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Feminist Pragmatism in the Work of Justice Bertha Wilson

Colleen Sheppard[*]

I. INTRODUCTION

Inspired by a commitment to promoting equality and to deciding individual cases, Justice Bertha Wilson's ideas resonate with feminist pragmatism. While pragmatist thought has long-standing historical roots in American philosophical traditions, it is only recently that the feminist dimensions of pragmatism have been acknowledged and explored.[1] Justice Wilson's pragmatism was reflected in her approach to legal interpretation — an approach based upon the centrality of social context and experiential knowledge rather than abstract legal formalism. She endeavoured to ensure that her judicial decisions regarding immediate legal disputes contributed to advancing social justice, despite her understanding that there were often no ideal solutions and recognition of significant constraints linked to broader patterns of systemic and intergenerational inequity. Yet pragmatism alone does not fully explain Justice Wilson's judicial philosophy. Her sensitivity to women's rights and her willingness to listen to the voices of those historically excluded from defining the law are consistent with important aspects of feminist legal theory.[2]

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[1] See Margaret Jane Radin, "The Pragmatist and the Feminist" (1990) 63 S. Cal. L. Rev. 1699 [hereinafter "'The Pragmatist and the Feminist'"]. See also Charlene Haddock Seigfried, *Reweaving the Social Fabric — Pragmatism and Feminism* (Chicago: University of Chicago Press, 1996) [hereinafter "*Reweaving the Social Fabric*"]; Catharine Pierce Wells, "Why Pragmatism Works for Me" (2000) 74 S. Cal. L. Rev. 347; Mari Matsuda, "Pragmatism Modified and the False Consciousness Problem" (1990) 63 S. Cal. L. Rev. 1763 [hereinafter "'Pragmatism Modified'"]; Richard Rorty, "Feminism and Pragmatism" (1991) 30 Mich. Q. Rev. 231 [hereinafter "Feminism and Pragmatism"]; and Jane Duran, "The Intersection of Pragmatism and Feminism" (1993) 8:2 Hypatia 159. For an example of early scholarship reflective of feminist pragmatism, see Jane Addams, *Democracy and Social Ethics* (Chicago: University of Illinois, reprinted in 2002).

[2] According to biographer Ellen Anderson in *Judging Bertha Wilson: Law as Large as Life* (Toronto: University of Toronto Press, 2001) [hereinafter "*Judging Bertha Wilson*"], Justice Wilson did not identify herself as a feminist. Her judgments and speeches, however, reveal a consistent and deep concern with advancing women's rights, a concern at the heart of the feminist

Justice Wilson's pragmatism was refracted through a lens of feminism. It was not simply a matter of making decisions that were practical within the parameters of current institutional and social conditions. It was a matter of making decisions that respected and advanced the equality of women and other socially disadvantaged groups while operating within the constraints of the rule of law and respecting the institutional limits on the role of judges. Understanding Justice Wilson's contributions through the lens of feminist pragmatism helps to deepen our understanding of some of the most innovative aspects of her legal reasoning. In this article, three dimensions of pragmatist thought are examined which are particularly significant for feminist theory and which are evident in the work of Justice Wilson. These include the commitment to making choices that have normative consequences while acknowledging the practical obstacles of an imperfect world, endorsement of an interpretative approach rooted in the contextual realities of everyday life, and a belief in the provisional and dynamic nature of truth.

II. THE DOUBLE BIND — MAKING CHOICES IN AN IMPERFECT WORLD

A useful starting point for exploring the theoretical intersections between pragmatism and feminism in relation to law is Margaret Radin's influential article, "The Pragmatist and the Feminist".[3] Professor Radin's interest in feminism and pragmatism emerged during her study of legal issues relating to surrogacy, prostitution and marital contracting. In these domains, Radin observes that the commodification of women's reproductive and sexual capacities risks accentuating exploitation and oppression. At the same time, she acknowledges that legal prohibitions on commodification threaten to undermine women's autonomy and in some cases their economic survival. Radin recognizes, therefore, that either dichotomous policy choice — for example, allowing contracts that commodify women's bodies or prohibiting such contracts — may be harmful "under current social conditions".[4] Yet, often either-or choices are the only ones available in the short term. She labels this dilemma the

project. See discussion in Clare McGlynn, "Book Review of Ellen Anderson, *Judging Bertha Wilson: Law as Large as Life*" (2003) 11 Feminist Studies 307.

[3] "The Pragmatist and the Feminist", *supra*, note 1.

[4] *Id*., at 1770.

"double bind".[5] Feminist pragmatists, therefore, recognize that "an outcome along ideal dimensions may leave individuals without a remedy".[6]

Understanding the double bind problem arises from consciousness of a duality between an ideal feminist analysis of gender equality and the actual effects of legal and policy choices in the context of present-day realities and constraints for women living in a non-ideal world. Imposing legal and policy choices premised on de-contextualized ideals of gender equality may impose significant harms on women given the immediate options and choices they have under existing social, economic and political conditions. Radin suggests that we "must look carefully at the non-ideal circumstances in each case and decide which horn of the dilemma is better (or less bad), and we must keep re-deciding as time goes on".[7] Rather than seeking a solution that resolves the double bind (an impossible task in the short term), Radin advocates choosing "the alternative that will hinder empowerment the least and further it the most".[8] Thus feminist pragmatism provides a theoretical framework for understanding the logic of decision-making in contexts of constrained and non-ideal choices.

Feminist judges are routinely confronted with the dilemma of the double bind. Because judging occurs in a non-ideal world, they recognize that ideal and principled outcomes may not be possible in the face of existing social and economic conditions. However, they still believe in the broader ideals, resulting in the experience of the double bind. In an important speech about women judges, "Will Women Judges Really Make a Difference?", Justice Wilson began by articulating her concerns about the expectations that women in Canada had regarding her appointment as the first woman on the Supreme Court. Though many heralded what they called "a new era for women", Justice Wilson asks: "So why was I not rejoicing? Why did I not share the tremendous confidence of these women?"[9] She states:

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5 *Id.*

6 Nancy Levit & Robert R.M. Verchick, *Feminist Legal Theory: A Primer* (New York: New York University Press, 2006), at 34.

7 "The Pragmatist and the Feminist", *supra*, note 1, at 1700.

8 *Id.*, at 1704.

9 Bertha Wilson, "Will Women Judges Really Make a Difference?" (The Fourth Annual Barbara Betcherman Memorial Lecture, delivered at Osgoode Hall Law School, February 8, 1990), (1990) 28 Osgoode Hall L.J. 507 [hereinafter "Women Judges"].

> … I knew from hard experience that the law does not work that way. Change in law comes slowly and incrementally; that is its nature. It responds to changes in society; it seldom initiates them. And while I was prepared — and, indeed, as a woman judge, anxious — to respond to these changes, I wondered to what extent I would be constrained in my attempts to do so by the nature of judicial office itself.[10]

Justice Wilson was sensitive to the limits of adjudication as a pathway to social change and, as explored further below, articulated various versions of the double bind problem in her judgments. Nonetheless, she was not afraid to challenge traditional frameworks and expand conventional legal categories as a means of moving forward, albeit haltingly and in complex ways, towards a more inclusive and egalitarian vision of legal rights and obligations.

Justice Wilson's pragmatic acceptance of the non-ideal conditions in which law operates is revealed in her approach to judging in a number of different contexts. In one of her most significant decisions while at the Supreme Court of Canada, *R. v. Lavallee*,[11] Justice Wilson acknowledged the importance of understanding the defence of self-defence in light of the lived realities of conjugal violence. Her judgment gave voice to societal condemnation of domestic violence:

> The gravity, indeed, the tragedy of domestic violence can hardly be overstated. Greater media attention to this phenomenon in recent years has revealed both its prevalence and its horrific impact on women from all walks of life. Far from protecting women from it the law historically sanctioned the abuse of women within marriage as an aspect of the husband's ownership of his wife and his "right" to chastise her.[12]

She then endeavoured to elaborate the law of self-defence, insisting that the jury consider emerging expert knowledge about the realities of domestic abuse in assessing whether the accused had both a reasonable apprehension of death or grievous bodily harm and a genuine belief that escape was impossible. While Justice Wilson recognized that it is clearly preferable for abused women to leave violent relationships instead of resorting to spousal homicide, she nevertheless insisted that the law be attentive to the constrained choices and desperation abused women live. In a speech about domestic violence delivered just after her retirement

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10 *Id*., at 13.

11 [1990] S.C.J. No. 36, [1990] 1 S.C.R. 852 (S.C.C.) [hereinafter "*Lavallee*"].

12 *Id*., at 872.

from the Supreme Court in 1991, and shortly after the *Lavallee* decision, Justice Wilson maintained that violence against women in the family will continue to occur until women "are recognized as equal, respected, and involved partners by the society at large and the institutions which comprise it".[13] For Justice Wilson, the ideal solution to domestic abuse was integrally connected to the larger struggle for gender equality. In the absence of such ideal conditions, however, her judicial decisions reflected a willingness to endeavour to decide cases based on the practical realities of societal inequality.

Beyond the context of domestic violence, Justice Wilson's judgments in a wide range of areas repeatedly attest to the necessity of making difficult either-or decisions when neither option is ideal. For example, in a trilogy of cases involving the rights of prostitutes, Justice Wilson recognized that there were no ideal solutions proffered by law. In her dissenting reasons, striking down *Criminal Code*[14] prohibitions on sexual solicitation, she chose to uphold the rights of prostitutes to freedom of expression:

> While it is an undeniable fact that many people find the idea of exchanging sex for money offensive and immoral, it is also a fact that many types of conduct which are subject to widespread disapproval and allegations of immorality have not been criminalized. Indeed, one can think of a number of reasons why selling sex has not been made a criminal offence … more often than not the real "victim" of prostitution is the prostitute himself or herself. Sending prostitutes to prison for their conduct may therefore be viewed by legislators as an unsuitable response to the phenomenon.[15]

Justice Wilson's sensitivity to the need to move forward in an imperfect world, in domains which were of critical importance in women's lives, informed the methodological dimensions of her approach to judging.

With respect to abortion rights, her path-breaking concurring judgment in *Morgentaler* affirmed a woman's right to decide whether or not to terminate an unwanted pregnancy as a dimension of her

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[13] Bertha Wilson, "Family Violence" (An Address to the National Convention of B'nai Brith Women of Canada, May 26, 1991), (1992) 5 Can J. of Women & L. 137, at 141 [hereinafter "Family Violence"].

[14] R.S.C. 1985, c. C-46.

[15] *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123, at 1216 (S.C.C.).

entitlement to both liberty and security of the person.[16] In so doing, she acknowledges that a woman's decision about abortion is a difficult one "that will have profound psychological, economic and social consequences for the pregnant woman".[17] She continues:

> ... The circumstances giving rise to it can be complex and varied and there may be, and usually are, powerful considerations militating in opposite directions. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well. Her response to it will be the response of the whole person.[18]

Recognition of the situational complexities of the dilemma of abortion resonates with pragmatism. Justice Wilson then proceeds to affirm women's constitutional right to make that complex decision — recognizing that its ethical and legal dimensions cannot be abstracted from the contextual realities of women's lives. While affirming women's constitutional rights and freedoms, Justice Wilson also recognizes the existence of countervailing and legitimate interests in the protection of the foetus "at the later stages of [a woman's] pregnancy when the state's compelling interest in the protection of the foetus would justify it in prescribing conditions".[19] Thus, she again demonstrates a resistance to absolutist outcomes, based on abstract principles. Instead, she recognizes that women's rights may yield to countervailing concerns depending on the conditions and circumstances.

In the domain of family law, she also demonstrated a willingness to make decisions in contexts where neither choice was ideal. In a widely criticized decision, *Racine v. Woods*,[20] she accorded custody via a *de facto* adoption process to the foster parents of a young Aboriginal girl. In rejecting the Aboriginal biological mother's claim for custody, Justice Wilson states that the decision was difficult given the dual concerns with Aboriginal cultural heritage and parent-child bonding as dimensions of the best interest of the child. Still, she accepted the view that a decision should be made rather than leaving the child's family status in limbo.

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

17 *Id*., at 171.

18 *Id*.

19 *Id.*, at 183.

20 [1983] S.C.J. No. 71, [1983] 2 S.C.R. 173 (S.C.C.).

She thus notes the need to "bite the bullet"[21] and decide. In so doing, she upholds the *de facto* adoption claim of the foster parents on the grounds that the child had bonded with her foster parents during the biological mother's three-year absence.

> ... In my view, when the test to be met is the best interests of the child, the significance of cultural background and heritage as opposed to bonding abates over time. The closer the bond that develops with the prospective adoptive parents the less important the racial element becomes.[22]

Justice Wilson demonstrates a willingness to make a choice despite conflicting concerns and risks of harm regardless of which choice was made. Nevertheless, she was criticized for the ways in which her decision reinforced systemic racism against Aboriginal people in the child welfare system and for her failure to appreciate the significant efforts made by the biological mother to remake her life.[23]

Justice Wilson was also criticized for her decision in a trilogy of cases dealing with spousal support.[24] In all three cases, she denied spousal support to economically needy wives — prompting criticism from feminist legal scholars about her failure to be adequately attentive to the economic consequences of marriage on women.[25] Justice Wilson's reasoning engaged with a number of conflicting policy concerns and principles. She endorsed the idea of freedom of contract, spousal compensation for economic dependence causally connected to marriage, the importance of allowing individuals to terminate once and for all the bonds of marriage, and state responsibility for economic well-being. In an effort to take these divergent and sometimes conflicting principles into account, she crafted her "causal connection" test — which limited spousal support obligations to cases where the current economic need of the former spouse was foreseeable and causally connected to the

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[21] *Id.*, at 187.

[22] *Id*., at 187-88.

[23] Patricia A. Monture, "A Vicious Circle: Child Welfare and the First Nations" (1989) 3 C.J.W.L. 1, at 12-14.

[24] See *Pelech v. Pelech*, [1987] S.C.J. No. 31, [1987] 1 S.C.R. 801 (S.C.C.) [hereinafter "*Pelech*"]; *Richardson v. Richardson*, [1987] S.C.J. No. 30, [1987] 1 S.C.R. 857 (S.C.C.); *Caron v. Caron*, [1987] S.C.J. No. 32, [1987] 1 S.C.R. 892 (S.C.C.) .

[25] See, *e.g*., Martha J. Bailey, "Pelech, Caron, and Richardson" (1989) 3 C.J.W.L. 615. See also Carol J. Rogerson, "The Causal Connection Test in Spousal Support Law" (1989) 8 Can. J. of Fam. L. 95.

marriage relationship.[26] In applying this framework to the specific factual circumstances of the trilogy of cases before the Court, she concluded that the economic need of the three wives seeking spousal support was not causally connected to their previous marriages, and thus denied their claims.

In a speech about family law a few years after her decisions in the trilogy, Justice Wilson appears to recognize that perhaps the Court did not adequately take into account the extended effects of economic disadvantage linked to marriage.[27] Nevertheless, the idea of basing economic obligations between spouses on some form of compensatory rationale that uses the logic of the causal connection test has been endorsed in other contexts, most notably the widely praised constructive trust cases involving common law couples.[28] Moreover, Justice Wilson's support for a more robust public responsibility for economic well-being, and resistance to the logic of the privatization of economic responsibilities, has been reclaimed as an important and yet often overlooked aspect of the spousal support trilogy.[29]

III. KNOWLEDGE AND EXPERIENCE: CONTEXTUAL APPROACHES

> It is so much easier to come up with a black and white answer if you are unencumbered by a broader context which might prompt you … to temper the cold light of reason with the warmer tints of imagination and sympathy.[30]

Faced with the recognition that we do not live in an ideal world — that moral, ethical, legal choices operate in the complex, messy, compromised contexts of everyday life, Justice Wilson advocated the need to adopt a contextual approach to legal reasoning. According to Justice Wilson, a contextual approach "recognizes that a particular right

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[26] *Pelech*, *supra*, note 24, at 851-52. This test appears to have been inspired by the constructive trust cases which relied on the causal connection concept to determine equitable distribution of property entitlements between common law spouses and which was widely praised by feminist legal scholars. See *Pettkus v. Becker*, [1978] O.J. No. 3398, 87 D.L.R. (3d) 101 (Ont. C.A.), affd [1980] S.C.J. No. 103, [1980] 2 S.C.R. 834 (S.C.C.) [hereinafter "*Pettkus*"].

[27] Bertha Wilson, "Women, the Family, and the Constitutional Protection of Privacy" (1992) 17 Queen's L.J. 5, at 16-17 [hereinafter "Women, the Family"].

[28] See, *e.g.*, *Pettkus v. Becker*, [1978] O.J. No. 3398, 87 D.L.R. (3d) 101 (Ont. C.A.) *per* Wilson J.A., affd [1980] S.C.J. No. 103, [1980] 2 S.C.R. 834 (S.C.C.).

[29] See Robert Leckey, "What Is Left of *Pelech*?" (2008) 41 S.C.L.R. (2d) 103.

[30] Jutice Wilson citing *Lord Macmillan* in "Women Judges", *supra*, note 9, at 23.

or freedom may have a different value depending on the context".[31] In an important concurring opinion regarding the interpretation of the section 1 balancing provisions in the *Canadian Charter of Rights and Freedoms*, Justice Wilson notes:

> ... The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it. It seems to be more sensitive to the reality of the dilemma posed by the particular facts and therefore more conducive to finding a fair and just compromise between the two competing values under s. 1.[32]

The contextual approach is prevalent throughout Justice Wilson's judgments and writings. To cite another example from her speech on constitutional law, family law and privacy, Justice Wilson writes:

> Real lives, contemporary women's lives should not only be taken seriously but should be regarded as primary in interpreting constitutional guarantees which impact directly or indirectly on women's equality. Experiences must not be "shoehorned" to fit within the constitutional guarantees: rather, the constitutional guarantees must be interpreted in a way that is responsive to women's reality.[33]

Justice Wilson championed a contextual methodology, linking it to a purposive approach that is consistent with the rejection of an originalist or frozen rights approach and reflective of a vision of the Constitution as a "living tree".[34] For Justice Wilson, a contextual approach engages judges in an assessment of the lived realities of individuals, historical understandings of legal categories and concepts and modern social conditions.

This insistence on linking law to the myriad complex contexts of modern social life finds important parallels in pragmatist philosophy. As

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[31] *Edmonton Journal v. Alberta (Attorney General)*, [1989] S.C.J. No. 124, [1989] 2 S.C.R. 1326, at 1355-56 (S.C.C.).

[32] *Id*. The appellant in the case sought a declaration that statutory provisions prohibiting the publication of personal details in matrimonial proceedings contravene, in part, the right to freedom of expression. The majority of the Court, including Wilson J., ruled in favour of the appellant. In a separate judgment, Wilson J. referred to the need to adopt a contextual rather than an abstract approach; the former recognizing the value differential of rights depending on the specific context under consideration which, in turn, contributes to addressing the particular aspect(s) of the right in question and aspects of other rights that may be in competition with it. See *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[33] "Women, the Family", *supra*, note 27, at 13.

[34] *Id.*, at 8 and 29.

John Dewey noted, "neglect of context is the greatest single disaster which philosophic thinking can incur".[35] As a critical contributor to pragmatist philosophy in the United States, Dewey's ideas underscore the need to ground theory in practice and experiential knowledge. As Shannon Sullivan explains, Dewey used the term "transaction" to denote the "dynamic, co-constitutive relationship" between individuals and their environment.[36] A recurrent theme in pragmatist philosophy is a concern with actual concrete contexts rather than abstract, universal principles and concepts.[37] As Sullivan suggests, "… pragmatism's emphasis on concrete particulars of 'real' life, instead of abstractions … lend it to feminist discourse".[38]

Yet, pragmatist contextualism in and of itself does not provide an adequate account of Justice Wilson's judicial philosophy. Justice Wilson's pragmatic turn to real life contexts and perspectives was deeply embedded in a concern with the effects of law on socially disadvantaged and disempowered groups, including women. Informing legal rights and obligations with the contextual realities of those who have been excluded from historical processes of defining legal concepts and categories was central to Justice Wilson's contextual methodology. It is this aspect of Wilson's interpretive methodology that resonates with feminist theory, particularly feminist standpoint theory. A central premise of feminist standpoint theory is the importance of "'starting off thought' from the lives of marginalized peoples" in order to "generate less partial and distorted accounts, not only of women's lives, but also of men's lives and of the whole social order".[39] Justice Wilson's approach also parallels what Mari Matsuda calls a "weighted pragmatic method" — an approach that actively seeks "to retrieve subordinated voices in

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[35] John Dewey, "Context and Thought" in Jo Ann Boydston, ed., *The Later Works of John Dewey, 1925-1953*, vol. 6 (Carbondale and Edwardsville: Southern Illinois University Press, 1981-1990), at 11, cited in *Reweaving the Social Fabric*, *supra*, note 1, at 38.

[36] Shannon Sullivan, *Living Across and Through Skins: Transactional Bodies, Pragmatism and Feminism* (Bloomington: Indiana University Press, 2001), at 1 [hereinafter "*Living Across and Through Skins*"].

[37] Nancy Levit & Robert R.M. Verchick, *Feminist Legal Theory: A Primer* (New York: New York University Press, 2006), at 11-12.

[38] *Living Across and Through Skins*, *supra*, note 36, at 5. Though such an orientation resonates with the legal realist approach to interpretation, unlike many legal realist scholars, pragmatists did not seek to find an objective truth through empirical analysis — or objectively correct legal concepts and meanings.

[39] Sandra Harding, "Rethinking Standpoint Epistemology: 'What is Strong Objectivity?'" in Linda Alcoff & Elizabeth Potter, eds., *Feminist Epistemologies* (New York: Routledge, 1993) 49, at 56.

order to attain a truer account of social reality and human possibilities".[40] A number of scholars who endorse pragmatic approaches have also focused on seeking to "grasp the world from the perspective of the dominated, to hear the outsiders who have been silent and are now trying to speak … [and] allow … the developing perspectives of the oppressed to infiltrate the dominant institutional coherence".[41] Indeed, most poignantly, Robert Cover's important idea of *nomos* — the regenerative interpretive authority of the oppressed — resonates with a pragmatism that encourages resistance and reinterpretations of dominant hegemonic understandings of the world from the perspective of the powerless.[42]

Such a modified or critical contextualism is important to ensuring that pragmatic approaches do not use the *status quo* in a world of systemic and structural inequality to define that which ought to be. In other words, traditional pragmatism may provide justifications and legitimation to conventional understandings of the world, rooted in present-day social and institutional constraints. Catharine MacKinnon has alluded to the tendency in law to define as "reasonable" that which currently is practicable and possible within the prevailing *status quo*.[43] Radin explains that pragmatism can reinforce conservative world views to the extent that an "unenlightened, complacent pragmatist tends to argue that since 'truth' about the world is found in conceptual coherence, legal 'truth' should be discerned by reference to institutional coherence".[44] This conservative risk of traditional pragmatism reinforces the importance of developing a feminist pragmatist lens.

Justice Wilson's approach reflects a deep commitment to understanding the world from the perspective of those who have been excluded and socially disadvantaged in society. For example, in a remarkable passage in *Morgentaler*, Justice Wilson demonstrates her

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[40] "Pragmatism Modified" (1990) 63 S. Cal. L. Rev. 1763, at 1768. See also Hilary Putnam, "A Reconsideration of Deweyan Democracy" (1989) 63 S. Cal. L. Rev. 1681.

[41] "The Pragmatist and the Feminist" (1990) 63 S. Cal. L. Rev. 1699, at 1724. She cites the scholarship of Martha Minow and Frank Michelman in this regard at 1723. See also "Pragmatism Modified", *id.*; "Feminism and Pragmatism" (1991) 30 Mich Q. Rev. 231; and Nancy Fraser, "From Irony to Prophecy to Politics: A Response to Richard Rorty" (1991) 30:2 Mich. Q. Rev. 259. For a feminist standpoint theory perspective, see also Sandra Harding, "Starting Thought from Women's Lives: Eight Resources for Maximizing Objectivity" (1990) 21:2-3 Journal of Social Philosophy 140.

[42] Robert Cover, "Violence and the Word" (1986) 95 Yale L.J. 1601.

[43] Catharine MacKinnon, "Feminism, Marxism, Method, and the State — Towards Feminist Jurisprudence" in Sandra Harding, ed., *Feminism and Methodology* (Bloomington: Indiana University Press, 1987) 135-56, at 141.

[44] "The Pragmatist and the Feminist", *supra*, note 41, at 1721.

profound respect for the experiential knowledge of women faced with a decision about whether to terminate a pregnancy.

> … It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma.[45]

Her comments reflect a deep respect for deferring to the choices made by those who live the dilemma of abortion, with all of its moral and ethical complexities.

In a similar vein, Justice Wilson's decision in *Lavallee* interprets the meaning of self-defence in criminal law on the basis of abused women's experiential knowledge

> … 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 a world inhabited by the hypothetical "reasonable man".[46]

The traditional legal standard for reasonableness linked to the mythical "ordinary man" is displaced in favour of an appreciation of the specificity of the lives of abused and battered women. Hester Lessard also highlights Justice Wilson's focus on social context and "attentiveness to detail in the stories of the central actors" in assessing reasonableness.[47] In *Lavallee*, for example, Lessard notes that "the suggestion that it was reasonable for Lyn Lavallee to defend herself by shooting Kevin Rust as he left the room is supported by a detailed account of Lavallee's actual situation as well as an exploration of the social phenomenon of male violence towards women".[48]

Another striking example of Justice Wilson's willingness to listen to the experiential knowledge of women, even when it diverges from socially accepted norms, is found in a speech she delivered on violence against women. She laments the inadequacy of the legal system in

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

[46] *Lavallee*, *supra*, note 11, at 874.

[47] Hester Lessard, "Equality and Access to Justice in the Work of Bertha Wilson" (1992) 15 Dalhousie L.J. 35, at 60 [hereinafter "'Equality and Access to Justice'"].

[48] *Id*.

responding to problems of domestic violence and then concludes her speech with the words of an abused woman, who, after calling the police ended up losing her children, being divorced by her husband and being economically destitute and on welfare:

> These are her anguished words:
>
> > *Why did I ever call the police? They took my family, my home, my security, my dignity, and my belief in what is right. I would rather be beaten every day of my life by my husband than have a bunch of strangers take my life away without ever asking.*
>
> Let us hope that the decade of the nineties will bring an end to the brutal face of inequality.[49]

What is remarkable about this excerpt is its honouring of the experiential knowledge of women, even when that knowledge is diametrically opposed to common conceptions about gender equality and necessary legal responses to conjugal violence. It demonstrates Justice Wilson's deep commitment to listening to what women say about the concrete effects of law on their daily lives, taking them seriously in her reflections on the justice system and amplifying them in her capacity as a public figure and judge.

Taking the experiential realities of socially disadvantaged and disempowered groups seriously as a starting point for legal interpretation resulted in a willingness both to question fundamental conceptual categories in law and to begin their creative reconceptualization. For example, in a speech on the concept of privacy in constitutional law, she asks:

> What can we learn when we ask ourselves what is it like to experience life as a woman? The main thing we learn, I believe, is that for women the distinction between public and private life is unreal.[50]

Her response reveals a willingness to challenge fundamental dimensions of conventional legal thought — the basic distinction between the public and private spheres. Moreover, Justice Wilson went further than critique, relying on experiential knowledge in her efforts to reformulate legal categories and rights — "to adapt doctrine, notwithstanding its historical roots, to contemporary reality and in particular to ensure that it serves all

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49 "Family Violence", *supra*, note 13, at 141.

50 "Women, the Family", *supra*, note 27, at 16. Justice Wilson's statement is best understood in the context of the concrete effects of a system of justice that women experience as "alienating and oppressive". See "Family Violence", *supra*, note 13, at 141.

the people, women as well as men".[51] Justice Wilson's defiance of convention and willingness to articulate new approaches to law distinguished her from her fellow judges in some key instances — with the result that a few of her most creative and memorable judgments were hers alone — sole dissenting decisions or concurring opinions.[52]

IV. THE PLURALITY OF TRUTH — PROVISIONAL CLAIMS AND CONTINUING CHANGE

A third theme that demonstrates the resonance between Justice Wilson's ideas and pragmatist thought is her open acceptance of the provisional, dynamic and tentative nature of legal categories and concepts. As Radin emphasizes, "pragmatism recommends that we take our present descriptions with humility and openness, and accept their institutional embodiments as provisional and incompletely entrenched".[53] As John Dewey wrote, "Truth is a collection of truths; and these constituent truths are in the keeping of the best available methods of inquiry and testing as to matters-of-fact."[54] In what has been called neopragmatism, Richard Rorty affirms the importance of "courage and imagination rather than putatively neutral criteria".[55]

In reflecting on the significance of pragmatist theory to feminism, Rorty heralds feminist scholars who resist "ahistoric realism"[56] and do not endeavour to "develop a non-hegemonic discourse, where truth is no

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[51] *Id.*, at 23-24. Her willingness to reassess the public-private dichotomy was also apparent in the constitutional domain in her willingness to expand the parameters of the state action doctrine: see *McKinney v. University of Guelph*, [1990] S.C.J. No. 122, [1990] 3 S.C.R. 229 (S.C.C.); *Stoffman v. Vancouver General Hospital*, [1990] S.C.J. No. 125, [1990] 3 S.C.R. 483 (S.C.C.).

[52] See, *e.g.*, *Société des Acadiens du Nouveau-Brunswick v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] S.C.J. No. 26, [1986] 1 S.C.R. 549 (S.C.C.) [hereinafter "*Société des Acadiens*"]; *Morgentaler*, *supra*, note 16; *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] S.C.J. No. 76, [1981] 2 S.C.R. 181 (S.C.C.); *Frame v. Smith*, [1987] S.C.J. No. 49, [1987] 2 S.C.R. 99 (S.C.C.) [hereinafter "*Frame*"]. Mary Jane Mossman notes that in *Frame*, "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." Mary Jane Mossman, "The 'Family' in the Work of Madame Justice Wilson" (1992) 15:1 Dalhousie L.J. 115, at 146.

[53] "The Pragmatist and the Feminist", *supra*, note 41, at 1726.

[54] John Dewey, *Experience and Nature*, 2d ed. (New York: Norton, 1929), at 410, cited *id.*, at 1706.

[55] "Feminism and Pragmatism", *supra*, note 41, at 242. See also Nancy Fraser, "From Irony to Prophecy to Politics: A Response to Richard Rorty" (1991) 30 Mich. Q. Rev. 263.

[56] "Feminism and Pragmatism", *id*.

longer connected to power". In Rorty's view, it is impossible to "do away with social constructs in order to find something that is not a social construct". Instead, he endorses feminist theory which is engaged in imagining new ways of being by appealing to "dimly imagined future practice".[57] Rorty's ideas on feminism and pragmatism highlight a critical source of divergence in feminist thought. While some feminist scholars seek to heighten or attain objectivity by including the perspectives and experiential knowledge of women and other socially disadvantaged groups, other feminist theorists reject the idea of objective knowledge. For many feminist scholars, all knowledge is socially constructed and intimately linked to one's power and position in society.[58] Feminist pragmatism embraces this vision of provisional and tentative knowledge, that is constantly tested and evolving in a changing world.

Justice Wilson's approach embodied the important pragmatist insight that "truth is inevitably plural, concrete, and provisional".[59] While it is no doubt true that virtually all legal theorists and lawyers understand that law is dynamic and continually evolving over time, the traditions of legal formalism still provide an important counterweight — insisting that law is separate from politics, that law is objective, and that we must strive for certainty and longevity in the definition of legal rights and principles. Justice Wilson defied conventional legal thinking and repeatedly articulated the need both to question past definitions and concepts and to innovate by bringing fresh perspectives and approaches to law. Moreover, she recognized that her innovations were works-in-progress that would in turn be challenged, revised, and enlarged. In her speech, "Will Women Judges Really Make a Difference?", Justice Wilson commented that "… there is no reason why the judiciary cannot exercise some modest degree of creativity in areas where modern insights and life's experience have

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[57] *Id*.

[58] See, *e.g*., Linda Alcoff, "Cultural Feminism versus Poststructuralism: The Identity Crisis in Feminist Theory" (Spring 1988) 13 Signs 404; Nancy Fraser & Linda Nicholson, "Social Criticism without Philosophy: An Encounter between Feminism and Postmodernism" in Linda Nicholson, ed., *Feminism/Postmodernism* (New York: Routledge, 1990); Martha Minow & Elizabeth V. Spelman, "In context" (1990) 63 S. Cal. L. Rev. 1597; Diana Fuss, *Essentially Speaking: Feminism, Nature and Difference* (New York: Routledge, 1989), at 118.

[59] "The Pragmatist and the Feminist", *supra*, note 41, at 1706. Ellen Anderson, *Judging Bertha Wilson: Law as Large as Life* (Toronto: University of Toronto Press, 2001) suggests at 140 that Justice Wilson's approach to judging was postmodern to the extent that it "optimistically assert(s) the possibility of determining some meanings even while acknowledging that meaning can no longer be unitary or universal". See also Rebecca Johnson, "Book Review of Ellen Anderson, *Judging Bertha Wilson: Law as Large as Life*" (2002) 81 Can. Bar Rev. 383.

indicated that the law has gone awry".[60] In some cases, however, what she viewed as a "modest degree of creativity" was seen by others as ushering in major shifts in law, reflecting (depending on the observer) either a much needed or unwarranted exercise of judicial power.[61] For Justice Wilson, however, it was not a matter of fitting into any particular political or social agenda, but rather developing the law in a way that was humane and principled, while attentive to glaring social and economic inequities and systemic patterns of disadvantage.

In the *Morgentaler* case, for example, she cites Noreen Burrows for her argument that the development of human rights began with a "history of men struggling to assert their dignity and common humanity against an overbearing state apparatus".[62] More recently, it is suggested that women sought "to eliminate discrimination, to achieve a place for women in a man's world, to develop a set of legislative reforms in order to place women in the same position as men".[63] What is still emerging, according to Justice Wilson, is the process of defining "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".[64] She endorses therefore a dynamic vision of legal and human rights:

> ... Thus, women's needs and aspirations are only now being translated into protected rights. The right to reproduce or not to reproduce which is in issue in this case is one such right and is properly perceived as an integral part of modern woman's struggle to assert her dignity and worth as a human being.[65]

In *Morgentaler*, Justice Wilson's willingness to interpret constitutional liberty as encompassing a woman's right to make fundamental choices about when and whether to have children constituted a landmark innovation in Canadian law.

Another particularly interesting example is Justice Wilson's idea that the content and meaning of a constitutional minority language right

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60 "Women Judges" (1990) 28 Osgoode Hall L.J. 507, at 516.

61 See, *e.g.*, Brian Dickson, "Madame Justice Wilson: Trailblazer for Justice" (1992) 15 Dalhousie L.J. 1. For the view that Justice Wilson was unduly activist in her judgments, see Robert E. Hawkins & Robert Martin, "Democracy, Judging and Bertha Wilson" (1995) 41 McGill L.J. 1.

62 Noreen Burrows, "International Law and Human Rights: The Case of Women's Rights" in Tom Campbell *et al.*, eds., *Human Rights: From Rhetoric to Reality* (Oxford: Basil Blackwell, 1986), at 81-82, cited in *Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30, at 172 (S.C.C.).

63 *Morgentaler*, *id.*

64 *Id.*

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

could grow over time as society changes. Usually, judges emphasize the universal and timeless quality of fundamental rights and freedoms. In *Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch v. Société des Acadiens du Nouveau-Brunswick Inc.*,[66] a case involving minority language rights in New Brunswick, Justice Wilson endorses the underlying principle of equality between French and English.[67] Drawing on the textual significance of the obligation to *advance* the equality of both official languages, she articulated a "principle of growth or development" in the constitutional minority language rights.[68] The question judges should ask, according to Justice Wilson, "will always be — where are we currently on the road to bilingualism and is the impugned conduct in keeping with that stage of development?"[69] Provided the government was acting in the "spirit of equality", its actions could be judged constitutional even if they fell short of securing absolute equality. As Justice Wilson maintained, constitutional protections were not to be "perceived as static".[70] Rather, judges should interpret protections for linguistic duality in a way that was sensitive to "an escalating standard commensurate with the evolution of social expectations".[71] Justice Wilson was at ease with a fluid understanding of constitutional principles; yet, her principle of growth was not in sync with the views of the majority of the Court. Nor did it attract support from Chief Justice Dickson, who penned a separate dissenting judgment in the case. It stands, nonetheless, as a testament to her creativity in judicial interpretation and to her belief in open acknowledgement of the dynamic nature of legal concepts, and the importance of their continued evolution in light of social change.

Justice Wilson's dynamic understanding of the law and the importance of its continued evolution was not limited to the domain of constitutional and public law. An important example of her willingness to interpret the common law principles of tort law in an innovative and creative way is her decision as a judge at the Ontario Court of Appeal in

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66 *Société des Acadiens*, *supra*, note 52.

67 *Id*.

68 *Id.*, at para. 185. The idea of advancement towards the ever-greater protection of human rights is not unheard of in human rights law. It is prevalent in the domain of economic and social rights. See, *e.g*., Covenant on Economic, Social and Cultural Rights, General Comment 3, "The nature of States parties obligations, Article 2, para 1" (14/12/90).

69 *Société des Acadiens*, *supra*, note 52, at para. 144.

70 *Id.*, at para. 188.

71 *Id.*, at para. 200.

Bhadauria v. Seneca College of Applied Arts and Technology.[72] The case involved allegations of discrimination on the basis of ethnic origin by an East Indian woman seeking employment as a teacher at Seneca College. Rather than filing a human rights complaint under the Ontario *Human Rights Code*, she initiated a court action, seeking damages for discrimination, including economic loss and "mental distress, frustration and loss of dignity and self-esteem".[73] In concluding that there was an independent tort of discrimination at common law, Justice Wilson traced the evolving jurisprudence on the intersection between freedom of contract, property rights, public policy and discrimination. She found the decision in *Re Drummond Wren* to be very persuasive because the Court based its decision to strike down a discriminatory restrictive covenant on the grounds of public policy.[74] As Justice MacKay affirmed in *Re Drummond Wren*, citing Halsburys, "what is public policy 'varies from time to time': the principles remain the same but they may be applied in novel ways".[75] Justice Wilson further quoted from Prosser's classic *Handbook on the Law of Torts*, where he affirms that the "law of torts is anything but static, and the limits of development are never set".[76] For Justice Wilson, the novelty of a legal claim does not preclude its recognition. With these principles in mind, Justice Wilson turns to the preamble to the Ontario *Human Rights Code*[77] and gleans from it evidence of prevailing public policy regarding the fundamental importance of equality and non-discrimination. She then relies on this endorsement of equality to ground recognition of a common law tort of discrimination. While it is true that there is widespread acknowledgment of the dynamic nature of the common law, Justice Wilson demonstrated a greater willingness than many judges to read new rights and

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[72] [1979] O.J. No. 4475, 105 D.L.R. (3d) 707 (Ont. C.A.), revd [1981] S.C.J. No. 76, [1981] 2 S.C.R. 181 (S.C.C.) [hereinafter "*Bhadauria*"]. See also *Frame*, *supra*, note 52 and *Pettkus*, *supra*, note 26.

[73] *Bhadauria*, *id*., at para. 2 (C.A.). It is noteworthy that her claim was grounded on an asserted common law tort of discrimination, as well as damages for breach of statute (Ontario *Human Rights Code*, R.S.O. 1970, c. 318). Since the Court concluded that a common law cause of action for discrimination existed, it did not address the question of whether violation of the Code gives rise to a civil cause of action.

[74] *Re Drummond Wren*, [1945] O.J. No. 546, [1945] O.R. 778 (Ont. H.C.J.).

[75] Cited by Justice Wilson in *Bhadauria*, *supra*, note 72, at para. 13 (C.A.).

[76] William Prosser, *Handbook of the Law of Torts*, 4th ed. (St. Paul: West Pub. Co., 1971), at 3-4, cited in *Bhadauria*, *supra*, note 72, at para. 17.

[77] R.S.O. 1970, c. 318, as amended by S.O. 1971, c. 50, s. 63, S.O. 1972, c. 119 and S.O. 1974, c. 73.

obligations into the common law — insisting that it respond to changing social realities.

V. CONCLUSION

> If women lawyers and women judges through their differing perspectives on life can bring a new humanity to bear on the decision-making process, perhaps they will make a difference. Perhaps they will succeed in infusing the law with an understanding of what it means to be fully human.[78]

Justice Wilson may have hesitated to situate herself within the parameters of any social movement or philosophical tradition. Nevertheless, recognizing the ways in which her approach to judging incorporated critical components of both feminism and pragmatism provides new sources of insight into her judicial contributions. Drawing on the attentiveness to context and constrained social realities in pragmatist philosophy and the commitments to equality at the heart of feminist theory provides us with a broader theoretical foundation for comprehending the logic of her decision-making. Her judgments reveal the willingness to make tangible and immediate decisions while acknowledging that ideal outcomes are often impossible in the face of non-ideal conditions and constraints. This awareness of the imperfect choices at the heart of judging prompted her to insist that we be vigilant in continuing to question, to reconsider, to seek to develop the law to create and recreate moments of justice in a constantly changing world. She insisted, moreover, in informing law with a contextual appreciation of social and economic realities. We may not agree with the decisions she made in every case; we may think that she was mistaken or misunderstood the litigants' lives or needs in some cases. Still Justice Wilson had the courage to act, to decide, and to articulate her dynamic and contextual vision of law.

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78 "Women Judges", *supra*, note 60, at 24.