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The Scottish Enlightenment, the Democratic Intellect and the Work of Madame Justice Wilson

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To talk of Madame Justice Wilson in the context of her Scottish background, the Scottish Enlightenment and the Democratic Intellect is one of the most exciting yet daunting tasks I have undertaken. A huge problem, which I will mention first but not discuss, has been to get to grips with her towering intellect. As will become clear, this problem was much diminished by Madame Justice Wilson herself: she writes with a simplicity, grace, rationality and humanity that may even lead one to underestimate the complexity of her thought.

I was also less daunted when I realized just how assured is Madame Justice Wilson's position in history. It does not matter what I say. I would be astonished if, on the very day on which she announced her retirement from the bench, some Canadian scholar had not decided to write a history of her judgments. To me, she is the Canadian Lord Mansfield. She, like Mansfield, is Scottish, with a legal training and judicial career outside Scotland, but whose Scottishness is appreciated as affecting their approach to law. Both are great judges, but Madame Wilson is Lord Mansfield with a heart.[1] It was a real treat to read her judgments. With each one I felt my heart and mind expand.

But there remained the problem of cause and effect of which no reader of David Hume can be unaware. How can one estimate the impact of a cultural tradition on an individual? As my master, David Daube, once put it: "There is no scholarly effort independent of fashion — by which I understand a cultural trend — and idiosyncrasy — by which I understand a personal bent... . Of course, fashion and idiosyncrasy overlap: the former may owe much to the energy of the individual, the latter is usually colored by prevalent conditions."[2] If one considered a largish number of individuals from a particular

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1. The task was also made easier by the fact that there exists a list of her judgments, both on the Court of Appeal of Ontario and on the Supreme Court of Canada, which reveals whether she agreed with all of her colleagues, dissented, dissented in part, gave separate reasons and so on. There is also, among other valuable biographical information, a splendid character and background sketch by Sandra Gwyn, 'Sense & Sensibility,' *Saturday Night* (July, 1985), pp. 13ff.

2. D. Daube, "Fashions and Idiosyncrasies in the Exposition of the Roman Law of Property," in A. Parel and T. Flanagan, eds., *Theories of Property*, (Waterloo, Ontario, 1979), pp. 35ff.

cultural milieu against a backdrop of a number of individuals from other milieus, one might, from general characteristics of the first group that differed from the characteristics of those others, draw some conclusions about the impact of the cultural tradition on the group, but still not know how it affected the individual. I was forced to think of my own case, as the child of a railway clerk, an M.A. Ordinary graduate of the University of Glasgow, who had taken the traditional class of Moral Philosophy. What impact did that background have on me? Certainly, when I taught at Oxford I felt I was very different from my colleagues. And I was left in no doubt that my colleagues believed I was different from them. But was I, and if so, why was I?[3]

To make things more difficult in this case, I could not set Madame Justice Wilson against the backdrop of her Supreme Court colleagues and declare her characteristics to be the result of the Scottish cultural tradition. That tradition has had an important impact on the Canadian outlook in general. [4] I am conscious of this whenever I come from the U.S. to Canada, whether to Toronto or Halifax.[5] Moreover, Madame Justice Wilson is female, her colleagues at first were all male. Is her obvious empathy with the parties to a law suit the result of the Scottish Enlightenment, her gender or her own personality? Is her even more obvious sympathy for the underdog the result of the Democratic Intellect, her gender or her personality?

Again, although lawyers were prominent in the Enlightenment, in the Scotland that Madame Justice Wilson left the structure of the Faculty of Advocates did not much partake of the spirit of the democratic intellect. For admission there was an upfront fee of £500 — an enormous sum in these times — and the applicant could not have been gainfully employed in the previous year. Advocates could not form partnerships, and they had to be instructed by a solicitor, not directly by the client. Without connections there would be no work, and no scope for the "lad or lass o' pairts" to show talent.[6] A look at the

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3. Yet I could have drawn some conclusions about the different world view of my Oxford students and of my fellow Glaswegians.

4. See, e.g., J. G. Reid, 'Beyond the Democratic Intellect: the Scottish Example and University Reform in Canada's Maritime Provinces, 1870-1933' in P. Axelrod and J.G. Reid, *Youth University and Canadian Society Essays in the Social History of High Education* (1989).

5. I almost emigrated to Canada on the completion of my legal studies at Glasgow and, indeed, made inquiries from the Bar Associations of most of the Provinces. I have little doubt that I would have been very happy.

6. To engage in sad speculation: I am as morally certain as one can be about such matters that if Madame Justice Wilson had remained in Scotland she would not have become a Senator of the College of Justice.

family relationships of Judges of the Court of Session this century is instructive. The situation was not much different in the eighteenth century.[7]

Nor could I find a mirror image for her empathy and sympathy in other 'outsider' judges, such as Thurgood Marshall and Sandra Day O'Connor, respectively the only black and only woman on the U.S. Supreme Court, or James McKay, the only British Lord Chancellor not a member of the English Bar.

The approach that was open was to analyze Madame Justice Wilson's judgments, then attempt to relate these to the characteristics of the Scottish Enlightenment.[8] Her judgments and dissents are so numerous that, to avoid the appearance of arbitrary selection, I chose for no specific reason to concentrate on one year, 1987. But I then realized that her characteristics are so marked that I need single out only one case. I picked the rather unlikely seeming one of *Kosmopoulos v. Constitution Insurance Co.*, [1987] 1 S.C.R. 2, simply because it came first. I was, however, not surprised to discover subsequently that it was regarded as a leading case.[9] But then, so are many others recording Madame Justice Wilson's opinion.

Madame Justice Wilson's exposition of the facts is quite remarkable. In the law reports it occupies less than a page (pp. 6ff).

> On February 7, 1972, the respondent, Andreas Kosmopoulos, entered into a commercial lease for premises located in the City of Toronto. From these premises he operated a business of manufacturing and selling leather goods under the name of Spring Leather Goods. This business was carried on as a sole proprietorship.
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> On the advice of his solicitor Mr. Kosmopoulos incorporated Kosmopoulos Leather Goods Limited ("the company") in order to protect his personal assets. Mr. Kosmopoulos was the sole shareholder and director of the company. Even though the business was thereafter technically carried on through the limited company, Mr. Kosmopoulos always thought that he owned the store and its assets. Virtually all the documentation required in the business, including bank accounts, sales tax permits and hydro and telephone accounts, made no reference to the company but rather to "Andreas Kosmopoulos carrying on business as

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7. See, e.g., A.C. Chitnis, *The Scottish Enlightenment: a Social History* (London, 1976), p. 75f.
8. Elsewhere I have argued that judges as a group reason in accordance with cultural norms that they have set for themselves: see A. Watson, *Roman Law and Comparative Law* (Georgia, 1991), pp. 221ff.
9. See, e.g., the remarks of the Right Honorable Antonio Lamer, P.C., Chief Justice of Canada, in "Retirement Ceremony of the Honourable Bertha Wilson, Supreme Court of Canada, Ottawa, Ontario, December 4, 1990", p. 3.

> Spring Leather Goods" (or some similar phrase). Although Mr. Kosmopoulos' solicitor tried to obtain the approval of the landlord to an assignment of the lease of the premises from Mr. Kosmopoulos to the company, this approval was never obtained. The lessee at all material times was Mr. Kosmopoulos and not the company.
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> Soon after Mr. Kosmopoulos started conducting his business in the leased premises, he contacted the respondent, Aristides Roussakis, in order to obtain insurance for the contents of the business premises. The respondents, Aristides Roussakis and Art Roussakis Insurance Agency Limited ("the insurance agency"), obtained a fire insurance policy with the General Accident Group for coverage from March 14, 1972 to March 14, 1975. Even though the insurance agency was well aware of the fact that the business was being carried on by an incorporated company, the insured was described on the policy as "Andreas Kosmopoulos O/A Spring Leather Goods." This policy was renewed but expired before the date of the loss and was replaced with subscription policies issued by Simcoe-Bay Group and Commercial Insurance Company. The appellant insurance companies are subscribing companies to the two replacement policies. Both of the replacement policies showed the insured as "Andreas Kosmopoulos O/A Spring Leather Goods."
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> On May 24, 1977 a fire broke out in the adjoining premises and caused fire, water and smoke damage to the assets of the company and to the rented premises. Mr. Kosmopoulos filed proofs of loss under the replacement policies on December 6, 1977 but the appellant companies refused payment and the present action was commenced.

Nothing is inserted that is not relevant. But it is not a bare recital of facts. We can taste the atmosphere. The respondent Andreas Kosmopoulos had a Greek name. So had his insurance broker, Aristides Roussakis who yet was North Americanized enough to term his agency Art Roussakis Insurance Agency Limited. Kosmopoulos incorporated his business in Toronto to protect his personal assets, but, we are told, he always thought he owned the store and its assets. The feeling comes across that Madame Justice Wilson knows Mr. Kosmopoulos, the kind of business that he runs, his way of doing business, his hopes and ambitions. Not only her head, but her heart is involved.[10]

Equally masterful is her description of the judgments of the courts below (pp. 8ff). But I wish to concentrate on her judgment.

She follows counsel for the appellant insurance companies and divides the issue into three parts.

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10. Likewise in *R.* v. *Robertson*, [1987] 1 S.C.R. 918 we know the respondent and her flatmate, Eileen.

The first question was whether to "lift the corporate veil." Kosmopoulos was the sole shareholder of his incorporated company, Kosmopoulos Leather Goods Limited. She states the general rule that a corporation is a legal entity distinct from its shareholders, and notes that courts may disregard the rule and "lift the corporate veil," but that the occasions when they do so show no consistent principle. She has "no doubt that theoretically the veil could be lifted in this case to do justice" but thinks it unwise to do so, and gives two reasons.

The first is that a person who chooses the benefits of incorporation should not escape its burdens, so the veil should be lifted only to protect third parties. The second is that to raise the veil in this case would create an arbitrary and indefensible distinction between this situation and that where the corporation had more than one shareholder but one of them had an overwhelming interest. (pp. 10ff)

The reasons are cogent, rational, and humane, but Madame Justice Wilson gives me the distinct impression that she would have lifted the veil if she could not have found for Mr. Kosmopoulos in any other way. She states: "In addition, it is my view that if the application of a rule leads to harsh justice, the proper course to follow is to examine the rule itself rather than affirm it and attempt to ameliorate its ill effects on a case-by-case basis."

Here we have an extraordinary statement of judicial philosophy. The usual judicial course is to accept precedent as forming a rule, then when the rule is seen at times to work injustice to do one of two things. Judges may follow the rule even when they accept that it works injustice. [11]

Alternatively, they may create exceptions upon exceptions until the exceptions swallow up the rule. But no consistent principle can be found in the exceptions. The rule still appears to be the rule.[12] Indeed, legislators often act in the same way: leaving the original, unsatisfactory rule but creating exceptions.[13] What legal rule is there when one can say, as Madame Justice Wilson says in this case: "As a general rule a corporation is a legal entity distinct from its shareholders: *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.) The law on when a court may disregard this principle by 'lifting the corporate veil' and regarding the company as a mere 'agent' or 'puppet' of its controlling

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11. For a fascinating example see the House of Lords case, *President of India* v. *La Pintada Compañia, Navigación S.A.*, [1985] A.C. 104: cf. Watson, *Roman Law and Comparative Law*, pp. 222ff.

12. For examples, see, e.g., Watson, *Supra*, note 8, pp. 143ff.

13. The history of 'Benefit of Clergy' is instructive: see, e.g., A. Watson, *Society and Legal Change* (Edinburgh, 1977), pp. 92ff.

shareholder or parent corporation follows no consistent principle. The best that can be said is that the 'separate entities' principle is not enforced when it would yield a result 'too flagrantly opposed to justice, convenience or the interests of the Revenue': L.C.B. Gower, *Modern Company Law* (4th ed. 1979), at p. 112." What law is there when one can say, or when one has to say, "The rule is followed except when it is flagrantly unjust or inconvenient?" Yet that is the line usually taken by judges, though it necessarily leads to arbitrary, unjustifiable distinctions.

But Madame Justice Wilson would take the radical route: when a rule works injustices, do not create further exceptions, examine whether the rule should be changed. Still, in proper judicial fashion, since no exception need be created, she does not reformulate the law in legislative fashion. But she indicates she would do so, and opens the way for others to follow.

The second issue, whether Kosmopoulos was bailee of the company's assets, was handled in a crisp, properly legal way. (pp. 12f). Kosmopoulos controlled the property of the company as its servant, so the company continued to possess — except in exceptional circumstances a servant does not possess the master's property — hence no bailment. On the basis of that and on the first issue, Kosmopoulos had no enforceable right to the destroyed and damaged property at common law or equity.

The third issue was whether the *Macaura* principle "is presently the law in Ontario and should continue to be the law of Ontario." We are put on notice. If Madame Justice Wilson found *Macaura* to be the law of Ontario she might still find it ought not to continue to be the law of Ontario. (pp. 13ff)

The *Macaura* principle can be briefly stated: the only interests that are insurable are those that can give rise to legal actions. If this doctrine applied in Ontario, then Kosmopoulos, being a different legal entity from Kosmopoulos Leather Goods Limited (whose property had been destroyed) and having no possession as bailee, had no insurable interest in the destroyed property.

Madame Justice Wilson attacks the *Macaura* principle in an illuminating way. She follows the advice of Lord Kames (1696-1782). She analyses the background. More than a century before *Macaura* the House of Lords considered the nature of insurable interest in *Lucena v. Crauford* (1806), 2 Bos. & Pul. (N.R.) 269, 127 ER 630. She observes that the much cited judges' opinions from the case on insurable interest were not critical to the decision. She downgrades the opinions.

But the judges disagreed in *Lucena.* Lawrence J. believed that a moral certainty of profit or loss was sufficient to create an insurable interest. Madame Justice Wilson stresses that for a time Lawrence's view was accepted: *Patterson v. Harris* (1861), 1 B. & S. 336, 121 E.R. 270; *Wilson v. Jones* (1867), L.R. 2 Ex. 139; *Blascheck v. Bussell* (1916), 33 T.L.R. 51 (Eng. K.B.). Lawrence's opinion is being upgraded.

It was Lord Eldon who favored the narrow view of insurable interest. Madame Justice Wilson attacks his reasons. Eldon had argued that a broad definition could lead to a lack of certainty. Madame Justice Wilson uses scholarly authority to support the very opposite. Eldon also had feared a broad definition might lead to too much insurance. This fear she regards as illusory. Those who want insurance still have to disclose their interest; if the insurance company is doubtful it need not write the policy, or it can limit its liability or charge higher premiums. The insurance companies, not the courts, should exercise judgment. She also suggests a stronger argument could be made for the opposite proposition, that there was too little insurance. "I would have thought that a stronger argument could be made that there is too little insurance. Why should the porter in Lord Eldon's example not be able to obtain insurance against the possibility of being temporarily out of work as a result of the sinking of the ships? As far as the insurer is concerned, how would this insurance differ from, say, health insurance covering loss of wages resulting from his own disability? If anything, the moral hazard would seem to be lower in the case of a porter's insurance on the possibility of loss resulting from the sinking of a ship. A broadening of the concept of insurable interest would, it seems to me, allow for the creation of more socially beneficial insurance policies than is the case at present with no increase in risk to the insurer." It is instructive that from Eldon's examples she should select that of the dock porter, and show her sympathy with his interests.

She accepts that Eldon's line was adopted in *Macaura v. Northern Assurance Co.* [1925] A.C. 619, but she rejects Buckmaster's further argument in that case that it could be difficult to assess the loss of an individual shareholder. She points out that there are other situations where assessment is difficult but the courts do it.

She also notes scholarly opinion that the court may have been influenced in its decision by the (unproven) suggestion of fraud. "In my view, this inference, if legitimate, further weakens the authority of *Macaura* as a precedent." That authority is still being eroded. It is further eroded by her claim that the *Macaura* principle was not strictly followed in later cases.

Still, the Supreme Court of Canada had adopted Eldon's view of insurable interest in *Clark v. Scottish Imperial Insurance Co.* (1879), 4 S.C.R. 192. *Macaura* was also referred in *Aqua-Land Exploration, Ltd.*[14] and *Wandlyn Motels Ltd.*[15] "In neither case did the Court examine the case in any detail. It appears to have been accepted without question." (p. 21). She is still undermining *Macaura*, using an argument that might have been used to strengthen it: *Macaura*, the other side of the argument could have gone, was so persuasive that its correctness did not come into question.

I do not find where she says that *Macaura* was the law of Ontario but she must accept that it was. The rest of her judgment is a discussion and dismissal of the three policy arguments adduced in favor of a restricted view of an insurable interest.

The first of these is a policy against wagering. Madame Justice Wilson notes that the current definition of insurable interest is not an ideal instrument to combat this ill: "The insurer alone can raise the defense of lack of insurable interest; no public watchdog can raise it. The insurer is free not to invoke the defense in a particular case or it can invoke it for reasons completely extraneous to and perhaps inconsistent with those underlying the definition." (p. 23).

The second argument is a policy favoring limitation of indemnity. She points out that the *Macaura* principle does not implement this policy, but a wider definition would. Mr. Kosmopoulos had, indeed, suffered financial loss (p. 24).

The third policy argument is that if the insured had no interest in the subject matter of the insurance he is more likely to destroy it to obtain the insurance money. She shows that the narrow definition does not have this effect, and insists that the exclusion from insurance of interests such as Kosmopoulos "is quite a price to pay for the supposed disincentive to wilful destruction of the insured property." (p. 26).

A further argument in favor of abandoning the *Macaura* principle is that although it is the law of England, Australia and New Zealand, a wider approach has been adopted in many U.S. jurisdictions. (pp. 28f).

A marked feature throughout is constant citation of scholarly literature to support her reasoning. No one case could demonstrate Madame Justice Wilson's range of expertise, and I would only men-

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14. *Guarantee Co. of North American* v. *Aqua-Land Exploration, Ltd.*, [1966] S.C.R. 133.
15. *Wandlyn Motels, Ltd.* v. *Commerce General Insurance Co.*, [1970] S.C.R. 992.

tion that in other cases she has shown a tendency to cite contemporary writers on legal philosophy, such as Gerald Dworkin.[16]

It cannot be to my purpose to compare and contrast Madame Justice Wilson with her colleagues on the Bench. That would be invidious in the extreme. But to exemplify her approach I should note Mr. Justice McIntyre's opinion in the same case. (p. 31). He accepts the decision. But he would not totally reject the *Macaura* principle. That is to say that he would retain the rule but add another exception. This is the approach that we have seen Madame Justice Wilson expressly reject.

But what are the characteristics that emerge from an examination of a judgment of Madame Justice Wilson?

In my view, the first is as I have already stated an empathy with the humans involved in the case. She has a strong understanding of the human condition.

A second characteristic is sympathy for the underdog.[17]

A third marked characteristic is rhetorical skill in presenting her arguments, in undermining authority opposed to her. This is combined with a clarity of exposition that is particularly persuasive.

There is also rationality and logic, that sweep one along to an acceptance of her conclusions. This is reflected in her willingness to make new and better law: and in her unwillingness to add another exception to an unjust rule.

But the most marked characteristic is an intense concern for the civil society, the humane society. This is what underlies all her policy arguments and her lack of sympathy with technical objections to doing justice.[18] This is what causes her to dissent or at least to disagree on the reasons so often.

When we think of Lord Mansfield, that other superb judge, we automatically think of commercial law, even though he was influential in other spheres. When we think of Madame Bertha Wilson, equally at home in many fields, we think of individuals' rights and liberties.

What do we find when we line up these characteristics with those of the Scottish Enlightenment and the Democratic Intellect?

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16. *R.* v. *Paré* [1987] 2 S.C.R. 618 at p. 626.

17. See, e.g., her dissent in *RWDSU* v. *Saskatchewan*, [1987] 1 S.C.R., 460 at pp. 485ff; see also e.g., *R.* v. *Rahey*, [1987] 1 S.C.R. 588 at 618ff.

18. See again her dissent in *RWDSU* v. *Saskatchewan ibid.*; her opinion disagreeing with the reasons in *Canada* v. *Schmidt*, [1987] 1 S.C.R. 500 at 531ff; similarly in *Argentina* v. *Mellino*, [1987] 1 S.C.R. 536 at pp. 561ff; *United States* v. *Allard*, [1987] 1 S.C.R. 564 at pp. 575ff; again, *R.* v. *Rahey*; *Pelech* v. *Pelech*, [1987] 1 S.C.R. 801; *Richardson* v. *Richardson*, [1987] 1 S.C.R. 857; *Caron* v. *Caron*, [1987] 1 S.C.R. 892; *R.* v. *Smith*, [1987] 1 S.C.R. 892; *Re: An Act to amend the Education Act*, [1987] 1 S.C.R. 1148.

Let us consider the Enlightenment first. I would stress above all a shared concern for the civil society. But in the Enlightenment the concern above all was, naturally enough, to uncover the roots of civil society and explain the stages of development. In the wake of this, Madame Justice Wilson's goal is to expand the practical reality of the civil society.

Then rhetoric was of considerable interest to leading figures in the Enlightenment, such as Dugald Steward. No doubt one can argue that the fee system would persuade professors to make an art of teaching. But equally it is beyond doubt that the feeling existed that knowledge and understanding should be presented as attractively and persuasively as possible.[19]

With regard to philosophical doctrines of the Enlightenment, I do not think I have found anything in Madame Justice Wilson's judgments that could not have been found in the opinions of philosophically sophisticated judges who had been trained elsewhere but had some exposure to trends in eighteenth century thought.

Madame Justice Wilson uses law creatively. While lawyers such as Lords Monboddo and Kames are important Enlightenment thinkers, their importance does not primarily lie in the field of legal thinking. Nor, to turn to perhaps a slightly earlier age should we, in my view, give the usual praise to Lord Stair. Certainly, he did set forth the first systematic treatment of Scots law on a new basis in his first edition of the *Institutions of the Law of Scotland*, first published in 1681. But that basis was cumbrous, and did not attract any following. Indeed, I have argued elsewhere that Sir George Mackenzie's book of the same name, that was published three years later, was a riposte, revealing his dissatisfaction with Stair's *Institutions*.[20] It was Mackenzie's approach, following the conventional continental line, that won approbation in Scottish legal education.[21] Of the Scottish Enlightenment lawyers I would probably single out Lord Kames as a thinker about law. But Kames' approach with an emphasis on the requirement of historical knowledge for understanding law is not quite that of Madame Justice Wilson.[22] When she uses history, it is largely to show that particular circumstances played a role in a judgment, and

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19. See, e.g., Chitnis, *Supra*, note 7, pp. 173ff.
20. A. Watson,, "Some Notes on Mackenzie's *Institutions* and the European Legal Tradition," (1989), 16 *Ius Commune*, pp. 303ff at pp. 310ff.
21. See above all, J. Cairns, "John Millar's Lectures on Scots Criminal Law," (1988), 8 *Oxford Journal of Legal Studies*, pp. 364ff at p. 382.
22. See, e.g., the preface to his *Historical Law Traits.*

that in other circumstances the precedent may not be entirely persuasive.

Ever since the publication of G.E. Davie's celebrated book, *The Democratic Intellect*,[23] the nature of the notion in nineteenth century Scotland has been a matter of debate. But two features should be uncontroverted: the stress on compulsory classes in philosophy, and that university education was open to economically poorer strata of society than was the case in England. The impact of these features on the Scottish character will continue to be debated. It is reasonable to believe that they would make many professional people more aware of the disadvantages of the underprivileged, interested in the common scene, able to debate more rationally, and be rather down to earth. With regard to Madame Justice Wilson, one has to observe that the days of so much compulsory philosophy had gone before she went to Aberdeen University but, like her two brothers, she concentrated on philosophy in her M.A. degree. And an English girl of her background was much less likely to attend university in 1941.

Madame Justice Wilson represents the best of the typical product of the Scottish Enlightenment and the Democratic Intellect. In so far as she does, we should be proud not only of her, but also of the Scottish achievement and contribution. But remembering David Hume on causation I have my hesitations. I am inclined to suspect that in addition to her natural character it was those hard years as a minister's wife in Macduff that gave her her sublime understanding of, and exceptional sympathy with the human condition.

Working on this paper has broadened my conception of "the good judge." Elsewhere I wrote:

> ... judges are unable to give society what it expects from them. The populace expects from judges the correct legal decision as a result of their applying the law to the facts. How do good judges arrive at their decisions? It is easier to say what makes a bad judge: his reasoning is lacking in logic, or he fails to know or to understand relevant law. But one cannot say that a good judge, at least in most types of appellate civil cases, is one who arrives at the correct decision through the use of logic and the application of the legal rules to established facts. Provided that the attorneys for the parties have done their work adequately and prepared their case, there is no answer that is necessarily correct. The case can go either way. The answer that is correct is the one the judges come to, but it is correct only after, and only because, they come to it. ... So, possibly, all judges who are not obviously bad judges ought

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23. G.E. Davie, *The Democratic Intellect*, (Edinburgh, 1961).

> to be counted good judges? Yet insiders all believe that there are, in addition to bad judges, mediocre and good judges, and that among good judges some are better than others. What are the criteria for insiders? The answer I suggest is that for insiders a good judge is one who reaches the law to be applied to the facts by a mental process that is thought to be the most appropriate by his brother judges and by well-placed attorneys and legal scholars. What the appropriate mental process is will be determined by the legal culture, and, like other aspects of culture, will scarcely be questioned by those participating in it.[24]

On this basis Madame Justice Wilson has all the qualities of the good judges. She plays the judging game to perfection. But she has taught me more. A good judge adds to her decisions a full measure of understanding and compassion.

But I am left with a question that has troubled me since I first began to work on this talk, and to which *I* have no answer. Sexism is by no means dead in Scotland. It is not so many years ago that I was asked by a Senator of the College of Justice, at an advocate's dinner party, whether I thought a woman could be capable of drawing up a contract. But in my experience, the U.S.A. is much more sexist. In my law school classes at Glasgow in the fifties, female students were about as numerous as men. But when I first taught a class in the U.S., in 1967, out of rather more than one hundred students, one was female. She was also the only black. And now I believe I recognize a pattern. Women are accepted as law professors, indeed singled out as super stars, by male colleagues if they adopt a demure posture. Woe unto those who achieve a reputation by publishing, who sound a dissident voice in meetings, wear tight skirts. The male approval of a woman who fits the male stereotype of her subordinate role masks their sexism from those who practice it. But now my question. What on earth did those persons responsible for appointing Bertha Wilson to the Court of Appeal of Ontario think they were getting when they chose a Scots woman, married to a Presbyterian minister, a mature student in law school, a lawyer who never had appeared in court? They got Madame Justice Bertha Wilson.

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24. Watson, *Supra*, note 8, p. 221.