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The "Family" in the Work of Madame Justice Wilson

Mary Jane Mossman
Osgoode Hall Law School

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I. Introduction: Family Justice

... the family ... must be just if we are to have a just society, since it is within the family that we first come to have that sense of ourselves and our relations with others that is at the root of moral development.¹

Susan Moller Okin's assertion about the need for justice in families offers a challenging starting point for an assessment of the family in the work of Justice Wilson. Her assertion challenges us for a number of reasons. First, in claiming that justice in the family is a prerequisite to a just society, Okin compels us to focus careful attention on our family relationships if we aspire to a just resolution of our public and political debates. For her, a satisfactory theory of justice can be developed only if it takes account of the structures and power in family relationships, and the different experiences of men and women in families. In her view, however, both contemporary justice theories and those of earlier times² have failed to take account of the family and its inherent injustice, thereby detracting from their usefulness as justice theories for our society. Thus, she argues that the "connections between domestic life and the rest of life"³ require that we address the need for justice in families as a fundamental prerequisite to creating a just society.

Second, her assertion about the need for justice in families illustrates how the family offers a mediating concept between our sense of

* Professor Mary Jane Mossman, Osgoode Hall Law School.

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1. Susan Moller Okin, *Justice, Gender and the Family* (Basic Books: 1989) at 14. Moller Okin argues that theories about justice have failed to take account of the family and its gendered nature, and that this situation is unacceptable for three reasons: first, because women must be fully included in any satisfactory theory of justice; and second, because equality of opportunity for women and for children of both sexes is undermined by the current gender injustices of our society. Her third reason is that quoted in the text.

2. In her book, Okin considered a number of contemporary theories of justice in detail, including communitarianism, libertarianism, and liberalism. For further details, see especially Ch. 2-5.

3. *Ibid.*, at 132.

personal identity as individuals and our commitment to others through our vision of a wider community. Such a concept of the family undermines law's traditional view of the public and the private as separate spheres. For Okin, the public/private division is an ideological one "which obscures the cyclical pattern of inequalities"⁴ between men and women:

Because of the past and present division of labor between the sexes, for women especially, the public and the domestic are in many ways *not* distinct, separate realms at all. The perception of a sharp dichotomy between them depends on the view of society from a traditional male perspective that tacitly assumes different natures and roles for men and women. It cannot, therefore, be maintained in a truly humanist theory of justice - one that will, for the first time, include all of us.⁵

Finally, Okin's assertion suggests that the family is a primary site for moral development. She suggests that it is in families that we can learn to express our individual identities within a context of respect for the ideas and wishes of others, a simultaneous experience of our own perspective which must also take account of others'. For Okin, this capacity is essential to a sense of justice; such a perspective "is not that of the egoistic or disembodied self, or of the dominant few who overdetermine 'our' traditions or 'shared understandings'... but rather the perspective of every person in the society for whom the principles of justice are being arrived at."⁶ Significantly, Okin's commitment to the need for justice in families is both a recognition that there are many families which do not currently meet this standard and an aspiration to transform family relationships so that they provide an experience of both self and others, an experience which she considers fundamental to creating a just society.

Okin's assertions provide important challenges to an assessment of the family in the work of Justice Wilson. Do her decisions as an appellate judge in Ontario and in the Supreme Court of Canada promote justice in families? Is there a sense in her work that there are similarities between family "conversations" and political "discourses" in Canada, and a sense of the urgent need for us to work together to accomplish justice at home in order to achieve a just society together? Is there an acceptance, or a critique, of the traditional legal division

4. *Ibid.*, at 111.

5. *Ibid.*, at 133. For a thorough review of the "public" and "private", see Frances Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983), 96 Harv. L.R. 1497.

6. Okin, *supra*, note 1, at 21-22.

between public and private spheres? Is there an appreciation of the family as a mediating concept between individual identity and society at large, or is the family ignored in a process which situates individuals (male and female) in an unmediated relationship with the state? Is there a sense of the significance of the family for encouraging us to see ourselves *both* as individuals and as part of a greater whole, a sense of our own and others' perspectives which is essential to a sense of justice?

These are difficult and fundamental questions, not just for an assessment of the idea of family in the work of Justice Wilson, but also for us as we continue to define ourselves and our relationships with others in a changing world. Indeed, in thinking about the family in the work of Justice Wilson, we are focusing on questions which are as profound as they are difficult, with answers as elusive as they are important. Particularly as we become more aware of the abuse of power in family relationships,⁷ the challenge of creating just families seems all the more difficult. Moreover, to consider these issues in a context of law means that we must necessarily take account of the tension between the ways in which the law encourages, supports and protects *both* families as units and *also* their individual members. Such a legal task has been described recently as incoherent because it fails to capture "either the integrity or the plurality of domestic relations."⁸ Moreover, because it necessarily occurs within an accepted dichotomy between "private" and state action, the law's role seems often inconsistent and ambivalent, not so much mediating between the family and its members as paralysed by the need to choose. In such a context, Okin's assertion that justice in the family is the linchpin for achieving a just society seems to offer only a bleak prospect of achieving either. Yet, to take seriously a need to ensure justice in our most intimate relations as the basis for building a just society also seems as necessary and desirable as it is daunting and difficult.

In adopting this approach to an assessment of the family in the work of Justice Wilson, I have been puzzled about how to connect these themes, if at all, to the philosophical ideas of the Scottish

7. See Bertha Wilson, "Family Violence" (unpublished paper, Toronto: May 1991); Nikolas Rose, "Beyond the Public/Private Division: Law, Power and the Family" (1987), 14 J. of Law and Soc. 61; and Pamela Symes, "Property, Power and Dependence: Critical Family Law" (1987), 14 J. of Law and Soc. 199.

8. Lee E. Teitelbaum, "The Legal History of the Family" (1987), 85 Mich. L.R. 1052, at 1070; the comment occurred in a book review of Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (Univ. of N. Carolina Press: 1985). See also Linda Nicholson, *Gender and History* (Columbia Univ. Press: 1986).

Enlightenment and their possible influence on Justice Wilson's work. Much has been written about the creative ideas, literary, philosophical and legal, which flourished in Scotland in the years after the Act of Union, and the significant role of men trained in law whose impact on both national institutions and literary experiments was so exceptional. A number of themes reoccur in the approaches of these men to legal decision-making which seem particularly apt in relation to the overall work of Justice Wilson. Peter Stein has suggested, for example, that Lord Stair, the author of *Institutions of the Law of Scotland* in 1681, eschewed the idea of dichotomies in law and particularly the suggestion that law is not logic but experience: in Stair's view, law was neither entirely logic nor entirely experience but "a mysterious mixture of the two."⁹ Stein has also suggested that the ideas of the Enlightenment encouraged lawyers to ensure that the law stayed in touch with the "changing social and economic state of the country";¹⁰ and similarly, that judges were encouraged in a broad historical understanding of the law because "an historically minded judge ... can see the direction in which the law is moving and this insight gives him [sic] a certain freedom in handling his [sic] authorities."¹¹ Justice Wilson's abilities to weave legal logic with the experiences of life, particularly in some of her later decisions, along with her interest in ensuring a relationship between law and social context and her singular facility for historical exegesis and a contextualized use of precedents all seem consistent with these ideas of the Scottish Enlightenment. Just as these men, her legal training has "suffused [her] thinking and ... inspired what [she] wrote."¹²

Yet, any such effort to trace the source of Justice Wilson's ideas about family in the Enlightenment remains somewhat discordant because the Scottish Enlightenment, in spite of its creativity, accepted the idea of separate spheres for women and men; the concept of family was dependent on a male head of household who participated in the new ideas, while women remained at home. Indeed, one can peruse the literature on the Enlightenment without encountering much information about its impact, if any, on women in Scotland;¹³ such a

9. Peter Stein, "Law and Society in Eighteenth-Century Scottish Thought" in N.T. Phillipson and Rosalind Mitchison, eds., *Scotland in the Age of Improvement: Essays in Scottish History in the Eighteenth Century* (Edinburgh Univ. Press: 1970) 148, at 150. See also Rosalind Mitchison, *A History of Scotland*, 2nd ed. (Methuen: 1982).

10. Stein, *supra*, note 9, at 156.

11. *Ibid.*, at 158.

12. Bertha Wilson, "The Scottish Enlightenment: The Third Shumiatcher Lecture in 'The Law as Literature'" (1987), 51 Sask. L.R. 253, at 269.

conclusion, paraphrasing historian Joan Kelly's apt comment about the impact of the Italian Renaissance on women, may suggest that "there was no [enlightenment] for Scottish women, at least not during the [Enlightenment]."¹⁴ This conclusion is reinforced by later, nineteenth century decisions of Scottish courts, such as that in 1873 which denied women the right to attend medical courses at the University of Edinburgh, and in which several of the judges openly espoused the doctrine of separate spheres.¹⁵

On this basis, it is tempting to conclude that the philosophical ideas of the Scottish Enlightenment are irrelevant to the idea of family in the work of Justice Wilson. However, there is one aspect of the Enlightenment which may have some continuing significance for her work about the family. John Clive has suggested that the Act of Union which made London the centre of the United Kingdom profoundly affected the Scottish imagination: it encouraged local pride in Scotland at the same time as it created a sincere aspiration among Scots for the sophistication of London's culture:

The complexity of the provincial Scotman's image of the world and of himself made demands upon him unlike those felt by the equivalent Englishman. It tended to shake the mind from the roots of habit and

13. In an essay on the geographical mobility of Scottish women in the eighteenth century, the authors suggest that there are some "distinctive features of female mobility" and emphasize "the importance of recognising gender differences within the more general field of migration studies". See Ian D. Whyte and Kathleen A. Whyte, "The Geographical Mobility of Women in Early Modern Scotland" in Leah Leneman, ed., *Perspectives in Scottish History: Essays in Honour of Rosalind Mitchison* (Aberdeen Univ. Press: 1988) 83, at 101-102.

14. Joan Kelly, "The Social Relation of the Sexes: Methodological Implications of Women's History" in *Women, History and Theory* (Univ. of Chicago: 1984) at 3.

15. *Jex-Blake v. University of Edinburgh*, [1873] Scottish Law Reporter 549; the doctrine of separate spheres was especially evident in the decision of Lord Neaves, at 582:

"The powers and susceptibilities of women are as noble as those of men; but they are thought to be different, and in particular, it is considered that they have not the same power of intense labour as men are endowed with. If this be so, it must form a serious objection to uniting them under the same course of academical study.... Add to this the special acquirements and accomplishments at which women must aim, but from which men may easily remain exempt. Much time must, or ought to be, given by women to the acquisition of a knowledge of household affairs and family duties, as well as to those ornamental parts of education which tend so much to social refinement and domestic happiness...."

The decision involved 12 judges in all, and was decided by a vote of 7 to 5. The Scottish courts were similarly unsympathetic to the claim of a woman to be admitted to examinations so as to qualify as a law agent; see *Hall v. Incorp. Society of Law Agents* (1901), 3 Sess. Cas. (5th Ser.) 1059. See also Albie Sachs and Joan Hoff Wilson, *Sexism and the Law* (Martin Robertson: 1978), especially at 40-66.

tradition. It led men [sic] to the interstices of common thought where they found new views and new approaches to the old.¹⁶

These ideas of aspiration and social idealism are reflected in the persistent theme of improvement in eighteenth-century Scottish culture,¹⁷ and in the resultant ideas about democratic values in education which affected social policies both in Scotland and in Nova Scotia.¹⁸

In the context of the family, moreover, these ideas of aspiration and improvement can be found in Rebecca West's modern biographical writing about her mother's family in Edinburgh in the latter part of the nineteenth century. The author's careful description suggests that the family's financial difficulties were borne with great fortitude and quiet grace. At the same time, West's evocative prose about the Scottish virtue of "self-improvement" precisely captures the solid idealism of the family's aspirations for better times:

It is the Scots' destiny to have to make good their losses, time and again. The rain and the wind and the Northern Seas eroded their land and nagged at all shelter; tribal warfare was inevitable in a land with these contours and such soil, and Irish and English aggression all brought down hammer-blows on man and beast, pasture and tilth and forest. When the Stuarts buckled under the weight of their destiny, and the Scots had to learn to live under the Hanoverians [during the Enlightenment],... it was then ... that Scotland developed its special idea of self-improvement.¹⁹

In my view, it is this sense of aspiration and idealism, evident in Justice Wilson's decisions about the family, which connects her to the spirit of the Scottish Enlightenment. For her, the human condition is

16. John Clive, "The Social Background of the Scottish Renaissance" in N.T. Phillipson and Rosalind Mitchison, eds., *Scotland in the Age of Improvement: Essays in Scottish History in the Eighteenth Century*, *supra*, note 9, 225, at 240.

17. See Phillipson and Mitchison, eds., *supra* note 9, at 1-4; and David Daiches, *The Paradox of Scottish Culture: The Eighteenth-Century Experience* (Oxford Univ. Press: 1964), especially at 72-73.

18. Donald J. Withrington, "Education and Society in the Eighteenth Century", in Phillipson and Mitchison, eds., *supra* note 9, at 169; and John G. Reid, "Beyond the Democratic Intellect: The Scottish Example and University Reform in Canada's Maritime Provinces, 1870-1933", in Paul Axelrod and John G. Reid, *Youth, University and Canadian Society: Essays in the Social History of Higher Education* (1989). See also Anand C. Chitnis, *The Scottish Enlightenment and Early Victorian English Society* (Croom Helm: 1986).

19. Rebecca West, *Family Memories: An Autobiographical Journey* (Penguin: 1987) at 49. In this passage, West is explaining the fine distinction between the virtue of "self-improvement" and the lesser objective of "self-help", and the reason why the woman who married the oldest brother (and male head of the household) was unacceptable because she aspired only to "self-help" and did not appreciate the need for a greater aspiration to "self-improvement".

one of aspiration to be better than we are and the best that we can be. Such an approach suggests her commitment to a sense of law as a moral imperative and not simply a tool for pragmatic decision-making.

Yet, while her work suggests that she understands law in terms of the virtue of human aspiration, it is more questionable whether a concept of the family is especially significant to her analysis. Whereas Susan Moller Okin's twentieth century philosophical approach makes the family a primary site of moral development and an essential element in creating a just society, it is arguable that Justice Wilson has more frequently aspired to ensuring that individual family members behave in accordance with standards of justice for individuals, regardless of their family status. In this respect, Justice Wilson's approach is similar to more general legal trends in the twentieth century which have made family connections ever less relevant, almost invisible, in the application of legal principles. As Carl Schneider has described this trend, twentieth century courts have increasingly treated legal claims as ones "involving individuals, not families" and regarded "family problems as matters to be settled between the law and a single member of the family"; this trend has occasioned a crucial change for law in relation to the family: "a diminution of the law's discourse in moral terms about the relations between family members, and the transfer of many moral decisions from the law to the people the law once regulated."²⁰

Yet, this legal trend away from family status and towards a recognition of individualism²¹ has continued to present a paradox for law: at the same time as law has increasingly focused on individuals (rather than family units), most people continue to spend much of their lives in families. And, as Mary Ann Glendon has suggested, the family has demonstrated "a remarkable capacity ... to endure through-

20. Carl E. Schneider, "Moral Discourse and the Transformation of American Family Law" (1985), 83 Mich. L.R. 1803, at 1857. For Schneider, it is the impact of constitutionalization and rights discourse which, among other influences, has contributed to this trend, a trend which also has an impact on morality discourse:

"...our tendency to constitutionalize family law and thus to think of it in terms of rights means that, when the law transfers moral decisions, it transfers them to individuals rather than to families, thus sustaining the image of the family as a collection of discrete individuals."

Ibid., at 1858.

21. An early description of this trend is found in Sir Henry Maine, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (1861). See also Mary Ann Glendon, *The New Family and the New Property* (Butterworths: 1981); and Manfred Rehbinder, "Status, Contract and the Welfare State" (1971), 23 Stan. L.R. 941.

out history [with] its ability to assume new forms, weather great historical changes, and to adapt to new conditions - all without help from law."²² In this context, therefore, this assessment of the family in Justice Wilson's work must take account of the law's current preoccupation with individuals, but without losing sight of their family context.²³ Moreover, this assessment provides a significant opportunity to assess this trend to individualism, not in order to return to former (inegalitarian) principles about family status, but rather to assess the need for the radical social (and legal) restructuring of families which Okin has identified as the prerequisite for a truly just society. In this way, justice in private homes is inextricably linked to justice in society: the personal is political.

This reflection about the family in the work of Justice Wilson, then, must go beyond an assessment of her decision-making to a broader exploration of the relations of law and the family, and the relationship between justice in our families and our aspirations for justice in our society. Thus, while the focus is the family in the work of Justice Wilson, the questions are ones which must be confronted by all of us.

II. Enduring Family Relationships: Invisible Legal Images

As the work of historians²⁴ and sociologists²⁵ has demonstrated, the idea of the family has continually changed over the centuries, shaping

22. Mary Ann Glendon, *The Transformation of Family Life* (Univ. of Chicago Press: 1989) at 312-313. Glendon also quotes a French jurist, Alain Benabent, who suggested that:

"Instead of the individual 'belonging' to the family, it is the family which is coming to be at the service of the individual. The pre-eminent place of the family among our institutions is retained, but not for the same reason: no longer is it because the family serves society, but because it is a means for the fullest development of the individual. When it no longer fulfils this role, the bonds diminish or disappear."

Alain Benabent, "La liberte individuelle et le mariage" (1973), *Revue trimestrielle du droit civil* 440, at 495. For an excellent review of Glendon's book, see Barbara Bennett Woodhouse, "Towards a Revitalization of Family Law" (1990), 69 *Texas L.R.* 245.

23. See also M.J. Mossman, "Individualism and Community: Family as a Mediating Concept" in A. Hutchinson and L. Green, eds., *Law and the Community: The End of Individualism?* (Carswell: 1989) 205.

24. For general histories, see L. Stone, *Road to Divorce: England 1530-1987* (Oxford Univ. Press: 1990) and Philippe Ariès and Georges Duby, eds., *A History of Private Life* (Harvard Univ. Press: 1989). For Canadian family history, see Emily M. Nett, *Canadian Families: Past and Present* (Butterworths: 1988) and Katherine Amup, Andrée Lévesque and Ruth Road Pierson, eds., *Delivering Motherhood* (Routledge: 1990).

25. See Nett, *supra* note 24; Nancy Mandell and Ann Duffy, eds., *Reconstructing the Canadian Family* (Butterworths: 1988); Anderson et al., *Family Matters: Sociology and Contemporary Canadian Families* (Methuen: 1987); Diana Gittins, *The Family in Question: Changing*

and being shaped by law and by other societal influences. Indeed, while this paper is not the place to examine the changing forms and functions of families over time, it is important to note that the concept of family is a dynamic one, responding to the demands of social, economic and political relationships in different historical periods. For our purposes, the modern concept of family is rooted in changes initiated with industrialization in the early nineteenth century, changes which promoted the kinds of family arrangements which are prevalent (but by no means uniform) in twentieth-century Canada: family units which are usually smaller than the former extended kinship networks appropriate to a more agricultural economy; a general acceptance of consent and voluntariness in the creation and maintenance of family relationships; and separation of work and the market from home and family, an arrangement which has supported the doctrine of separate spheres for men and women despite the entry of women to the paid workforce in large numbers.²⁶

In such a context, law's relation to the family has also changed. In particular, law has increasingly focused on the rights and responsibilities of individual members of families, ignoring the family as a unit. As Mary Ann Glendon has perceptively noted, there has been an increasing tendency:

... for law and social programs to break the family down into its component parts and to treat family members as separate and independent. This shift of emphasis from 'the' family, or even 'families' in all their various forms, to the individual family member seems to have come about more by accident than by design. The effect, however, is that ... modern legal systems in varying degrees have come close to realizing a dream of the French revolutionaries: that citizens would one day stand in direct relation to the state, without intermediaries.²⁷

Households and Familiar Ideologies (MacMillan: 1985); Margrit Eichler, *Families in Canada Today*, 2nd ed. (Gage: 1983); and Carol Smart, *The Ties That Bind* (Routledge & Kegan Paul: 1984).

26. *Ibid.* See also Mary Ann Glendon, *The New Family and the New Property*, *supra* note 21. These characteristics reflect trends among families within the "dominant" culture of Canadian society; within some communities, however, some of these trends may be non-existent or different. For some details, see Nett, *supra* note 24; and Sedef Arat-Koc, "In the Privacy of our own Home: Foreign Domestic Workers as Solution to the Crisis in the Domestic Sphere in Canada" (1989), 28 *Studies in Pol. Econ.* 33.

27. Mary Ann Glendon, *supra* note 22, at 295. Glendon makes the point that the focus on individual members of the family unit is more pronounced in the common law and nordic countries than in the civil law systems of western Europe, a point explored more fully in her earlier book, *Abortion and Divorce in Western Law: American Failures, European Challenges* (Harv. Univ. Press: 1987). For an overview and critique of the latter book, see M.J. Mossman, "Not a Woman's Story" (1989-90), 3 *Can. J. of Women and the Law* 650.

In such a context, it is individual family members who become the focus of law, while the family unit is consigned to the background.

In thinking about the law's increasing focus on individuals to the exclusion of family, and my task of assessing Justice Wilson's ideas about the family, therefore, it seems appropriate to acknowledge openly the tension involved in my task. Fundamentally, it seems that I am asked to assess something which has already disappeared or is at least somewhat invisible. At the same time, such a review offers an opportunity to re-think the law's focus on individuals to the exclusion of family and the relationship between law and family, and to re-imagine legal principles which take account of both relationships and rights to achieve justice for families and society.

In undertaking this challenge, I want to consider Justice Wilson's concept of family in a broader context than traditional "family law" cases. In her decisions in the Ontario Court of Appeal and in the Supreme Court of Canada, I have been interested in disputes among family members which are not "family law" disputes, as well as those which more readily fall into the traditional "family law" category. In this broader range of cases, in particular, law's approach to the resolution of familial disputes typically ignores familial relationships, treating family members as if they were "strangers". Such an approach is, of course, consistent with the idea of consent and voluntariness for individual members, but it may ignore the extent to which there are differing amounts of access to voluntary action among family members. It may also ignore aspects of the familial relationship which are relevant to resolving the dispute; since the principles are being applied as if the parties are strangers, the fact of their relationship and its impact on voluntariness or other motives may not be sufficiently taken into account.

Thus, I begin my review of the family in Justice Wilson's work by examining some cases which involve disputes among family members, although they might not all be characterized as typical "family law" cases. In my view, these cases provide an excellent opportunity to examine whether the familial relationships are taken into account by Justice Wilson in shaping her legal analysis, modifying or extending the principles applicable to relationships among strangers. To a limited extent, I think that these cases show that Justice Wilson has sometimes taken account of the presence of the family as part of her analysis, and not merely as backdrop to the dispute. As a result, her decisions sometimes seem to undermine the claim that twentieth century law focuses only on individuals and makes the family invisible. At the very least, her approach may require us to appreciate the

resilience of the family and its ability to influence our analysis, “not so much by coercion as by infusion, [colouring] our images and ideology of family.”²⁸

Families and Property Disputes

One of Justice Wilson’s early cases concerning family relationships was *Re Lottman*²⁹ decided by the Ontario Court of Appeal in 1978. Technically, the case concerned the interpretation of a clause in a will and the authority of executors to sell property and invest the proceeds in accordance with the rule in *Howe v. Lord Dartmouth*.³⁰ The facts involved a dispute between the deceased’s widow who was entitled to a life interest and (primarily) the deceased’s son by an earlier marriage, the widow’s step-son, who was entitled to the remainder interest (along with other children) at the death of the widow. According to Justice Wilson, “relations between the [deceased’s] two families [were] strained and the widow, Emma Lottman,... [was] clearly in a most difficult and sensitive position.”³¹ The issue of the economic relationship between the two generations was further accentuated by the fact that two pieces of leased property, central to the dispute, were leased to the step-son and one at least was leased on terms which were exceptionally favourable to him.

At first glance, the reasoning in this case seems to take no account at all of the familial relationship of the parties.³² Apart from recogni-

28. Woodhouse, *supra* note 22, at 247. In her review of Mary Ann Glendon, *The Transformation of Family Law*, *supra* note 22, Woodhouse suggests that Glendon demonstrates how law not only describes, but also influences, social behaviour. It seems arguable, at least, that it may also influence legal analysis.

29. (1978), 2 E.T.R. 1.

30. (1802), 32 E.R. 56.

31. *Re Lottman*, *supra*, note 29, at 12.

32. The outcome of the case is complex because there are three separate judgments. MacKinnon, J.A. agreed with Wilson, J.A. that the rule in *Howe v. Lord Dartmouth* imposed a duty on the trustees to convert the residuary realty into authorized investments. However, he concluded that there was a triable issue with respect to whether the residuary beneficiaries were estopped from attacking the lease to the second property by reason of their consent, and that the Court was not in a position, in light of the summary method of procedure adopted, to make a determination on that issue of fact. Thus, he concluded that the matter should be referred back for a trial on this issue. Weatherston, J.A., disagreed that the rule in *Howe v. Lord Dartmouth* could apply to a will in which there was no clause providing a general power of sale, and agreed with MacKinnon, J.A. with respect to the triable issue concerning the second property. With respect to the lease to the second property, Wilson, J.A. held that there was no evidence of consent which would have estopped the residuary beneficiaries from attacking the lease, and, on the other hand, if there was consent, it was given without full knowledge of their legal rights, and thus invalid. See also Moe Litman, “A Second Look at the Application of the Rule in *Howe v. Lord Dartmouth* to Realty” (1978), 2 E.T.R. 3.

tion of the difficult circumstances experienced by the widow, referred to above, the analysis focused entirely on technical doctrines relevant to the interpretation of wills. Yet, there are two aspects of the case which deserve mention in relation to an assessment of family in Justice Wilson's work. One is that her decision, in terms of the outcome of the inter-generational dispute, boldly rearranged the economic relationships so that there was more equity between the family members, and did so without the need for further court action.³³ It is tempting to suggest that this conclusion shows an appreciation of the difficulties encountered by a penurious widow, as well as sympathy for all the family members entwined in costly and technical litigation which might, like the litigation in *Bleak House*,³⁴ be of more lasting benefit to the lawyers than to the litigants. Admittedly, such an assessment is somewhat speculative, although I think it not unreasonable.

More significantly, her judgment in *Lottman* is characterized by a clear boldness of spirit in dealing with the technical doctrine. Since the rule in *Howe v. Lord Dartmouth* was applicable only to personalty, and not to realty, in England, the respondents argued that it could not apply to the leased properties, in spite of the existence of some precedents in Canada to the contrary. Justice Wilson's response to this argument demonstrated her sense of the history of the rule, and its contextual relationship to land and families in England, a context quite different from the baker's shop on Baldwin Street in Toronto in the 1970's:

Even if our Courts were on a frolic of their own in applying the rule to real estate,... it was in my opinion a frolic which reflected a contemporary Canadian attitude to property. Real estate is not a 'sacred cow' in Canada as it was in England when these equitable rules were developed. Sale of the family hereditaments is not fraught with the same trauma and disgrace. I see no reason why in the current social context in Canada a trustee's powers and duties in relation to realty should be any different from his powers and duties in relation to personalty.³⁵

Clearly evident in this passage is a sense of the historical rationale for the rule's non-application to realty, a limitation designed to con-

33. On this latter issue, Justice Wilson's reasons dissented from the majority view. Her scrupulous review of the documentation led her to conclude as well that there had been no valid consent, an issue on which MacKinnon, J.A. wished to have oral testimony.

34. Charles Dickens, *Bleak House* (Peter Fenelon Collier and Son: 1900). The story concerns the celebrated litigation in the Court of Chancery in *Jarndyce v. Jarndyce*.

35. *Re Lottman*, *supra*, note 29, at 14.

serve family land for future generations in the context of the United Kingdom. Justice Wilson's assertion of the differing circumstances in Canada in the twentieth century illustrates her sense of the malleability of (especially) equitable principles and the need to fashion remedies for modern families which are as sensitive to their needs and hopes as those, like the technical rule at issue, which were designed for other families at other times. At the same time, however, Justice Wilson's decision is firmly based on the application of the relevant legal principles and it seems that the familial relationships (and the role of property within family generations) provides only a backdrop to the analysis. Thus, although there is some room for speculation that the outcome in *Lottman* takes account of the familial aspect of the legal dispute, Justice Wilson's expressed reasons for decision seem to confine the family to the background.

A number of Justice Wilson's other decisions similarly focused on property disputes intertwined in family relationships, decisions in which legal principles were applied, at least overtly, without regard for the family context. In her dissent in *Canada Life Assurance Co. v. Kennedy*,³⁶ for example, Justice Wilson applied the principles regarding improvements by a co-tenant (the wife) to jointly-held property so as to benefit an innocent mortgagee defrauded by the co-tenant husband, a lawyer who had made an assignment in bankruptcy. At issue were the improvements made by the wife to the family home, accomplished by a gift of funds from her mother with the expectation that they would be used to build an extension in which the mother wished to reside. Prior to the gift, the wife sought and obtained her husband's oral assurance, in light of a pending claim from a mortgagee, that the improvements would enure to her benefit alone. In this case, although the issue involved a bargain between a husband and wife, there was no examination of the spousal bargaining relationship or the possible extent of the husband's influence over his wife by reason of his professional status. Rather, all the judgments analyzed the property principles as if the circumstances occurred among strangers, and not between a husband and wife. In such a case, it seems that the family remained substantially invisible to the law and to Justice Wilson.³⁷

36. (1978), 21 O.R. (2d) 83.

37. The case is also interesting in terms of Justice Wilson's abiding interest in equity. In her analysis of the competing claims of the wife and the mortgagee, for example, she was clear that the mortgagee was innocent while the wife was fully aware of the existence of the mortgagee's claim at the time she sought assurance from her husband.

The decision in *Re Rynard* (1980), 118 D.L.R. (3d) 530 is a similar case involving a significant family dispute over the terms of a will. The case was decided on technical doctrinal

In a recent decision in the Supreme Court of Canada, however, the family context was more visible in Justice Wilson's assessment of a property transaction. In *Goodman v. Geffen*,³⁸ the court reviewed the validity of a trust agreement in light of the doctrine of undue influence. The property subject to the trust agreement was devised by her mother's will to Mrs. Goodman, a woman who suffered from mental problems; her mother had been primarily responsible for Mrs. Goodman's care prior to the mother's death.³⁹ After their mother's death, Mrs. Goodman's three brothers arranged for a meeting with their sister at the office of a lawyer. At this meeting, the brothers expressed concern that their sister would sell the property which she had inherited, exhausting her only means of support so that they might ultimately become responsible for her financially. No agreement was reached at this meeting with the lawyer, and the brothers apparently departed. Mrs. Goodman, however, maintained contact with the lawyer and eventually executed a trust agreement which conveyed the

principles, in this case the Rule in Shelley's Case; the judgment has been criticized as failing to take an opportunity to abolish the rule: see Bruce Ziff and M.M. Litman, "Shelley's Rule in a Modern Context: Clearing the 'Heir'" (1984), 34 U. of Toronto L.J. 170.

The familial relationships were also treated as not very relevant to the legal analysis in two cases involving tortious damages in the Court of Appeal. See *Cotic v. Gray* (1981), 33 O.R. (2d) 356, in which the wife of a deceased man sued for damages for wrongful death against the estate of the other driver involved in a car accident with her husband. Subsequent to the accident, her husband suffered a serious deterioration of a pre-existing mental condition and then, sixteen months after the accident, committed suicide. The jury concluded that the defendant caused or contributed to the death of the plaintiff's husband and the trial judge awarded damages to the plaintiff wife. On appeal by the defendant, the Court of Appeal dismissed the appeal, with concurring reasons by Justice Wilson; the familial relationship was taken for granted since it formed the basis for the plaintiff's action for wrongful death.

In *Kienzle v. Stringer* (1981), 35 O.R. (2d) 85, the court considered an appeal in relation to the advice of a solicitor in connection with the administration of an estate and problems concerning real estate transactions arising out of it. The trial judge had determined that the solicitor had been negligent and awarded damages accordingly, but had denied some heads of damage. The Court of Appeal allowed additional damages, but withheld damages based on costs associated with the purchase of property at current market value which would have been available at a lower price in the absence of the solicitor's negligence. Justice Wilson dissented from the majority decision in that she was willing to allow recovery in relation to this latter head of damage also. The judgments are clearly focused on the obligations of solicitors, and the familial relationships appear irrelevant to the determination. In fact, the plaintiff was the brother of the administratrix of the estate, and they were entitled, along with another sister, to the estate of their parents. Nowhere in the case is there any real attention given to the relationships nor to the practical problems of family farm arrangements.

38. (1991), 127 N.R. 241.

39. An earlier will executed by the mother had devised to Mrs. Goodman only a life estate, with the remainder interest to be divided among all the grandchildren after Mrs. Goodman's death, but the mother had apparently executed a subsequent will making Mrs. Goodman the beneficiary of the fee simple interest.

inherited property to trustees (two brothers and a nephew) in trust for her for life (with a proviso for sale in her best interests) and with the remainder interest to be divided among all the grandchildren of her mother; her own will left all her property to her own children.

The claim of undue influence was brought by Mrs. Goodman's son, executor of her estate, against the trustees, his two uncles and his cousin. At trial, the court concluded that there had been no undue influence, a conclusion supported by evidence admitted by the trial judge which was provided by the lawyer who had drawn up the trust document; by contrast, in the Alberta Court of Appeal, the majority concluded that there was undue influence exerted on the sister. In the Supreme Court of Canada, Justice Wilson's majority judgment canvassed both judicial decisions and academic writing on the law of undue influence.⁴⁰ In terms of her view of the family, the decision's significance lies in her broad characterization of relationships which may give rise to a presumption of undue influence:

It seems to me ... that when one speaks of 'influence' one is really referring to the ability of one person to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power.... To dominate the will of another simply means to exercise a persuasive influence over him or her. The ability to exercise such influence may arise from a relationship of trust or confidence but it may arise from other relationships as well.⁴¹

On the basis of this statement of principle, Justice Wilson concluded that the relationship between Mrs. Goodman and her brothers was one which "could have afforded them the potential to exercise undue influence over her."⁴² Nonetheless, on the basis of the trial judge's findings as to the absence of communication between Mrs. Goodman and her brothers after the initial meeting with the solicitor, coupled with their interest in advancing her welfare, Justice Wilson

40. In particular, her judgment reviewed the recent decision of the House of Lords in *National Westminster Bank Plc. v. Morgan*, [1985] A.C. 686.

41. *Goodman*, *supra* note 38, at 266. The judgments reviewed the effect of the presumption of undue influence in the context of gift transactions by contrast with commercial agreements, agreeing that this arrangement was a trust, not a contract, thereby relieving the executor of the obligation to show "manifest disadvantage". There are differing views of these legal principles; see, for example, Brenda Dale, "Undue Influence and Manifest Disadvantage" (1988), 52 *The Conveyancer* 441.

42. *Goodman*, *supra*, note 38, at 270.

concluded that the presumption of undue influence had been rebutted.⁴³

In reviewing the concept of family in Justice Wilson's work, this case is an important one. Her characterization of undue influence in terms of relative dominance in relationships suggests a recognition of the potential for abuse of trust arising out of family relationships *per se*. Even though the findings of the trial judge did not support the existence of undue influence on the facts, Justice Wilson's acknowledgment that power may exist in familial relationships is expressly evident in *Goodman*, by contrast to the earlier cases referred to above. Of course, the fact that this later decision involved a claim of undue influence may have lent itself more readily to such an approach, but it is difficult to argue that the family is invisible in such a case. Thus, although the court was concerned with an individual family member, the familial relationships and the power inherent in them were both clearly recognized.⁴⁴

Overall, however, these cases involving family property disputes suggest that the concept of family was not central to the legal analysis, and in most cases not taken into account at all. Thus, even when such legal disputes involved family members, their resolution was generally achieved as if the parties were strangers rather than connected by family ties, and the legal principles were conceptualized and applied without much, if any, regard for the impact of familial connections on

43. Although she deferred to the trial judge's findings, Justice Wilson expressed concern about the lawyer's actions in failing to inquire about the importance of the estate bequeathed to Mrs. Goodman and in his failure to assess whether she appreciated the economic implications of the trust agreement. *Goodman*, *supra* note 38, at 282. There were two concurring judgments, by La Forest and McLachlin, JJ., and by Sopinka, J. For La Forest and McLachlin, JJ., the relevant question was whether Mrs. Goodman's relationship with her brothers was one which allowed them to dominate her; in concluding that it was not such a relationship, these Justices seemed to rely on the absence of contact between Mrs. Goodman and her brothers, both at the time of their mother's death and during the subsequent arrangements for setting up the trust agreement. While contact between siblings may often be a feature of influence within families, some family support workers would suggest that it may also be possible for brothers who are not present to dominate a sister, especially such a dependent one. This view was expressed in a somewhat jocular review of this case: see J. Stuart Langford, "Did Broad Concern for Equity Lead to Unfair Result?" *The National* (September 1991) 28, in which the author suggested that the court's careful and erudite reasoning made the case "a gold mine for scholars and practitioners" but that others might be left "with the uneasy feeling that the wrong side won."

44. It is also important, in assessing these cases, to take note of the relatively greater scope for decision-making in the context of equitable claims. Thus, in the context of a claim of undue influence, a judge may have more scope for considering the rationale for the doctrine than in a claim about the interpretation of a will. In reviewing cases for this comment, I have concluded that it would also be interesting to examine Justice Wilson's concept of equity and equitable jurisdiction, a task unfortunately beyond the scope of this comment.

the claims. The invisibility of the image of family in the legal principles, however, creates a tension when the disputants are family members and especially when their familial relationships are implicated in the “neutral” application of legal principles. In thinking about this tension, it is useful to examine three cases in which the court’s preoccupation with procedures and statutory interpretation arguably obscured the idea of family, and the possible significance of family relationships, in similar ways.

Procedures and Statutory Interpretation

*Bezaire v. Bezaire*⁴⁵, a difficult and tragic case concerning a custody dispute between former spouses, was decided by the Ontario Court of Appeal in 1980. The majority of the appeal court decided to admit new evidence, including a report from the Office of the Official Guardian, in the course of the appeal but ultimately concluded that the conflict among expert reports and the absence of cross-examination of the experts made it impossible for the court to justify changing the trial judge’s decision to award custody to the father. Justice Wilson dissented, holding that the conflict in the reports and the fact that the report of the Official Guardian (based on an independent investigation) supported the mother’s claim required that the case be referred back to the trial judge to hear the expert evidence and make a determination according to the best interests of the children. Thus, in terms of the reasons given, the case is one which focused primarily on procedural arrangements in an appellate court, particularly arrangements for assessing new evidence.

Yet, the case is also regarded as an important one in terms of substantive legal principles concerning custody decisions, because both the majority and dissenting judgments stated expressly that homosexuality *per se* should not be the deciding factor in custody determinations. At the same time, however, the procedural focus of the judgments meant that neither the majority nor the dissenting opinion assessed the quality of the parent-child relationships in fact. On this basis, the case is troubling because of the apparent inability of the majority judges to take appropriate action in the context of allegations of child abuse on the part of the father, especially in light of the independent recommendations of the Official Guardian that the mother should be given custody; and the court’s willingness to permit the father to have continued custody in light of such allegations may also

45. (1980), 20 R.F.L. (2d) 358. (Ont. S.C. C.A.)

suggest insufficient concern about power relations within families, especially between parents and children.⁴⁶ In this context, Justice Wilson's dissenting judgment seemed somewhat more concerned to explore the facts, and perhaps also the relationships, more carefully,⁴⁷ even though her suggestion that the matter be referred back to the trial judge probably offered little comfort to Mrs. Bezaire.⁴⁸

Nonetheless, Justice Wilson's expressed wish to have full information about the familial circumstances before the court in order to apply the legal principles appropriately makes clear her interest in determining custody only by reference to the broader, family context. In this respect, her firmly-stated conclusion that "homosexuality is a neutral and not a negative factor as far as parenting skills are concerned"⁴⁹ must be understood as eliminating sexual preference as a factor, but not eliminating a full examination of the qualities of a parent (whether homosexual or heterosexual), from the court's proper considerations. While the significance of such an approach should not be underestimated, it is also important to note that no such assessment occurred in *Bezaire*. Thus, although the family context was fully visible to the court's decision-making in *Bezaire*, the judgments focused on procedural aspects of the case, eliminating the need to take into account the quality of familial relationships. In such a context, the principled statements about the neutrality of sexual preference as a factor in custody determinations represented only an abstract legal principle, not one grounded in a factual assessment of the parties' relationships. In this way, the family was visible as a concept, but not in terms of real family members and their concerns.

This conclusion is reinforced by a later decision in the Supreme Court of Canada in which Justice Wilson confronted the issue of statutory interpretation concerning Indian status in the context of an

46. For another account of the "facts" in *Bezaire*, an account which substantially supports the mother's claims, see Susan Crean, *In the Name of the Fathers: The Story Behind Child Custody* (Amanita Pubs.: 1988).

47. Justice Wilson's approach in *Bezaire* was similar to her approach, again in a dissenting judgment, in *Cooney v. Cooney* (1982), 36 O.R. (2d) 137, in which she decided that the custody issue should be heard in the context of divorce proceedings then pending. It is of interest that she noted the absence of evidence about the child's best interests (in spite of 300 pages of testimony, mainly recriminations between the husband and wife) and the possibility that the wife's reasons for removing the child on one particular occasion might have affected the judge's conclusions. In this way, it seems that Justice Wilson was suggesting a need to know more about the familial relationships between each parent and the child in order to make an appropriate custody order.

48. From the perspective of Mrs. Bezaire, the trial judge did not appear to be impartial; for subsequent developments, see Crean, *supra* note 46, at 31-34.

49. *Bezaire*, *supra*, note 45, at 367.

illegitimate child. In *Martin v. Chapman*,⁵⁰ Justice Wilson wrote the majority decision which conferred Indian status on the applicant, the illegitimate child of a member of the Micmac of Maria Band and a non-Indian woman. The applicant had applied to be registered as an Indian pursuant to section 11(1)(c) of the Indian Act as a “male person who is a direct descendant in the male line of a male person described in paragraph (a) or (b)”, there being no issue that the applicant’s father was so qualified. The Band Registrar refused registration and both the federal court, trial division and the appellate court had dismissed mandamus applications. Justice Wilson’s decision conferred the right to be registered on the applicant notwithstanding his illegitimacy.⁵¹

From the perspective of ideas about the family, this case is interesting in terms of the issues which are raised but not really addressed by the court about the nature of family relationships, and especially the relationships among these “family” members. Because of the federal statutory provisions,⁵² the legal issue was necessarily confined to determining blood relationships; thus, it was the blood relationship of the applicant and his father which determined both his familial status as illegitimate as well as his entitlement to registration as a member of the Indian race. In the context of the statute, there was no need to inquire about whether the applicant had a relationship with his father, and even less need to determine whether one existed with his mother, nor any reason to consider whether he had maintained any contact with or respect for people of the Indian race during his lifetime. In this way, since both his family and racial status were to be determined by blood relationships alone, the issue for the court was confined to an issue of statutory interpretation, without any need to think about the concept of family in a more meaningful way.

Such an approach to defining family relationships by blood alone may seem somewhat restrictive in terms of all that has been written about the nature of family.⁵³ At the same time, Justice Wilson’s judgment in favour of the applicant clearly demonstrated a purposeful approach to defining status, as well as to statutory interpretation, and her conviction that any apparent doubtfulness about legislative intention was to be firmly resolved in favour of inclusiveness. Nonetheless, the case is limited in terms of ideas about the family; the outcome

50. [1983] 1 S.C.R. 365.

51. The judgment of Wilson, J. was supported by Ritchie, Dickson and Beetz, J.J.; three judges dissented (Estey, McIntyre and Lamer, J.J.).

52. *Indian Act*, R.S.C. 1970, c. I-6, ss. 11 and 12.

53. *Supra*, note 25.

did not alter the illegitimate family status of the applicant even as it permitted him to claim racial status as an Indian. For the applicant, such a result was undoubtedly quite satisfactory, since any perils of illegitimate family status may have seemed much less consequential to him than his need to confirm his racial identity. However, the case is significant to an assessment of Justice Wilson's ideas about family because it shows the complexity inherent in ideas about human identity, and the dynamic interaction of issues of family and race which define our differing perspectives on the world. As well, the law's continuing focus on blood relationships, and the ways in which they are entwined in identities of family and race, provide continuing challenges for all of us.⁵⁴ As in *Bezaire*, however, the process of legal analysis in *Martin v. Chapman* occurred in a family context, but the actual familial relationships were both irrelevant to the legal analysis and substantially invisible.

Similarly, analysis of legal principles obscured the complexity of ideas about the family in Justice Wilson's concurring judgment in *Brossard v. Quebec Commission des droits de la personne*.⁵⁵ The decision concerned the validity of a policy adopted by a municipality which disqualified from employment with the town any members of the immediate families of full-time employees and town councillors. The complainant had applied for summer employment as a lifeguard and was not considered, pursuant to the town's anti-nepotism policy, because her mother was employed as a typist at the police station. At issue was whether the anti-nepotism policy infringed the provisions of the Quebec Charter of Human Rights. The Commission held that the complainant had been discriminated against and the municipality then sought a ruling from the Superior Court that its policy did not constitute wrongful discrimination. The court dismissed the motion but the Court of Appeal reversed the lower court's decision.

The Supreme Court of Canada allowed the appeal and Justice Wilson wrote an opinion concurring with the result reached by Justice Beetz on behalf of the court. Because it was the municipality's policy which was at issue, both judgments focused primarily on the statutory provisions⁵⁶ under which the municipality claimed justification for its policy; Justice Beetz focused particularly on the conflict of interest

54. The issue of blood relationships as the primary means of defining family status has become controversial in the context of new reproductive technologies. See, for example, Barbara Katz Rothman, *Recreating Motherhood* (Naton & Co.: 1989).

55. [1988] 2 S.C.R. 279.

56. *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12, ss. 10, 16 and 20.

provisions, while Justice Wilson canvassed more broadly the issue of whether a municipality might justify such a policy even when a private employer could not do so, on the basis that the municipality must be seen to be accountable and “‘squeaky clean’ in the way it hires its staff.”⁵⁷ While agreeing with the basis for the court’s decision as outlined in Justice Beetz’s decision, Justice Wilson also suggested that the nature of the requirement of a “bona fide qualification” for a position might vary depending on the employer,⁵⁸ even though the absolute anti-nepotism policy adopted in this case was too extensive in relation to the goal sought to be achieved.

From the perspective of a concern about the family, what is interesting about this decision is the absence of any concern on the part of the court about the need to define who is “family”. The judgments proceeded on the basis that there would be no difficulty in applying the policy in terms of defining family members, an approach which was clearly justified on the facts of the case. At the same time, the ability of any employer to implement fairly such a policy in the context of statistics about changing family forms in Canada,⁵⁹ including high rates of divorce and remarriage, suggests a need for sensitivity to both diversity of form and ever changing familial relationships. Thus, issues about relationships among members of “blended families”, for example, require a policy which indicates whether “family” includes only blood and marital relationships, or whether it extends beyond to include others.

If, for example, the young woman in *Brossard* had been the daughter of a man, now married to the woman employed at the police station but formerly married to the girl’s mother (who was not employed by the municipality), the case would have required analysis of more difficult questions about anti-nepotism in the context of blended family status. If the girl’s parents had never been married, but had merely lived in a common law relationship, similar questions might have arisen. And, if two persons who wished to be employed by the municipality lived in a same sex unit with children, should they have been considered family for purposes of such an anti-nepotism policy or not? Moreover, since family status may change over time, the question of whether two unrelated employees who subsequently marry must result in the termination of employment of one of them requires that a policy determine whether it is the hiring practice or the fact of

57. *Brossard*, *supra*, note 55, at 340.

58. *Brossard*, *supra*, note 55, at 341-343.

59. *Supra* note 25.

employment which is at issue. More significantly, if we conclude that one of the partners must resign, how should a policy address the question of which of them should be required to do so; and if the matter is to be left to them to decide, should the law be concerned about whether it can be done fairly within family bargaining relationships?⁶⁰ All of these questions, not addressed because of the facts of *Brossard*, suggest that the case presents important underlying questions about the (invisible) image of the family in law, questions which remain to challenge us for the future.

Thus, in the context of the cases examined here, the conclusion is inescapable that the family is both present and, for the most part, legally invisible. The legal analysis is individualistic in tone and perspective, with the family serving as only a backdrop to the determination of legal rights and responsibilities. Such an approach is one which is generally accepted within the liberal tradition of individualism in western law. Yet, as Glendon has suggested,

... the tale currently being told about marriage and family life is probably more starkly individualistic than the ideas and practices that prevail [among citizens in western democracies]. It is true that individuals have been emancipated in fact, law, and imagination from group and family ties to a historically unprecedented degree, but it is also the case that most men and women still spend most of their lives in emotionally and economically interdependent family units.⁶¹

Thus, the paradox remains that the family is a presence, albeit an invisible one, an image which emerges in the legal analysis from time to time, almost imperceptibly. And while it is impossible to argue that the concept of family is central to the determination of rights in these kinds of cases in the twentieth century, it is equally important to recognize the image of family which is in the background, a central factor in the way in which claims are made by family members, and that family relationships are as enduring as they must sometimes be endured.

For those who are interested in justice claims, therefore, there is a need to take account of these cases, as well as family law cases, and to question the kinds of family images which exist in law as well as the

60. The issue of how the family is defined by law is best illustrated by the current debate about whether same-sex units are considered "families". See Didi Herman "Are we Family? Lesbian Rights and Women's Liberation" (1990), 28 Osgoode Hall L.J. 789 and Bruce Ryder, "Equality Rights and Sexual Orientation: Confronting Heterosexual Family Privilege" (1990), 9 Can. J. of Family Law 39.

61. Glendon, *supra*, note 22, at 312.

assumptions about familial roles which law takes for granted. In the context of Justice Wilson's approach to the family, I think that there is some evidence of her recognition of the paradox identified by Glendon between the law's focus on individuals and the ways in which people actually live their lives in families, even as there is less certainty on her part about how to respond to it within the parameters of legal analysis. Because a full analysis of the implications of this paradox depends on a consideration of the cases in which legal principles focus more explicitly on the family, I want to turn now to a review of some of them, looking first at the cases which raise issues about parenting (Part III) and then at those concerning spousal relationships (Part IV).

III. Justice and Children: Perspectives on Parenting

Susan Moller Okin's claim that the family is the primary site for moral development offers a useful context for assessing some of Justice Wilson's decisions about parenting.⁶² According to Okin, children will grow into adults with a sense of justice and a commitment to just institutions *only* if children "spend their earliest and most formative years in an environment in which they are loved and nurtured, *and* in which principles of justice are abided by and respected."⁶³ In consid-

62. Okin, *supra*, note 1, at 22. Okin's claim is somewhat similar to Rawls' liberal theory of justice. According to Rawls, the family is fundamental to a just society because children learn from their parents both a sense of identity and an ability to see things from the perspective of others. However, Okin is critical of Rawls' theory because it assumes that family institutions are just; by contrast, she suggests that:

"If gendered family institutions are *not* just, but are, rather, a relic of caste or feudal societies in which responsibilities, roles, and resources are distributed, not in accordance with the principles of justice he [Rawls] arrives at or with any other commonly respected values, but in accordance with innate differences that are imbued with enormous social significance, then Rawls' theory of moral development would seem to be built on uncertain ground."

Ibid. Yet, in spite of Okin's disagreement with Rawls as to the justice of families, it is clear that they are in agreement about the family's central importance for a child's moral development and understanding about justice.

63. *Ibid.* Okin's major concern is the gendered (and therefore) unjust arrangements in families. As she goes on to say:

"What is a child of either sex to learn about fairness in the average household with two full-time working parents, where the mother does, at the very least, twice as much family work as the father? What is a child to learn about the value of nurturing and domestic work in a home with a traditional division of labor in which the father either subtly or not so subtly uses the fact that he is the wage earner to 'pull rank' on or to abuse his wife? What is a child to learn about responsibility for others in a family in which, after many years of arranging her life around the needs of her husband and children, a woman is faced with having to provide for herself and her children but is totally ill-equipped for the task by the life she agreed to lead, has led, and [is] expected to go on leading?"

ering this claim, I think that Justice Wilson's decisions about parenting, both in the Ontario Court of Appeal and in the Supreme Court of Canada, reflect her high aspirations about such relationships in spite of the fact that she was sometimes required to come to terms with the harshness of family life and its injustice. In this context, Justice Wilson's work reflects agreement with Okin that the family *should* be a site of moral development at the same time as she has been forced to recognize its current flaws.

Child Custody Disputes

In two early decisions in the Court of Appeal, for example, Justice Wilson demonstrated her sense of idealism in relation to parental custody disputes. In *Ishaky v. Ishaky*⁶⁴ she dismissed an appeal from an order awarding interim custody of two children to a wife, rejecting the argument presented by the husband's lawyer that the trial judge's decision was made for the sole purpose of punishing the husband for confining his wife and children in Israel against their will. Commenting on this argument, Justice Wilson enunciated a standard of conduct for husbands and fathers as follows:

However well-intentioned Mr. Ishaky may be, and I accept the bona fides of his conviction that it would be better for his children to be brought up in Israel, it seems to have impaired his judgment and blinded him to the terrible price he is paying for his obdurate attitude, namely, the disruption of the family whose well-being he seeks to advance. It is truly the stuff of tragedy.⁶⁵

In the same year, Justice Wilson also granted an application by a wife for a stay of an order granting interim custody of her son to her husband pending her appeal of the order.⁶⁶ In a short judgment, Justice Wilson took into account additional evidence available to her

Ibid., at 22-23. This quotation also makes clear Okin's assumption that "families" are heterosexual unions; her analysis does not, therefore, confront ideas about justice in same-sex unions with children. For some analysis of these issues, see Herman, *supra* note 60

64. (1978), 7 R.F.L. (2d) 138. (Ont. S.C. C.A.)

65. *Ishaky*, *supra* note 64, at 144. The idealism about family relationships was even more obvious in her earlier, very poignant comment in the case:

"... the husband has engaged in conduct which has not only exacerbated the gulf between himself and his wife but has shed a somewhat unkindly light upon his disposition and called in question his ability to form a considered judgment as to what is best for his family. He seems to have forgotten the human insight reflected in the aphorism: If you love something, set it free; if it comes back, it is yours; if it does not, it never was."

Ibid., at 139..

66. *Petersik v. Petersik* (1979), 1 F.L.R.A.C. 228.

which had not been submitted to the trial judge, thereby justifying her decision to stay the order. As well, however, there were suggestions in this case of her sense of appropriate standards of conduct for parents. In particular, she noted that the husband had deserted his wife and two children to travel abroad, leaving debts which were paid by his wife through a sale of the matrimonial home; the wife then maintained a home for the children on welfare for almost two years until the husband returned to Canada, established a common law relationship with another partner, and began to have access once again to his children. Justice Wilson cited these facts, along with the absence of information about the husband's new partner (including "how stable that home is or what kind of mother-figure the common-law partner will be to this boy"⁶⁷) and the child's wishes to be with his mother, as justification for staying the interim custody order.

In both these cases, the fathers' behaviour was found wanting; in *Ishaky*, the father seemed unable to appreciate perspectives other than his own and in *Petersik*, the father placed his own well-being ahead of that of his family, both of which are attitudes unacceptable to Okin as well as to Justice Wilson. By contrast, the mothers in both cases were either apparently blameless (*Ishaky*) or praiseworthy (*Petersik*), and the children's wishes, which had been disregarded by their fathers, were taken into account by Justice Wilson.

Yet, at the same time as it is evident that the relative morality of parental actions was being taken into account, at least to some extent, it is equally clear that these decisions rested primarily on a determination of the rights of individual family members rather than an assessment of the needs of a family's well-being as a whole. In light of the fact that these custody disputes occurred after the family units had disintegrated, it is not surprising that Justice Wilson focused on individual family members and their well-being, especially that of the children, rather than on the family as a unit. This conclusion raises questions, moreover, about the appropriateness of ideas of justice within families when the family unit has itself dissolved; in such a context, a focus on the well-being of individual family members may be all that is possible. Such a view confirms the rationale for the law's increasingly exclusive focus on individual family members, especially in the context of dissolved family units. Yet, even in this context, the idea of the family, and the need for justice in family relationships, has not been entirely abandoned. For my part, the Ontario Court of

67. *Petersik*, *supra*, note 66, at 231.

Appeal's decision in *Kruger v. Kruger*⁶⁸ offers an interesting example of Justice Wilson's idea of the possibility of family relationships enduring beyond the legal dissolution of the family unit.

Kruger raised fundamental issues about moral standards to be applied to parental actions in relation to their children, and demonstrated divergent views about appropriate judicial approaches to determining custody disputes. The case involved divorcing parents who did not dispute the fitness of each other to parent their two children, a boy and a girl. However, the trial judge concluded that it was necessary to make an order in favour of one or the other and awarded custody to the mother. The father appealed on the basis that there should be an award of joint custody, raising before the Court of Appeal the issue of whether the court should order joint custody in the absence of a consensual agreement between the parents. According to the majority judgment of Justice Thorson, it was not appropriate for the Court of Appeal to do so because such a decision required unwarranted speculation on the part of the court about the ability of the parents to cooperate in such an arrangement, no evidence about this possibility having been led at trial. Justice Wilson dissented, suggesting that the court had a primary obligation to assess what was in the best interests of a child in such cases and that the trial judge's assessment of the parents and their parenting abilities indicated that an award of joint custody would be appropriate.

It is the contrast in language and approach between the two judgments, rather than the outcomes, which so clearly demonstrates Justice Wilson's commitment to idealism in standards for parental action. Acknowledging her awareness "that there is a healthy cynicism in some judicial circles as to the practicality of joint custody orders,"⁶⁹ she relied carefully on the transcript of testimony by Dr. Malcolmson, the psychiatrist appointed by the trial judge to conduct an assessment of the parents and their children; Dr. Malcolmson had expressed confidence in the positive attitudes of the parents toward each other and that they were unusual in their ability to respect one another and value each other as a parent to the children. Commenting on the fact that "men and women who fall short as spouses may nevertheless excel as parents,"⁷⁰ she concluded that recent developments in the courts:

68. (1979), 25 O.R. (2d) 673.

69. *Kruger*, *supra*, note 68, at 692-693.

70. *Kruger*, *supra*, note 68, at 694.

... reflect a new awareness that in the mind of a child authority and love are interrelated and that the transformation of a mother or father into a 'visitor' is a traumatic experience for a child frequently attended by feelings of rejection and guilt. And in many cases it is wholly unnecessary. Most mature adults, after the initial trauma has worn off, are able to overcome the hostility attendant on the dissolution of their marriages or at the very least are capable of subserving it to the interests of their children. This is particularly so now that the social stigma attending divorce has all but disappeared and men and women are picking themselves up and putting their lives together again. Indeed, the so-called 'friendly divorce' is one of the phenomena of our time. It is in this social milieu that more imaginative and ... more humane custody orders find their place.⁷¹

These are aspirational words about divorcing parents and their continuing relationships with each other and their children, words which suggest that family relationships may remain positive after the dissolution of the family unit. By contrast, Justice Thorson suggested that "it is not cynicism but observed human behaviour"⁷² which made courts generally less confident than Justice Wilson about the parties' ability to cooperate with one another in the best interests of children. Noting that the transcript evidenced "considerable antagonism between the Krugers as former spouses"⁷³ in spite of their regard for one another as parents, and the absence of evidence about their willingness to cooperate in a joint custody arrangement, he concluded:

... I do not see any basis on which we, at this stage in the present proceedings, could be justified in decreeing [joint custody], in the hope, without more, that the parties may thereby be persuaded to make it work. If we were to act on such a hope, the result, in my view, would be a triumph of optimism over prudence.⁷⁴

These differing approaches of "optimism" and "prudence" may be explained by different experiences of divorce and custody disputes, differences which led Justice Wilson to accept more readily than Justice Thorson the idea of the "friendly divorce". More significantly, it is arguable that these differing approaches reflected different views about the role of law in cases of this kind; on this basis, it could be suggested that Justice Wilson had adopted a symbolic role for law, one which established standards of moral conduct to which parents

71. *Kruger, supra*, note 68, at 698.

72. *Kruger, supra*, note 68, at 676.

73. *Kruger, supra*, note 68, at 680.

74. *Kruger, supra*, note 68, at 681.

should aspire, even if they are not always able to meet them. Her description of the parental relationship presented an aspirational standard for conduct concerning their children, a standard arguably appropriate to familial relationships concerned with the moral development of children. By contrast, Justice Thorson rejected such an aspirational role for law because of its attendant risks; he noted that joint custody would be unlikely to work if it were imposed on parents by court order and that "the price to be paid if it does not work is likely to be altogether too high to warrant taking the risk [which might result from such an attempt]."⁷⁵

In the years since *Kruger*, both legal decisions and more recent social science literature⁷⁶ have tended to reinforce the views expressed by Justice Thorson rather than those of Justice Wilson, although there have been some recent decisions in Ontario which have adopted the approach of Justice Wilson's judgment without expressing the same idealism.⁷⁷ The issue remains one fraught with differences of opinion, both as to whether divorcing spouses can participate effectively in court-ordered joint custody arrangements as a matter of fact; and as to the role of judicial decision-making and whether it should reflect the actual standards of parental behaviour or, on the other hand, establish standards to which parents should aspire. Justice Wilson's preference for the latter approach evidenced in *Kruger* established a standard which remains to challenge lawyers and judges, in addition to parents. As well, subsequent decisions in the Supreme Court of Canada have provided opportunities for her to further develop this expressed commitment to an aspirational role for law, especially in relationships between parents and their children. Such a role arguably provides a basis for promoting the continuation of family relationships, and justice within such relationships, after divorce ends the family unit.

A good example of her continued commitment to such an approach occurred in *Frame v. Smith* in 1987,⁷⁸ an application by a father for damages in relation to wrongful interference, on the part of his former wife and her new husband, with his relationship with his children.

75. *Kruger*, *supra*, note 68, at 681.

76. See Sheila Holmes, "Imposed Joint Legal Custody: Children's Interests or Parental Rights?" (1987), 45 U. of Toronto Faculty of L.R. 300; J. Folberg, ed., *Joint Custody and Shared Parenting* (Bureau of Nat. Affairs, Washington: 1984); and J.S. Wallerstein and S.B. Corbin, "Father-Child Relationships after Divorce: Child Support and Educational Opportunities" (1986), 20 Fam. L.Q. 109.

77. See *Lewis v. Lewis* (1989), 18 R.F.L. (3d) 97; and *Alfoldi v. Bard* (1989), 20 R.F.L. (3d) 290.

78. [1987] 2 S.C.R. 106.

After the parents' separation in 1970, the wife was awarded custody of their three children, with generous access to the husband. According to the majority judgment, the husband claimed that his wife and her husband had done everything possible to frustrate his efforts to maintain a relationship with the children, including moves to Toronto, Denver and Ottawa, changes to the children's surnames and religion, instructions to the children not to telephone their father and interception of letters between father and children. The father claimed damages against the respondents for their failure to permit him to exercise his right of access, for their wilful denial or refusal to permit such access, and for their conspiracy to prevent the exercise of his legal rights and the loss of opportunity to develop a meaningful human relationship with his children, providing them with his parental love, care and guidance. The respondents' motion to strike out the statement of claim because it disclosed no cause of action was granted by the trial judge, and her decision was upheld by the Ontario Court of Appeal.

In the Supreme Court of Canada, only Justice Wilson dissented from the majority judgment dismissing the appeal. For the majority, Justice La Forest pointed out the court's concern about recognizing a tort action of this kind:

There are formidable arguments against the creation of such a remedy. I have already mentioned the undesirability of provoking suits within the family circle. The spectacle of parents not only suing their former spouses but also [other family members] for interfering with rights of access is one that invites one to pause. The disruption of the familial and social environment so important to a child's welfare may well have been considered reason enough for the law's inaction...⁷⁹

However, the majority judgment held that the determining factor was not the problem of legal intervention in the private sphere of the family, but rather that the common law remedy had been superseded by legislative action defining rights and responsibilities about custody and access. According to Justice La Forest, the Children's Law Reform Act of Ontario "[dealt] with the matter in a comprehensive manner;"⁸⁰ even more clearly, according to the majority judgement, there was no justification for finding a fiduciary obligation on the part of the custodial spouse to ensure access to the children on the part of their father.

79. *Frame, supra*, note 78, at 110.

80. *Frame, supra*, note 78, at 111.

Justice Wilson's dissenting judgment differed in its approach and in the characterization of the legal issues. In the first place, her statement of the facts was more detailed, suggesting both a greater degree of intentional action on the part of the respondents in trying to sever the connection between the father and his children, and the serious nature of the harm, including illness, suffered by the father as a result.⁸¹ Second, in identifying the legal principles, Justice Wilson suggested that the court was required to take into account not only the claims between the parents but also the primary obligation to consider the best interests of the children. Significantly, in exploring the latter concern, she recognized that children's best interests might not be served by protracted litigation on the part of their parents; however, she also noted that they might equally be harmed if "custodial parents defy with impunity court orders designed to preserve their relationship with their non-custodial parents."⁸²

Justice Wilson also held that any right of access is a right of a child and not a parent, and that therefore the appellant had no civil cause of action based on the court order(s); nor would the appellant have had such a right under the 1982 statutory amendment.⁸³

Significantly, however, only Justice Wilson recognized the appellant's claim of a fiduciary relationship on the part of the custodial spouse. Having identified three basic elements for the application of the fiduciary principle,⁸⁴ she concluded that the relationship between a custodial and non-custodial parent qualified as a fiduciary one. Be-

81. These details were apparently drawn from the affidavit of the appellant, since the appeal was a technical one concerning only the motion to strike for want of a cause of action. In this context, while it may have been prudent to recognize that there had been no opportunity for the wife to explain the reasons for her actions, reasons which might have tempered condemnation of her behaviour (even though her actions were inconsistent with both the original and subsequent custody orders), Justice Wilson was prepared to assume that the facts could be proved and assess the claim on its merits, accordingly.

82. *Frame, supra*, note 78, at 121. Thus, she considered and rejected the appellant's claims based on the torts of conspiracy and intentional infliction of harm, particularly because to do so would not be in the best interests of children. In relation to this concern, she also expressed her understanding of the litigious nature of parties involved in marital breakdown:

"[Such a tort action] appears to be an ideal weapon for spouses who are undergoing a great deal of emotional trauma which they believe is maliciously caused by the other spouse. It is not for this Court to fashion an ideal weapon for *wives whose initial, although hopefully short-lived objective*, is to injure one another, especially when this will almost inevitably have a detrimental effect on the children."

Ibid., at 129 (emphasis added).

83. *Children's Law Reform Amendment Act*, 1982, S.O. 1982, c. 20.

84. Drawing on academic literature concerning fiduciary relationships, Justice Wilson concluded: "Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

cause the relationship between the parent and child pre-dated an access order, and continued after the order, the parent-child relationship was not created by the order; according to this analysis, it was the court order splitting custody and access which put "the custodial parent in a position of power and authority which enabled him or her, if so motivated, to affect the non-custodial parent's relationship with his or her child in an injurious way."⁸⁵ Thus, the basis of the fiduciary relationship was the parent-child relationship, a relationship established prior to court orders for custody and access. On this basis, Justice Wilson concluded that judicial recognition of a cause of action for breach of a fiduciary obligation, an equitable remedy which permitted the court to take account of the conduct of both parents, was appropriate, "but only where a sustained course of conduct has caused severe damage to the non-custodial parent-child relationship to the detriment of both the non-custodial parent and the child."⁸⁶

Arguably, this test is a stringent one, dependent on the damage to the parental-child relationship "to the detriment of both the non-custodial parent and the child". In *Frame*, Justice Wilson seemed to consider that it might be applicable even though only the non-custodial parent had complained; indeed, Justice Wilson indicated that by the time of the appeal, the father was no longer seeking access to the

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- (1) The fiduciary has scope for the exercise of some discretion or power.
 - (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
 - (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power".

Ibid., at 136.

85. *Frame*, *supra*, note 78, at 139. Justice Wilson also examined the merits of relief based on breach of a fiduciary obligation, particularly by contrast with tort actions, and concluded that its equitable nature ensured that a court could take account of the primary obligation to consider the best interests of children in deciding whether relief should be granted in a particular case. *Id.*, at 143-145. See also Bertha Wilson, "Children: The Casualties of a Failed Marriage" (1985), 19 U.B.C. Law Rev. 245.

86. *Frame*, *supra*, note 78, at 145. Justice Wilson also addressed the problem of whether such a cause of action could be justified, having regard to the decision of the Supreme Court of Canada in *Seneca College v. Bhadawria*, [1981] 2 S.C.R. 181. In this case, Chief Justice Laskin had allowed an appeal from Justice Wilson's decision in the Ontario Court of Appeal, a decision in which she had recognized the existence of a tort of discrimination. In *Frame*, Justice Wilson stated that the Chief Justice's comments in *Bhadawria* were restricted to common law relief and thus did not prevent the equitable relief proposed in *Frame*; and secondly, that the relief in *Frame* was not founded on breach of a statute but was directed to the protection of the child's relationship with a parent, a relationship which was not created by a court order or statute. According to Justice Wilson, therefore, "the remedy is accordingly given not for individual violations of the court order or the statute but for an entire course of conduct designed to undermine or destroy the underlying relationship which access was intended to preserve and foster." *Id.*, at 147.

children, his relationship with them having been completely destroyed. In light of her earlier comments about the need to consider, as a paramount concern, the best interests of children in custody cases, her conclusion that the facts, if proved, disclosed a cause of action seemed to place more emphasis on the detriment suffered by the father in *Frame*, there being no evidence about detriment to the children. If this analysis suggests that detriment to children can be assumed, there is serious potential for abuse of the remedy. On the other hand, if Justice Wilson meant for the test to be applied to the facts,⁸⁷ including facts about the detriment suffered by the children, its consistency with the court's commitment to the best interests of children is more assured.

In spite of these concerns, however, Justice Wilson's decision in *Frame* represents a singular contribution to the search for new legal metaphors for relationships. In her imaginative use of traditional legal principles,⁸⁸ she has identified a standard of behaviour to which we would all aspire as parents, even though we must often and inevitably fail to meet it. And while we can and should debate whether the standard is appropriate, and whether the law's role should include the creation of moral standards for families, it is undeniable that Justice Wilson's dissenting decision in *Frame* is consistent with her views about the aspirational role of law and its appropriate application to

87. In *Frame*, of course, the remedy was fashioned by Justice Wilson in the context of assumed facts and without evidence as to the wife's reasons for her actions; on this basis, it may prove less persuasive as a precedent because it is unconnected to a context. On the surface, Justice Wilson's willingness to take bold action in the absence of a factual context may also appear somewhat inconsistent with her approach in *Bezaire*, a case in which she seemed determined to ensure a full hearing of all the facts. Yet, there is a crucial difference in the contexts of these cases; in *Bezaire*, the Court of Appeal was presented with an appeal on the facts, while in *Frame*, the court was asked to determine whether there was a remedy, on the assumption that the stated facts could be established by proof. In the latter context, it was Justice Wilson who seemed most able to focus on the precise question before the court, undistracted by the ability or otherwise on the part of the appellant to establish the factual basis for his claim. Thus, while *Bezaire* demonstrates Justice Wilson's commitment to fact-finding when it is relevant to her decision-making, *Frame* illustrates her ability to focus precisely on the narrow task of defining applicable legal principles in the context of facts which are assumed to be as stated.

88. It should also be noted that Justice Wilson's conclusion that a custodial parent has a fiduciary obligation in relation to the non-custodial parent and the children is remarkable for its destruction of the public/private division in law. None of the literature cited in her judgment applied the fiduciary concept to family relationships; this analysis was her work alone. See *Frame*, *supra* note 78, at 105-106. What is also evident is that the use of the fiduciary principle transforms an argument about parental "rights" to custody of children to one of parental "responsibility" for maintaining relationships between parents and children. Such a concept reflects the work of Carol Gilligan, *In a Different Voice* (Harvard Univ. Press: 1983), an influence acknowledged by Justice Wilson in "Will Women Judges Really Make a Difference?" (Osgoode Hall Law School, February 1990). For a recent application of this fiduciary principle in the family law context, see *Gregoric v. Gregoric* (1990), 28 R.F.L. (3d) 419.

parental behaviour in the interests of children. Moreover, her analysis in *Frame* confirms her sense of the continuity of familial relationships despite the legal dissolution of family units, an approach which illustrates her commitment to seeking new ways for law to support relationships between individuals within families. In doing so, her attention is firmly focused, not on an abstract entity called "the family", but rather on the need for law to promote continuing relationships among members of the family unit. The boldness of her decision in *Frame* is her imaginative search for legal principles which recognize family relationships and their continuing importance after the "family" has ended.

The "Best Interests" Test and Child Welfare

This conclusion about Justice Wilson's decision in *Frame* also offers a way of understanding her decision on behalf of the Supreme Court of Canada in *Racine v. Woods*,⁸⁹ an earlier decision which still challenges our ideas about the family almost a decade later. *Racine v. Woods* was, and still is, a hard case. At the centre of the dispute was a young Indian girl, apprehended at the age of six weeks by the Children's Aid Society of Central Manitoba and placed in a foster home. In due course, with her mother's consent, a court ordered that she be made a ward of the court for one year, a period subsequently extended by an additional six months. From the date of the initial court order, the child was placed in a foster home of a married couple who subsequently separated, the wife cohabiting with and then marrying her subsequent partner. At the expiry of the period of wardship, the foster parents (the woman and her second husband) arranged to return the little girl to her mother. Because of their attachment to the child, the foster parents also accepted the mother's offer to visit the child and did so on two occasions shortly after the child returned to live with her mother. On the occasion of the second visit, with the mother's "consent", the foster parents took the child home with them.

Justice Wilson's decision set out the parties' differing views of this arrangement: the child's mother believed that the foster parents were to have the child "just for a while";⁹⁰ by contrast, the foster parents believed that the child's mother had surrendered the girl to them, because of information confided to them by the mother that she was having difficulties with her husband (who was not the child's father)

89. [1983] 2 S.C.R. 173.

90. *Racine, supra*, note 89, at 176.

and that she was in a "state of emotional instability".⁹¹ About four months later, the foster parents acted upon their belief by filing a statutory notice which initiated the process of private adoption. In the same month, the child's mother arrived at the foster home, announcing that she was on her way to Regina and wanted her sister to have the child, but the foster parents refused to give up the child.⁹² The foster parents heard nothing further from the child's mother for just over three years; a month prior to completing their application for an adoption order, the child's mother launched an application for habeas corpus.

After a lengthy trial concerning the foster parents' application for adoption and the mother's application for custody, the trial judge granted the order for adoption. The mother's appeal to the Manitoba Court of Appeal was partially successful, however; the adoption order was overturned and the child was made a ward of the court with custody granted to the foster parents, but leaving open the possibility that the child's mother could apply for custody or access at a later time. The child's mother subsequently applied for access, but the trial judge adjourned the hearing on the matter, pending the appeal to the Supreme Court of Canada. In her decision for the court, Justice Wilson allowed the foster parents' appeal and confirmed the trial judge's order for the adoption of the child.

Justice Wilson's sympathy for the mother's difficult situation was apparent in her description of the reasons for her actions with respect to her child. As Justice Wilson noted, the mother was trying to deal with her alcohol problem and difficulties with her husband during the period when the child was with the foster parents, and she was also "engaging in a program of self-improvement."⁹³ Her sympathy for the mother was also apparent in her careful analysis of the circumstances under which the child's mother initially handed over the child to the foster parents. Although the trial judge had concluded that the mother had abandoned the child and Justice Wilson agreed that there was

91. *Ibid.*

92. There were differing views of this event as well. The Manitoba Court of Appeal concluded that the Racines had wrongfully refused to return the child to her mother. By contrast, Justice Wilson explained the conduct of the Racines as motivated by "concern for the child". In addition, she stated that ... "I think it is quite inappropriate to characterize the conduct of the Racines as some kind of illegal assertion of title". *Racine*, *supra* note 89, at 183.

93. *Racine*, *supra* note 89, at 176. The language used here is interesting in light of the suggestion made earlier that the aspiration for "self-improvement", arguably evidenced in Justice Wilson's work as a whole, is connected to the idealism of the Scottish Enlightenment.

evidence to support such a finding, she suggested that she might not herself have reached such a conclusion:

I believe that the significance of a person's conduct must be assessed in the context of that person's circumstances. Acts performed by one may constitute abandonment when the same acts performed by another may not. I think I would have been disposed to take a more charitable view of [the mother's] failure to contact her child given her circumstances than that taken by the learned trial judge.⁹⁴

This comment is a significant one. In suggesting a need to judge the actions of others within a context, Justice Wilson seems to have accepted that the actions of a native Indian woman should be judged on her own terms. Yet, at the same time, there was no explicit acknowledgement in Justice Wilson's words that the mother, whose acts were under scrutiny, was a native woman. In this way, the words remain tantalizingly ambiguous: they may suggest Justice Wilson's belief that the mother's perspective as a native woman should be taken into account in judging her behaviour, or they may merely suggest that her situation as a mother experiencing difficult problems should be given due regard. If the mother's perspective as a native woman were taken into account, her plan to have her sister look after the child would have to be understood as typical of arrangements in communities where the concept of family includes a kinship network,⁹⁵ and the passage of time out of her own mother's care might be seen to be less dramatic. On the other hand, if Justice Wilson's words merely expressed the need to consider a mother's problems, they were words of sincere sympathy but they did not recognize a diversity of cultural perspective.

On balance, I think it is the latter interpretation which prevails in Justice Wilson's judgement. Although the mother's efforts were consistently portrayed positively and commendably in her judgment, they were also juxtaposed to the child's experiences in the foster family in language which suggested an implicit preference for the nuclear family rather than a native extended family:

94. *Racine*, *supra* note 89, at 184. See also Bertha Wilson, "State Intervention in the Family" in *Justice Beyond Orwell* (Editions Y. Blais: 1986) at 353.

95. See Emily Carasco, "Canadian Native Children: Have Child Welfare Laws Broken the Circle?" (1986), 5 *Can. J. of Family Law* 111; John A. MacDonald, "Child Welfare and the Native Indian Peoples of Canada" (1985), 5 *Windsor Yearbook of Access to Justice* 284; and Judge Murray Sinclair, Donna Phillips and Nicholas Bala, "Aboriginal Child Welfare in Canada" in Bala, Homick and Vogl, eds., *Canadian Child Welfare Law* (Thompson Educational Publishing: 1991) at 171.

... none of this [the mother's rehabilitative effort] was easy, and periods of achievement ... would be followed by periods of backsliding. It took her five years and the support of friends, relatives and her extended family on the Reserve to accomplish her objective. By the time she did, [the child] was five or six years old and an established part of the [foster] family. *They had brought her up as if she were their own.*⁹⁶

This conclusion, that Justice Wilson's sympathy did not encompass a recognition of differing native perspectives on child-rearing, is reinforced by her conclusion that the child's best interests would be served by reinstating the adoption order. In weighing the factors to be considered in determining the best interests, Justice Wilson suggested that "the significance of cultural background and heritage as opposed to bonding abates over time" and that "the closer the bond that develops with the prospective adoptive parents the less important the racial element becomes."⁹⁷ It seems likely that the foster father's status as a Metis and the foster parents' efforts to "encourage [the child] to be proud of her Indian culture and heritage"⁹⁸ also reduced any concern which Justice Wilson may have had about an interracial adoption.

In light of the child's age and the fact that she had spent most of her life in the home of her foster parents (and particularly with her foster mother), Justice Wilson's decision that the child had bonded with her psychological parents was not unreasonable. Yet, the reasonableness of the decision does not negate the tragedy of its result. At one level, the court's inability to "see" the facts from the perspective of the native mother underlines the limits of judicial analysis. However, more trenchant criticism of the decision can be made from a broader analysis of adoption and child welfare policies in Canada, particularly as they relate to native people.⁹⁹ Because governmental policies in most provinces have routinely failed to provide enough support for

96. *Racine, supra*, note 89, at 176. (Emphasis added)

97. *Racine, supra*, note 89, 187-188.

98. *Racine, supra*, note 89, at 177. In doing so, Justice Wilson seems to have assumed that it is possible to acquire a sense of racial heritage from persons who are sympathetic, albeit foreigners to the heritage. Since the adoptive mother was white and her husband was Metis, neither was Indian. Justice Wilson's failure to criticize the language used by the expert witness, Dr. McCrae, on the issue of racial heritage confirms her perspective as one of "racial integration" rather than "racial autonomy". For a different view of the facts, see Patricia Monture, "A Vicious Circle: Child Welfare and the First Nations" (1989), 3 *Can. J. of Women and the Law* 1; and Ann McGillivray, "Transracial Adoption and the Status Indian Child" (1985), 5 *Can. J. of Family Law* 437.

99. See Anna Pellatt, "An International Review of Child Welfare Policy and Practice in Relation to Aboriginal People" (*Can. Res. Inst. for Law and the Family*: 1991).

existing family units, children who cannot be cared for by their parents have been frequently removed from their families and sometimes placed for adoption. These general policies have had a disproportionate impact on native families (and other minority groups), so that large numbers of native children have been adopted by non-native families; whether intentional or not, such policies have been destructive of both native families and communities, and many individuals have grown up without knowledge about their racial identity and native heritage.¹⁰⁰ Against this tragic background, Justice Wilson's concluding comments in *Racine* strike discordantly:

Much was made in this case of the interracial aspect of the adoption. I believe that interracial adoption, like interracial marriage, is now an accepted phenomenon in our pluralist society. The implications of it may have been overly dramatized by the respondent in this case. The real issue is the cutting of the child's legal tie with her natural mother. This is always a serious step and clearly one which ought not to be taken lightly. However, adoption ... gives the child secure status as the child of two loving parents. While the Court can feel great compassion for the respondent, and respect for her determined efforts to overcome her adversities, it has an obligation to ensure that any order it makes will promote the best interests of her child. This and this alone is our task.¹⁰¹

It is difficult to accept uncritically these laudatory words about interracial adoption in Canada in a context in which provincial adoption policies have been so destructive of native families. Indeed, even in the context of Justice Wilson's aspirational view of law, such language seems to ignore or misunderstand the facts about the impact

100. See Patrick Johnston, *Native Children and the Child Welfare System* (1983). Such an analysis has also occurred in Australia; see Sebastian Poulter, "Review Essay: Cultural Pluralism in Australia (1988), 2 Int. J. of Law and the Family 129, where the analysis of Australian child welfare practices, and the reasons for them, sound hauntingly familiar:

"... it was estimated that between 1883 and 1969 one in six Aboriginal children in New South Wales were taken from their parents by the state authorities and placed in care or put out to white foster-parents. Partly this seems to have resulted from a misunderstanding of the nature of Aboriginal child care practices, such as letting a child grow up with relatives within its extended family rather than with its own parents and being more concerned to afford children emotional warmth than give them a high material standard of living. Although the criteria for state intervention were based upon the fundamental principle that the welfare of the individual child is the first and paramount consideration, the values and assumptions of white Australian social workers, judges and magistrates seem to have been widely at variance from those of the Aborigines themselves".

Ibid., at 132. See also *Multiculturalism and Family Law* (Australian Law Reform Commission: 1991), especially chapter 4.

101. *Racine*, *supra* note 89, at 188.

of child welfare practices on native people in Canada. Moreover, in light of recent legislative reforms, many of which explicitly require decision-makers to take account of native heritage in adoption proceedings,¹⁰² the views expressed appear somewhat dated.

In this context, I want to consider two aspects of Justice Wilson's views about the family in *Racine*. In the first place, her abiding commitment to give priority to the needs of children is clear throughout her decision. While we may disagree with her conclusion as to what was in the child's best interest in this case, it is irrefutable that she focused on the individual whose needs she regarded as paramount in the court's determination. In this respect, her decision in *Racine* is consistent with her view of the legal standards of parental conduct demonstrated in her earlier decisions concerning custody of children. At the same time, her approach in *Racine* arguably reflects the legal ideology of individualism, an approach which allowed Justice Wilson to segregate the interests of the child, and to separate the child's individual well-being from that of her native mother; such an approach is less acceptable according to some native perspectives on child welfare, perspectives which place more emphasis on parent-child relationships as a unity.¹⁰³ In this respect, it is important to understand *Racine* as one of Justice Wilson's earliest decisions in the Supreme Court of Canada, particularly by contrast with the views she later expressed (in a different context) about parent-child relationships in her dissenting opinion in *Frame*.

At the same time, her comments about the merits of interracial adoption and marriage in a pluralist society in *Racine* expressed a sense of idealism about human relationships in a diverse society, a sense of idealism which suggests that racism will end when race is no longer relevant in any context.¹⁰⁴ By contrast with these views, others have more recently suggested that we need to define ways of accepting and recognizing our human diversity - diversity of race, sex, ability and sexual preference, for example - without attaching necessary and frequently negative legal consequences to such differences.¹⁰⁵ In such a context, *Racine* must also be understood as an early decision

102. See, for example, *Child and Family Services Act*, S.O. 1984, c. 19, especially sections 130 (3) and 134(3).

103. *Supra*, notes 95, 98 and 99.

104. Richard Wasserstrom, "Racism, Sexism and Preferential Treatment: An Approach to the Topics" (1977), *UCLA Law Rev.* 581.

105. See, as examples, Martha Minow, "Pluralisms" (1988-89), 21 *Conn. L.R.* 965; Elizabeth Spelman, *Inessential Woman* (Beacon Press: 1988); and Iris Young, *Justice and the Politics of Difference* (Princeton Univ. Press: 1990).

in the evolution of Justice Wilson's ideas about family and diversity.¹⁰⁶

Regardless of whether this suggestion has merit, however, *Racine* has to be understood in the context of the limits of judicial decision-making, especially appellate decision-making, in child welfare cases. In one sense, the case was less about who could best provide for the child at the time of the appeal than it was about how the policy and practices of child welfare agencies contributed to the creation of such a difficult, even tragic, legal problem in the first place. While there were no palpable errors identified on the part of the agencies involved in the apprehension, the wardship proceeding, the foster placement, or other contacts, it seems apparent as well that there was also no significant effort to enable the child's mother to keep the child in her community or to assist her to stay in contact with her child. Thus, it was the absence of support for the mother, coupled with the length of time required by the legal proceedings, which resulted in the foster parents' ability to bond with the child. Even for those who may be uncritical of governmental policies in *Racine* itself, the existence of such practices on a wide scale must be matters of serious concern.

However, the point is that such concerns can be addressed only obliquely by an appellate decision. While we may point to the underlying problem in the policies of such agencies, or in the low level of resources made available to provide support to families in Canada, or in the delays which seem so inevitable in such legal proceedings, these arguments were not available to Justice Wilson in *Racine*. For her, the issue was defined narrowly and tragically. Yet, her solution cannot ever be uncritically accepted, not so much because it is "wrong" in law, but because of the inherent limits of appellate decision-making in the context of governmental policies about child welfare and their devastating impact on native families. In this context, where "public" policies affect some "private" families disproportionately, appellate decision-making which reflects dominant social values (including a preference for the nuclear family) offer little support for the perspective of mothers like the respondent in *Racine*. Thus, while the case illustrates Justice Wilson's commitment to the continuity of family relationships, her decision in *Racine* demonstrates her preference for continuity in terms of physical care rather than the continuity of racial identity, and her understanding of relationships within a nuclear fam-

106. See, for example, *R. v. Jones*, [1986] 1 S.C.R. 284; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; and Bertha Wilson, "Women, the Family and Constitutional Protection of Privacy" (unpublished: Hong Kong, 1991), at 26-27.

ily context rather than one of extended kinship. Thus, by contrast with the imagination in her later decision in *Frame*, Justice Wilson accepted the law's approach to family relationships in *Racine*, an approach which emphasized individual well-being and a nuclear family form. In such a context, the continuity of relationships in the adoptive home seemed clearly preferable to her.

Justice Wilson's conclusion about the significance of bonding in *Racine* must be contrasted with her judgment a year earlier in *Beson v. Director of Child Welfare*,¹⁰⁷ on appeal from Newfoundland. As Justice Wilson herself noted, "the chronological history of the matter [was] a procedural nightmare".¹⁰⁸ By contrast with *Racine*, however, there was clear evidence about the inadequacy of the child welfare agency's decision-making. Although it acted with commendable speed and removed the child from a prospective adoptive home immediately after receiving information alleging child abuse on the part of the husband of the adoptive family, the agency seemed unwilling to provide further details or an opportunity for the adoptive parents to respond to these allegations.¹⁰⁹ Further, when the adoptive parents initiated habeas corpus proceedings, the allegations of abuse were fully canvassed and held to be unfounded by the Newfoundland Supreme Court; in addition, the judge recommended that the agency should discuss with the adoptive parents arrangements, "subject to supervision, to give this boy a chance to have this fine home."¹¹⁰ In spite of this recommendation, the agency refused to follow the court's advice, with the result in due course that the appeal reached the Supreme Court of Canada. By that time, moreover, the child had been placed for adoption with a second family, and there were, therefore, two sets of prospective adoptive parents before the court at the time of the appeal.

For purposes of this assessment of the family in Justice Wilson's work, this case underlines the difficult problem faced by an appellate court in adoption matters, when two sets of parents are relatively innocent, the problems having been created by others. In this case, both sets of prospective adoptive parents were acceptable, although the financial circumstances and work arrangements of the Besons

107. [1982] 2 S.C.R. 716.

108. *Beson, supra*, note 107, at 717.

109. The agency's intransigence also seems suspect because the decision to remove the child occurred only seven days prior to the expiry of the six-month period of residence required for a completed adoption, and there had been no reports of problems by the social worker assigned to monitor the case.

110. *Beson, supra*, note 107, at 718-719.

meant that they would be able to provide more time with and attention to the child as well as the prospect of post-secondary education. Yet, a decision to return the child to the Besons required a further change for the child, a matter which Justice Wilson approached cautiously. In all the circumstances, however, she concluded that it was appropriate for the court to make an order for the adoption of the child by the Besons, in spite of the required change in the status quo, on the basis of the court's inherent power of *parens patriae* and the child's best interests.

At first glance, this case seems inconsistent with *Racine*. Justice Wilson's willingness to change the child's home in *Beson* appeared markedly greater than in *Racine*, but there are some important differences between the cases. In *Racine*, the child had lived with the adoptive parents for almost all of her life, while in *Beson*, the child had lived with two sets of adoptive parents as well as in a foster home, and the length of time with the second set of adoptive parents seemed to be about one year in total. Thus, while we should not underestimate the effect of a change, it is arguable that the child in *Beson* would be likely to suffer less from such a change than would the little girl in *Racine*.

What may be less acceptable are the factors which influenced Justice Wilson's decision in *Beson*. Justice Wilson's judgment examined the relative merits of the two prospective adoptive homes in light of the recommendations of the child's representative and concluded that the Besons were preferable for two reasons: one was the more favourable financial circumstances which the Besons enjoyed, and the other was the fact that Mrs. Beson did not have to work as did the other prospective adoptive mother (coupled with the relatively flexible schedule of Mr. Beson by contrast with the other prospective father). Thus, a preference for financial security and parental care, by contrast with less economic security and care provided by others, seemed to have been the determining factors, factors which distinguished the prospective parents, arguably inappropriately, on the basis of financial considerations.¹¹¹ Such criticism is, however, complicated by the fact that her decision is also consistent with the evidence and recommendations presented by the court-appointed counsel for the child, a lawyer who meticulously interviewed all the parties and whose submissions were commended as "totally impartial and objec-

111. See Susan Boyd, "Child Custody and Working Mothers" in Kathleen Mahoney and Sheila Martin, eds., *Equality and Judicial Neutrality* (Carswell: 1987) at 168; and Susan Boyd, "From Gender Specificity to Gender Neutrality? Ideologies in Child Custody Law" in Carol Smart and Selma Sevenhuijsen, eds., *Child Custody and the Politics of Gender* (Routledge: 1989) at 126.

tive".¹¹² Thus, although the decision undoubtedly caused "anguish for [the second set of prospective parents]",¹¹³ as Justice Wilson noted, it was not the appellate court which was responsible for "the tragic feature of this sorry situation,"¹¹⁴ but rather the policies and administrative decision-making which permitted the dispute to arise in the first place.

In terms of Justice Wilson's concept of the family, these child welfare/adoption cases demonstrate her continuing concern to make the interests of children paramount and to exact standards of parental conduct accordingly. Thus, when prospective parents were found less able by comparison with others, it was always because of her aspirations for the best interests of children in the family unit. In this way, her overall approach has been consistently principled, even though we may disagree with the weight which she has placed on particular factors (psychological bonding and financial security) by comparison with others which are arguably equally important (especially racial heritage). At the same time, the child welfare cases seem to implicitly assume an idea of family which is normative rather than neutral: a family setting which is nuclear rather than an extended kinship arrangement and which demonstrates continuity through evidence of care rather than a sense of racial identity. In this way, the idea of family in Justice Wilson's decisions seems less diverse than the reality of many family units in Canada. Thus, there is an implicit ideal of "the family" in the child welfare cases which arguably contrasts with the emphasis on family relationships in the custody decisions, and especially in *Frame*. Moreover, this diversity in Justice Wilson's ideas about the family, in the context of parenting, must also take account of her imaginative perspective on the relation between self and others, the coexistence of individualism and relationship, which was so clearly enunciated in her concurring opinion in *R. v. Morgentaler*,¹¹⁵ a case in which she suggested yet another way of approaching the idea of family.

Re-Thinking "Parenting"

In *Morgentaler*, the focus for Justice Wilson was women's privacy rights; indeed, she has identified this decision as "... the most important decision to date in Canada dealing with women's privacy rights as

112. *Beson*, *supra*, note 107, at 728.

113. *Ibid.*

114. *Ibid.*

115. [1988] 1 S.C.R. 30.

against the state".¹¹⁶ The case challenged the constitutional validity of the therapeutic abortion sections of the Criminal Code, and a majority of the Supreme Court of Canada struck down section 251. Yet, while other members of the court held that the Code provision infringed section 7 of the Charter on the basis of procedural inadequacy (restrictions on the availability of hospitals, uncertainty of administrative procedures on the part of committees, and the disparate effect of the burden of travel for some women seeking abortions, for example), Justice Wilson alone decided that the Criminal Code provisions infringed women's section 7 liberty and security interests in a substantive way. Thus, although she agreed with her colleagues that the legislation subjected women to emotional stress and unnecessary physical risk, she held that the flaw in the legislation was much deeper:

In essence, what it does is assert that the woman's capacity to reproduce is not to be subject to her own control. It is to be subject to the control of the state.... This is not, in my view, just a matter of interfering with her right to liberty in the sense ... of her right to personal autonomy in decision-making, it is a direct interference with her physical 'person' as well.... She is the passive recipient of a decision made by others as to whether her body is to be used to nurture a new life. Can there be anything that comports less with human dignity and self-respect?¹¹⁷

This statement is significant for a number of reasons. In the first place, it confronted directly the dilemma of liberal individualism as it applies to pregnant women, and pointed to the need to envisage the foetus as part of the body of a woman, not a separate, abstracted "space hero".¹¹⁸ Second, it recognized the physical impact of abortion and reproduction on a pregnant woman, and not merely control over decision-making, as an issue about autonomy. More significantly, Justice Wilson's statement extended the law's concern to issues of human dignity and self-respect, issues which are as elusive as they are necessary. Such an approach is consistent with Justice Wilson's idea of law as a moral imperative, of course, but I think that her approach to the legal issues here is both more textured and more imaginative than

116. Bertha Wilson, *supra*, note 106, at 33.

117. *Morgentaler*, *supra*, note 115, at 173.

118. For an analysis of legal images of the foetus in the context of fetal apprehension see Brett Dawson, "In re Baby R: A Comment on Fetal Apprehension" (1990), 4 Can. J. of Women and the Law 265. See also *Re A* (1990), 28 R.F.L. (3d) 288 (Ont. Un. Fam. Ct.); and Sheila L. Martin, "Morgentaler v. The Queen in the Supreme Court of Canada" (1987-88), 2 Can. J. of Women and the Law 422.

in the earlier child welfare cases.¹¹⁹ In *Morgentaler*,¹²⁰ she demonstrated a willingness to envisage the legal issues from a new perspective.

Morgentaler reflects Justice Wilson's image of women connected to others; she described a woman's decision about abortion as one which "deeply reflects the way the woman thinks about herself and her relationship to others and to society at large", a decision which is "not just a medical decision" but also a "profound social and ethical one" to which she necessarily responds as "a whole person". She continued:

It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal

119. In particular, Justice Wilson cited an academic article which stated

"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 ... It has *not* 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 is one such right and is properly perceived as an integral part of modern woman's struggle to assert her dignity and worth as a human being".

See Noreen Burrows, "International Law and Human Rights: The Case of Women's Rights" in *Human Rights: From Rhetoric to Reality* (1986); *Morgentaler*, *supra* note 115, at 171-172. See also Gillian Douglas, "The Family and the State Under the European Convention on Human Rights" (1988), 2 Int. J. of Law and the Family 76, especially at 85-87. Justice Wilson was also a member of the court, although she did not write an opinion in *Brooks v. Canada Safeway Ltd.*, [1989] 2 S.C.R. 1219, in which the court overruled *Bliss v. A.G. of Canada*, [1979] 1 S.C.R. 183. 120. Justice Wilson's focus on the physical integrity of a pregnant woman was reiterated subsequently in the court's decision in *Tremblay v. Daigle*, (1989), 62 D.L.R. (4th) 634, denying a claim by a woman's partner to an injunction restraining her from obtaining an abortion. Taking these cases together, it is arguable that Justice Wilson's view is that abortion is not a family matter, but rather one over which neither the state nor other family members (especially men) may have control. See also Maria Walters, "Who Decides? The Next Abortion Issue: A Discussion of Fathers' Rights" (1988), 91 W. Virg. L.R. 165.

At the same time, it is important to note the limits of such a legal approach especially for pregnant women. Although the decision ensures that a pregnant woman may choose whether to seek an abortion, it does not ensure that there will be societal support for a woman who chooses to bear a child (in terms of paid maternity leaves, adequate and affordable child care, and financial support for child-rearing costs) or even for a woman who chooses abortion (in terms of all the costs of the abortion and its attendant effects). In this sense, the woman's freedom to "choose" abortion may sometimes be more apparent than real. Such a conclusion does not negate the obvious advantage for a woman to be able to make a choice, however constrained it may be; but it does mean that we must distinguish the benefit of limiting state intervention in decision-making from the need to make positive claims about societal support for women and their reproductive choices. In this context, *Morgentaler* ensures that a pregnant woman may choose whether to bear a child or not, but there is no assurance that there will be adequate support for her if she chooses to create a family. See Glendon, *supra*, note 27; and Glendon, "A Beau Mentir Que Vient du Loin" (unpublished: U. of Toronto Law School: 1989).

experience ... 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.¹²¹

These words are significant, both for their recognition of the uniqueness of the experience of pregnancy for women but also because they identify the different qualities of objective and subjective experiences. Such an approach suggests that law must take account of the specificity of gendered experiences; it also provides some basis for suggesting that Justice Wilson's later decisions seem more receptive to legal recognition of differing perspectives, particularly those of persons who are not dominant in society. Yet, a recognition of differing perspectives must not absolve us from responding to others' legal claims because we have had different experiences of reality.¹²² Indeed, what is needed is a legal imagination which helps us to understand the perspectives of others, and which encourages judges and members of the legal profession to respond to others' experiences, as to their own.

These ideas coincide with Okin's claim that it is in families where we first learn to recognize ourselves and our individual identities, but also there where we begin to appreciate the perspectives of others and learn how to respond to their needs and wishes.¹²³ In recognizing the pregnant woman's sense of relationship to others, Justice Wilson has similarly described the ways in which individual human beings, especially women who are pregnant, may experience a sense of individual integrity at the same time as they feel connected to others. In her

121. *Morgentaler, supra*, note 115, at 171.

122. It is also important to understand that women have different experiences of reality, as individuals, and that there are dangers inherent in reifying experience. See Carol Smart, "Unquestionably a Moral Issue: Rhetorical Devices and Regulatory Imperatives" (unpublished paper: 1991).

123. According to Okin, the role traditionally assigned to women in our society means that they more often see themselves in relation to others and that they more often learn to balance their individual identities while responding to others, by contrast with men. In exploring this assertion, she drew attention to an American decision concerning a young woman's right to obtain an abortion without parental consent, a decision made exclusively by persons without experience of balancing individual identities and the perspectives of others through significant family relationships:

"... those who rise to the top in the highly politically influential profession of law are among those who have had the least experience of all in raising children.... Here we find a systematically built-in absence of mothers (and presumably of 'wimp-like' participating fathers, too) from high-level political decisions concerning some of the most vulnerable people in society.... It is not hard to see here the ties between the supposedly distinct public and domestic spheres."

Okin, *supra*, note 1, at 127.

poetic description of the pregnant woman, Justice Wilson placed the autonomy of the woman's decision-making in its context, suggesting that the law's protection of her physical integrity provides scope for her to make her individual decisions in the context of her relationships to others.

Such an approach creates a sphere of privacy for individual decision-making. In the context of this assessment of Justice Wilson's work, moreover, I want to suggest that *Morgentaler* is an important element of Justice Wilson's work on family and parenting. Clearly, her approach to issues of parenting reflects an important distinction between a child and a foetus; her judgment in *Morgentaler*, for example, expressly identified an increasing state interest in a foetus as the period of pregnancy lengthens.¹²⁴ At the same time, her analysis in *Morgentaler* was more textured and complex than in some of the earlier custody decisions (*Kruger*) and child welfare decisions (especially *Racine*). On this basis, it is at least arguable that her approach to issues of parenting has evolved. Yet, while I think it is important to examine *Morgentaler* in relation to the cases about custody and child welfare, it is also significant that the law's protection for a pregnant woman's decision in Justice Wilson's analysis was accorded to an adult woman whose dilemma focused on whether to become a parent; thus, it is arguable that such an analysis cannot be readily applied to the cases about parenting which concern children, already born and requiring love and care, such as in the cases earlier decided by Justice Wilson. In this way, *Morgentaler* clearly reflects Justice Wilson's view of the autonomy and independence of adult spouses, an approach which has significantly informed her decisions about spousal relationships, as much as it demonstrates her views of parenting.

Yet, both *Morgentaler* and the cases on custody and child welfare do reflect the paradox between the law's focus on individuals and our continued patterns of family living. In *Morgentaler*, the idea of family was consigned to the background, outside the sphere of the pregnant woman's decision-making; the idea of family was more frequently invoked in the custody and child welfare cases, although they also demonstrated a focus on individualism and sometimes on family relationships. In both the custody cases and the child welfare cases, moreover, the image of the family was frequently narrow and nuclear,

124."... it is consistent with the position taken by the United States Supreme Court in *Roe v. Wade*, that the value to be placed on the foetus as potential life is directly related to the stage of its development during gestation."

Morgentaler, *supra*, note 115, at 182.

and Justice Wilson's decisions suggested her preference for stability and security in a child's life, at the same time as she challenged parents to meet high standards of parental conduct. Thus, the image of the family in Justice Wilson's work on parenting reflects the dilemma for family law - mediating relationships between individuals and the collectivity - in the late 20th century:

For family law, since it deals with society's basic unit, since it deals with the formation and perpetuation of basic social attitudes, since it is the voice through which society speaks, is in one sense the easiest case for the proposition that common values may (and should) be expressed through law. Yet family law is, in another sense, also the hardest case for the proposition, since expressing common values through family law interjects the state into the most private part of life.¹²⁵

In my view, Justice Wilson's decisions about parenting demonstrate her willingness to use the concepts of family and family relationships in a variety of different ways, an approach which reflects the complexity of differing contexts. Significantly, there is much less variety in her use of family images in her decisions about spousal relationships, by contrast with these decisions about parenting. To illustrate this contrast, we now turn to an assessment of the idea of family in her decisions about spouses.

IV. Engendered Justice? : The New Family Law

The symbolic aspects of equality rhetoric have dominated [family law] reforms, casting debates in terms that construct rules as though the egalitarian ideal has been achieved. The assertion of equality has overshadowed instrumental concerns about the impact of specific changes on the post divorce economic and social status of women and children.¹²⁶

Justice Wilson's tenure as a member of the Ontario Court of Appeal and the Supreme Court of Canada coincided with a flourishing period of family law reform activity in legislatures across Canada. At the beginning of her career as an appellate judge, Ontario enacted the

125. Schneider, *supra*, note 20, at 1876.

126. Martha Albertson Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (Univ. of Chicago Press: 1991) at 4. For an analysis of the Canadian context, see Erika Abner, Mary Jane Mossman and Elizabeth Pickett, "'A Matter of Simple Justice': Assessing the Report of the Royal Commission on the Status of Women in Canada" (1990), 22 *Ottawa L.R.* 573.

Family Law Reform Act¹²⁷, legislation which substantially altered spousal relations in terms of property and support at marriage breakdown and which was similar to reform statutes enacted in all the common law provinces during the same period.¹²⁸ At the federal level, the reformed divorce legislation enacted in 1968 was repealed and replaced by revised divorce legislation in 1986,¹²⁹ the same year in which Ontario repealed its legislation and enacted the current Family Law Act.¹³⁰ So much legislative activity suggests a fundamental desire for societal change and an expectation that legislative reform offers a means of achieving defined objectives. With the benefit of hindsight, we can now assess this reform activity as more directed to the rhetoric of equality, as Fineman has suggested, rather than substantive equality between women and men at divorce. Such a conclusion is a sobering one, suggesting a need for more careful evaluation of the law's usefulness as a strategy for achieving substantive changes in societal arrangements,¹³¹ as well as the changes in families which Okin has suggested are fundamental if we are to achieve a just society.

In this context, Justice Wilson's decisions concerning family law reform, and particularly the adjustment of property and support claims between men and women at marriage breakdown, offer interesting ideas about her approach to justice in families. In these cases, the disputes have generally been focused on the adult partners, while children (if there are any) have remained in the background. Moreover, unlike the cases about children in which the quality of parent-child relationships was so significant, her approach in cases involving spousal claims has been characterized by a consistent image of the partners as autonomous individuals, especially at the point of marriage breakdown. As Martha Bailey has suggested in relation to Justice Wilson's important decisions about spousal support:

[Their] atomistic view of the family is consistent with dominant liberal discourse, which represents the oppressive relationship between hus-

127. R.S.O. 1980, c. 152.

128. For a review of the impact of these legislative changes, see *Mossman and MacLean, "Family Law and Social Welfare: Toward a New Equality"* (1986), 5 *Can. J. of Family Law* 79; and Ivan Bernier and Andree Lajoie, eds., *Family Law and Social Welfare Legislation in Canada* (Univ. of Toronto Press: 1986).

129. The Divorce Act, R.S.C. 1970, c. D-8 was repealed and replaced by the Divorce Act, 1985, R.S.C. 1985, c. 3 (2nd Supp.)

130. S.O. 1985, c. 4.

131. See also Carol Smart, "Feminism and Law: Some Problems of Analysis and Strategy" (1986), 14 *Int. J. of the Soc. of Law* 109.

band and wife as a freely chosen contract between rational, unencumbered, autonomous individuals.¹³²

Yet, at the same time as Justice Wilson's judgments have revealed an approach which promotes formal rather than substantive equality, she has sometimes exercised considerable creativity in the interpretation of new statutory schemes and has willingly adapted traditional legal principles to members of family units, eroding the public/private dichotomy. At the same time, an overall assessment of her concept of family in terms of spousal relationships seems to suggest that the idea of family is irrelevant because the focus is the individual family members; indeed, even their relationships are less significant than their autonomy and independence. On this basis, the image of family in the cases about spousal relationships requires careful and contextualized scrutiny.

Property and Cohabitees

One of Justice Wilson's earliest decisions concerning "spousal" relationships was *Becker v. Pettkus*.¹³³ On behalf of the Ontario Court of Appeal, Justice Wilson allowed Ms. Becker's appeal from the trial court's decision which had denied her a share in the property acquired during nearly twenty years of cohabitation and work with the respondent. Although all the property was held in the respondent's name, Ms. Becker claimed that she had been an economic partner in the acquisition of the assets. Justice Wilson concluded that the trial judge had "vastly underrated the contribution the appellant made to the acquisition of the assets",¹³⁴ and held that the doctrine of constructive trust established in *Rathwell v. Rathwell*¹³⁵ (and earlier developed in Chief Justice Laskin's dissenting judgment in *Murdoch v. Murdoch*¹³⁶) was applicable; thus, she concluded that the respondent was a constructive trustee for Ms. Becker with respect to a one-half interest in the assets.

Justice Wilson's judgment in *Becker v. Pettkus* is an important one because of its subsequent impact on legal doctrine concerning the

132. Martha Bailey, "Pelech, Caron, and Richardson" (1989-90), 3 Can. J. of Women and the Law 615, at 616.

133. (1978), 20 O.R. (2d) 105.

134. *Becker, supra*, note 133, at 108. As Justice Wilson noted, the parties had lived together as husband and wife, although unmarried, for almost 20 years "during which period she not only made possible the acquisition of their first property" by supporting them entirely on her own earned income, but also "worked side by side" with the respondent for 14 years, building up the bee-keeping operation." *Ibid.*

135. [1978] 2 S.C.R. 436.

136. (1973), 41 D.L.R. (3d) 367.

constructive trust, as well as because it seems to suggest an expansive vision of the family. The subsequent appeal from Justice Wilson's decision to the Supreme Court of Canada resulted in confirmation of her decision and acceptance of the idea of constructive trust as a means of extending equitable concepts about property to cohabitants,¹³⁷ in spite of the failure of provincial legislation to provide for sharing of property between cohabiting partners. In a number of subsequent decisions, moreover, the principles of constructive trust have been applied to cohabitants,¹³⁸ including those in both heterosexual and homosexual relationships,¹³⁹ and the remedial constructive trust has been recently extended to married spouses in addition to the benefit they have pursuant to statutory schemes for sharing property at divorce.¹⁴⁰ In this way, Justice Wilson's decision in 1978 can be regarded as very significant indeed in the development of the remedy of constructive trust.¹⁴¹

Her decision in this case is also important in terms of its vision of family relationships. In her description of the relationship between the cohabitants, she stated that "the parties lived together as husband and wife, although unmarried, for almost 20 years",¹⁴² suggesting that the absence of a legal marriage was not significant by comparison with the nature and duration of the relationship itself. At a later point in the judgment, indeed, she explicitly confirmed this view:

This may be an opportune moment to mention that, as far as the application of the law under review is concerned, nothing, in my

137. See (1980), 19 R.F.L. (2d) 165; and the Supreme Court of Canada's subsequent decision in *Sorochan v. Sorochan* (1986), 2 R.F.L. (3d) 225, in which the court extended the principles so as to take account of a cohabiting partner's contribution to the maintenance and preservation of property during 42 years of cohabitation.

138. See, for example, *Georg v. Hassanali* (1989), 18 R.F.L. (3d) 225; and *Kutt v. Sam* (1990), 26 R.F.L. (3d) 268; see also *Archer v. Cornfoot* (1990), 28 R.F.L. (3d) 447. In *Stanish v. Parasz* (1989), 23 R.F.L. (3d) 207, a constructive trust application was refused.

139. See *Anderson v. Luoma* (1986), 50 R.F.L. (2d) 127.

140. See *Rawluk v. Rawluk* (1990), 23 R.F.L. (3d) 337. The opinion of the majority in *Rawluk* was written by Cory, J. on behalf of Dickson, C.J., and Wilson and L'Heureux-Dube, JJ.

141. At the same time, the remedy developed in *Becker v. Pettkus* did not benefit Ms. Becker. Indeed, it was reported some years later that Ms. Becker had committed suicide, leaving letters in which "she described her death as a protest against a legal system that prevented her from seeing a penny of a Supreme Court of Canada award worth about \$150,000." *Globe and Mail* (November 13, 1986). A few years later, it was reported that, in addition to an amount of \$68,000. which was forwarded to her by Mr. Pettkus, all of which was paid to her lawyer to cover legal fees, the trustees of Ms. Becker's estate accepted a \$13,000. settlement from Mr. Pettkus. *Globe and Mail* (May 26, 1989).

142. *Becker, supra*, note 133, at 108.

opinion, hinges on the fact that the appellant and the respondent were not legally married.¹⁴³

It is possible to interpret this comment as one which conferred on the appellant and respondent an image of family no different in any meaningful respects from a family composed of married spouses. In this way, Justice Wilson's comment could be understood as supportive of an expanded vision of family.

On the other hand, her comment could also have intended to deny that the relationship was at all significant to the application of the principles, and that the elements needed for finding a constructive trust could be present whether or not a spousal relationship (involving either marriage or cohabitation) existed. On this interpretation, it was not so much an expanded vision of family which motivated her decision, but rather a dispassionate application of equitable principles to achieve fairness between two individuals (arms length "strangers") who had engaged in joint economic activity. Ironically, if we accept that the "spousal" relationship was irrelevant, the possibility that it may have influenced the choices made by the individuals (especially Ms. Becker, the non-titled "spouse") would not be taken into account. Only in her scathing description of the "trap" which the respondent suggested had been laid for him by the appellant was there any indication that Justice Wilson might have been considering the ways in which gendered roles and expectations influenced the choices made by Ms. Becker and Mr. Pettkus.¹⁴⁴

Justice Wilson's approach in *Becker v. Pettkus* is characteristic, in my view, of her vision of spousal relationships. As her judgment in *Becker* demonstrated, she has generally approached disputes between spouses as if they occurred between autonomous adult individuals, and she has ignored "the limits on choice created by gender inequality".¹⁴⁵ At the same time, she has shown boldness and imagination in applying traditional legal principles about proprietary interests to those involved in economic relationships, in spite of legislative choices that only married persons should have protection for contributions to assets acquired during the marriage. Thus, Justice Wilson's creative approach, one on which there can be differences of opinion "according to ... views of the appropriate limits to judicial law creation, ...

143. *Becker, supra*, note 133, at 112.

144. *Becker, supra*, note 133, at 106. Justice Wilson also disagreed with the trial judge's characterization of Ms. Becker's contribution as "in the nature of risk capital invested in the hope of seducing a younger defendant into marriage." *Id.*, at 108.

145. Bailey, *supra*, note 132, at 616.

faith in the judiciary and, of course, ... attitudes towards the institution of marriage,"¹⁴⁶ was bold in its judicial response to perceived injustice, even though it was characterized by a focus on the two individuals rather than their relationship. In my view, the approach demonstrated in this early decision in *Becker v. Pettkus*, and especially its focus on individuals rather than the "family" unit, is characteristic of most of Justice Wilson's decisions about spousal relationships, decisions which occurred in a number of quite different contexts.

Interpreting Statutes in the Context of Divorce

The family law reform statutes enacted in recent decades have altered family law principles in significant ways.¹⁴⁷ In a number of decisions about the meaning of these new statutory provisions, Justice Wilson has generally favoured interpretations which have captured the reformist purpose of the legislation, creating meanings in the context of the objectives of the new approaches to family law. In her decision in the Ontario Court of Appeal in *Bailey v. Bailey*,¹⁴⁸ for example, she concluded that there was a triable issue (and that the trial judge had wrongly struck out a statement of claim based on the sharing of assets under the statute) in the circumstances; the husband had applied to strike out his wife's claim for a share of family assets on the basis of a separation agreement pursuant to which she had released certain property to her husband. However, after signing the separation agreement,

146. Maurice Cullity, "The Matrimonial Home - A Return to Palm-Tree Justice: Trust Doctrines Based on (a) Intent and (b) Unjust Enrichment" (1977-78), 4 *Estates and Trusts Quarterly* 277. For another review of the resulting trust cases, see Norman Fera, "The Role of the Resulting Trust in Family Law" (1980), 11 *R.F.L.* (2d) 6. An analysis of *Pettkus v. Becker* is also found in Peter Maddaugh and John McCamus, *The Law of Restitution* (Canada Law Book: 1990) at 660; in this analysis, it is the decision of the Supreme Court of Canada (rather than Justice Wilson's decision in the Ontario Court of Appeal) which is credited with "a most significant contribution to the Canadian law of restitution at the level of general principle." *Ibid.*

Justice Wilson also wrote the decision for the Supreme Court of Canada in 1983 in *Palachik v. Kiss*, [1983] 1 S.C.R. 623. In that case, she held that the doctrine of constructive trust applied to a contribution of improvements and services on the part of the husband, a penurious man married to a more wealthy widow. After the widow's death, her son (executor of the estate) attempted to prevent the man from having access to any of the assets. As Justice Wilson stated, "The trial judge expressed the view that this case should never have come to trial and I agree with him", noting, however that there were "some difficult legal issues". Justice Wilson's decision applied the doctrine of constructive trust set out in *Rathwell* and in *Pettkus*.

147. For an overview and thoughtful analysis of the "progress" of such reforms, see Brenda Hoggett, "Recent Reforms in Family Law: Progress or Backlash?" (1987), 11 *Dalhousie L.J.* 5. See also J. Bekelaar, *Family Law and Social Policy*, 2nd ed. (Weidenfeld and Nicholson: 1984), and R. Abella and C. L'Heureux-Dube, eds., *Family Law: Dimensions of Justice* (Butterworths: 1983).

148. (1982), 37 O.R. (2d) 117.

the parties had subsequently reconciled and lived together for more than three years. Justice Wilson noted the common law principle that a reconciliation terminated a separation agreement unless it was clear that there was an intention that it survive a subsequent reconciliation, and concluded that the effect of the statutory provisions was, accordingly, a triable issue.¹⁴⁹

This purposive approach to the interpretation of the new legislation was also evident in *Hanlon v. Hanlon*,¹⁵⁰ a decision of the Ontario Court of Appeal in which Justice Wilson participated, where the court concluded that there was judicial discretion to refuse to grant a decree absolute of divorce because of non-compliance with an order for support. Similarly, in *Glover v. Glover*,¹⁵¹ the same court considered requests for the release of information about the address of a spouse from Revenue Canada and from the telephone company. A unanimous court concluded that the confidentiality provisions of the income tax statute prevented disclosure of such information; as well, a majority concluded that there was no jurisdiction in the court to order release of such information from the telephone company. Dissenting from the latter conclusion, Justice Wilson distinguished the second request and asserted the court's jurisdiction to make such an order "to maintain the integrity of its own process and to punish for contempt".¹⁵² In doing so, she demonstrated her commitment to the

149. *Bailey, supra*, note 148, at 119:

"Whether a marriage which has at some stage survived a crisis and carried on is forever thereafter precluded from attracting the operation of the Family Law Reform Act just because the parties entered into a separation agreement during the crisis period without contemplating the possibility of reconciliation is, in my view, a triable issue."

150. (1979), 24 O.R. 335. The judgment of Brooke, J.A. concluded that:

"It would take very clear statutory language to compel the interpretation that one who is on the facts in contempt of the judgment nisi is entitled as of right to have the judgment made absolute. I do not think that a party who is in default under a judgment or who chooses to ignore it can compel the Court to make it final for his purposes. The issues of custody and maintenance are not severable from the judgment in divorce cases and I think it was the clear intention of Parliament that these family matters be resolved together when in issue between the parties."

Ibid., at 340.

151. (1980), 29 O.R. (2d) 392 (#1); and (1980), 29 O.R. (2d) 401 (#2).

152. *Glover* (#2), *supra*, note 151, at 410. As she stated:

"I would have thought that, having regard to what is at stake here, namely, the integrity of the Court's own process, the circumstances cry out for the exercise of the Court's inherent jurisdiction. The alternative facing the Court appears to be to accept the fact that it has made an abortive custody order notwithstanding there may be persons amenable to its jurisdiction who have Mr. Glover's address in their records. If those records are protected by statute, that is one thing.... But if they are not, then I think the sole issue is whether the alleged duty of confidentiality, having regard to the nature of the information

effective implementation of the statutory scheme as well as to a purposive interpretation of the new legislative provisions.¹⁵³

Justice Wilson's approach to the new family law legislation was similarly illustrated in *McLaren v. McLaren*,¹⁵⁴ a decision in which she first enunciated her vision of women in the context of divorce. The case involved an application by a former husband for a declaration of his interest in the matrimonial home, the title to which he had conveyed to his wife during their marriage; the parties had divorced prior to the enactment of the Family Law Reform Act, and so the court had to consider the retroactive application of sections 11 and 12 of the statute. These sections abolished the presumption of advancement and replaced it with a presumption of resulting trust. The majority of the court concluded that the new legislative scheme contemplated the abolition of the presumption of advancement only in those cases where a spouse, especially a wife, would be able to take advantage of the new rights conferred by the sharing provisions of section 4; since the parties in this case had been divorced before the legislation was effective, it was not possible for the wife to make a claim under section 4, and thus, the legislation should be interpreted so as to make the presumption of advancement available to her. As Lacourciere, J.A. stated:

... in the absence of express words or necessary inference, it must be presumed that the Legislature did not intend to interfere with benefits that would otherwise be conferred by the presumption of advancement. To so apply s. 11 (1) would, in my opinion, be an exercise of mechanical interpretation that would fail to give full effect to the statutory scheme elaborated in Part I of the Act.¹⁵⁵

sought to be disclosed, has the effect of depriving the Court of its inherent jurisdiction to make the impugned order.

I do not think it does. Such a duty is not absolute but must yield to a greater public interest.... It is for this Court to decide whether or not there is a public interest to be served by the disclosure which is more compelling than the one relied on by the appellant. I think there is in this case."

Ibid., at 410-411.

153. Another example of this approach to interpretation occurred in the decision of the Supreme Court of Canada in *Lamb v. Lamb*, [1985] 1 S.C.R. 851, a decision in which Justice Wilson participated as well. In *Lamb*, the court decided that section 45 of the Family Law Reform Act (permitting an order for exclusive possession of the matrimonial home in certain cases) was not a provision in relation to support and maintenance and was not invalid or inoperative under the paramountcy doctrine; the court held that the provisions of the federal Divorce Act and the provincial statute were independent jurisdictions in relation to different subject matters, conferred by *intra vires* federal and provincial legislation which complemented one another.

154. (1979), 24 O.R. (2d) 481.

155. *McLaren, supra*, note 154, at 485. As was noted by the majority, the statutory scheme was

In her strong dissenting judgment, Justice Wilson enunciated her views about women and the law in the context of her interpretation of the statutory language. She agreed with the majority judgment that the language of section 11 should be interpreted in the context of the statute as a whole, but did not agree that this required a “restricted interpretation ... on the ground that the new legislation was intended generally to better the position of married women.”¹⁵⁶ In relation to the presumption of advancement, Justice Wilson identified its origins in the eighteenth century, reflecting the “historic economic dependence of women on their husbands,” and suggested that it was a common law device adapted to meet a “desirable social objective.”¹⁵⁷ Her conclusion that the presumption was abolished by the new statute was based on both the clear statutory language and the need for a “fresh perspective” on the position of married women:

... the new legislation reflects policy considerations of a totally different nature. The preamble to the Act makes it very clear that the concept of economic dependency is no longer socially acceptable. A different concept of the relationship between husband and wife has matured in the community and is expressed in the preamble. The Legislature has stated that economic dependency must give way to equality and economic partnership *if the role of the family in society is to be encouraged and strengthened*. In this new context, the presumption of advancement has no role to play; it is of historic interest only.¹⁵⁸

On this basis, Justice Wilson concluded that the presumption of advancement was not available to assist the wife’s claim to the matrimonial home; however, because the trial judge had concluded that there was evidence that the husband had intended that his wife be the absolute owner of the property when he conveyed title to her, the presumption of resulting trust was also rebutted. Thus, title remained with the wife and the husband’s claim was denied by all the judges, although for substantially different reasons.

Justice Wilson’s approach in *McLaren* was rooted in the equality objectives of the new family law legislation, an approach which she has vigorously pursued in the context of interpreting the rights and responsibilities (especially in relation to support) of divorcing spouses in a number of subsequent decisions. Indeed, she has herself noted the

one which balanced the loss of former rights, such as the presumption of advancement and dower, with the new sharing of family assets under section 4.

156. *McLaren*, *supra*, note 154, at 487.

157. *McLaren*, *supra*, note 154, at 487-488.

158. *McLaren*, *supra*, note 154, at 488 (Emphasis added).

extent to which such an approach has been criticized by commentators because of its reliance on a perspective of formal, rather than substantive, equality.¹⁵⁹ Similarly, in her recent analysis of the impact of interpreting family law reform statutes from a formal equality perspective, Martha Fineman has succinctly noted that “overreliance on symbolic concerns can also create difficulties for women with more than symbolic concerns.”¹⁶⁰ For purposes of this review of Justice Wilson’s work concerning the family, it is important to note her longstanding commitment to the equality of spouses at divorce; as evidenced in this early dissent in *McLaren*, however, her commitment has been expressed in terms which are more consistent with the idea of formal rather than substantive equality. Moreover, consistent with the concept of formal equality, she has accepted an image of independent and autonomous spouses, an approach which offers scant opportunity for considering the impact of familial relationships on individual choices.

Matrimonial Property : A Liberal Approach

Justice Wilson’s judgments on the property provisions of new family law statutes are consistent with her general approach to statutory interpretation in this context, demonstrating her commitment to a purposive interpretation and to the idea of (formal) equality for spouses. In her early decision in *Re Young and Young*,¹⁶¹ she canvassed the provisions concerning the division of family and non-family assets under the Family Law Reform Act, and especially the relation between section 4(6)(b) and section 8. She concluded that the wife was not entitled to a share of non-family assets under section 4(6)(b) because there was no inequity in the result of the division of family assets, having regard to the responsibilities enumerated for both spouses in section 4(5). Significantly, Justice Wilson reiterated her view that the latter section expressed the legislative rationale for the prima facie equal division of matrimonial assets, “namely, that marriage is a mutual affair and that each party is expected to pull his or her weight in discharging the totality of the responsibilities.”¹⁶²

However, she also concluded that the wife was entitled to a share in non-family assets pursuant to section 8 of the Act because she had made a direct contribution to the management, maintenance and op-

159. Bertha Wilson, *supra*, note 106, at 19-20.

160. Fineman, *supra*, note 126, at 75.

161. (1981), 32 O.R. (2d) 19.

162. *Young*, *supra*, note 161, at 25.

eration of part of an apartment building to which the husband held title. As in the cases concerning the imposition of a constructive trust, this conclusion focused on the wife's contribution outside the home to the enhancement of value of property which was a non-family asset.¹⁶³

In *Young*, Justice Wilson also held that the date for valuing property interests was the date of trial, not the date of separation, in accordance with the language of section 4, a conclusion different from that of the trial judge. A similar issue arose in *Re Maroukis and Maroukis*¹⁶⁴ in which the trial judge held that the wife's right (to an unequal share of family assets, that is title to the matrimonial home) crystallized at the date of separation, even though no order was made with respect to the home for over a year; after the parties had separated, the wife had commenced an application for a declaration as to her entitlement, and thereafter, the husband's creditors had filed notices of their claims against the matrimonial home in respect of his default on loans. Justice Wilson allowed an appeal by the creditors, holding that section 4 did not "confer rights in property in the absence of an order of the court,"¹⁶⁵ but rather that the section merely set out the circumstances under which the court could make orders about family assets. In the circumstances, therefore, the creditors' executions attached to the matrimonial home, and Justice Wilson ordered that the husband should pay the amounts owed to the creditors so that the order of the trial judge in favour of the wife could be otherwise enforced.¹⁶⁶

163. The similarity in these arguments is reinforced by the fact that the wife also made a claim in *Young* based on the doctrine of constructive trust, a claim which Justice Wilson did not adjudicate in light of her conclusion that the wife could sustain her claim under section 8 of the legislation. See *Young, supra* note 161, at 26. Justice Wilson's conclusions on the facts of this case are consistent with the analysis of the statute in Court of Appeal cases such as *Page v. Page* (1980), 31 O.R. (2d) 136 and *Leatherdale v. Leatherdale* (1980), 31 O.R. (2d) 141. In *Page*, a case in which Justice Wilson participated, Arnup, J.A. held that the fact that the parties had agreed on the division of family assets meant that there could be no inequity pursuant to section 4(6). As he stated:

"In our views, where the parties agree on a division of family assets (and especially where, as here, they have each been advised by counsel) the division thus arrived at and adopted by the trial Judge cannot then be characterized as inequitable."

Page, at 140. Such an approach is, of course, entirely consistent with formal equality.

In *Leatherdale*, a case in which Justice Wilson did not participate, there was disagreement in the Supreme Court of Canada about the appropriate approach to the interpretation of the statute, and especially the extent to which there should be judicial discretion in the allocation of matrimonial assets; Chief Justice Laskin favoured a strict approach to the legislative scheme, while Justice Estey, dissenting, held that there was a need for judicial discretion. See [1982] 2 S.C.R. 743.

164. (1981), 33 O.R. (2d) 661.

165. *Maroukis, supra*, note 164, at 664.

166. Brooke, J.A. agreed with Justice Wilson with respect to the outcome of the appeal, but

In spite of the doctrinal context of these decisions, Justice Wilson's vision of the formal equality of the spouses was consistently evident in her approach to them. At the same time, these decisions offer somewhat less scope for analysis of her reasoning because they were decided within a narrow and technical legal framework. Thus, for example, there was no discussion in *Maroukis* of the reasons for the delay in processing the wife's claim to the matrimonial home, reasons which might have included the backlog in family law courts or the lack of financial resources to pursue her entitlement quickly and efficiently. Nor was there any inquiry about the nature of the husband's loans or the reasons for his default, or other matters relating to the processing of divorce claims in the context of the breakdown of an unhappy marriage.¹⁶⁷ In this way, the resolution of these property claims for divorcing spouses seems to have been a more technical process for Justice Wilson than the decisions in cases concerning children; such a conclusion also reinforces the idea that her view of spousal arrangements has been consistently one of formal equality.¹⁶⁸

concluded that the husband had not had proper notice that his interests were to be determined in these proceedings and that it was therefore not appropriate for the court to make an order against him. As a result, he agreed that the appeal should be allowed but that the title of the lands in question should be vested in the wife, subject to the claims of the execution creditors. *Maroukis*, *supra*, note 164, at 665-666. The appeal to the Supreme Court of Canada was dismissed; see [1984] 2 S.C.R. 137.

167. Some of these issues have been explored in Lenore Weitzman, *The Divorce Revolution* (Free Press: 1985). For a Canadian perspective, see Bruce Ziff, "Recent Developments in Canadian Law: Marriage and Divorce" (1986), 18 *Ottawa L.R.* 121; and Department of Justice, *Evaluation of the Divorce Act, Phase II: Monitoring and Evaluation* (1990).

168. The absence of concern for the context in which matrimonial property claims arose was also evident in two decisions in the Supreme Court of Canada, both concerning the effect of matrimonial property regimes on native women on reserves. Although Justice Wilson did not take part in these decisions, it is interesting to speculate whether the context might have engaged her in light of the special challenges they presented. In *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285 and in *Paul v. Paul*, [1986] 1 S.C.R. 306, the court concluded that the matrimonial property legislation in British Columbia did not affect the property regimes of Indian reserves established under section 88 of the Indian Act. These decisions have been criticized for failing to exhibit any "awareness of the real life choices that will be made as a result of conclusions that Indian women have no rights to property on marriage breakdown or divorce, as they would have if they were not Indians on Indian lands." See Mossman, "Developments in Property Law: The 1985-86 Term" (1987), 9 *Supreme Court L.R.* 419; and *Lonewolf v. Lonewolf*, 657 P. 2d 627 (N.M., 1982) for an analysis which is different from that of the Supreme Court of Canada in these cases. The decisions were distinguished in a more recent case in Ontario in which the judge made an in personam order against the husband, restraining him from interfering with the wife's possession of the matrimonial home. See *Wynn v. Wynn* (1989), 14 A.C.W.S. (3d) 107 (Ont. Dist. Court). Note that there has also been a suggestion that there may be a way of distinguishing these cases in Ontario because of some differences in the allocation of lands; in some cases, Indian lands on reserves may be allocated by band councils rather than by way of certificates issued by the federal Minister. See Mossman, at 433.

More recently, however, Justice Wilson's decision in *Clarke v. Clarke*,¹⁶⁹ a decision which explored the nature of pensions according to the provisions for property and support under the legislation in Nova Scotia, approached the issues with more apparent sensitivity to the idea of substantive equality. At issue was the wife's entitlement to share in the husband's retirement pension, for which he became eligible about four years before the parties separated. At trial, the judge included the payments received each month by the husband in the calculation of his matrimonial assets and ordered him to pay his wife a one-half share of the pension amounts to be received in future. On appeal, the court characterized the pension monies as income rather than matrimonial property and deleted the amounts from both the calculation of the husband's assets and the future monthly pension payments to his wife. The appeal to the Supreme Court of Canada was unanimously allowed; on behalf of the court, Justice Wilson held that the pension was a matrimonial asset pursuant to section 4 of the Matrimonial Property Act.¹⁷⁰

In reaching this conclusion, Justice Wilson took account of the objectives of the legislative scheme and its recognition of "the equality of both parties to a marriage ... [and the] joint contribution of the spouses, be it financial or otherwise, to that enterprise."¹⁷¹ As well, however, she noted that for most Canadian families, a pension was

By contrast, however, it has also been suggested that the results in *Derrickson and Paul* were preferable to the application of provincial matrimonial property regimes, arrangements substantially foreign to the culture of first nations people:

"In the context of the division of matrimonial property it may be necessary *inter alia* to consider the extended Indian family rather than the Western nuclear family, the lands as the property of the band and not of any individual, the customs of the band with respect to cohabitation, marriage, custody and adoption, the support of children, and the disadvantaged circumstances of Indians on reserves. Such factors may suggest a different result than the iconoclastic application of provincial laws. The application of Euro-Canadian rules and values relating to the family and property may be inappropriate."

See Richard Bartlett, "Indian Self-Government, the Equality of the Sexes, and Application of Provincial Matrimonial Property Laws" (1986), 5 Can. J. of Family Law 188, at 194-195. See also Martha Montour, "Iroquois Women's Rights with Respect to Matrimonial Property on Indian Reserves", [1987] 4 C.N.L.R. 1.

What is most striking, in light of the issues which these comments raise, is the absence of any discussion of these controversies in the court's reasons for decision. By contrast, the court's decisions seemed to be merely technical applications of the paramouncy doctrine in the context of matrimonial property, without regard for the impact of the decision on native people in general or on native women especially, an approach which arguably might have offered a special contextual challenge to Justice Wilson.

169. [1990] 2 S.C.R. 795.

170. S.N.S. 1980, c.9.

171. *Clarke*, *supra*, note 169, at 807.

usually the only substantial asset, so that it would be “inequitable to place pension benefits outside the scheme of equal division.”¹⁷² On this basis, she approached the issue by considering three alternative approaches: including the pension as matrimonial property, taking account of the pension in an unequal division of matrimonial assets, and taking the pension into account in awarding support. After considering these alternatives, she concluded that the pension should be included as matrimonial property.

More specifically, Justice Wilson concluded that it was not appropriate to characterize the pension according to the second option because section 13 required that an applicant for such judicial discretion satisfy an onus of showing inequity, a heavy burden; moreover, in cases where the pension was the only significant asset, it would preclude any practical exercise of such discretion. As well, Justice Wilson concluded that it was not appropriate to characterize the pension as a matter to be taken into account in terms of support; because entitlement to support under the statute was dependent on the recipient’s need and the payor’s ability to pay, such a characterization would be substantially different from one which made the pension a matrimonial asset:

Discretionary support payments are a wholly inadequate and unacceptable substitute for an entitlement to share in the assets accumulated during the marriage as a result of the combined efforts of the spouses.¹⁷³

This statement arguably reflects Justice Wilson’s preference for sharing assets rather than for ongoing support, but it also seemed to take into account the nature of the marriage relationship and the typical ways of accumulating spousal assets.

On the basis of an extensive review of decisions in a number of provinces, Justice Wilson concluded that the pension should be characterized under the Nova Scotia legislation as a matrimonial asset;

172. *Ibid.*

173. *Clarke, supra*, note 169, at 811. Justice Wilson’s analysis relied to a great extent on that of Cameron, J.A. in the Saskatchewan Court of Appeal in *Tataryn v. Tataryn* (1984), 38 R.F.L. (2d) 272.

It is interesting that the same issue has been addressed by courts in Ontario, not in relation to pensions (which are included in the definition of “property” in section 4 of the Family Law Act), but rather with respect to professional degrees. Courts have treated such degrees as “property” but having no “value” (*Corless v. Corless* (1987), 5 R.F.L. (3d) 256 (Ont. Un. Fam. Ct.)); as property to which the doctrine of constructive applied (*Caratun v. Caratun* (1987), 9 R.F.L. (3d) 337 (Ont. S.C., H.C.J.)); and as entitling the contributing spouse to compensatory support (*Keast v. Keast* (1986), 1 R.F.L. (3d) 401 (Ont. Dist. Ct.); and *Linton v. Linton* (1988), 11 R.F.L. (3d) 444 and (1991), 1 O.R. (3d) 1 (H.C.J.)).

indeed, she asserted that “to characterize the pension benefits in this case as income [would be] to disregard the nature of pensions and place form ahead of substance with resultant unfairness.”¹⁷⁴ As well, she concluded that any problems of valuation should not preclude the characterization of a pension as a matrimonial asset.¹⁷⁵ In the result, the trial judge’s order was confirmed because it reflected “the spirit and intent of the legislation ... even though it [did] not result in a ‘clean break’ between the parties.”¹⁷⁶

Justice Wilson’s conclusion in *Clarke* suggested a willingness to characterize “new property”¹⁷⁷ assets like pensions as property, and to use a purposive approach which reflects the “spirit” of the legislation creating equality of entitlement for husbands and wives at divorce. At the same time, her comment about the need for a “clean break” points to a need to assess her ideas about equality of entitlement, taking account of issues concerning support as well as property. As has been suggested elsewhere, family law reform legislation has transformed the economic arrangements for spouses at divorce; whereas formerly dependent spouses (usually wives) had no entitlement to property but could claim lifelong support (if they were innocent), the new reforms created entitlement to share in property but foreclosed any continued financial support for dependent spouses.¹⁷⁸ Such an approach is consistent with “a liberal approach to legal problem-solving: legal intervention is restricted to removing legal barriers to full participation,” while “economic and other barriers are generally ignored.”¹⁷⁹

This approach has been identified as the cause of the “gender gap” in family law reform. Not only because many divorcing spouses will

174. *Clarke*, *supra*, note 169, at 825.

175. The problems of valuation have created problems in a number of jurisdictions. For example, see *Rutherford v. Rutherford* (1981), 23 R.F.L. (2d) 337 (B.C.C.A.); *George v. George* (1983), 35 R.F.L. (2d) 225 (Man. C.A.); and *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70. For useful discussions of the problems presented by these and other cases, see Alastair Bissett-Johnson, “Three Problems of Pensions - An Overview” (1990), 6 C.F.L.Q. 137; and Neil Campbell, “Division of Pensions Under the Ontario Family Law Act: A Comment on *Marsham v. Marsham* and *Humphreys v. Humphreys*” (1988), 7 Can. J. of Family Law 79. In *Clarke*, the problem of valuation was not significant because the pension entitlement had matured prior to the parties’ separation.

176. *Clarke*, *supra*, note 169, at 836.

177. See Glendon, *supra*, note 21; and Weitzman, *supra*, note 167.

178. See Mossman and MacLean, *supra*, note 128, especially at Part II. A recent evaluation of the implementation of the Divorce Act, 1985 reported that “Court files revealed that women requested support in only 16% of the applications, and were awarded support in only 6% of all cases in 1988”; see *Lawyers Weekly* (August 31, 1990) report on the evaluation published by the Department of Justice, *supra*, note 167.

179. Mossman and MacLean, *supra*, note 128, at 93.

have all too few assets to divide at divorce, but also because of the relative disadvantages of women in the paid workforce (particularly for those who have a primary role in caring for children), a scheme which provides for property division but no ongoing financial support will result in serious financial difficulty, and not infrequently poverty, for women and children after divorce.¹⁸⁰ In this context, Justice Wilson's conclusion in *Clarke*, a case in which she interpreted the legislative provisions generously to permit the wife to share in her husband's pension asset, included a note of concern about her inability to achieve a "clean break" in the method of payment. In this way, her decision in *Clarke* signalled the tension between the contextualized needs of the wife in *Clarke* and, on the other hand, Justice Wilson's longstanding ideas about post-divorce financial arrangements, ideas which have reflected a firm commitment to (formal) equality and independence for former spouses. Significantly, her generous and purposeful interpretation about pension entitlement occurred in the context of property adjustment; and the absence of a "clean break" was apparently more tolerable in that context than in relation to ongoing financial support. In the latter context, by contrast, Justice Wilson's commitment to formal equality was boldly confirmed by her decisions in "the trilogy".

*Spousal Support: "Equality and Economic Partnership"*¹⁸¹

In relation to claims for spousal support, Justice Wilson has remained substantially committed to the idea of formal equality for spouses throughout her career as an appellate judge, from the early decision in *McLaren*¹⁸² and culminating in "the trilogy" in 1987. In her decision in *Cure v. Cure*,¹⁸³ for example, she reduced an award of spousal support ordered by the trial judge from \$20,000. to \$10,000. The spouses separated after less than one year of marriage. For each of them, the marriage had been a second one; in the wife's case, her marriage to her second husband had resulted in the termination of a surviving spouse's pension (\$365. per month) provided by the Workmen's Compensation Board in relation to an industrial accident suffered by her first husband. (The Board had provided her with a lump sum award of \$8000. on termination of her monthly pension.) At trial,

180. M. McCall, J. Hornick and P. Wallace, "The Process and Economic Consequences of Marriage Breakdown" (Can. Research Inst. for Law and the Family: 1988).

181. See Justice Wilson's comments in *McLaren*, *supra*, note 158.

182. *Supra*, note 154.

183. (1982), 36 O.R. (2d) 345.

the parties were found to have relatively equal amounts of real property, but the wife had substantially fewer other assets than her husband. On this basis, the trial judge had made the award of spousal support to the wife as “compensation” for the loss of the monthly pension at the time of her second marriage; moreover, he made the support award even though he concluded that both parties were able to work.

On appeal, Justice Wilson reduced the amount of spousal support. However, it was her expressed rationale for doing so which demonstrated so clearly her conception of equality and independence for spouses at divorce:

We are all of the view that in awarding the wife \$20,000. in respect of the loss of her pension on re-marriage, the learned trial judge failed to give enough weight to the fact that the decision to re-marry with all the risks attendant upon it as to its success or failure was consciously taken by the wife. She cannot when the marriage turns out to have been a mistake expect the husband to indemnify her fully for any financial sacrifice she decided to make in order to take that step. The marriage might have prospered and if it had she would no doubt have shared in that prosperity. Her financial sacrifice might then have been worthwhile. When it works the other way we are all of the view that she must share in the consequences of the calculated risk she took.¹⁸⁴

Implicit in this statement was the idea that the marriage presented a risk, and an opportunity, for both spouses; more significantly, it suggested that it was an equivalent risk for both the husband and the wife. Although there are not sufficient facts to assess this proposition fully, it is clear that the husband had no income which was threatened or terminated by his marriage; in this way, while the wife may have accepted marriage in terms of a risk factor (either increased prosperity or the loss of her pension), she took a risk which the husband, by virtue of the different nature of his capital and income, was not required to consider. In this respect, the risk was not equal in relation to the possible failure of the marriage for husband and wife, a factor which seemed to influence the trial judge’s conclusion. By contrast, Justice Wilson’s analysis closely adhered to the idea of the formal equality of the spouses, and the need for a relatively “clean break”.¹⁸⁵

184. *Cure, supra*, note 183, at 347.

185. In *Welsh v. Welsh* (1980), 28 O.R. (2d) 255, Justice Wilson also considered the relationship between the principles of support at common law, by contrast with the provisions of the Divorce Act. She concluded that the common law standard for support, “the modestly and in retirement” test had been superseded by the legislative standard of means and needs. This conclusion is

Such a conclusion also made the wife (relatively) independent of her former husband in terms of financial resources. Yet, appellate judges have been forced to recognize that one result of such independence may be a need for social assistance. In such situations, of course, it may be necessary to assess whether a dependent family member should look first to individual members of the former family unit, or to the state, for financial assistance. Significantly, Justice Wilson participated in a decision in the Ontario Court of Appeal in which the court concluded that the allowance received by a disabled adult child could be taken into account in reducing her father's obligation for child support.¹⁸⁶ This decision did not confront directly the issue of whether it was appropriate for a former wife, like the adult daughter in that case, to become dependent on social assistance rather than remain dependent on her former husband. However, in a subsequent essay about these issues in 1983, Justice Wilson confirmed her view that familial obligations for support of such dependents should be limited, suggesting that jurisprudence in the United Kingdom exhibited a "level of sophistication" much greater than in Canada in relation to the respective roles of former spouses and the State in ensuring financial security for dependent family members.¹⁸⁷

entirely consistent with the intent of the legislation and with a number of other decisions at the time: see especially *Sharp v. Sharp* (1975), 10 O.R. (2d) 465; as well, of course, such an approach provided ample scope for the development of principles consistent with her ideas of the equality and independence of former spouses and the need for a clean break.

186. *Harrington v. Harrington* (1981), 33 O.R. (2d) 150. In reaching this conclusion, Morden, J.A. canvassed a number of decisions, as well as the Law Reform Commission of Canada Report on Family Law (1976), concluding that:

"I think that it is reasonable to take the daughter's receipt of payments under the Family Benefits Act into account. I consider it a 'relevant circumstance' on the central issue of whether it is 'fit and just' to order that the husband pay maintenance. Having regard to the absence of a general parental obligation to support adult children it can hardly be said, in the particular circumstances of this case, that a parental obligation should come first and the State's second. The illness which has befallen the daughter is one of those misfortunes of life for which, at the present time, it is reasonable to expect some sort of social security response.... It is not unreasonable, depending on the parent's ability to pay, to consider his or her obligation to be of a residual nature."

Ibid., at 162.

187. See Bertha Wilson, "The Variation of Support Orders" in R. Abella and C. L'Heureux-Dube, eds., *Family Law: Dimensions of Justice*, *supra* note 147, at 35. In the article, Justice Wilson reviewed a number of Canadian decisions concerning applications for support in which the State was a "hidden" party and lamented the effect of such "fictitious" proceedings on the public image of the courts. *Ibid.*, at 60-67.

For critical analysis of spousal dependence and State support, see Margaret Leighton, "Handmaids' Tails: Family Benefits Assistance and the Single-Mother-Led Family" (1987), 45 *Univ. of Toronto Fac. L.R.* 324; and Sylvia Law, "Women, Work, Welfare and the Preservation of Patriarchy" (1983), 131 *Univ. of Penn. L.R.* 1249.

More significantly, Justice Wilson's participation in the dissenting judgement in *Messier v. Delage*¹⁸⁸ clearly confirmed her view of the respective roles for former spouses and the State in relation to financial security after divorce. In *Messier*, the parties had divorced and made arrangements for spousal and child support. A few years later, the former husband applied to vary the corollary relief, particularly the award for spousal support, on the basis that, although he remained able to pay the amount awarded, his former wife's needs had changed. The former wife was 38 years old and in good health, and she had completed a Master's degree in translation; however, she had encountered serious difficulty in obtaining employment and had worked only part-time with an approximate annual income of \$5000. At trial, the court decided that the spousal support order should be terminated after eight more months, reasoning that the wife would have ample time to become self-sufficient within that time period; the appellate court in Quebec reversed the decision, restoring the wife's continued entitlement to spousal support.

On appeal to the Supreme Court of Canada, a majority of the court held that the decision of the appellate court was correct and that it was not appropriate, pursuant to the variation provisions of the Divorce Act,¹⁸⁹ for the court to "[hypothesize] as to the unknown and ... unforeseeable future"; on the other hand, "if other changes [were to occur], ... the appellant [could] apply to the Court again."¹⁹⁰ By contrast, three judges dissented, including Justice Wilson, and their views expressed strong support for the principles of independence and the necessity of a clean break for spouses at divorce. As Justice Lamer stated on behalf of Justices Wilson and McIntyre, the appeal raised questions of great importance, particularly in light of "the current economic situation, the difficulty in finding work and the resulting high rate of unemployment."¹⁹¹ In addition, he suggested that "the evolution of society and of the status of women both require us to re-examine what the nature of maintenance should be."¹⁹²

For the dissenting judges, therefore, the former wife's inability to obtain well-paid employment was not a circumstance which required

188. [1983] 2 S.C.R. 401.

189. The case considered the provisions of the former Divorce Act, and particularly section 11 (2); see *supra*, note 129.

190. *Messier*, *supra*, note 188, at 417, per Chouinard, J. on behalf of Ritchie, Beetz and Estey, JJ.

191. *Messier*, *supra*, note 188, at 417.

192. *Messier*, *supra*, note 188, at 420.

that her former spouse provide financial support for her, especially not indefinitely. As Justice Lamer stated:

In my view, the evolution of society requires that one more step be taken in favour of the final emancipation of former spouses. To me, aside from rare exceptions the ability to work leads to 'the end of the divorce' and the beginning of truly single status for each of the former spouses. I also consider that the 'ability' to work should be determined intrinsically, and should not in any way be determined in light of factors extrinsic to the individual, such as the work force and the economic situation.... A divorced spouse who is 'employable' but unemployed is in the same position as other citizens, men or women, who are unemployed. The problem is a social one and it is therefore the responsibility of the government rather than the former husband. Once the spouse has been retrained, I do not see why the fact of having been married should give the now single individual any special status by comparison with any other unemployed single person.¹⁹³

This statement on the part of the dissenting judges in *Messier* clearly enunciated a model of independence and autonomy for divorcing spouses, a model which gained the approval of a majority of the court in the "trilogy" a few years later.

In writing the decisions on behalf of the court in *Pelech*,¹⁹⁴ *Richardson*¹⁹⁵ and *Caron*,¹⁹⁶ Justice Wilson affirmed these ideas of equality and independence for former spouses in the context of applications for subsequent variation of the terms of agreements entered into by former spouses at the time of divorce. In *Pelech*, Justice Wilson canvassed the differing approaches to variation under section 11(2) of the former Divorce Act and the finality of "private" agreements between spouses, identifying the competing concerns expressed in judicial precedents; on one hand, some courts gave priority to the need to encourage private ordering among divorcing couples by respecting the finality of their agreements, while on the other hand, some had taken the view that the court had an overriding obligation to ensure fairness between the parties, thereby requiring judicial intervention to accomplish such objectives, even though it altered the parties' agreement. Midway between these two approaches was a compromise approach which permitted intervention but confined it to a number of specified situations.¹⁹⁷

193. *Messier*, *supra*, note 188, at 426-427.

194. [1987] 1 S.C.R. 801; on appeal from British Columbia.

195. [1987] 1 S.C.R. 857; on appeal from Ontario.

196. [1987] 1 S.C.R. 892; on appeal from the Yukon.

197. *Pelech*, *supra* note 194, at 832 - 849. Justice Wilson identified the private ordering

Justice Wilson's judgment in *Pelech* identified as "an overriding policy consideration" the need to encourage people "to take responsibility for their own lives and their own decisions."¹⁹⁸ Starting from this point, she declared that "parties who have declared their relationship at an end should be taken at their word,"¹⁹⁹ and agreed that judicial intervention in their affairs should be confined to those circumstances in which there had been a "radical change in circumstances flowing from an economic pattern of dependency engendered by the marriage."²⁰⁰ Unless such a test was met, moreover, "the obligation to support the former spouse should be, as [would be] the case of any other citizen, the communal responsibility of the state."²⁰¹

In my view, Justice Wilson's judgment in *Pelech* was entirely consistent with her earlier decisions about entitlement to spousal support. Moreover, in light of her expressed views about the relative responsibilities of former spouses, by contrast with the State, to provide financial security for dependent former spouses, it was not surprising that she concluded that Mrs. Pelech (whose divorce had been concluded over a decade earlier) should look to the State, rather than to her former husband, for financial security.²⁰² Yet, the *Pelech* decision has remained a troubling one for a number of reasons.

As has been suggested, the approach adopted by Justice Wilson reflected a notion of equality between the spouses, both in terms of their opportunities for financial security after divorce as well as in the private bargaining process of their agreement. Justice Wilson expressly rejected any "need to compensate for systemic gender-based

approach with decisions in the Ontario Court of Appeal, especially *Farquar v. Farquar* (1983), 1 D.L.R. (4th) 244; and the fairness approach with those in the Manitoba Court of Appeal such as *Katz v. Katz* (1983), 33 R.F.L. (2d) 412 (Man. C.A.). The midway approach was evidenced by decisions such as *Webb v. Webb* (1984), 39 R.F.L. (2d) 113 (Ont. S.C. C.A.), also a decision of the Ontario Court of Appeal. Although her decision ultimately adopted the midway approach, that is that courts may intervene in only defined circumstances, the test which she defined for such intervention differed from that in *Webb* and other similar cases.

198. *Pelech, supra*, note 194, at 850.

199. *Pelech, supra*, note 194, at 851.

200. *Pelech, supra*, note 194, at 851.

201. *Pelech, supra*, note 194, at 852.

202. In *Pelech*, the former spouses had made an agreement which provided that Mr. Pelech would care for the children and provide lump sum support to Mrs. Pelech; Mr. Pelech had carried out all his obligations under the agreement. When Mrs. Pelech subsequently became unable to work because of illness, it seemed that it was Mr. Pelech's considerable wealth which prompted the trial judge's decision that he should, once again, accept financial responsibility for his former spouse. The British Columbia Court of Appeal allowed an appeal and the appeal to the Supreme Court of Canada was dismissed, LaForest providing a judgment concurring with Justice Wilson's decision.

inequality”,²⁰³ suggesting that continued surveillance by the courts over privately negotiated agreements would tend to reinforce the very bias they sought to counteract. Such comments clearly suggested that Justice Wilson had adopted a formal equality approach, one which did not seek to take account of systemic economic disparity between former spouses, disparity which might affect their respective bargaining power in the negotiation of a spousal agreement, as well as their ability to attain self-sufficiency after divorce.²⁰⁴ On this basis, Justice Wilson’s adherence to a formal equality approach prevented her from recognizing “that marriage has concealed or masked the poverty of women in this country, and when divorce occurs, the mask is removed.”²⁰⁵

Moreover, even if one were to accept the approach adopted by Justice Wilson in *Pelech*, it is arguable that the principle was not appropriately applied in *Richardson*. In the latter case, the “agreement” negotiated between the spouses occurred in the context of minutes of settlement prior to the divorce action; thus, the application for spousal support was filed with the divorce claim and was technically a matter under section 11(1) of the former Act, a section which might have required an interpretation somewhat different from that developed by Justice Wilson for section 11(2) in *Pelech*; such a position was expressly adopted by LaForest, J. in his dissenting judgment. More significantly, the facts suggested that Mrs. Richardson’s financial dependency was probably at least partly related to her decision to remain at home when her children were young, a decision which meant that she had only a limited connection to the paid workforce for several years.²⁰⁶

203. *Pelech*, *supra*, note 194, at 849.

204. See Bailey, *supra*, note 132. See also Clare Dalton, “An Essay in the Deconstruction of Contract Doctrine” (1985), 94 *Yale L.J.* 997; Brenda Cossman, “A Matter of Difference: Domestic Contracts and Gender Equality” (1990), 28 *Osgoode Hall L.J.* 303; and Katharine Baker, “Contracting for Security: Paying Married Women What They’ve Earned” (1988), 55 *Univ. of Chicago L.R.* 1193.

205. Martha Fineman, “Illusive Equality: On Weitzman’s *Divorce Revolution*” (1986), *Amer. Bar Found. Res. J.* 781, at 782. In criticizing Weitzman’s acceptance of a formal equality approach, an approach similar to that of Justice Wilson, Fineman stated:

“... she ... hints that male backlash, provoked by recent feminist reforms that resulted in perceived gains, might provide the key to the puzzle of why equality is applied with such a vengeance in the family law area (the only area in which women are perceived to have an advantage) even if its application tends to impoverish dependent women and children.”

Ibid., at 783-784.

206. *Richardson*, *supra* note 195. According to Justice Wilson’s judgment, the parties married in 1967, and she worked fulltime until 1974. In that year, when her second child was born, she worked only one month; she did not work again until 1976, when she worked three months. The

Thus, Justice Wilson's decisions in the trilogy of cases concerning spousal support have boldly implemented the underlying rationale of formal equality enshrined in the new family law. By her willingness to embrace the ideology of formal equality, she has forced us to reconsider the consequences of accessible divorce and serial monogamy, and the extent to which individual family members should be completely relieved of continuing responsibilities for those who are dependent, both while a family unit exists and (especially) after its dissolution;²⁰⁷ as well, of course, Justice Wilson's approach requires us to consider alternatives to private familial support.²⁰⁸ Moreover, her decision has required that we confront the issue of gender bias in the substance and process of family agreements,²⁰⁹ particularly because of the disparity of access to economic resources for women by contrast with men, a disparity created both by family arrangements and also by different societal expectations and rewards for women and men.²¹⁰ In such a context, Martha Fineman has argued forcefully that equality is merely an illusion:

Richardsons separated in 1979. On this basis, Justice Wilson concluded that Mrs. Richardson had not been out of the paid workforce for significant periods and that it could "not be said that the marriage [had] atrophied her skills or impaired their marketability." *Ibid.*

The extent to which previous workforce attachment may impact on the marketability of employees may vary according to the nature of employment. In this case, Mrs. Richardson was a clerk-typist; her skills might well have atrophied in light of the computerization of office workplaces which occurred in the late 1970's and early 1980's. Moreover, the pool of persons with such skills might also affect her competitiveness for the jobs available. See Pat Armstrong and Hugh Armstrong, "Women, Family and Economy" in Nancy Mandell and Ann Duffy, eds., *Reconstructing the Canadian Family*, *supra*, note 25, at 143; and Nancy Dowd, "Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace" (1989), 24 Harvard Civil Rights-Civil Liberties L.R. 79. See also *Moge v. Moge* (1990) 25 R.F.L. (3d) 396, currently on appeal to the Supreme Court of Canada.

207. The trilogy has also sparked a number of different approaches in the courts; for an overview, see Carol Rogerson, "Judicial Interpretations of the Spousal Support and Child Support Provisions of the Divorce Act 1985" (Part I)(1990-91), 7 C.F.L.Q. 155; Rogerson, "The Causal Connection Test in Spousal Support Law" (1989), 8 Can. J. of Family Law 95; Lorne Wolfson, "The Legacy of *Pelech v. Pelech*" (1989) 4 C.F.L.Q. 115; see also Nicholas Bala, "Domestic Contracts in Ontario and the Supreme Court Trilogy: 'A Deal is a Deal'" (1988), 13 Queen's L.J. 1; Georgiale Lee, "*Pelech*: Variations on a Theme" (1990), 69 Can. Bar Rev. 78; and Julien Payne, "Further Reflections on Spousal and Child Support after *Pelech*, *Caron* and *Richardson*" (1990), 11 *Advocates' Q.* 137.

208. For an excellent overview, see M.T. Meulders - Klein and J. Eekelaar, eds., *Family, State and Individual Economic Security* (E. Story-Scientia: 1988).

209. For an analysis of gender and contract, see Carole Pateman, *The Sexual Contract* (Stanford Univ. Press: 1988).

210. See Nitya Duclos, "Breaking the Dependency Circle: The Family Law Act Reconsidered" (1987), 45 U. of Toronto Fac. L.R. 1; and M.L. McCall, "Options for Reform of the Law of Spousal Support Under the Divorce Act, 1985" (Can. Research Inst. for Law and the Family: 1991).

Despite the fact that each spouse has a legal right to unilaterally terminate the marriage bond, the costs - both economic and, given custody reforms, emotional - which attend divorce are far more profound for women than men. Thus, in spite of the illusion of easily available divorce created by formal law, it is still freer for some than for others.²¹¹

In the context of Justice Wilson's image of family in these cases about spousal rights and responsibilities, moreover, this analysis suggests that the formal equality of individuals has erased the image of family, both in terms of property entitlements and with respect to the lack of ongoing financial support. Tragically, the assumption of legal equality for both spouses has *increased* the actual economic inequality of former (female) spouses.²¹² Thus, the assumption of the equality of spouse in family units has eliminated the costs and benefits of gendered familial roles and choices from legal relevance, as if spousal arrangements in family units were no different from "arms length" transactions between strangers. In such a context, the idea of family has truly been eliminated, leaving individual spouses in unmediated relationships not only with the State,²¹³ but also with each other. For wives, the equality of the new family law has thus created only "engendered justice".

Re-Thinking Spousal Relationships

The *Pelech* trilogy confirmed the idea of autonomy and independence, as well as (formal) equality, for spouses in matters of economic security after marriage breakdown. In the application of the principle adopted by Justice Wilson in *Pelech*, she found no opportunity to take account of gendered experiences of family life, either during or at the end of a marriage; because each spouse was regarded in law as equally free to make choices within the family, neither was entitled subsequently to look to the other former spouse for continuing economic support at the end of the marriage. Such an approach was, in my view, entirely consistent with the ideas of formal equality for spouses adopted

211. Fineman, *supra*, note 126, at 174. In Fineman's view, moreover:

"The rhetoric of equality is too easily appropriated and utilized to gain support for antifeminist measures. Equality rhetoric is a rhetoric that belongs both to no one, and to everyone. For this reason alone, it would seem time to abandon equality."

Ibid., at 190.

212. See, for example, Department of Justice *Report*, *supra* note 167; and C. Schmitz, "Women, Kids Driven into Poverty by Law Awards under Divorce Act" (*Lawyers' Weekly*: 31 Aug. 1990) at 1.

213. Glendon, *supra*, note 22, at 12.

by Justice Wilson from the time of her earliest decisions in the Ontario Court of Appeal. Yet, there is also some evidence that her views about the appropriateness of such an individualistic approach changed, in terms of recognizing gendered experiences of family life, between her decision in *Pelech* and her later decision in *R. v. Lavallee*.²¹⁴

In *Lavallee*, the accused was charged with an indictable offence after she shot and killed her common law partner. The evidence suggested that she had done so in self-defence by reason of the violence of the relationship and the likelihood that the deceased, who had threatened to kill her, would have carried out the threat had she not killed him first. The trial court admitted expert testimony about the nature of the "battered women's syndrome", testimony which confirmed the accused's state of mind; in doing so, the expert witness provided details of the accused's state of mind, for some of which there was no other admissible evidence, the accused having chosen not to testify. The trial judge admitted the evidence and instructed the jury in its role in assessing its significance and weight, in the context of the self-defence claim by the accused. The jury acquitted the accused, but the Manitoba Court of Appeal reversed this verdict. On appeal to the Supreme Court of Canada, Justice Wilson allowed the appeal, restoring the trial judge's decision to acquit the accused.²¹⁵

The decision in *Lavallee* has been regarded as an important development in criminal law and procedure, particularly relating to the claim of an accused (female) person to self-defence. As Christine Boyle has suggested, the case has "made an important contribution to Canadian law on self-defence."²¹⁶ Its special significance lies in

214. [1990] 1 S.C.R. 852.

215. Justice Wilson reviewed the trial judge's charge to the jury and concluded that he had "performed his task adequately in this regard." *Lavallee*, *supra* note 214, at 896-897; she specifically commented on the evidence which was admitted which corroborated the expert testimony, even though the latter remained "a melange of admissible and inadmissible evidence." *Ibid.* Justice Sopinka wrote a concurring opinion which elaborated on the issue of weight to be given to such expert testimony, having regard to the decision in *R. v. Abbey*, [1982] 2 S.C.R. 24. *Lavallee*, *supra* note 214, at 898-899.

216. Christine Boyle, "The Battered Wife Syndrome and Self-Defence: *Lavallee v. R.*" (1990), 9 *Can. J. of Family Law* 171. See also Daniel Brodsky, "Educating Juries: The Battered Woman Defence in Canada" (1987), 25 *Alberta L.R.* 461; Cynthia Coffee, "A Trend Emerges: A State Survey on the Admissibility of Expert Testimony Concerning the Battered Woman Syndrome" (1986-87), 25 *J. of Family Law* 373; Elizabeth Schneider, "Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering" (1986), 9 *Women's Rights Law Reporter* 195; and Susan Podebradsky and Mary Triggiano-Hunt, "An Overview of Defense of Battered Women from a Postconviction Perspective" (1988), 4 *Wisc. Women's L.J.* 95.

Justice Wilson's acceptance of the usefulness of expert testimony about the context of family violence, an approach which suggested that there was a need for expert evidence, rather than reliance on social stereotypes, about the position of women in violent relationships with men:

Expert evidence on the psychological effect of battering on wives and common law partners must, it seems to me, be both relevant and necessary in the context of the present case.... The average member of the public (or of the jury) can be forgiven for asking: Why would a woman put up with this kind of treatment? ... Such is the reaction of the average person confronted with the so-called 'battered wife syndrome'. We need help to understand it and help is available from trained professionals.²¹⁷

According to Mary Eberts, Justice Wilson's decision in *Lavallee* shows how receiving such testimony "can change the way a legal problem is viewed, and thus, inevitably, its outcome"; for her, the expert evidence admitted by the decision in *Lavallee* was "transformational".²¹⁸ Thus, in reviewing the "objective standard of reasonableness" required for a claim of self-defence, Justice Wilson expressed the impossibility of applying the principles in the context of a battered woman's claim to self-defence:

If it strains credulity to imagine what the 'ordinary man' would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. 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'.²¹⁹

217. *Lavallee*, *supra*, note 214, at 871-872.

218. Mary Eberts, "New Facts for Old: Observations on the Judicial Process" in Richard Devlin, ed., *Feminist Legal Theory* (Ermond-Montgomery: 1991) 110, at 115. See also Christine Boyle, "A Feminist Approach to Criminal Defences" in *id.*, at 6; and Kathleen Lahey, "On Silences, Screams and Scholarship: An Introduction to Feminist Legal Theory" in *id.*, at 47. There is an interesting overview of feminist analysis of criminal law in Marie-Andree Bertrand, Christine Boyle, Celine Lacerte-Lamontagne and Rebecca Shamai, *A Feminist Review of Criminal Law* (Status of Women Canada: 1985). For an earlier analysis, see Christine Boyle, "Violence Against Wives - The Criminal Law in Retreat?" (1980), 31 *N. Ireland Legal Quarterly* 35.

219. *Lavallee*, *supra*, note 214, at 874. The decision relied extensively on Lenore Walker, *The Battered Woman* (Harper and Row: 1979), and criticized the decision in *R. v. Whynot* (1983), 9 C.C.C. 449:

"The requirement imposed in *Whynot* that a battered woman wait until the physical assault is 'underway' before her apprehensions can be validated in the law would, in the words of an American court, be tantamount to sentencing her to 'murder by installment': *State v. Gallegos*, 719 P.2d 1268 (N.M. 1986)..."

On this basis, she concluded that “fairness and the integrity of the trial process demand that the jury have the opportunity”²²⁰ to hear the expert testimony, although she also emphasized that it was “up to the jury to decide whether, *in fact*, the accused’s perceptions and actions were reasonable.”²²¹

In this decision, Justice Wilson arguably recognized a need for legal principles which extend beyond ideas of formal equality. In her firm statement that “a man’s home may be his castle but it is also the woman’s home”,²²² she identified equal legal entitlement to physical security for both women and men. In her analysis of the applicable legal principles, moreover, she recognized the need to take account of the different experiences of men and women in their home and family life. Thus, in *Lavallee*, Justice Wilson accepted the need to apply legal principles so as to achieve substantive legal equality, not merely the formal equality of *Pelech*; and she recognized differences in access to power within spousal relationships, differences which may affect choices and opportunities available to women, by contrast with men. In this way, her decision in *Lavallee* offered a more complex image of spousal relationships - images of power and dependency, for example - than those in *Pelech* where they were defined primarily by ideas of individual autonomy and independence. As well, the legal principles were applied in *Lavallee* by taking account of the impact of familial relationships, by contrast with the exclusive focus on the individualism of family members in *Pelech*.

These differences between the two cases might be explained in a number of ways. In between these two cases, for example, the Supreme Court of Canada decided *Andrews v. Law Society of British Columbia*,²²³ a case which required the court to reflect on the nature of equality, and the impact of legal tests which addressed substantive as well as formal equality claims.²²⁴ On this basis, it is arguable that Justice Wilson’s understanding of the disadvantaged position of women

220. *Lavallee*, *supra*, note 214, at 891.

221. *Ibid.*

222. *Lavallee*, *supra*, note 214, at 888-889. In this comment, she also suggested that the woman’s home may seem to her “more like a prison in the circumstances.” *Ibid.*

223. *Supra*, note 106.

224. In *Andrews*, McIntyre, J. stated that equality must be defined by reference to discrimination, and that discrimination was:

“... a distinction, whether intentional or not ... which has the effect of imposing burdens, obligations, or disadvantages on [an] individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.”

Andrews, *supra*, note 106, at 174.

in families might have been more critical and contextualized by the time that *Lavallee* was considered, by contrast with *Pelech*. Clearly, *Lavallee* also eroded the law's traditional division between public and private spheres.²²⁵ In asserting a role for law in recognizing the differing circumstances of men and women in the context of family violence, Justice Wilson's decision in *Lavallee* confirmed the necessity of taking account of power in spousal relationships, and especially the perceptions of the less powerful spouse. In this way, the law's role in family relationships was engaged on behalf of the perspective of the least powerful members of the family, an approach which arguably transformed the image of family as well as eroding the distinction between public and private spheres.

In this context, it may be important to note that *Lavallee*, like Justice Wilson's decision in *Morgentaler*, focused on claims to physical security for women; and that, while both cases established important principles for ensuring women's physical integrity and safety, neither case addressed the economic disadvantages experienced by women, disadvantages which restrict their ability to leave abusive relationships as well as the choices available to them when they become pregnant. On this basis, it is possible that the different images

225. The issue of public and private spheres was also addressed in *Edmonton Journal v. Alberta*, [1989] 2 S.C.R. 1326. In that case, the appellant newspaper sought a declaration that section 30 of the *Judicature Act* contravened section 2(b) and section 15 of the Charter. Section 30 prohibited the publication of certain categories of information relating to matrimonial proceedings. Both the trial court and the Alberta Court of Appeal dismissed the appellant's application on the basis that section 30 was a reasonable limit to section 2(b) under section 1 of the Charter and that it did not violate section 15.

A majority of four justices (with three justices dissenting) in the Supreme Court of Canada allowed the appeal, holding that section 30 contravened section 2(b) and was not justifiable under section 1. Justice Wilson wrote a concurring opinion in which she characterized as public interests both a litigant's interest in privacy and the public's interest in an open court process. According to her, "both interests must be seen as public interests, in this case the public interest in protecting the privacy of litigants generally in matrimonial cases against the public interest in an open court process." *Id.*, at 1354.

Having concluded that there was an infringement of section 2(b), Justice Wilson considered whether the legislation constituted a justifiable limit within section 1 of the Charter. In this context, she expressed clear views about society's acceptance of marriage breakdown and divorce:

"It [section 30] encompasses all matrimonial causes presumably on the assumption that they are all inevitably attended by such consequences. While this assumption may have been valid at one time, I think it is wholly unrealistic to make this assumption today. Many allegations that might once have been acutely embarrassing and painful are today a routine feature of matrimonial causes to which little, if any, public stigma attaches...."

Ibid., at 1368. Arguably, this case also eroded the division between public and private spheres; here, this goal was accomplished by abandoning the protection for privacy in family matters which become the subject of litigation.

of family life and spousal relationships evidenced by *Pelech*, by contrast with *Lavallee*, can be explained not so much on the basis of a change in Justice Wilson's ideas about family relationships, as in the nature of the claims being made: to the extent that the image of spousal relationships may appear more textured in *Lavallee*, it is because the case focused on physical integrity; by contrast, the image of family remains more starkly individualistic in the context of economic security, just as was demonstrated in *Pelech*.

In this way, these cases suggest that Justice Wilson may have accepted the need to take account of family relationships in the context of claims by women affecting their physical security, while eschewing any such image when the claims related to economic well-being. In the latter case, the image of spouses as fully autonomous individuals with responsibility for their own financial security arguably remained intact for her. In such a context, it appears that Justice Wilson's decisions about spousal relationships have demonstrated a range of ideas about the family; while in most cases, she applied a rigorously individualistic image to spousal relationships, her recent decision in *Lavallee*, by contrast, recognized the existence of power and the dependency generated by it, and she responded firmly and imaginatively to the demonstrated need for legal intervention. Just as in the cases about parenting, therefore, it is difficult to define her decisions concerning spousal relationships in terms of a single image of the family; instead, the decisions demonstrate a dynamic and textured perspective on the reality of such relationships and the evolution of her understanding of them.

V. Law and the Family: Private Conversations and Public Discourse

These reflections on the idea of family in Justice Wilson's work reveal both the established pattern of the law's focus on individuals rather than the family unit, and at the same time, some surprising nuances where family relationships have been recognized, even welcomed, as relevant to her legal analysis. In drawing together these reflections now, I want to enliven the context for these ideas and explore their connections to other aspects of her appellate decision-making. At the outset, of course, it is important to understand the textual focus of this essay, a focus which has explored the meaning of Justice Wilson's

“writing”: her reported decisions.²²⁶ Such a textual inquiry necessarily focuses on ideas-in-words and ignores law-in-action; in such a context, we may scrutinize the legal principles meticulously, but we are not supposed to ask whether Mrs. Richardson has found a job, whether Leticia Racine has re-discovered her heritage, or whether Mrs. Goodman’s son has established any relationship with his uncles in the years since the family became embroiled in litigation about Mrs. Goodman’s estate. These questions, questions which are central to the way people define their family lives, are not within the scope of a textual inquiry about the family in Justice Wilson’s work.

Extensive critical reflection about the role of texts in legal analysis is beyond the scope of this essay.²²⁷ At the same time, it is important to note the ways in which legal texts may be used to shape social meanings as well as to reflect them. In her work on divorce and abortion, for example, Mary Ann Glendon has explored this paradox from a comparative law perspective, suggesting that constitutional texts shape, as well as reflect, societal values in important ways.²²⁸ Especially because of the role of the Supreme Court of Canada in constitutional discourse, it is arguable that the texts of its decisions may similarly shape, as well as reflect, society’s views about the family.

As has been suggested elsewhere, however, such texts all too often reflect (and shape) values which accord more readily with men’s

226. The idea of writing, in legal decisions as in other contexts, is both exploration and communication. My favourite description is Annie Dillard’s in *The Writing Life* (Harper and Row: 1989) at 3:

“When you write, you lay out a line of words. The line of words is a miner’s pick, a woodcarver’s gouge, a surgeon’s probe. You wield it, and it digs a path you follow. Soon you find yourself deep in new territory. Is it a dead end, or have you located the real subject? You will know tomorrow, or this time next year....”

In exploring Justice Wilson’s ideas about family for this essay, I have also been influenced by Carolyn Heilbrun, *Writing a Woman’s Life* (Ballantine Books: 1988), an essay in which Heilbrun confronts the nuances of women’s accommodation to their lives. Her comments about the ways in which women find their voices as they age seem quite apt in the context of this review of more than a decade of Justice Wilson’s work:

“Acting to confront society’s expectations for oneself requires either the mad daring of youth or the colder determination of middle age. Men tend to move on a fairly predictable path to achievement; women transform themselves only after an awakening. And that awakening is identifiable only in hindsight.”

Ibid., at 118.

227. See, for example, Sanford Levinson and Steven Mailloux, eds., *Interpreting Law and Literature: A Hermeneutic Reader* (Northwestern Univ. Press: 1988); Fred Dallmayr, “Hermeneutics and the Rule of Law” (1989-90), 11 *Cardozo L.R.* 1449; and Rosemary Coombe, “‘Same as it ever was’: Rethinking the Politics of Interpretation” (1988-89), 34 *McGill L.J.* 603.

228. See Glendon, *supra*, note 27.

experiences and needs rather than with those of women.²²⁹ According to Christine Littleton, for example, the law's texts have too often failed to understand and respond to women's experiences of battering:

Women who have been battered tell stories that include fear (the one story law might listen to), love (a story usually heard as masochism), desire for connection (a story hardly heard at all) and absence of options (often dismissed as 'objectively' inaccurate). Must we be forced, by either the lack of a unitary account or the pressure of existing conditions, to choose among them only one story?²³⁰

Littleton's critique suggests that law uses a singular (and decidedly male) focus for assessing women's complaints about battering. Yet, as has been suggested, Justice Wilson's decision in *Lavallee* created space for a different image, the viewpoint of a battered woman, in addressing the legal issues. In this way, her decision, admittedly a written text, reflected lived experiences of women; arguably, it may also have (re)shaped the meaning of family violence for men and for women. In this sense, it is important to note the ways in which even a textual analysis inevitably reveals the values and lived experiences of women²³¹ and men who are judges, and the extent to which legal

229. See Mossman, *supra*, note 27.

230. Christine Littleton, "Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women", [1989] Univ. of Chicago Legal Forum 23, at 29. As Littleton explained, the problem is one of finding ways for the law to respond to women's needs without thereby creating further dependency for women. Her words are haunting:

"The problem of transition is itself part of the structure of phallogentrism. In fact, being placed in the double bind of having to choose between being a woman and unequal, on the one hand, and being equal and not a woman on the other, is the hallmark of women as an oppressed class. The way out of this double bind is not, however, to choose between equality and identity, nor even to move back and forth depending on the instant context, but rather to focus on, criticize and change the conditions that create the double bind. This essay is dedicated to all women who have found themselves in the double bind of being human and female, and especially to those who have refused to choose between the two."

Ibid., at 31. As I have argued elsewhere, it is women's roles in families, arrangements which are frequently invisible to law, which often create the double bind for women. See Mossman, *supra* note 23.

231. For an inspiring account of the creative role for judges, especially women judges, see Marlene Cano, "Claire L'Heureux-Dubé et le droit de la famille: Juge innovateur? ... Innovatrice" (1991), 12 *Queen's Quarterly* 131. According to Cano:

"Dans ses décisions, L'Heureux-Dubé s'est montrée sensibilisée et sensible au contexte social dans lequel se trouvent bien ancrées les inégalités, particulièrement d'ordre pécuniaire, entre conjoints. Elle s'est aussi intéressée au sort réservé aux enfants vivant les conséquences de la séparation de leurs parents; plus spécifiquement, en tenant compte des opinions de spécialistes en sciences humaines...."

Ibid., at 155. For a useful overview of issues about women as judges, see also Regina Graycar

principles define only the frame for the picture, leaving judges to draw and colour more individual details.

Such a textual analysis of Justice Wilson's decisions about the family reveals a dynamic quality in her understanding of the significance of family relationships and in her conviction that law should respond to them. While her ability for creative doctrinal exegesis is evident in decisions throughout her career as an appellate judge, her approach to the issues in the later cases demonstrates a singular appreciation for the complexity of human relationships, an approach which has radically altered her analysis. Thus, even though she has generally accepted the trend in law which focuses on individuals in unmediated relationships with the State, foreclosing legal recognition of the family unit, Justice Wilson has nonetheless taken seriously the impact of family relationships in a number of her later decisions.

For example, in her application of the doctrine of undue influence among siblings in *Goodman*, in her recognition of a trust relationship between custodial and non-custodial parents with respect to their children in *Frame*, in her appreciation of the context of a woman's decision about abortion because of the physical connection of her body and the foetus in *Morgentaler*, and in her understanding of the power and dependency of spousal relationships involving violence in *Lavallee*, she has focused on individuals in relationships and taken seriously the ways that our relationships are often infused with "family" meanings. In doing so, she has challenged the law's traditional focus on individuals as autonomous and independent parties, an approach which confined the doctrine of undue influence and fiduciary principles to legal arrangements between "strangers", separated the pregnant woman from the foetus, and ignored the battered woman's connection to her partner. Indeed, even in *Pelech*, the legal principle adopted by Justice Wilson focused on dependency *as connected to the*

and Jenny Morgan, *The Hidden Gender of Law* (Federation Press: 1990) at 400 ff. In an introduction to the book, Justice Elizabeth Evatt identified the role for women judges (and lawyers) as follows:

"The women's movement has already generated much necessary law reform in Australia. Getting down to the entrenched bias, however, is no easy task. While it is hard to change the system from outside, operating inside it causes a dilemma for women who are called on to act in accordance with the established rules and hierarchies of that system, to compete with and behave in the same way as men, and to take part in the essentially combative approach of the legal process. The twin dangers of either absorbing the culture and ignoring its bias, or of totally rejecting its insensitivity have to be overcome if a genuine attempt is to be made to bring about a fundamental change in the institution and its values."

Ibid., at vi.

spousal relationship, even though her application of the principle ignored the nature of economic relationships in family units and its disproportionate impact on former spouses at marriage breakdown. In this way, the idea of family has steadily emerged in Justice Wilson's work as an appellate judge, but it has emerged by taking account of the nature of family relationships and their impact on human actions, rather than in a legal recognition of family units *per se*. In doing so, her decisions have both reflected and (re)shaped ideas and values about family relationships.²³²

Moreover, her decisions have also demonstrated her willingness to engage with the ideas about families which Susan Moller Okin has identified.²³³ In Justice Wilson's aspirations for children, for example, she has shown her commitment to ideal standards of parenting, a commitment which is consistent with Okin's claim that the family should be a site of moral development for children. Some of Justice Wilson's decisions have also confronted the public/private dichotomy, and she has been astute in her grasp of the ways in which the dichotomy masks gendered experiences of family life. In doing so, she has contributed in important ways to the creation of the "truly humanist theory of justice" envisaged by Okin. Moreover, in some of her most

232. At the same time, it is important to recognize a constraint inherent in any textual analysis of appellate decision-making. The constraint of the caseload itself was compellingly described by Chief Justice Laskin, contrasting the role of an academic lawyer to that of a judge, as follows:

"The [law teacher] was and is able to touch law at its raw edges, to limit his or her concern to the intractables, to the deficiencies in the law as he or she sees them. The Judge, be he or she a trial Judge or an appellate Judge, is obliged to deal with the cases that come forward; there is no choice open to the Judge to slough off the routine and to apply himself or herself only to the exotic, to the marginal issues, to those cases that may be used to express a philosophy of law or to exhibit a sociological examination of legal doctrine. Not every case provides an opportunity for this kind of reflection."

B. Laskin, "A Judge and His (sic) Constituencies" (1976), 7 *Man. L.J.* 1, at 11. This quotation was adopted by Carol Rogerson in her thoughtful review of the work of Chief Justice Laskin's contribution to family law. Significantly, she concluded that Chief Justice Laskin's vision of family law matters was relatively traditional:

"Absent is any discussion of the particular purposes to be served by family law... as is any sensitivity to the effect of the law on the lives of the particular individuals affected by it.... [T]his quality of abstraction, of distancing from a particular social context and its needs, is a result of Laskin's particular interest in the legal process. I have tried to show throughout this paper that in many of his decisions the focus is not on issues of substantive law but on the legal process itself and maintaining the integrity of that process."

See Carol Rogerson, "From *Murdoch* to *Leatherdale*: The Uneven Course of Bora Laskin's Family Law Decisions" (1985), 35 *Univ. of Toronto L.J.* 481, at 539-540. Although Rogerson's essay focuses on Chief Justice Laskin's "family law" decisions, there are some interesting contrasts with Justice Wilson's ideas of "family", the focus of these reflections.

233. See text *supra*, at 1-4.

recent decisions, she has identified the ways in which a gender specific analysis may be essential to accomplishing substantive equality goals, and she has demonstrated a willingness to re-think how legal principles and processes may confront, rather than sustain, gender inequality. In this respect, her work represents a concrete legal response to Okin's philosophical vision about achieving justice in family life.

Thus, in the context of these reflections about the family in the work of Justice Wilson, it is clear that her approach has been both traditional and innovative. For her, as for others in the late twentieth century, the primary focus of legal analysis has been on individuals and on the State; the family, as a focus of legal entitlement and responsibility has all but disappeared, except perhaps in some cases relating to child welfare. On this basis, the task of assessing the family in the work of Justice Wilson might seem elusive and even unwarranted. In reflecting about her work, however, it has also been clear that she has frequently been aware of the family in the background, all but invisible perhaps - but a real presence nonetheless. Moreover, this paradoxical image of the family (both absent and yet present) has increasingly infused her legal analysis so that familial relationships have insistently coloured, even transformed, legal principles and their application in a wide range of differing factual contexts. In this sense, it is the idea of family relationships in the work of Justice Wilson which so illuminates her analysis about "family" matters. Moreover, it is this aspect of her work which most suggests a need to take seriously Okin's claim that we can attain justice in our society only if we achieve justice in families: the need to see a critical relationship between "family conversations" and "public discourse".²³⁴

Okin asserted a relationship between justice in families and in society because of the family's role in fostering connections between an individual's sense of personal identity and the needs and wishes of others. For Okin, there is an urgent need to ensure that these connections between our "sense of ourselves and our relations with others" be encouraged by just families so that we can learn how to sustain our sense of personal identity within a community which supports and respects the views of others. In this sense, family conversations may

234. For an interesting analysis of differing approaches to constitutional discourse, see William Conklin, *Images of a Constitution* (Univ. of Toronto Press: 1989) especially at 148 ff. According to Conklin, Justice Wilson's approach to constitutional issues has been quite unique, relying on philosophical arguments and "emotive or intuitive" meanings. *Ibid.*, at 156. Such a conclusion is not unlike my argument about her willingness to recognize the importance of family relationships in the choices made by individuals.

truly represent the seeds of public discourse; unless families are just institutions, there may be little possibility for public discourse which embraces and respects diversity.

It is in this context that Justice Wilson's recognition of the significance of family relationships, and their impact on individual choices and opportunities, offers a way of reconceptualizing our ideas of justice in public discourse. In place of current legal images of the individual and the State, it may be possible to create images which reflect relationships between individuals as well as connections between individuals and the State, images which take account of power and dependency as well as autonomy and independence. As Jennifer Nedelsky has suggested, we may also need to consider refining our understanding of autonomy so as to take account of its context:

The autonomy I am talking about does remain an individual value, a value that takes its meaning from the recognition of (and respect for) the inherent individuality of each person. But it takes its meaning no less from the recognition that individuality cannot be conceived of in isolation from the social context in which that individuality comes into being. The value of autonomy will at some level be inseparable from the relations that make it possible; there will thus be a social component built into the meaning of autonomy.²³⁵

In this sense, the nature of family conversations, collections of words which reflect the individuality of each member of the family as well as the connections among diverse family members, offers a way of re-thinking our constitutional discourse: the possibility of a new legal metaphor which reconceptualizes ourselves as both individuals and community at the same time. If we take seriously Okin's concern to establish family justice as a prerequisite for societal justice, we will need new models for our family conversations and for our public and constitutional discourses. In Justice Wilson's emphasis on the legal significance of family relationships, an approach which accepts neither the isolation of individualism nor the inequality of the family unit, we may find an imaginative revisioning of ourselves both as individuals with family relationships and also as members of the Canadian community.

Such a revisioning may offer all of us "the ability to take [our] place in whatever discourse is essential to action and the right to have [our] part matter."²³⁶

235. Jennifer Nedelsky, "Reconceiving Autonomy: Sources, Thoughts and Possibilities" in Hutchinson and Green, eds., *Law and the Community: The End of Individualism?*, *supra* note 23, 219 at 251.

236. Heilbrun, *supra*, note 226, at 18.

