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Danielle Pinard

The Constituents of  
Democracy  
The Individual in the Work of  
Madame Justice Wilson\*

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*Introduction\**

Judge Bertha Wilson was appointed to the Supreme Court of Canada in March 1982. She was the first woman to be appointed to that Court. I am thrilled to have the opportunity to participate in this symposium in her honour.

The overall theme of the event is the contribution of Madame Justice Bertha Wilson to the Democratic Intellect. Within that theme, I shall try more particularly to delineate her conception of the individual as a constituent of the democracy, as found in her work at the Supreme Court of Canada. Such a task is an arduous one and it would be far from me to pretend that I have accomplished it without fail. In other words, it is not my intention to give you an exhaustive, rigorous and detailed analysis of her entire intellectual work spanning ten years. Nor will I give you a vision of the important role Judge Wilson played as regards Canadian substantive law. I will confine myself to a more humble goal.

I shall attempt to share with you the impression I have of Judge Wilson's conception of the individual. I will try to present a general view of what occurred to me as I went through the opinions *she* wrote while at the Supreme Court of Canada, alone or with the assent of her colleagues, dissenting or in agreement with the majority.<sup>1</sup> I shall try to put together, as honestly as possible, what she explicitly said on the subject in question.

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\* I would like to thank my colleagues Stephen Perry from the Faculty of Law of McGill University and Jean Leclair from the Faculté de droit de L'Université de Montréal for helpful comments on an earlier draft of this paper.

1. I was skeptical about a commonly-held belief to the effect that Judge Wilson was "always" writing dissenting opinions. I made a rough statistical analysis of the cases in which she wrote opinions. It would seem that she wrote twice as many majority judgments as dissenting opinions. Moreover, she wrote far more opinions with which other judges concurred than opinions written alone. Therefore her reputation of a dissenting loner, at first sight, seems undeserved. Could it be because of prejudices? Could it be similar to the prejudice to the effect that women talk more than men, even though statistical evidence would tend to show quite the contrary? See Dale SPENDER, *Man Made Language*, 2nd edition, Routledge and Kegan Paul, London, 1985, p. 41.

I hope she won't stand up and say I'm wrong. I admit from the outset that it's an impressionist work I am presenting here. My paper is really about the way *I see* her work.

After a few words about what I understand to be her general contextual approach, I will address Judge Wilson's conception of the individual within a social context. It will include comments on her vision of individual dignity and liberty, on the necessary state intervention and unavoidable burdens thereby created, on the role of the *Canadian Charter of Rights and Freedoms*<sup>2</sup> and on the duty of the state to respect human dignity and to treat the individual with justice. I shall then address her conception of a gendered individual and, finally, some other characteristics she seems to see in individuals.

### *I. A Contextual Approach*

Before directly addressing Judge Wilson's conception of the individual, it seemed to me essential to first and briefly consider her general approach to law, which obviously influenced the elaboration of the former.

In a controversial speech entitled "Will Women Judges Really Make a Difference?", now published in the *Osgoode Hall Law Review*<sup>3</sup>, Judge Wilson considered the possible impact on law of the new presence of women in the judiciary. In the course of that speech, she presented the work of Carol Gilligan, who has developed a theory that women have a different way of being, of approaching life and of elaborating moral judgments, i.e. women speak in "A Different Voice".<sup>4</sup> I said and wrote elsewhere that I had serious reservations about that difference theory.<sup>5</sup> Essentially, along with Catharine Mackinnon, I am afraid that it could be the "velvet glove on the iron fist of domination".<sup>6</sup> But that is not the point here. What I want to address particularly is the hypothesis developed by Judge Wilson that one manifestation of that different voice could be that women judges

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2. Part of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982*, (U.K.) 1982, c. 11, hereinafter: the *Charter*.

3. Wilson, Judge Bertha, "Will Women Judges Really Make A Difference?" (1990), 28 *Osgoode Hall L.J.* 705.

4. Gilligan, Carol, *In a Different Voice*, (Cambridge: Harvard University Press, 1982).

5. Pinard, Danielle, "Le Langage et L'interprétation des lois: au masculin seulement?", to be published in *Thémis*.

6. Mackinnon, Catherine A., *Feminism Unmodified*, (Cambridge: Harvard University Press, 1987), p.8.

would be more sensitive to a contextual approach to law than to abstract formalism.<sup>7</sup> I don't know about other women judges, and I don't know if it is by reason of a different voice, but Judge Wilson surely advocated for a more contextual approach to law. Her approach to the *Charter* and to criminal law will serve here to illustrate that general attitude.

From the outset, she clearly adopted an empirical approach to *Charter* adjudication. Indeed, as early as the *Big M Drug Mart* case,<sup>8</sup> concerning freedom of religion, she affirmed that the *Charter* was an effect-oriented document and that, therefore, the crucial step in *Charter* cases was the search for empirical effects alleged to be in violation of *Charter* rights. That particular opinion was not subscribed to by any other member of the Court. But her opinion turned out to be correct, as confirmed by subsequent decisions that adopted this approach.<sup>9</sup>

Similarly, in the *Edmonton Journal* case,<sup>10</sup> a decision respecting freedom of expression and freedom of the press, Judge Wilson explicitly confirmed her preference for a contextual approach to *Charter* interpretation, an approach that allows the taking into account of the particular context, and therefore, the particular values at stake in a case. She explains :

One virtue of the contextual approach, it seems to me, is that it recognizes that a particular right or freedom may have a different value depending on the context. It may be, for example, that freedom of expression has greater value in a political context than it does in the context of disclosure of the details of a matrimonial dispute. 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.<sup>11</sup>

That is consistent with views she had expressed earlier, writing generally about statutory interpretation. She had then written :

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7. Wilson, *supra*, note 3, p. 520-521.

8. *R. v. Big M. Drug Mart*, [1985] 1 S.C.R. 295.

9. Indeed, it seems that most subsequent Supreme Court judgements approached the *Charter* as an "effect-oriented document".

10. *Edmonton Journal v. Alberta*, A.G. [1989] 2 S.C.R. 1326.

11. *Idem*, p. 1355-1356.

... the Court must determine the content of *Charter* rights ... in the context of the real life situations brought to the Court by the litigants and on the basis of empirical data rather than on the basis of some abstraction.<sup>12</sup>

More precisely, as regards the limitation clause of the *Charter*, she has long been advocating for better factual information brought to the courts by the litigants. For the kind of balancing analysis required by section one, judges must be made aware of the legislative as well as the adjudicative facts.<sup>13</sup> If litigants fail to bring them the proper information, she said, judges simply won't be able to transcend the limits of their ego, but they will still make judgments.<sup>14</sup>

That contextual approach is obvious as well in applications of that limitation clause where she often emphasized the importance of considering the particular circumstances. In *McKinney*,<sup>15</sup> for example, the recent case concerning mandatory retirement for university professors, discussing possible limits to equality rights, she expressed the view that the judicial treatment of the "resources argument" made by the state should each time be approached in the particular context of the case. It could be, she wrote, that courts should show more judicial restraint where the legislature has attempted a fair distribution of resources in a context of competing constitutional claims.<sup>16</sup>

In *Chaulk*,<sup>17</sup> where the constitutionality of the insanity provisions of the *Criminal Code* was questioned on the basis of the presumption

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12. Wilson, Judge Bertha, "Statutory Interpretation - The Use of Extrinsic Aids", a paper presented in April 1990, at the 9th Commonwealth Law Conference, in New Zealand, p. 14.

13. See Pinard, Danielle, "Le droit et le fait dans l'application des standards et la clause limitative de la Charte canadienne des droits et libertés" (1989), 30 C. de D. 137, p. 169.

14. After having underlined the need for solid factual underpinnings regarding problems of proof in *Charter* cases, she wrote: "Otherwise the judges will be unable, as Judge Cardozo put it, to transcend the limitations of their own egos and will tend to rely upon their own personal value systems interpreting and applying the Charter..." Judge Bertha Wilson, paper presented at the University of Toronto, November 1985, quoted in Manning, M., "Proof of Facts in Constitutional Cases", in Beaudoin, G.A., *Causes invoquant la Charte 1986-1987*, (Éditions yvon Blais, 1987), p. 271.

15. *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229.

16. "On the other hand, there may be circumstances in which other factors militate against interference by the courts where the legislature has attempted a fair distribution of resources. For example, courts should probably not intervene where competing constitutional claims to fixed resources are at stake. The allocation of resources ought not, in other words, to be approached in a contextual manner. It should always be open to the Court to examine the government's reasons for making the particular allocation and to measure those reasons against the values enshrined in the constitution." *Idem*, p. 404. In the same vein, in *United States v. Cotroni*, [1989] S.C.R. 1469, she made clear that her section one analysis was clearly grounded on the particular facts of the case (p. 1509).

17. *R. v. Chaulk*, [1990] 3 S.C.R. 1303.

of innocence, she denounced, in principle, the attempt to justify limits imposed on constitutional rights on the mere ground that hypothetical evils would be thereby remedied.<sup>18</sup>

In the definition of constitutional rights as well, she preferred a contextual approach and refused abstract formal reasoning. For example, in *Hess and Nguyen*,<sup>19</sup> a case concerning the constitutionality of a *Criminal Code* provision prohibiting a defined sexual conduct, she wrote an interesting opinion in which she warned against any kind of rigid formalism in the interpretation of equality rights guaranteed by the *Charter*. Indeed, she made the point, in a context of sexual offences, that for the legislation to create an offence which, as a matter of fact, could only be committed by persons of one sex, did not automatically raise a section 15 issue of equality rights.<sup>20</sup>

In my view we are therefore dealing with an offence that involves an act that as a matter of biological fact only men over a certain age are capable of committing and given that only men may be penetrators, it is as absurd to suggest that the provision discriminates against males because it does not include women in the category of potential offenders as it is to suggest that a provision that prohibits self-induced abortion is discriminatory because it does not include men among the potential class of offenders.<sup>21</sup>

However, she made it clear that it was always a matter of context, and warned against the risk of perpetuating discrimination in the name of alleged sex-related distinctions.<sup>22</sup>

Her concern with concrete particular circumstances, as opposed to abstract formal principles, is obvious, as well, in her approach to individuals accused of criminal offences. Two examples will illustrate this point.

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18. As regards the hypothesis that it was "necessary to impose a burden on the accused to prove his insanity on a balance of probabilities in order to prevent perfectly sane persons who had committed crimes from escaping criminal liability on tenuous insanity pleas" (p. 8), she wrote: "The question posed by the Chief Justice's approach, it seems to me, is therefore whether s. 16(4) of the *Code* can be justified under s. 1 as a prophylactic measure designed to fend off a hypothetical social problem that might arise if accused persons pleading insanity had to meet only an evidentiary burden. This prompts me to ask: do we wish to go down this path and justify infringements of guaranteed *Charter* rights on a purely hypothetical basis? And, in particular, do we wish to go down this path where such a fundamental tenet of our justice system as the presumption of innocence is at stake? I have serious reservations about adopting such a course even in cases where it could be said that the hypothesis was a strong one which I do not think it is in this instance for reasons which I will discuss." *Idem*, manuscript, p. 12.

19. *R. v. Hess and Nguyen*, [1990] 2 S.C.R. 906.

20. *Idem*, p. 929.

21. *Idem*, p. 930.

22. *Idem*, p. 928.

In *Hill*,<sup>23</sup> a criminal law case, she wrote an important dissenting opinion in which she tried to make sense of the objective standard that one finds in the provocation defence of the *Criminal Code*<sup>24</sup> [i.e. that the provocation be “of such a nature as to be sufficient to deprive an ordinary person of the power of self-control”] by putting it within a particular fact setting. Indeed, she did not want to transform the objective standard into a subjective one. Rather, and more simply, she wanted the objective standard to make sense, considering the reality that provocation never occurs in a vacuum. It always happens in a particular fact setting, the knowledge of which is essential to understand and evaluate whether an “ordinary person” would have been deprived of her power of self-control.

[...] an insulting remark or gesture has to be placed in context before the extent of its provocativeness can be realistically assessed.<sup>25</sup>

She therefore would have considered the accused’s attributes “for the purpose of putting the insult into context and assessing its gravity.”<sup>26</sup>

The *Lavallée* case<sup>27</sup> can be understood as coming within the same philosophical approach. One recalls that, in that case, Judge Wilson wrote that the inner and particular complexity of relationships involving domestic violence was such that, in a criminal case where a battered woman relied on self-defence, the determination of this defence became a subject-matter for expert witnesses. Ordinary lay people could too easily be overcome by common prejudices. So, once again, Judge Wilson refused to be caught in abstract and formal principles, and advocated for legal responses adapted to particular social contexts.

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”.<sup>28</sup>

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23. *R. v. Hill*, [1986] 1 S.C.R. 313.

24. *Criminal Code*, R.S.C. 1970, c. C-34, s. 215.

25. *R. v. Hill*, *supra*, note 23, pp. 345-346.

26. *Idem*, pp. 346-347.

27. *R. v. Lavallée*, [1990] 1 S.C.R. 852.

28. *Idem*, p. 874.

The contextual approach to law advocated for by Judge Wilson determined her conception of the individual. Neither can a question of law be isolated from the particular factual setting in which it arises, nor can the understanding of the individual be accomplished without the light of a social environment.

## *II. A Free and Autonomous Individual Living Within a Particular Social Context*

In a manner consistent with her global views of the world and of the law, Judge Wilson analyzes, and believes in, a free and autonomous individual who lives, however, in a societal context. Let me explain. More than once, in her work, Judge Wilson affirmed the importance, the centrality of the individual, of her dignity and of her liberty. However, it seems to me, she did not forget the constant pervasiveness of social contextuality : her free and dignified individual does not live alone on a desert isle, she lives in a community that made her who she is, that constantly models and changes her but over which she still retains some control.

In certain areas of life, liberty will require the state not to interfere with individual choices. In others, however, genuine freedom will rest on the state intervention protecting individuals against threats caused by others.

### *1. Assertion of Individual Dignity and Liberty*

Mostly within the context of some discussion of the *Canadian Charter of Rights and Freedoms*, Judge Wilson has stressed the importance of individual liberty and dignity. One finds, in that part of her work, the expression of the fundamental liberal point of view that the individual must have the liberty to be the real author of her life, and to determine the course of her life in accordance with her own conception of what is a good life.

In the *Jones case*<sup>29</sup>, an early *Charter* case concerned with freedom of religion, Judge Wilson, after having reminded us that the liberty guaranteed by the *Charter* meant "liberty as understood and enjoyed in a free and democratic society"<sup>30</sup>, defined "liberty" in the following terms:

I believe that the framers of the Constitution in guaranteeing "liberty" as a fundamental value in a free and democratic society had in mind the

29. *Jones v. R.* [1986] 2 S.C.R. 284.

30. *Idem*, p. 318-319.

freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make his own choices for good or ill, to be non-conformist, idiosyncratic and even eccentric — to be, in to-day's parlance, "his own person" and accountable as such. John Stuart Mill described it as "pursuing our own good in our own way". This, he believed, we should be free to do "so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it".<sup>31</sup>

But it is really in the *Morgentaler* case,<sup>32</sup> discussing the constitutionality of the *Criminal Code* provisions criminalizing abortion, that she expanded on her views on the liberty of the individual.

She affirmed therein that the right to liberty guaranteed by the *Charter* was inextricably tied to the concept of human dignity.<sup>33</sup> Along with Neil MacCormick, she shared the classical liberal view that "the ability to pursue one's own conception of a full and rewarding life"<sup>34</sup> was an important element of liberty. She also agreed with the point made by Dickson C.J. (as he then was) in *R. v. Big M Drug Mart*,<sup>35</sup> to the effect that respect for "the ability of each citizen to make free and informed decisions"<sup>36</sup> was central to our democratic political tradition. With Dickson C.J. (as he then was) she considered as well that respect for the inherent dignity of the human person was a value essential to a free and democratic society.<sup>37</sup>

She analyzed many of the rights and freedoms guaranteed by the *Charter* as expressions of the basic value of human dignity. For example, she considered the right to choose one's own religion and one's own philosophy of life, and the right to free speech and free association, as united by a common concern for the idea of human dignity.<sup>38</sup>

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31. *Idem*.

32. *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

33. *Idem*, p. 164.

34. *Idem*, p. 164, quoting Neil MacCormack *Legal Right and Social Democracy: Essays in Legal and Political Philosophy*, (1982), p. 39.

35. *Supra*, note 8.

36. *Idem*, p. 346.

37. *Morgentaler*, *supra*, note 32, p. 165, quoting Dickson C.J.'s opinion (as he then was) in *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136.

38. "The idea of human dignity finds expression in almost every right and freedom guaranteed in the *Charter*. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue." *Morgentaler*, *supra*, note 32, p. 166.



She considered “the right to make fundamental personal decisions without interference from the state”<sup>39</sup> to be “a critical component of the right to liberty”.<sup>40</sup> She wrote:

[...] the right to liberty contained in s. 7 guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives.<sup>41</sup>

Amongst those fundamental personal decisions, of course, she included the decision of a woman to pursue or not a pregnancy.<sup>42</sup>

Judge Wilson linked that decision to the notion of privacy. It is a theme she addressed in other opinions she wrote, always concerned with the necessary protection of privacy against state violation. For example, in *Thompson Newspaper*,<sup>43</sup> she wrote that the historical origins of the rights against compellability and self-incrimination expressed a concern for the necessary respect, by the state, for the privacy and personal autonomy and dignity of the individual.<sup>44</sup>

Still in the *Morgentaler* case, emphasizing that the *Criminal Code* provisions not only violated the liberty of pregnant women, but that they infringed as well upon women’s right to security, she denounced the fact that by these provisions a woman was treated as “a means to an end which she does not desire but over which she has no control”.<sup>45</sup> She added:

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39. *Idem*, p. 166.

40. *Idem*, p. 171.

41. *Idem*.

42. “The question then becomes whether the decision of the woman to terminate her pregnancy falls within this class of protected decisions. I have no doubt that it does. This decision is one that will have profound psychological, economic and social consequences for the pregnant woman. 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.”*Idem*.

43. *Thompson Newspaper v. Dir. des enquêtes et recherches*, [1990] 1 S.C.R. 425.

44. “Having reviewed the historical origins of the rights against compellability and self-incrimination and the policy justifications advanced in favour of their retention in more modern times, I conclude that their preservation is prompted by a concern that the privacy and personal autonomy and dignity of the individual be respected by the state. The state must have some justification for interfering with the individual and cannot rely on the individual to produce the justification out of his own mouth. Were it otherwise, our justice system would be on slippery slope towards the creation of a police state.” *Idem*, p. 480. She expressed a similar concern in other cases as well. See, for example: *R. v. Chesson*, [1988] 2 S.C.R. 148, 169; *R. v. Thompson*, [1990] 2 S.C.R. 1111, 1158; *Edmonton Journal v. Alta, A.G.*, *supra*, note 10, p. 1364.

45. *Morgentaler, supra*, note 32, p. 173-174.

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? How can a woman in this position have any sense of security with respect to her person?<sup>46</sup>

In a later decision, the *Prostitution* case,<sup>47</sup> which discussed the constitutionality of the *Criminal Code* provisions concerned with prostitution, within the general affirmation of the importance of respect for the individual's capacity to make choices, Judge Wilson classified the negotiation for a sexual encounter, in the context of prostitution, as a form of expression related to an economic choice, and not less protected by the *Charter* than negotiation for the purchase of a Van Gogh.<sup>48</sup>

It is interesting to note that she did so despite her evaluation "that prostitution is [...] a degrading way for women to earn a living".<sup>49</sup> As prescribed by the classical liberal view, an individual should be free to make her choices in accordance with her own conception of what is a good life, and should not be compelled to endorse others' visions.

Judge Wilson's analysis of permissible limits to constitutional rights is consistent with her deep respect for individual dignity. Therefore, she won't allow the exercise of balancing individual interests and collective preoccupations to be made within the definition of substantive constitutional rights : if there are to be any limits imposed, they must be justified through the process of a section one analysis.<sup>50</sup>

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46. *Idem*.

47. *Renvoi relatif au Code criminel (Man.)*, [1990] 1 S.C.R. 1123.

48. "The provision prohibits persons from engaging in expression that has an economic purpose. But economic choices are, in my view, for the citizen to make (provided that they are legally open to him or her) and, whether the citizen is negotiating for the purchase of a Van Gogh or a sexual encounter, 2.2(b) of the *Charter* protects that person's freedom to communicate with his or her vendor." *Idem*, p. 1206.

49. *Idem*, p. 1210.

50. An important consequence of that approach is the imposition on the party seeking the application of section one of the burden of proof as to the reasonableness of the limits to constitutional rights and freedoms, and the applicability of the Oakes test. See, generally, for her two-steps approach: *R. v. Askov*, [1990] 2 S.C.R. 1199 at 1252-1253: "[11b]...protects only the accused's interest. If the government wishes to restrict the accused's right to a speedy trial for societal reasons, e.g. on grounds of lack of institutional resources, it is free to do so through appropriate legislation. Then a balancing of the societal and individual interests in speedy trials will be carried out under s.1 of the *Charter*."; *R. v. Hébert*, [1990] 2 S.C.R. 151 at 190-191: "It is accordingly inappropriate to qualify it [the right to silence] by balancing the interests of the state against it or by applying it to the considerations relevant to the admissibility of evidence set out in s.24(2) of *Charter*. [...] In deciding whether or not the authorities have offered fundamental justice or not it is, in my view, essential to focus on the treatment of the accused and not on the objective of the state. It would, in my view, be quite contrary to a purposive approach to the s.7 right to inject justificatory considerations for putting limits upon it into the ascertainment of its

And even within a section one analysis, she won't allow administrative or policy convenience to justify infringements on constitutional rights.<sup>51</sup> These rights must be accommodated, and, in principle, the costs for them must be absorbed by society.

So, for Judge Wilson, the dignity of the individual is fundamental. It includes the liberty to make decisions, to live one's life in accordance with one's values.

Some passages of Judge Wilson's work could be understood as implying that the kind of liberty advocated for shows a crude version of a negative conception of liberty; a liberty that can only exist on the foundation of an absence of state. Within this version, governmental action is essentially seen as a threat to individual liberty. One can remember that in the *Jones* case<sup>52</sup>, reported in 1985, she actually defined the right to liberty as "the right to pursue one's goals free of governmental constraint".<sup>53</sup> Some of her comments in later decisions seem to go in the same direction.

In the *Morgentaler* case<sup>54</sup>, for instance, hasn't she proposed the metaphor of the fence erected by the *Charter* around each individual, and over which the state would not be allowed to trespass?<sup>55</sup> Hasn't she affirmed that "an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state"<sup>56</sup>, and that liberty, in a free and democratic society, requires the state to respect the personal decisions made by its citizens?<sup>57</sup>

Her analysis of the relationship between the individual and the community is, however, more sophisticated than that.

Actually, beyond a possible first impression of blind acceptance of pure individualism, one finds in Judge Wilson's work one preoccupa-

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scope or content."; *R. v. Debot*, [1989] 2 S.C.R. 1140 at 1165: "If there are to be limits on the right to counsel other than the limit required for the safety of the police, i.e., if there are to be qualifications put upon the words "without delay" in s. 10(b), then it seems to me that they must be supported under s.1 of the *Charter*."

51. See, for example: *R. v. Chaulk*, *supra*, note 17, p. 27-28; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483, 554; *McKinney v. University of Guelph*, *supra*, note 15, p. 403; *Singh v. Ministre de l'emploi et de l'immigration*, [1985] 1 S.C.R. 177. See also, to the same effect: Wilson, Judge Bertha, "The Making of a Constitution" (1988), 71 *Judicature* 334, p. 338.

52. *Jones*, *supra*, note 29.

53. *Idem*, p. 488.

54. *Morgentaler*, *supra*, note 32.

55. *Idem*, p. 164. See, to the same effect: Wilson, Judge Bertha, "The Making of a Constitution" (1988), 71 *Judicature* 334, p. 338.

56. *Idem*, p. 166.

57. *Idem*.

tion for the individual as a socially constructed being, and another for the welfare of the community as a whole.

## 2. *Necessary State Intervention*

Wilson J.'s opinion, in the *Morgentaler* case, is the one in which one finds by far the finest and strongest defense of an individual's, particularly a woman's, liberty against state interference. It is, though, closely linked to the particular issue that was discussed in that case, and it can, unfortunately, create a false impression of Judge Wilson's views on the individual living within a community. One must not forget that, in that same *Morgentaler* case, she accepted the principle that, at some point of development of the pregnancy, the state interest in the protection of the foetus may well supercede the right to liberty of the woman, thereby allowing for legitimate state regulation.

In the recent case of *McKinney v. University of Guelph*<sup>58</sup>, concerning mandatory retirement for sixty five year old university professors, Judge Wilson wrote an opinion in which her conception of freedom and of the state is made clear. One finds in it, indeed, a critique of the conception of freedom as defined in terms of absence of governmental constraints. While individual liberty may sometimes require inaction and passive respect on behalf of the state, its full blossom will often rest, on the contrary, on the necessary creation, by the state, of proper material conditions. Indeed, liberty may be primarily threatened by individuals, private or corporate, and governmental action may then be the only way to allow for an equal exercise and practice of liberty. The state has therefore not only a passive role of respect for freedom, but must as well act to *promote* it.

In *McKinney*, Judge Wilson made a historical review in which she reminds us that "government regulation and intervention has long been part of the political, social and economic culture of Canada [...]"<sup>59</sup>, and that "it seems to be generally accepted by our historians that the political philosophy of laissez-faire has not been embraced to any substantial degree in Canada".<sup>60</sup> She added that "the phenomenon of the interventionist state has traditionally been and continues to be a feature of Canadian political life".<sup>61</sup> She linked state intervention, in Canada, to justice, equality, and real freedom :

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58. *McKinney*, *supra*, note 15.

59. *Idem*, p. 355.

60. *Idem*.

61. *Idem*.

Canadians recognize that government has traditionally had and continues to have an important role to play in the creation and preservation of a just Canadian society. The state has been looked to and has responded to demands that Canadians be guaranteed adequate health care, access to education and a minimum level of financial security to name but a few examples. It is, in my view, untenable to suggest that freedom is co-extensive with the absence of government. Experience shows the contrary, that freedom has often required the intervention and protection of government against private action.<sup>62</sup>

Therefore, she kept herself at a distance, in principle, from a conception of an individual's liberty that implies non-interference by the state. On the contrary, she admits that justice and freedom will *often* require the state's intervention. This view, made explicit in *McKinney*, was however already present in Judge Wilson's previous work.

As early as the *Operation Dismantle* case<sup>63</sup>, in which, one remembers, the constitutionality of the federal cabinet decision to authorize the cruise missile testing was challenged on the ground of *Charter* rights, Judge Wilson made clear that rights, including the right to liberty, had to be understood in the context of inter-relations of individuals in society, and of the political reality of the modern state. Indeed, as regards the inter-relations of individuals, she explained that one person's rights had to accommodate the corresponding rights of others<sup>64</sup>, recalling the aphorism that "A hermit has no need of rights".<sup>65</sup> Concerning the political reality of the modern state, she acknowledged the fact that life in an organized state necessarily implied inescapable limits to individual liberty.<sup>66</sup> In the context of that particular case, she exemplified her thesis with the question of national defence policy, the state sometimes having to create risk for its own population in order to protect it against threats from potential foes.<sup>67</sup>

At a more general level, she made, in *Operation Dismantle*, the powerful affirmation that there was no liberty without law and no law without some restriction of liberty.<sup>68</sup>

In the *Jones* case<sup>69</sup>, as well, Judge Wilson reminded us of the limits

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62. *Idem*, p. 356.

63. *Operation Dismantle v. R.*, [1985] 1 S.C.R. 441.

64. *Idem*, p. 488.

65. *Idem*.

66. *Idem*.

67. *Idem*, p. 489.

68. *Idem*.

69. *Jones*, *supra*, note 29.

to individual freedom unavoidably intertwined with a life in a community :

Of course, this freedom is not untrammelled. We do not live in splendid isolation. We live in communities with other people. Collectivity necessarily circumscribes individuality and the more complex and sophisticated the collective structures become, the greater the threat to individual liberty in the sense protected by s.7.<sup>70</sup>

Judge Wilson does not define precisely the contours of individual liberty within a community, but accepts the principle that there will be cases where "individual liberty must yield to the collective authority of the state."<sup>71</sup>

Her concern about some state intervention, held to be necessary in order to promote genuine liberty, that is sometimes threatened by other individuals, shows that her view of political morality goes far beyond a conception of liberty as mere lack of governmental constraint. A few cases will illustrate her views on the matter.

Judge Wilson acknowledged the necessity of state intervention in order to protect the best interest of children. One knows that the "free market" of personal relationships is one in which powerless children often have to pay an important emotional price in the name of the personal autonomy and the individual freedom of their parents. It thus became widely accepted, by Judge Wilson included, that a policy of legal intervention was required to protect the child's interests. In *Frame v. Smith*<sup>72</sup>, a family law case, Judge Wilson acknowledged this reality, admitting the justified policy of intervention by the law to protect the child's best interests when a custodial parent denies access to the other parent.<sup>73</sup>

In *Racine v. Woods*<sup>74</sup>, in the context of an adoption case, she

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70. She added: "Section 7 does not spell out for us when individual liberty must yield to the collective authority of the state. It does however, provide that no-one can be deprived of it "except in accordance with the principles of fundamental justice." *Idem*, p. 318-319.

71. *Idem*.

72. *Frame v. Smith*, [1987] 2 S.C.R. 99.

73. "Accordingly, the custodial parent who denies access to the other parent is sacrificing the child's best interest as so found to his or her own selfish interests and this would appear, as a general principle at least, to favour a policy of intervention by the law to protect the child's best interests in such circumstances. This is not to deny that in specific cases that general policy of intervention in order to uphold what has been found to be in the child's best interests may have to yield to a greater threat to the child's interests arising from the fact of litigation by one parent against the other. It is simply to say that the limits on any cause of action which the law might recognize would have to be the result of a weighing of the positive against the negative factors impacting on the children." *Idem*, p. 121-122.

74. *Racine v. Woods*, [1983] 2 S.C.R. 173.

admitted that, considering the fact that parents may be blinded by their own self interest, the legislature was justified in providing for the possibility of dispensing with the consent of the biological parent on a *de facto* adoption.<sup>75</sup>

Judge Wilson has been sensitive, as well, to some injustices caused by matrimonial relationships, thereby justifying some corrective state intervention. At the material level, for example, her opinion in *Clarke v. Clarke*<sup>76</sup> shows a concern for a necessary state adjustment of inequities between individual spouses, particularly as regards economic contributions made by women.<sup>77</sup>

Other inequalities, products of the free market, were held by Judge Wilson to deserve some state intervention. For example, in *R. v. Horseman*<sup>78</sup>, discussing an Indian treaty, she was concerned with the inequality of the bargaining power that prevailed at the time of the agreement. She therefore advocated for a judicial interpretation of the treaty that would be sensible to that inequality and that would somehow try to remedy it. She wrote:

In other words, to put it simply, Indian treaties must be given the effect the signatories obviously intended them to have at the time they were entered into even if they do not comply with to-day's formal requirement. Nor should they be undermined by the application of the interpretive rules we apply to-day to contracts entered into by parties of equal bargaining power.<sup>79</sup>

In *Rothfield v. Manolakos*<sup>80</sup>, a tort case, Judge Wilson seriously took into account the inexperience and lack of power of property

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75. "In giving the court power to dispense with the consent of the parent on a *de facto* adoption the legislature has recognized an aspect of the human condition - that our own self interest sometimes clouds our perception of what is best for those for whom we are responsible. It takes a very high degree of selflessness and maturity - for most of us probably an unattainable degree - for a parent to acknowledge that it might be better for his or her child to be brought up by someone else. The legislature in its wisdom has protected the child against this human frailty in a case where others have stepped into the breach and provided a happy and secure home for the child for minimum period of three consecutive years. In effect, these persons have assumed the obligations of the natural parents and taken their place. The natural parents' consent in these circumstances is no longer required." *Idem*, p. 185.

76. *Clarke v. Clarke*, [1990] 2 S.C.R. 795.

77. "The Act is accordingly remedial in nature. It was designed to alleviate the inequities of the past when the contribution made by women to the economic survival and growth of the family was not recognized." *Idem*, p. 807.

78. *R. v. Horseman*, [1990] 1 S.C.R. 901.

79. *Idem*, p. 907.

80. *Rothfield v. Manolakos*, [1989] 2 S.C.R. 1259.

owners, in the definition and evaluation of their legal relationship with contractors and municipal authorities.<sup>81</sup>

In *Towne Cinema*<sup>82</sup>, an obscenity case, implicit in her opinion seems to be the evaluation that the free marketing of sex, even on a presumed consensual basis, has permitted some socially unacceptable results, dehumanizing direct participants as well as viewers. The state has therefore a role to play, protecting individual dignity as a matter of collective interest.<sup>83</sup>

In the same vein, in *Hess and Nguyen*<sup>84</sup>, a criminal case concerned with a sexual offence, Judge Wilson seems to accept, in principle, the legitimacy of state intervention to protect females under 14 years old from the dangers inherent in premature sexual activity. Once again, freedom and individual liberty are held to be potentially harmful.<sup>85</sup>

The *Lavallée*<sup>86</sup> case, sometimes referred to as the “battered wife syndrome case”, can be understood as another manifestation of Judge Wilson’s sensitivity to the reality that state intervention, including through its judicial arm, can sometimes be made necessary by inequalities and injustices prevailing in the real and unregulated life of the personal relationships, which is sometimes said to belong to the realm of the sacred individual liberty. Indeed, she affirmed in that case that the profound inequality and injustice arising from the situation of battered women required a particular judicial intervention allowing

81. “We are dealing here with inexperienced owners seeking to have a retaining wall built on their property and relying on the expertise of their contractors and on the watchdog function of the city. Both let them down. I think it was perfectly reasonable for the plaintiffs to rely on the city in that capacity particularly since it had issued a permit for the work to go ahead without any advice to the plaintiffs that it, the city, was taking a calculated risk in doing so and that subsequent on-site inspections were therefore absolutely vital.” *Idem*, p. 1295.

82. *Towne Cinema Theatres Ltd. v. R.*, [1985] 1 S.C.R. 494.

83. “It seems to me that the undue exploitation of sex at which s.159(8) is aimed is the treatment of sex which in some fundamental way dehumanizes the persons portrayed and, as a consequence, the viewers themselves. There is nothing wrong in the treatment of sex per se but there may be something wrong in the manner of its treatment. It may be presented brutally, salaciously and in a degrading manner, and would thus be dehumanizing and intolerable not only to the individuals or groups who are victimized by it but to society at large. On the other hand, it may be presented in a way which harms no one in that it depicts nothing more than non-violent sexual activity in a manner which neither degrades or dehumanizes any particular individuals or groups. It is this line between the mere portrayal of human sexual acts and the dehumanization of people that must be reflected in the definition of “undueness.” *Idem*, p. 523.

84. *Hess and Nguyen*, *supra*, note 19.

85. “I agree that s. 146(1) is designed to protect female children from premature sexual intercourse and that this is a pressing and substantial concern. Very young girls who are made to engage in sexual intercourse may suffer grave physical harm. No one can doubt that they may suffer permanent psychological harm as a result of sexual intercourse at an unnaturally early age. The first test in *Oakes* is therefore met.” *Idem*, p. 920.

86. *Lavallée*, *supra*, note 27.



for admissibility of expert evidence. That was made necessary by the need to understand, beyond common and prejudiced first impression, the very complex and socially constructed relationship between a woman and her batterer partner. Ordinary legal rules were clearly deficient to deal with that kind of situation.

From these cases, one gets a sense of Judge Wilson's preoccupation with a contextual notion of liberty, alive and well only if the state not only respects it in a passive way, but protects and promotes it as well in a positive way.

### 3. *Unavoidable Burdens Imposed by the State*

Individuals have therefore to emancipate themselves within a social structure that imposes on them burdens which may be unavoidable in a free and democratic society.

In *Operation Dismantle*<sup>87</sup>, Judge Wilson discussed the possible burdens that have to be imposed on individuals in the context of a national defence policy.

In *Jones*<sup>88</sup>, she accepted that the state may have to impose some burdens on freedom of religion. Not every trivial or unsubstantial effect on religion, caused by legislative or administrative action, she wrote, was to give rise to a constitutional freedom of religion issue.<sup>89</sup>

Judge Wilson warned against the trivialization of constitutional guarantees that would ensue from the artificial protection against the burdens that inevitably come with an organized social life. In *Re B.C. Motor Vehicle Act*<sup>90</sup>, the reference in which was discussed the constitutionality of absolute responsibility offences matched with imprisonment, she clearly made the point :

It is true that the section prevents citizens from driving their vehicles when their licences are suspended. Citizens are also prevented from driving on the wrong side of the road. Indeed, all regulatory offences impose some restriction on liberty broadly construed. But I think it would trivialize the *Charter* to sweep all those offences into s.7 as

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87. *Operation Dismantle*, *supra*, note 63.

88. *Jones*, *supra*, note 29.

89. "However, even assuming that this legislation does affect the appellant's beliefs, which for the reasons given I doubt, not every effect of legislation on religious beliefs or practices is offensive to the constitutional guarantee of freedom of religion. Section 2(a) does not require the legislature to refrain from imposing any burdens on the practice of religion. Legislative or administrative action whose effect on religion is trivial or insubstantial is not, in my view, a breach of freedom of religion. I believe that this conclusion necessarily follows from the adoption of an effects-based approach to the *Charter*." *Idem*, p. 313-314.

90. *Reference Re: B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486.

violations of the right to life, liberty and security of the person even if they can be sustained under s.1. It would be my view, therefore, that absolute liability offences of this type do not *per se* offend s.7 of the Charter.<sup>91</sup>

In *Thompson Newspapers*<sup>92</sup>, she emphasized the necessity of general regulatory schemes designed to organize human behaviour, and contrasted these to real violations of liberty and security of the person.<sup>93</sup>

She acknowledged as well the imperfection of our system of justice. For example, in *Mills*<sup>94</sup>, in which the right to be tried within a reasonable time was discussed, she accepted that the mere fact of being charged brought with it important prejudice that even innocent persons had to suffer, including anxiety, stress and stigmatization by family and friends.<sup>95</sup> But that was held to be part of living in an organized society.<sup>96</sup>

She made the point again in *Askov*<sup>97</sup>, a case concerned with the same question, where she stated:

It is an inevitable consequence of our system of justice that innocent people may from time to time be charged and suffer the social stigma of the charge until their innocence is proved at trial. We accept this. We cannot restore the accused to the *status quo ante*, much as we would like to in these cases, but at least we can ensure that that period of stigma is brought to an end as soon as is reasonably possible by the

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91. *Idem*, p. 524.

92. *Thompson Newspapers*, *supra*, note 43.

93. "It is not necessary for me to attempt to determine the perimeters of "liberty" and "security of the person". Clearly, they must be subject to some limits; otherwise any tenuous restriction placed on an individual would constitute a violation of liberty and security of the person. There is, however, in my view, a vast difference between a general regulatory scheme (such as the rules of the road for motorists) designed to give some order to human behaviour and a state-imposed compulsion on an individual to appear at proceedings against his will and testify on pain of punishment if he refuses.: *Idem*, p. 460-461.

94. *Mills v. R.*, [1986] 1 S.C.R. 863.

95. *Idem*, p. 967.

96. "We should not, in other words, turn the presumption of innocence into a presumption of Charter violation arising from the mere fact of the charge alone. To do so is to deny one of the realities of the justice system, namely that it is not a perfect system and that persons who are subsequently found to be innocent will, in the interval, have suffered the ignominy of the process. The Charter does not purport to protect us against that. What it does guarantee however, is that a person charged with an offence will not have to suffer that ignominy for an unreasonable length of time before the charge against him is disposed of one way or the other. At some point what was therefore lawful prejudice becomes unlawful and unconstitutional delay." *Idem*, p. 968.

97. *Askov*, *supra*, note 50.

guarantee of trial within a reasonable time so that the accused has the opportunity to clear himself if he can.<sup>98</sup>

The mere fact of living within an organized state therefore entails everyday burdens that individuals have to bear. Beyond a mythical image of liberty, it is simply a realistic aspect of it.

#### 4. *The Role of the Canadian Charter of Rights and Freedoms*

Thus individual freedom and dignity are fundamental, but life within a community organized by a state necessarily implies some form of limits on liberty. It is within that framework that the *Charter* must operate: to allow the proper functioning of the Canadian democracy while providing protection for the individual and collective rights that it guarantees.

In *McKinney v. University of Guelph*<sup>99</sup>, Judge Wilson made explicit, in these terms, the role of the *Charter*:

It seems to me that a historical review of the growth of the Canadian state makes clear that those who enacted the *Charter* were concerned to provide some protection for individual freedom and personal autonomy in the face of government's expanding role. I do not think they intended to do this by carving out or preserving "private" spheres of activity. I believe, however, that they considered it crucial to establish norms by which government would be constrained in performing the many roles it has assumed and will no doubt continue to assume. They sought to do this by setting out basic constitutional norms rooted in a concern for individual dignity and autonomy which government should be compelled to respect when structuring important aspects of citizens' lives. The purpose of the *Charter* then, it seems to me, is to ensure that government action that affects the citizen satisfies these basic constitutional norms.<sup>100</sup>

There is therefore no question of a "private" sphere of activity that would be outside the realm of state intervention. It is, rather, that the *Charter* provides some standards that the Canadian interventionist state must respect; standards devoted to the protection of human dignity and autonomy.

In the *Debot* case<sup>101</sup>, in a context of criminal procedure, Judge Wilson clearly asserted that the *Charter* guarantees did not prevent

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98. *Idem*, p. 1253.

99. *McKinney*, *supra*, note 15.

100. *Idem*, p. 357-358.

101. *Debot*, *supra*, note 50.

state action, but, rather, that they circumscribed the exercise of coercive power, this being one of the essential attributes of any organized state.<sup>102</sup>

Even in the *Morgentaler*<sup>103</sup> case, which could be seen as a paroxysm in the celebration of individual freedom against state action, one finds in Judge Wilson's opinion some remarks to the effect that the *Charter* does not isolate individual freedom from communal preoccupations, but rather operates a democratic compromise:

The *Charter* is predicated on a particular conception of the place of the individual in society. An individual is not a totally independent entity disconnected from the society in which he or she lives. Neither, however, is the individual a mere cog in an impersonal machine in which his or her values, goals and aspirations are subordinated to those of the collectivity. The individual is a bit of both. The *Charter* reflects this reality by leaving a wide range of activities and decisions open to legitimate government control while at the same time placing limits on the proper scope of that control.<sup>104</sup>

Hence, it is possible that only "individual decision-making in matters of fundamental personal importance"<sup>105</sup> could in certain (but not all) circumstances be beyond the reach of state intervention.

It would therefore seem, in the light of the above analysis, that Judge Wilson, though a strong defender of individual autonomy and liberty, acknowledges the importance of state intervention which inevitably entails limitations on both. Or rather, it could be put, in a truer sense, this way: she wants to promote the kind of individual liberty that is compatible with a life inside a community.

### 5. *The Duty of the State to Respect Human Dignity*

Exemplifying the realm of what appears to be her general conception of an individual within a state, Judge Wilson constantly showed a real concern for human dignity.

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102. "I start with the proposition that a monopoly on the use of certain types of power is a sine qua non of a legitimate government and its agents. With few exceptions only the state can detain persons against their will, enter homes without permission, forcibly subject some one to a search, and send people to prison. The intrusiveness and coercive nature of these procedures should not be underestimated. The legal rights guaranteed by the *Charter* are designed inter alia to circumscribe these coercive powers of the state within the boundaries of justice and fairness to the individual. They are the most formidable defences the individual can marshal against abuses of state power." *Idem*, p. 1172-1173.

103. *Morgentaler*, *supra*, note 32.

104. *Idem*, p. 164.

105. *Idem*, p. 170.

In the *Stoffman*<sup>106</sup> case, for example, in a context of alleged discrimination, she expressed the view that people should be treated as the individuals they really are, rather than according to generalizations made on the basis of their colour or race, for example. This is demanded by respect for human dignity.<sup>107</sup>

In *R. v. Hess and Nguyen*<sup>108</sup>, reported in 1990, Judge Wilson explained her preoccupation regarding the necessity of some form of guilty mind, in the context of criminal liability. For her, respect for human dignity and sense of worth forbid the imprisonment of a morally innocent person.<sup>109</sup>

She rejects the utilitarian conception to the effect that punishing the innocent can be the price to pay for the achievement of higher social values : human dignity, in a free and democratic society, requires that individuals not be treated as means to an end.<sup>110</sup>

One finds similar considerations about human dignity in *S.D.G.M.R. v. Saskatchewan*<sup>111</sup>, where Wilson J., in a dissenting opinion, associates free negotiations, in the context of labour law, with dignity of the workers:

Free negotiation is valued because it enables workers to participate in establishing their own working conditions. It is an exercise in self-government and enhances the dignity of the worker as a person.<sup>112</sup>

Finally, her discussion of undue exploitation of sex, in *Towne Cinema*<sup>113</sup>, shows the same kind of preoccupation with moral dignity

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106. *Stoffman*, *supra*, note 51.

107. "In discrimination claims of the kind involved here, if the guarantee of equality is to mean anything, it must at least mean this: that wherever possible an attempt be made to break free of the apathy of stereotyping and that we make a sincere effort to treat all individuals, whatever their colour, race, sex or age, as *individuals* deserving of recognition on the basis of their unique talents and abilities. Respect for the dignity of every member of society demands no less." *Idem*, p. 29.

108. *Hess and Nguyen*, *supra*, note 19.

109. "Our commitment to the principle that those who did not intend to commit harm and who took all reasonable precautions to ensure that they did not commit an offence should not be imprisoned stems from an acute awareness that to imprison a "mentally innocent" person is to inflict a grave injury on that person's dignity and sense of worth." *Idem*, p. 918.

110. "I noted in connection with my s.7 analysis that the criminal law has come to recognize that punishing the mentally innocent with a view to advancing particular objectives is fundamentally unfair. It is to use the innocent as a means to an end. While utilitarian reasoning may at one time have been acceptable, it is my view that when we are dealing with the potential for life imprisonment it has no place in a free and democratic society." *Idem*, p. 923-924.

111. *S.D.G.M.R. v. Saskatchewan*, [1987] 1 S.C.R. 460.

112. *Idem*, p. 486-487.

113. *Towne Cinema*, *supra*, note 82.

of individuals. Nothing is wrong with sex, but some treatment of it is dehumanizing, threatening at the same time the dignity of the immediate victims and that of the population at large.<sup>114</sup>

Judge Wilson accepts that if individual liberty must sometimes be shaped by state intervention, it must always be done with a real preoccupation for human dignity. The latter is, for her, a real concern.

## 6. *The Duty of the State to Treat the Individual with Justice*

### 1. GENERAL APPROACH

One finds in Judge Wilson's work a pervasive preoccupation with the notion of justice and the necessary fairness essential in any relationship between the individual and the state.

She showed, for example, great respect for the presumption of innocence, as a means to treat individuals with fairness.<sup>115</sup>

In *Thompson*<sup>116</sup>, she denounced the unfairness of the "massive violations of the rights of third parties to be free from unreasonable searches"<sup>117</sup> guaranteed by the *Charter*, which inevitably flowed from the tapping of public pay phones. Therefore, she required the authorization of such tapping to be expressly granted.<sup>118</sup>

In *Hunt v. Carey*<sup>119</sup>, Judge Wilson insisted on the importance of the right to present and defend one's case in a court of justice.<sup>120</sup>

It is interesting to consider *Air Canada v. B.C.*<sup>121</sup>, a case in which Judge Wilson, once again, strongly argued for protection of individuals against what she considered to be unjust treatment. In that case the right of the state to recover moneys collected under an unconstitutional law was discussed. She vehemently opposed the recognition of such a right since it would have imposed an undue burden on citizens

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114. *Idem*, p. 523, quoted above, note 83.

115. In *Chaulk*, *supra*, note 17, for example, one finds the following, at p. 3: "The presumption of innocence has traditionally been viewed as the cornerstone of our criminal justice system. It is reflected in the axiom that "It is better that a guilty person go free than that an innocent person be convicted of a crime"."

116. *Thompson*, *supra*, note 44.

117. *Idem*, p. 1156.

118. "[...]any violation of the rights of third parties to be free from unreasonable searches should be expressly authorized and not arise by implication or by the police exercising a discretion which can only be appropriately exercised by the authorizing judge." *Idem*, p. 1157.

119. *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

120. "As in England, if there is a chance that the plaintiff might succeed then the plaintiff should not be driven from the judgment seat. Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case." *Idem*, p. 980.

121. *Air Canada v. B.C.*, [1989] 1 S.C.R. 1161.

to first check the constitutionality of a tax law before making any payment.<sup>122</sup>

Moreover, she insisted on the fact that there was no reason for an individual taxpayer, as opposed to the entire population, to pay for the constitutional mistake made by the state. No policy reasons were strong enough, she wrote, to justify that courts should go out of their way to protect the government against its own actions. With an obvious passion dedicated to justice, she wrote:

Based on the foregoing reasoning I conclude that payments made under a statute subsequently found to be unconstitutional should be recoverable and I cannot, with respect, accept my colleague's proposition that the principle should be reversed *for policy reasons* in the case of payments made to governmental bodies. What is the policy that requires such a dramatic reversal of principle? Why should the individual taxpayer, as opposed to taxpayers as a whole, bear the burden of government's mistake? I would respectfully suggest that it is grossly unfair that X, who may not be (as in this case) a large corporate enterprise, should absorb the cost of government's unconstitutional act. If it is appropriate for the courts to adopt some kind of policy in order to protect government against itself (and I cannot say that the idea particularly appeals to me) it should be one which distributes the loss fairly across the public. The loss should not fall on the totally innocent taxpayer whose only fault is that it paid what the legislature improperly said was due. I find it quite ironic to describe such a person as "asserting a right to disrupt the government by demanding a refund" or "creating fiscal chaos" or "requiring a new generation to pay for the expenditures of the old". By refusing to adopt such a policy the courts are not "visiting the sins of the fathers on the children". The "sin" in this case (if it can be so described) is that of government and only government has means available to it to protect against the consequences of it. It should not, in my opinion, be done by the courts and certainly not at the expense of individual taxpayers.<sup>123</sup>

Judge Wilson's preoccupation with fairness in the relationship between the individual and the state found some expression in cases in which she insisted on some right to information, for the population in general, as well as for individuals in particular.

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122. "It would be my view that the mistake of law doctrine (if it is to be retained) should certainly not be extended to moneys paid under unconstitutional legislation. Otherwise taxpayers will be obliged to check out the constitutional validity of taxing legislation before they pay their taxes in pain of being unable to recover anything paid under unconstitutional laws. In my opinion, this is to place the onus of inquiry as to constitutionality in the wrong place." *Idem*, p. 1214.

123. *Idem*, p. 1215.

One remembers *Mackeigan v. Hickman*<sup>124</sup>, a case concerned with judicial immunity and in which she showed, in a dissenting opinion, a real concern for the right of the community to know what is going on in the judicial arm of the state. She stated that there could be cases where public interest would be better served by public scrutiny than by strict protection of the principle of judicial immunity.

When there is a real risk that judicial immunity may be perceived by the public as being advanced for the protection of the judiciary rather than for the protection of the justice system, the public interest in my view requires that the question be asked and answered.<sup>125</sup>

In the criminal law setting, Judge Wilson often insisted on the necessity of the accused to have the benefit of proper information, before having to make a decision.<sup>126</sup>

Finally, some remarks Judge Wilson made in the *Towne Cinema*<sup>127</sup> case show a great concern for fairness in the dealings between the state and the individual. In that case, it takes the form of a preoccupation that the individual be given the proper information in order to be able to answer the case made against him. Indeed, in the case of undue exploitation of sex, she insisted on the fact that the burden imposed on the Crown to establish obscenity beyond a reasonable doubt included the burden to prove both the community standard of acceptability and its non-respect by the accused. She refused to take judicial notice of the former. She made clear that the accused had the right to know the case he had to meet, in order to be able to present a full defence. Judicial notice, if possible at all, would here have caused prejudice to the accused.<sup>128</sup>

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124. *MacKenzie v. Hickman*, [1989] 2 S.C.R. 796.

125. *Idem*, p. 808-809.

126. See, for example: *R. v. Black*, [1989] 2 S.C.R. 138 at 152-153; *R. v. Lyons*, [1987] 2 S.C.R. 309 at 379-380; *Clarkson v. R.*, [1986] 1 S.C.R. 383 at 394; *R. v. Farrault*, [1983] 1 S.C.R. 124 at 127-128.

127. *Towne Cinema*, *supra*, note 82.

128. "Having regard to the fact that the onus is on the Crown to establish obscenity beyond a reasonable doubt, it seems to me that the onus is on it to establish both what the community standard of acceptability is and that the accused has gone beyond it. The accused may counter the Crown's evidence of the community standard with evidence of its own and the Judge may reach his decision on the evidence in the usual way. In my view it is naive to think that a judge, drawing on his own experience alone, can determine the objective standard against which impugned conduct is to be measured. As Borins Co. Ct. J. said in *R. v. Doug Rankine Co.* (*supra*) the legislature cannot credibly expect a trier of fact to have his finger on the "pomographic pulse of the nation". Moreover, it is wrong in principle. It leaves the accused with no way of knowing the case it has to meet, at what level of acceptability the line will be drawn by any particular judge. There is no certainty. It is the length of the Chancellor's foot imported into the criminal law." *Idem*, p. 529.



## 2. A SUBJECTIVIST APPROACH TO CRIMINAL LAW

Judge Wilson's concern with the duty of the state to treat the individual with justice finds a particular expression in her strong defense of a subjectivist approach to criminal law. Indeed, she strongly believes in the principle that criminal responsibility should be entailed only by those with some sort of a guilty mind.

In *Hess and Nguyen*<sup>129</sup>, a case concerning the constitutionality of a *Criminal Code* provision prohibiting a sexual conduct and making irrelevant the knowledge of one element of the offence, i.e. the age of the victim, she considered the history of *mens rea*. She explained that it revealed a progressive concern for the injustice of punishing the morally innocent, a recognition of the uselessness of deterrence absent some culpable mind<sup>130</sup>, and an abandonment of the purely retributive element of punishment.

In my view, the history of the doctrine of *mens rea* shows a gradual move away from a purely retributive conception of punishment, where the law sought to pay back the moral evil done without regard for the reasons why the actor committed the prohibited act, to a conception of punishment that is not only sensitive to injustice involved in punishing those who are mentally innocent but also takes account of the fact that punishment will not act as an effective deterrent if persons are punished who did not know or could not have known that they were committing an offence.<sup>131</sup>

For Judge Wilson, the requirement of *mens rea* seems to rest ultimately on the necessary respect, by the state, for the inherent dignity of the individual.<sup>132</sup>

In *Tutton*<sup>133</sup>, a criminal negligence case, she related the requirement of some sort of guilty mind as a condition of penal liability to the principles of fundamental justice.<sup>134</sup>

In *Docherty*<sup>135</sup>, she affirmed that knowledge that what one was committing was a criminal offence constituted a necessary element of

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129. *Hess and Nguyen, supra*, note 19.

130. See also, to the same effect: *R. v. Docherty*, [1989] 2 S.C.R. 941 at 951: "Put simply, it makes little sense to think that a person will be deterred from wrongdoing in situations where that person does not believe and has no awareness that he or she is doing anything wrong."

131. *Hess and Nguyen, supra*, note 19, p. 917-918.

132. *Idem*, p. 918, quoted above, note 109.

133. *R. v. Tutton*, [1989] 1 S.C.R. 1392.

134. "This Court made clear in *Sault Ste. Marie* and other cases that the imposition of criminal liability in the absence of proof of a blameworthy state of mind, either as an inference from the nature of the act committed or by other evidence, is an anomaly which does not sit comfortably with the principles of penal liability and fundamental justice [...]" *Idem*, p. 1401-1402.

135. *Docherty, supra*, note 130.

the offence of wilfully breaching one's probation order through the commission of a criminal offence. The importance of a subjective knowledge of every component of an offence was considered so fundamental as to justify an exception to the general inadmissibility of a defence of ignorance of law.<sup>136</sup>

In the same vein, Judge Wilson's commitment to a subjectivist approach to criminal law modeled her interpretation of statutory language. In *Tutton*<sup>137</sup>, for example, she interpreted the criminal negligence offence created by the *Criminal Code* as requiring a mental element of advertence or awareness of the created risk, beyond a mere objective gross negligence.<sup>138</sup> She clearly made the point that, should policy reasons argue in favour of an objective standard, it was Parliament's responsibility to decide this, and that the Courts would not do so through statutory interpretation.

Should social protection require the adoption of an objective standard it is open to Parliament to enact a law which clearly adopts such a standard. In my respectful view this Court should not do it for them.<sup>139</sup>

Within that general context, one can wonder why Judge Wilson insisted on maintaining the rule that, in principle, intoxication was not an admissible defence in the case of an accusation based on a general intent offence. Indeed, more than once, she refused to overrule the principle. In *Penno*<sup>140</sup>, for example, she confirmed that the rule was justified on the ground that intoxication generally did not deprive a person of the mere knowledge of what she was doing, which was the only required intent.<sup>141</sup>

In *Bernard*<sup>142</sup>, a sexual assault case, she made clear, moreover, that "in most cases involving general intent offences and intoxication, the Crown will be able to establish the accused's blameworthy mental state by inference from his or her acts".<sup>143</sup>

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136. *Idem*, p. 960.

137. *Tutton*, *supra*, note 133.

138. *Idem*, p. 1406-1407.

139. *Idem*, p. 1413-1414.

140. *R. v. Penno*, [1990] 2 S.C.R. 865.

141. "The rationale in support of this finding was that intoxication could affect a person's ability to foresee the consequences of an act, which is a requirement for crimes of specific intent, but that, generally speaking intoxication could not deprive a person of the ability to know that he or she was committing the act which is the minimal requirement for crimes of general intent." *Idem*, p. 887.

142. *R. v. Bernard*, [1988] 2 S.C.R. 833.

143. *Idem*, p. 882.

However, still preserving her subjectivist approach, Judge Wilson accepted the possibility that extreme intoxication could sometimes be shown as negating even the minimal knowledge required by general intent offences.

I view it as preferable to preserve the *Leary* rule in its more flexible form as Pigeon J. applied it, i.e., so as to allow evidence of intoxication to go to the trier of fact in general intent offences only if it is evidence of extreme intoxication involving an absence of awareness akin to a state of insanity or automatism. Only in such a case is the evidence capable of raising a reasonable doubt as to the existence of the minimal intent required for the offence.<sup>144</sup>

Her concern with a criminal justice system founded on the need for a guilty mind in criminal offences prompted Judge Wilson to accept that even unreasonable beliefs and mistakes of fact could repudiate *mens rea*. In *Tutton*<sup>145</sup>, for example, she made the point that to require that mistakes be reasonable would permit the condemnation of some innocent people, those, for example, who cannot be fairly expected to live up to the standard of the reasonable person.<sup>146</sup>

However, in *Robertson*<sup>147</sup>, a sexual assault case where a defence of mistake of fact was presented, still accepting the admissibility of even unreasonable mistakes of fact, Judge Wilson made clear that the accused had to adduce sufficient evidence as to his honest belief, if he wanted to put the defence in issue.<sup>148</sup> Moreover, she added:

There must be evidence which gives an air of reality to the defence of mistake of fact before the court will consider it [...] <sup>149</sup>

For Judge Wilson, it would seem, justice in the relationship between the individual and the state is the *raison d'être* for the requirement of a guilty mind for criminal responsibility. If one accepts that the state has the monopoly on legitimate coercion, it would simply not be just for it to punish the morally innocent person.

From the foregoing one finds a sophisticated conception of the individual. The person's dignity and liberty are fundamental. This will

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144. *Idem*, p. 887.

145. *Tutton*, *supra*, note 133.

146. "To require, as does my colleague, that all misperceptions be reasonable will, in my view, not excuse many of those who through no fault of their own cannot fairly be expected to live up to the standard of the reasonable person." *Idem*, p. 1417.

147. *R. v. Robertson*, [1987] 1 S.C.R. 918.

148. *Idem*, p. 936.

149. *Idem*, p. 939.

sometimes require some passive respect from the state, and some other times a more active protection against interference by other individuals. But when the state intervenes, it must always do so with justice and with respect for human dignity.

### *III. A Gendered Individual*

It is impossible to have a proper image of the individual in the work of Judge Wilson without addressing the issue of gender relationships. Indeed, it seems to have been an important preoccupation of hers, and she has had the opportunity to explain some of her views on the matter.

It would seem to me that the *ad hoc* impressions and opinions she expressed on the subject are quite consistent. I think she would agree that historically gender relationships have been ones of domination. Women's lack of power, be it economic, political or institutional, prevented us from participating in the elaboration of the world, and of ideas about the world. We were not involved in the creation of legal concepts and our particular viewpoint has therefore not been taken into account.<sup>150</sup> It is therefore time for women to take their place in society generally, and in the legal domain in particular.

Obviously, one first thinks of Judge Wilson's speech on the impact of the presence of women judges.<sup>151</sup> Therein, she referred to sexist stereotypes within the legal field. For example, she explained how prejudices about women's sexuality have modeled some aspects of the criminal law. She wrote about the possibility of women having a different voice, and about the importance of that different voice being heard, from then on.

And she, for sure, let a different voice be heard.

In that respect, her opinion in the *Morgentaler* case<sup>152</sup> is a fundamental one. In that case, Judge Wilson has proved herself to be courageous and powerful. Discussing the constitutionality of the *Criminal Code* provisions providing for the principle of criminalization of abortion, in the light of women's constitutional rights, she made assertions essential to women's rights generally. She first made clear that the decision by a woman to continue or not a pregnancy was a

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150. In the *Morgentaler* case, *supra*, note 32, at p. 170, Judge Wilson referred to "the subjective elements of the female psyche", to women's "special place in the societal structure" and to "biological distinctions between the two sexes."

151. Wilson, Judge Bertha, *loc. cit.*, *supra*, note 3.

152. *Morgentaler*, *supra*, note 32.

most important and intimate one, and that the state's interest in the protection of the foetus could only be exercised in the respect of women's rights to liberty and security. She acknowledged the fact that human rights struggles have until now mainly been concerned with rights of human beings in general, and that women's rights were sometimes unique, and forgotten.<sup>153</sup> As regards abortion, one remembers how provocative she was by asserting that:

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.<sup>154</sup>

But too much emphasis has been put on this particular sentence. I don't think she in any way was positing some kind of irreconcilability between men and women. I would rather understand what she said as founded on a vision implying that men and women live fundamentally different realities, and have to work towards a better mutual understanding, but cannot take this understanding for granted.

In the *Lavallée* case<sup>155</sup> as well, Judge Wilson acknowledged the difficulty of the relationship between genders, the existence of prejudices and myths to be destroyed, and the necessity for the law to take into account those social realities. In that case, the admissibility of expert evidence as regards the "battered wife syndrome" was in issue. Since self-defence is based on the establishment of a reasonable apprehension of death, the Court had to decide whether, in the case of a battered woman, the determination of that apprehension was a matter for the layperson's common sense to decide, or whether it necessitated here expert evidence to be admitted. Judge Wilson went for the latter. Here again, she wrote an important opinion. She first acknowledged the existence, "[t]he gravity, indeed, the tragedy of domestic violence".<sup>156</sup> Coming from a Supreme Court of Canada Justice, it was a rather important and meaningful affirmation. She added:

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.<sup>157</sup>

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153. *Idem*, p. 170.

154. *Idem*, p. 170.

155. *Lavallée*, *supra*, note 27.

156. *Idem*, p. 872-873.

157. *Idem*.

She accepted that the law had not been neutral as regards the problem, but that it had even sanctioned domestic violence.<sup>158</sup> Deeply entrenched in the social setting, the law had simply showed to be in tune with real world relationships.

Laws do not spring out of social vacuum. The notion that a man has a right to “discipline” his wife is deeply rooted in the history of our society. The woman’s duty was to serve her husband and to stay in the marriage at all costs “till death do us part” and to accept as her due any “punishment” that was meted out for failing to please her husband. One consequence of this attitude was that “wife battering” was rarely spoken of, rarely reported, rarely prosecuted, and even more rarely punished. Long after society abandoned its formal approval of spousal abuse tolerance of it continued and continues in some circles to this day.<sup>159</sup>

Because of this historical background, the average person is not sensitive to the complex pattern of relationship giving rise to domestic violence.<sup>160</sup> The woman is easily thought to be lying or masochistic. Because, as regards domestic violence, myths and stereotypes are well and alive.

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? Why should she continue to live with such a man? How could she love a partner who beat her to the point of requiring hospitalization? We would expect the woman to pack her bags and go. Where is her self-respect? Why does she not cut loose and make a new life for herself? Such is the reaction of the average person confronted with the so-called “battered wife syndrome”.<sup>161</sup>

Judge Wilson therefore admitted the importance of expert evidence allowing to go beyond prejudice, and toward a better understanding of the complex relationship involved in the case.

One cannot be surprised to find in Judge Wilson’s work a gendered individual. Her contextual approach so required; the individual could not have been taken apart from her context, where gender is such a fundamental feature.

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158. *Idem*, pp. 872-873.

159. *Idem*, pp. 872-873.

160. *Idem*, pp. 872-873.

161. *Idem*, p. 871-872.

#### IV. *Some Other Characteristics of the Individual*

The individual one finds in Judge Wilson's work is complex and presents numerous characteristics, some of which will briefly be presented here.

##### 1. *An Individual Responsible for Her Choices*

One finds in Judge Wilson's work a conception of an individual with the capacity to make choices, obviously, but at the same time responsible for those choices.

In *Kosmopoulos*<sup>162</sup>, an insurance case, for example, Judge Wilson reminded that the person choosing incorporation for the pursuance of certain activities had to reconcile himself with the burdens that come with that choice.<sup>163</sup>

In *Pelech v. Pelech*<sup>164</sup>, a divorce case, she made a similar argument, but in a somewhat more emotionally charged context. In that case, the issue was the responsibility of a person as regards an ex-spouse's difficult financial situation, long after a divorce, and completely outside the scope of an agreement freely entered into by both partners. Judge Wilson decided that the terms of the agreement had to be respected, and affirmed that "people should be encouraged to take responsibility for their own lives and their own decisions".<sup>165</sup>

She wrote that "parties who have declared their relationship at an end should be taken at their word".<sup>166</sup> In a way, she insisted that, in principle, a terminated marital relationship should not continue to have effects for the rest of the life of the former spouses.<sup>167</sup> They had to have the possibility to start a new life without the threat of a

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162. *Kosmopoulos v. Constitution Insurance Co.*, [1987] 1 S.C.R. 2.

163. "Mr. Kosmopoulos was advised by a competent solicitor to incorporate his business in order to protect his personal assets and there is nothing in the evidence to indicate that his decision to secure the benefits of incorporation was not a genuine one. Having chosen to receive the benefits of incorporation, he should not be allowed to escape its burdens. He should not be permitted to "blow hot and cold" at the same time." *Idem*, p. 11.

164. *Pelech v. Pelech*, [1987] 1 S.C.R. 801.

165. "It seems to me that where the parties have negotiated their own agreement, freely and on the advice of independent legal counsel, as to how their financial affairs should be settled on the breakdown of their marriage, and the agreement is not unconscionable in the substantive law sense, it should be respected. People should be encouraged to take responsibility for their own lives and their own decisions. This should be the overriding policy consideration." *Idem*, p. 850.

166. *Idem*, pp. 851-852.

167. She mentioned an exception for the case where the radical change in the situation of the former spouse is "the result of a pattern of economic dependency generated by the marriage relationship": see *Richardson v. Richardson*, [1987] 1 S.C.R. 857 at 866.

Damoclès sword constantly hanging over their heads. Judge Wilson preferred individual liberty over “a fiction of marital responsibility”:

While I realize that Mrs. Pelech’s present hardship is great, to burden the respondent with her care fifteen years after their marriage has ended for no other reason than that they were once husband and wife seems to me to create a fiction of marital responsibility at the expense of individual responsibility.<sup>168</sup>

Consequently, subsequent financial hardship of a person is a matter for the “communal responsibility of the state”<sup>169</sup>, rather than for the ex-spouse.

### 2. *An Individual who Communicates with Others*

Judge Wilson views the individual as communicating with others. She therefore considers language as fundamentally important, as a way of shaping as much as of expressing ideas. Adding these premises to the Canadian political history, she acknowledges the importance of language rights, underlying the importance of communicating and of being understood.

It starts from the premise that the essence of language is communication and that implicit in the notion of language rights in the context of court proceedings is the ability both to understand and to be understood. If this is correct, it is clearly not enough that the litigant has the right to use his or her language if those dealing with him or her are using a different language. Indeed the specific and often urgent necessity of clear communication in the course of litigation is a feature of the fundamentally social function of language.<sup>170</sup>

### 3. *An Ordinary Individual*

Probably because of her general commitment to a contextual approach centered around particular circumstances, one does not find, in Judge Wilson’s work, an abstractly defined and typified image of the individual. On the contrary, from one case to another, one finds a very ordinary person : a free person that legitimately can say sometimes yes and sometimes no to sexual encounter<sup>171</sup>; a person that can be

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168. *Pelech, supra*, note 164, p. 852-853.

169. *Idem*, p. 852.

170. *MacDonald v. Ville de Montréal*, [1986] 1 S.C.R. 460, 523-524. See also: *Société des Acadiens v. Association of Parents*, [1986] 1 S.C.R. 549.

171. See *R. v. Konkin*, [1983] 1 S.C.R. 388at 398-399: “There is no doubt that at this stage the trial Judge was in effect saying to counsel: Why is post-offence sexual conduct relevant? *Prima facie* it doesn’t appear to me to be so. How can sexual conduct the complainant engaged in after



tempted to take advantage of the self-reporting tax system<sup>172</sup>; a person who is not legally versed<sup>173</sup>; a frail person<sup>174</sup>; one with a commendable sense of initiative<sup>175</sup>; or a rather well-informed person.<sup>176</sup> As we have seen in *Lavallée*<sup>177</sup>, Judge Wilson's individual is well integrated in a social context that models her way of thinking, and therefore may hold prejudices and stereotypes.

### Conclusion

It is difficult to conclude such a paper. One does not want to betray, in

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the offence tell us anything about her credibility as a witness or whether she consented to have intercourse with this particular accused in relation to this particular offence?"; and at 401-402: "[...]it would not in my view effect a "balancing" of the interests of the complainant and the accused to permit him to lead a humiliating and devastating inquiry at trial into post-offence sexual conduct of the complainant that would clearly have been inadmissible prior to the enactment of the section. Accordingly, while post-offence sexual conduct is not inadmissible per se, it should only in my view be admitted where its relevance to a fact in issue has been established. The trial Judge himself gave an example of how this might be done, namely if it were shown that pre- and post-offence sexual conduct formed a continuous pattern. He did not exclude the post-offence conduct per se. He excluded it because it did not cross the first hurdle of being relevant to a fact in issue in the case."

172. See *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R., 627 at 637: "Nonetheless, it would be naive to think that no one attempts to take advantage of the self-reporting system in order to avoid paying his or her full share of the tax burden by violating the rules set forth in the Act."

173. See *R. v. Stevens*, [1988] 1 S.C.R. 1153 at 1181: "Is McLachlin J.A. correct in suggesting that absolute liability is rationally connected to the objective of deterrence? In my view, if there is a connection, it is a somewhat tenuous one. The learned Justice's thesis seems to be based on the assumption that an individual contemplating sexual intercourse with a female who appears to him to be over 14 first addresses his mind to the *mens rea* requirement of a fairly obscure section of the Code. In my view, this ascribes an unrealistically high degree of legal sophistication to the average accused."

174. See *Racine v. Woods*, *supra*, note 74, p. 185, quoted above, note 75.

175. See *Abrahams v. A.G. Canada*, [1983] 1 S.C.R. 2 at 9: "One might ask what comparable wrong was the legislature seeking to remedy in para.(c). The Federal Court of Appeal says it was trying to prevent claimants from taking other occupations during a strike with the intention of returning to their original employment after the strike was over. But what is wrong with this? Why would the legislature seek to discourage it? Perhaps such persons should be commended, not penalized, for their initiative. I have concluded that again what the legislature was seeking to deter was some sort of fraud on the Commission. A "token" engagement in another occupation should not have the effect of restoring benefits. It has to be a "regular" job and not just a day or two here and there with no firm commitment by either the claimant or the new employer. The legislative purpose in inserting the adverbial qualifications into both these paragraphs was, in my view, to protect against abused under the section."

176. See *R. v. Béland*, [1987] 2 S.C.R. 398 at 426: "I question whether the fear that the polygraph operator will usurp the role of the jury is wellfounded. Juries of today are much more sophisticated than they were when some of our restrictive rules of evidence were developed. They are well versed in modern technology, thanks to the influence of the mass media, and are not today in awe of scientific evidence as they might have been a hundred or even fifty years ago."

177. *Lavallée*, *supra*, note 27.

a few words, a complex intellectual work. Nonetheless, let me just say that I could easily live with the kind of individual I found depicted in Judge Wilson's work. She is free and autonomous, has the right to know, is capable of making choices but must live with the consequences even if they are burdens. She is not alone, she is not isolated. She lives within a community that made her who she is but which she can transform. She lives with others, within an organized state, within which there is no liberty without law. The state can, and ought to, intervene, but there are ways it can do so and ways it can not. And this stems from the fact that justice and dignity must be respected.

This individual is a gendered one, and, historically, women were at a disadvantage within gender relationships. But things have started to change. Judge Wilson has courageously accomplished a great deal towards attainment of this change. And we should all be thankful for that. But more courage is still needed.