct with respect to the use of violence that is expected of all persons. As discussed above, Justice Wilson had taken a fairly hard line on this issue in *Hill* by concluding that youth was the only personal characteristic that was relevant to the standard of self-control. At first reading, then, it might be concluded that her approach in *Lavallee* was at odds with her

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65 *Id*., at 890.

66 *R. v. Whynot*, [1983] N.S.J. No. 544, 9 C.C.C. (3d) 449 (N.S.C.A.).

approach four years earlier in *Hill* because she concluded in *Lavallee* that the gender and experience of the accused could be relevant to determining whether the accused had acted reasonably in killing her partner.

Justice Wilson's decision in *Lavallee* can, however, be reconciled with her judgment in *Hill*. In *Lavallee*, evidence about the accused's characteristics and circumstances and the experiences of battered women would be used not to suggest that women were subject to lesser standards of self-control than men, but rather to compensate for a number of disadvantages that only women would experience in a self-defence scenario. Justice Wilson was concerned that judges and juries might reject a battered woman's self-defence claim on the unrealistic basis that the woman always had the alternative of leaving the abusive relationship as opposed to resorting to violent self-help. Justice Wilson addressed this danger directly and concluded 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."[67] Gender was not to be considered in order to hold women to lower standards of self-control, but rather to ensure that the circumstances of battered women were fairly considered and evaluated by the trier of fact.

Although *Lavallee* created a new contextualized approach to self-defence, Justice Wilson also attempted to justify her new approach by adapting traditional concepts of self-defence to the circumstances of battered women. To this end, she argued "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 woman's home even if it seems to her more like a prison in the circumstances."[68] This statement is based on the premise that the standard of self-control traditionally expected of people by the law of self-defence did not require retreat. Justice Wilson was prepared to accept a fairly generous ambit for self-defence for all individuals and this made it easier for her to expand the ambit of self-defence in *Lavallee*. She would have agreed with a subsequent decision that stressed that it was the accused who deserved the benefit of the doubt in self-defence cases.[69]

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67 *Lavallee*, *supra*, note 50, at 888.

68 *Id*., at 888-89.

69 *R. v. Pétel*, [1994] S.C.J. No. 1, [1994] 1 S.C.R. 3 (S.C.C.).

A careful reading of *Lavallee* suggests that many of the criticisms that it has received from both feminists and those skeptical of battered women syndrome are unfair. A number of feminist commentators and Justice L'Heureux-Dubé in *R. v. Malott*[70] have raised concerns that a focus on battered women's syndrome might medicalize self-defence for battered women and make it difficult for battered women who do not fit into psychological profiles of a battered woman to claim the defence. These criticisms are in my view allayed by Justice Wilson's focus on the individual accused. The corollary of her warning that not all battered women will necessarily act in self-defence is the proposition that women may act in self-defence even if they are not diagnosed as battered women. To be sure, there may be problems of convincing juries to accept a defence in the absence of expert evidence, but from a doctrinal perspective, Justice Wilson's approach was very much focused on the individual.

Others have criticized *Lavallee* as based on junk science and advocacy for women.[71] Although the science behind battered women's syndrome can indeed be questioned, it is unfair to characterize *Lavallee* as ignoring the text and purpose of section 34(2) of the Code or as mandating the acquittal of all women who are diagnosed as having battered women's syndrome. Justice Wilson made quite clear that not all battered women will act in self-defence. At the end of the day, the trier of fact must be convinced not only that the accused believed that violence was the only way to avoid more battering, but also that this belief was reasonable. As in all her criminal law decisions, Justice Wilson focused on the individual accused and the need to give that individual any benefit of the doubt about guilt.

## V. THE REQUIREMENT THAT THE STATE JUSTIFY INVASIONS OF LIBERTY

The Supreme Court has had second thoughts about the rigorous *Oakes*[72] standard for justifying limits on rights from the start. In the same year as he penned *Oakes* with its insistence that the state take the least

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[70] [1998] S.C.J. No. 12, [1998] 1 S.C.R. 123 (S.C.C.) and authors cited at para. 39. Justice L'Heureux-Dubé did, however, recognize that Wilson J. also considered environmental as well as mental factors that may have influenced a woman's decision not to leave a battering relationship.

[71] David Paciocco, *Getting Away with Murder* (Toronto: Irwin Law, 1999), at 306.

[72] *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

drastic possible approach to limiting Charter rights, Justice Dickson also authored *R. v. Edwards Books and Art Ltd.*,[73] which stressed the need to defer to reasonable attempts by the legislature to balance conflicting interests and accommodate rights in its legislative program.

The issue in *Edwards Books* was an exemption in a provincial Sunday closing law that allowed businesses with no more than seven employees that closed for religious reasons on a business day to be open on Sunday as a form of reasonable accommodation. Justice Dickson concluded for the majority of the Court that the state had acted reasonably even though its exemption would not apply to larger stores that closed for religious reasons on a Saturday. He stressed the secular legislative purpose of the Sunday closing law in providing for a common result day.

Justice Wilson dissented on the basis that the state had failed to demonstrate why it could not accommodate all businesses that closed for religious reasons on days other than Sunday. She characterized the legislature's line drawing as unprincipled and productive of a "checkerboard"[74] approach to rights. Freedom of religion should, in her view, protect "the rights of all members of the group. It does not make fish of some and fowl of the others. For, quite apart from considerations of equality, to do so is to introduce an invidious distinction into the group and sever the religious and cultural tie that binds them together."[75] As in *Singh*,[76] Justice Wilson was not satisfied with arguments that some members of a minority would be treated fairly. Everyone in the group should be treated fairly. This was a liberal's insistence that each and every individual be treated fairly.

Justice Wilson was also concerned that the government had failed to discharge its burden of justifying the infringement of the right to freedom of religion. She stressed that the "Crown adduced no evidence to establish that permitting all retailers who close on Saturdays on religious grounds to stay open on Sundays would cause a substantial disruption of the common pause day".[77] In her remaining years on the Court, Justice Wilson was a fierce defender of a rigorous version of the *Oakes* test. Her stubborn consistency on the question of justification was

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73 [1986] S.C.J. No. 70, [1986] 2 S.C.R. 713 (S.C.C.) [hereinafter "*Edwards Books*"].

74 *Id*., at para. 208.

75 *Id*., at para. 207.

76 *Singh*, [1985] S.C.J. No. 11, [1985] 1 S.C.R. 177 (S.C.C.).

77 *Edwards Books*, *supra*, note 73, at para. 209.

based on liberal principles that stressed the need to protect the individual from the state and to restrain state activity that harmed the rights of individuals.

Justice Wilson parted company with Chief Justice Dickson again in a series of cases involving prostitution laws. The main decision involved a broad 1985 law that was enacted against all forms of public solicitation for the purpose of prostitution. Justice Dickson accepted that the law was a reasonable response to the public nuisance of solicitation. Justice Wilson, with the concurrence of Justice L'Heureux-Dubé, dissented on the basis that the law was overbroad and would apply to expression that would not produce any public nuisance.[78] The dissent was based on standard overbreadth analysis rather than a feminist critique of laws against street prostitution. Justice Lamer was the only judge to discuss feminist writings in his judgment. He believed that they supported his conclusion that the law should be upheld as an attempt to protect street prostitutes as a disadvantaged group. Justice Wilson may have had concerns about the disadvantaging effects of prostitution laws on women, but she was most comfortable with an analysis that stressed the importance of the individual's freedom of expression and association and the state's overbreadth in responding to public nuisances.

Justice Wilson parted company with Justice Lamer again in 1990 on the question of whether the reverse onus placed on the accused to establish the insanity defence could be justified under section 1 of the Charter. Justice Lamer, for the majority of the Court, was influenced by the traditional nature of the reverse onus and the possible dangers of acquitting people whenever there was a reasonable doubt about their insanity. Justice Wilson in her dissent stressed the need to focus on the criminal context of the case. She explained:

> In my view, this is not a situation calling for a departure from the strict standard of review set forth in *Oakes*. On the contrary, the issue on appeal seems to be the quintessential case of the state acting as the "singular antagonist" of a very basic legal right of the accused rather than in the role of "mediating between different groups" as discussed in *Irwin Toy*. This is, in my view, an appropriate case in which to apply the stricter standard of review on the "minimal impairment" issue.[79]

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[78] *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123 (S.C.C.).

[79] *R. v. Chaulk*, [1990] S.C.J. No. 139, [1990] 3 S.C.R. 1303, at 1390 (S.C.C.).

She also concluded that the American experience with the less restrictive alternative of only placing an evidential burden on the accused demonstrated that the government had not justified the traditional reverse onus as the least rights restrictive means to control the insanity defence. She parted company with Justice Lamer the next year in *Swain*[80] when she concluded that allowing the Crown to raise the insanity defence when the accused put his or her state of mind in issue could not be justified under section 1 as a reasonable limitation on the accused's right to control his or her own defence. Again, she stressed that the state was acting as "the singular antagonist" of the accused and that there was "no room for deference to the legislature" when the courts themselves were reformulating a common law rule to make it consistent with the Charter.

Justice Wilson was again in lonely dissent when she found that the government had not justified mandatory retirement at 65 years of age. Although this case arose outside of the criminal context and in the context of universities, Justice Wilson still focused more on the effects of mandatory retirement laws on individuals than she did on the government's attempt to mediate between the claims of competing generations. She rejected the idea that mandatory retirement was necessary to do justice to "younger academics". In her view, the government had created a conflict between younger and older academics by starving the universities for cash. Despite recognizing that the Court had sanctioned some departures from the strict *Oakes* requirement, she remained uncomfortable with the trend:

> This Court has stressed that the standard which presumptively applies is that of *Oakes*. It is only in exceptional circumstances that the full rigours of *Oakes* should be ameliorated. The onus in this case was on the respondent universities to show that the application of a more relaxed test under s. 1 was appropriate. In my respectful view that onus has not been met.[81]

Justice Wilson also stressed that the universities could make room for young academics by offering incentives to older professors to take voluntary retirement as opposed to forcing all older professors to retire. She was offended by the notion that individuals were being forced to retire. She also rejected the idea that mandatory retirement was a

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[80] [1991] S.C.J. No. 32, [1991] 1 S.C.R. 933, at 967 (S.C.C.).

[81] *McKinney v. University of Guelph*, [1990] S.C.J. No. 122, [1990] 3 S.C.R. 229, at 404-405 (S.C.C.).

package deal that was tied to pensions and other benefits. With the same insistence as in *Edwards Books* that the rights of everyone affected be considered, she noted that non-unionized employees and those who joined the workforce late (mostly women) would be severely affected by mandatory retirement. A concern about the rights of all individuals made her focus on the rights of the most vulnerable.

One decision that stands in contrast to the above dissents was Justice Wilson's decision to join with Chief Justice Dickson, L'Heureux-Dubé and Gonthier in *R. v. Keegstra*[82] to uphold the hate propaganda offence as a reasonable limit on freedom of expression and the presumption of innocence. Justice McLachlin's dissent which would have struck down the offence appears to be more consistent with Justice Wilson's approach to section 1 than Chief Justice Dickson's majority decision holding the government had justified the limits on freedom of expression and the presumption of innocence. The majority's decision in *Keegstra* has been cited by some of evidence of the Court's tendency to follow the lead of a Court party of post-materialistic elites, in this case a range of equality-seeking groups that intervened in support of the hate propaganda law.[83]

There may indeed be some inconsistency between Justice Wilson's general approach to section 1 and her concurrence with Chief Justice Dickson in *Keegstra.* That said, a case for the consistency of Justice Wilson's position can be made on the basis that the majority in *Keegstra* was concerned that the very conditions of liberalism that allow each individual the maximum liberty and opportunity to pursue his or her life goals would be thwarted in a world where those who promoted hate against identifiable groups were given the benefit of any reasonable doubt. To this extent, Justice Wilson may have concluded that hate speech presented a *sui generis* threat to liberalism that was not present in other section 1 cases discussed above where she found that the state had failed to justify the necessity of limiting Charter rights. In any event, the Court as an institution remained ambivalent about the deference to the state that it displayed in *Keegstra*. Two years later, Justice McLachlin

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82 [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 (S.C.C.).

83 Retired Justice L'Heureux-Dubé has urged prosecutors to invoke equality rights as a means of defending criminal laws from Charter challenge. See Claire L'Heureux-Dubé, "The Charter of Rights and the Administration of Criminal Justice in Canada: Where We Have Been and Where We Should Go" (2006) 3 Ohio St. J. Crim. L. 473. On the limits of such an approach, both in terms of the limited number of crime victims who will find protection under s. 15 of the Charter and the often false assumption that punitive criminal law will protect and satisfy crime victims, see Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999), chapters 4 and 7.

found herself in a majority striking down the false news offence in *R. v. Zundel*[84] on the basis that the state had not justified an overbroad restriction on freedom of expression.

Unfortunately, by this time Justice Wilson had retired from the Court. We will never know for certain how she would have decided that case. I suspect, however, that Justice Wilson would have agreed with Justice McLachlin and struck down the false news provision as an overbroad restriction on freedom of expression. Had she remained on the Court a few more years, Justice Wilson might also have changed the result in cases such as *R. v. Wholesale Travel Group Inc.*[85] and *R. v. Creighton*[86] by perhaps siding with Justice Lamer in his dissents in those cases. Canadian criminal law might look quite different today had Justice Wilson remained on the bench until she reached the mandatory retirement age of 75.

## VI. CONCLUSION

There is no point in speculating about historical might-have-beens. There is, however, a point in better understanding the underlying philosophy that motivated the many important decisions made by Justice Bertha Wilson during her distinguished service on the Supreme Court. Although Justice Wilson will understandably be remembered as the first woman who served on the Supreme Court, it has been suggested in this essay that her most distinctive and important contribution to the work of the Supreme Court at a critical time in its history was her steadfast commitment to the principles of classical liberalism that protected individuals in all their individuality from the state.

Justice Wilson was aware of the many disadvantages faced by women, but she consistently favoured liberal strategies that, by protecting the rights and freedoms of all individuals, would often have an ameliorating effect on the conditions of women. In the statutory rape case of *Hess*, she was not persuaded by strong arguments that maximizing the liberty of the individual accused in relation to the state would have disadvantaging effects on women. Her defence of a woman's right to choose in *Morgentaler*[87] was grounded in a consistent application of

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84 [1992] S.C.J. No. 70, [1992] 2 S.C.R. 731 (S.C.C.).

85 [1991] S.C.J. No. 79, [1991] 3 S.C.R. 154 (S.C.C.).

86 [1993] S.C.J. No. 91, [1993] 3 S.C.R. 3 (S.C.C.).

87 [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.).

liberal principles that defended the rights and freedoms of all individuals from the state. The decision benefited women, but it was grounded in a consistent and principled stance that defended the rights of all individuals from the state.

The animating principle in Justice Wilson's celebrated concurrence in *Morgentaler* and in her criminal law and Charter jurisprudence was an abiding concern about protecting the individual from the state. The insight about the primacy of Justice Wilson's classical liberalism and individualism is important in understanding her outstanding but frequently dissenting contribution to Canadian jurisprudence. It may also be helpful in understanding the future. There seem to be few judges today who are as committed to the principles of subjective fault and strict justification of any limits on rights as Justice Wilson. Today, context is everything. The liberal principles that Justice Wilson espoused are often tempered, if not diluted.

It is unfortunate that so few judges today are prepared to follow in Justice Wilson's footsteps. Liberalism that defends the right of the individual against the power of the state and the collectivity is somewhat out of favour in a post-September 11 world that is preoccupied with the fear of crime and terrorism. Justice Wilson's insistence on strict justification under section 1 of the Charter has been overtaken by a contextualism that at times seems devoid of principle or predictability. Justice Wilson's preference for subjective fault in the criminal law is under siege as the state continues to expand the criminal sanction and make increasing use of negligence-based forms of criminal liability. The Supreme Court has seemingly abandoned the project of constitutionalizing subjective fault even for serious crimes. The presumption of innocence that is designed to give the individual accused the benefit of the doubt is today more honoured in its breach, or at least through a section 1 justification. Justice Wilson's retirement from the Court and now her death will prevent us from seeing the present through her eyes. This is a matter of great regret because she served as a principled conscience for liberal values that are an important part of our heritage.