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Philip L. Bryden

The Democratic Intellect:
The State In The Work Of
Madame Justice Wilson*

Introduction

It is a great honour to have been asked to provide an essay for this volume of reflections on the contribution Madame Justice Bertha Wilson has made to the development of law in Canada. To a certain extent, this is a matter of pride in finding my own name associated with that of the very learned and respected individuals who have set out their thoughts in this collection of articles. In the main, however, the honour comes from the opportunity to make a public statement of my own respect and admiration for Madame Justice Wilson and the significant role that she has played in our law and in our society.

Mine are the observations of someone who worked for Justice Wilson as a law clerk for roughly eighteen months, from January 1983 until August 1984. They are also the observations of a legal academic with an interest in constitutional and administrative law. They are, without a doubt, coloured by my deep affection for Justice Wilson as an individual. I do not know anyone who has served with Justice Wilson as a law clerk who does not regard that experience as a great privilege. In my own case, the opportunity to clerk for Justice Wilson provided me with both a formative experience for my legal career and a relationship that has enriched my life in areas that extend far beyond the boundaries of the law. Notwithstanding these personal prejudices, I have tried to bring to my comments a scholarly objectivity, and it is my hope that any deficiency that you may detect on this score will be compensated for by such insights as someone who has worked with a judge on a personal and confidential basis may properly offer.

The organizers of this volume, and of the symposium at which the papers in it were presented, asked the authors to structure our observations around the theme of "The Democratic Intellect", a term coined by George Elder Davie to describe the distinctive features of Scottish higher education in the nineteenth century,¹ and one that can be employed to reflect the tensions between communitarian and liberal

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1. G.E. Davie, *The Democratic Intellect: Scotland and Her Universities in the Nineteenth Century* (Edinburgh: 1961).

ideals that influence Canadian jurisprudence in the post-Charter era. The theme strikes me as a useful one insofar as it encourages us to recognize the inadequacy of efforts to encompass Justice Wilson's legal work within traditional descriptive categories. To take only one example, Justice Wilson can be described as a "liberal" judge in any of a number of ways in which this term is employed — indeed, I shall be using this description myself later in my paper — but I believe that an attempt to focus exclusively on this facet of her judicial thinking is likely to obscure as much of her contribution to law in Canada as it reveals. The challenge of thinking about hers as a "democratic intellect" is that we are invited to explore facets of her judicial work that might otherwise be neglected.

While acknowledging the usefulness of the democratic intellect as a starting point for our consideration of Justice Wilson's judicial work, I want to take some liberties with the theme in this article, at least in so far as I do not propose to say anything about the extent to which the values that underlie the democratic intellect of the Scottish enlightenment can be used to explain why Justice Wilson viewed the state as she did.² I say this because I feel much more confident in my ability to comprehend the contribution Justice Wilson has made to our understanding of the state in Canadian law than I am in my ability to provide a philosophical or psychological explanation for it. With due respect to those who may be able to give an account of Justice Wilson's work in which the democratic intellect has explanatory force, I would prefer to be more cautious in my use of the ideas that this term conjures up. What I propose to do instead is begin with a description of some of the salient characteristics that I believe Justice Wilson exhibited as a judge, and then relate those characteristics to the understanding of the state that I find emerges from her judicial writing. I believe these judicial characteristics are consistent with the theme of Justice Wilson as a "democratic intellect", but I do not offer this as an explanation of their presence in her work.

1. Justice Wilson's Characteristics as a Judge

The choice of Justice Wilson's judicial characteristics as an organizing tool for exploring her views of the state struck me initially as a

2. Justice Wilson's knowledge of, and interest in, the work of Scottish enlightenment writers is evident from her lecture "The Scottish Enlightenment: The Third Shumiatcher Lecture in 'The Law as Literature'" (1987), 51 Sask. L. Rev. 251. I have not found it productive, however, to attempt to pursue a possible relationship between this interest and Justice Wilson's judicial thinking about the Canadian state.

suitable one in a volume that was dedicated to the consideration of her judicial work. Moreover, it seemed to me that those of us who have worked for Justice Wilson might have insights as a result of this experience that could usefully be shared with others. I was, however, troubled by the possibility that this might detract from this essay's focus on Justice Wilson's thinking about the state. Other organizational principles were certainly plausible candidates, but in the end I decided that the peculiar status of the state in Canadian law reinforced my idea that an exploration of Justice Wilson's judicial character was a particularly appropriate vehicle for gaining an understanding of her view of the state.

In its working paper on *The Legal Status of the Federal Administration*, the Law Reform Commission of Canada has pointed out that Canadian law does not possess a modern and coherent description of the state or of the status of governmental officials as they carry out their duties.³ This is not simply a recognition that such accommodation as we have made for the state in our law is shaped by our history and by competing visions of what ought to be the relationships among the various organs of government and between them and individuals and social groups. It is an acknowledgement that, by and large, Canadians have not tried to develop a comprehensive legal vision of the state for purposes of institutional design and improvement. It is as if we were building contractors who were constantly engaged in household renovations, and occasionally performed this work with some skill, but who had made a choice (whether deliberate or unconscious) not to avail ourselves of the services of an architect.⁴

What this means for present purposes is that in deciding cases in which the limits of state authority are challenged, judges have significant freedom to call upon a range of doctrines that enable them to justify different decisions on the merits without impinging too obvi-

3. Law Reform Commission of Canada, *The Legal Status of the Federal Administration* (Working Paper 40), (Ottawa: L.R.C.C., 1985) especially Chapter 1.

4. Suspicion of overarching solutions to the problematic legal status of the state tends to be a characteristic shared by legal conservatives and progressive administrative law scholars. The attitude of the latter is typified by the oft-quoted observation made by John Willis that "The principle of 'uniqueness' is the principle for me". J. Willis, "The McRuer Report: Lawyers' Values and Civil Servants' Values" (1968), 18 U.T.L.J. 351 at p. 359. One by-product of this suspicion is that at the legislative level we have tended to prefer piecemeal changes to the legal structure of government over comprehensive reforms, and that even changes that could have significant structural implications (such as the Canadian Charter of Rights and Freedoms) have placed fundamental control over the pace of change in the hands of an institution — the judiciary — that by its very nature is forced to react to problems on a case by case basis. See P. Bryden, "Canadian Administrative Law: Where We've Been" (1991), 16 Queen's L.J. 7.

ously on legal convention and the concept of adherence to precedent. This is especially true in the kind of close cases that a final court of appeal is called upon to decide. These are situations, in other words, in which the judicial values or character of the judge occupy a place in the decision-making process that is as prominent as her knowledge of the law or her skill and ingenuity in crafting a persuasive rationale for the chosen outcome. Accordingly, they are the types of cases in which the judge's values are not only revealed, but in which the judge's way of thinking about the responsibilities of judicial office may, in significant measure, shape her view of the law.

The first characteristic that I associate with Justice Wilson's career as a judge is her commitment to a very traditional sense of professionalism. This may seem an odd choice, especially to those, possibly influenced by the popular press, who may be inclined to see Justice Wilson as a radical or a rebel on the bench.⁵ I believe she was nothing of the kind, and I think it is fair to say that she never saw or presented herself as such.⁶ Instead, I think she was a judge who saw traditional legal skills and methods as pregnant with possibilities for fresh insights into the human condition and for new and more productive ways of regulating the relations that human beings have with each other and the state. She took seriously the work of feminist scholars such as Carol Gilligan,⁷ but she was equally happy to draw inspiration from eminent judges such as Lord MacMillan for her view that holders of judicial office must make themselves aware of the social implications of their decisions.⁸ Far from rejecting the lawyerly arts of textual and case analysis, Justice Wilson delighted in them and believed that, used with skill and imagination, they enhanced rather than hindered the ability of a court to provide substantive justice to the litigants before it.

The second characteristic of Justice Wilson's judicial career that I would highlight is her interest in the functioning of the courts, and on a grander scale in the role of the courts within our system of government. Whether the issue was how to make the Supreme Court more efficient so as to reduce to acceptable limits the delay between the

5. See P. Calamai, "Justice Bertha Wilson: odd judge out in Supreme Court", *Ottawa Citizen*, November 30, 1985.

6. See Justice Wilson's letter to the editor in response to Mr. Calamai's article, in which she states: "I am not a 'rebel' judge nor do I aspire to be one; that is not how legitimate dissent is characterized on a collegial court where differing views are accepted with courtesy and respect."

7. B. Wilson, "Will Women Judges Really Make a Difference?" (1990), 28 *Osgoode Hall L.J.* 507 at pp. 519-21.

8. B. Wilson, "Law in Society: The Principle of Sexual Equality" (1983), 13 *Man. L. Rev.* 221 at pp. 221, 233; and see "Will Women Judges Really Make a Difference?", *supra* note 7, at pp. 508-09, 521.

granting of leave to appeal and the rendering of judgment,⁹ or how we should rethink the role that intervenors ought to be allowed to play in argument about the important issues that were brought before the Court,¹⁰ Justice Wilson gave the same care and attention to the implications of the way the Court functioned that she provided to the preparation of her judgments themselves. Moreover, she did not believe that the internal processes of the Court should be hidden behind a veil of secrecy. Much as she disliked commentary that focussed on personalities, commentary that in her view trivialized the work of the judiciary,¹¹ she welcomed and encouraged serious efforts to understand the functioning of the courts and to suggest ways of enhancing the confidence Canadians have in the quality of justice our legal system provides.

Beyond this, Justice Wilson was sensitive, perhaps more so than any of her colleagues on the Court, to the extent to which the Charter threw into high relief the question of the appropriate role of the judiciary within our system of government. In the summer before the first Charter cases wound their way up to the Court, she spent a significant amount of time reading, writing and thinking about this issue in preparation for a speech to the Australian Legal Convention,¹² and I believe that this reflection helped to prepare her for some of the difficult conceptual questions that were to face her and her colleagues in the years to come. Indeed, it is a hallmark of her career as a speaker about legal issues outside the judicial forum that she did not see these as occasions for the mouthing of platitudes or after dinner humour, but as opportunities to address, within the constraints of her judicial office, serious issues that our legal system was being forced to confront.¹³

The third feature of Justice Wilson's approach to judicial decision-making to which I would draw attention is the intensity of her desire to reconcile a commitment to legal ideas and principles with the need to provide sound and practical resolutions to the problems of the litigants who appeared before the Court. She is a person who reads widely, and

9. See B. Wilson, "Decision-Making in the Supreme Court" (1986), 36 U.T.L.J. 227 at pp. 233-35.

10. *Ibid.* at pp. 241-44.

11. *Supra* note 6.

12. B. Wilson, "Guaranteed Freedoms in a Free Society — A New Role for the Courts?", Address to the 22nd Australian Legal Convention, Brisbane, Australia, 1983.

13. See, eg., "The Charter of Rights and Freedoms" (1985), 50 Sask. L.R. 169; "Decision-Making in the Supreme Court", *supra* note 9; "Will Women Judges Really Make a Difference?", *supra* note 7.

the breadth of her knowledge and the depth of her interest in ideas is apparent to even a casual reader of her judgments and her published speeches. Nevertheless, she was very reluctant as a judge to let her interest in ideas and the development of the law distract her from her responsibilities to the litigants.

I am sure that she will forgive me if I recount one anecdote from my time as her law clerk that I think illustrates the matter nicely. I was seeing her in her office after lunch one day and she recounted to me a conversation she had with one of her colleagues in the judge's dining room. The colleague had commented on her view on some issue or other with the observation that it was obvious that she was simply a result oriented judge. Her response was that she took that as a compliment, knowing full well, of course, that her colleague's remark had not been offered as one. My point here is that she believed that the law had to be of service to human beings, and the law's failure to produce appropriate results in individual instances had implications for the legal ideas that produced these results. She was not a judge who was prepared to content herself with the observation that hard cases make bad law; she took the view that hard cases meant that judges had to work just that much harder.

I have created this portrait of Justice Wilson's approach to the art of being a judge because I think it helps to explain the way that she viewed the state. In particular, I believe that her commitment to traditional legal methodology and the production of socially acceptable results had a softening effect on what I would regard as the dominant view of the state that appears in her judicial work, which is that the state represents a potential threat to individual autonomy that needs to be checked by a mechanism of accountability through law.

I should note as well that I rely very heavily in the observations that follow on judgments in which Justice Wilson did not have the support of the majority of her colleagues on the Supreme Court of Canada. I do this because I want to highlight her distinctive vision of the state, not because I think that her participation in the Court's collective understanding of the place of the state in Canadian society was insignificant. Justice Wilson believed that respectful differences of opinion were natural features of a collegial court that must, as our Supreme Court does, grapple with extraordinarily difficult legal and social issues.¹⁴ I think that she was disappointed at the inability of the

14. See "The Charter of Rights and Freedoms", *supra* note 13; "Decision-Making in the Supreme Court", *supra* note 9. One sign of Justice Wilson's respect for the views of her colleagues is that she did not follow the practice commonly employed by United States Supreme

Supreme Court to function more effectively as a collegial body that might be able to offer Canadians a collective wisdom that was greater than the sum of the insights of its individual members. I do not, however, believe that she thought that dissent was inconsistent with a spirit of collegiality, or that its suppression would enhance the collegial functioning of the Court, though I am not sure that all of her colleagues shared that view.

II. Justice Wilson and the Accountable State – A Modern Liberal Conception

At the base of Justice Wilson's understanding of the state was the liberal conception of government standing in contrast to the individual and representing at least a potential threat to the autonomy of the individual. Her intellectual roots are in the liberal tradition and it was not by accident that she found herself relying, in her discussion of liberty in the *Jones*¹⁵ and *Morgentaler*¹⁶ cases, on the work of John Stuart Mill. Thus, we find her writing in *Jones*:

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 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 today'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."¹⁷

Court judges in constitutional cases of building up a shadow jurisprudence relying on their own dissenting opinions. This, I believe, was a conscious decision on her part. For example, in *Jones v. The Queen*, [1986] 2 S.C.R. 284 at p. 322, she showed signs of a desire to cling to the position she had taken in her concurring judgment in *Reference Re British Columbia Motor Vehicle Act*, [1985] 2 S.C.R. 486, that once a court had found that the government had deprived a person of life, liberty or security of the person in a way that was not in accordance with the principles of fundamental justice, such a violation of s. 7 of the Charter could never, as a matter of law, be justified by the government under s. 1. Even in the *Jones* case itself she was willing to accept the possibility that she, rather than the majority, had been wrong on this point, and in later cases she showed that she was prepared to accept and rely upon majority decisions with which she had not agreed. For an example of this, see her references in *American Farm Bureau Federation v. Canadian Import Tribunal*, [1990] 2 S.C.R. 1324, to the majority judgment in *Paccar of Canada Ltd. v. CAIMAW, Local 14*, [1989] 2 S.C.R. 983, from which she had dissented.

15. *Jones*, *supra* note 14, at pp. 318-19.

16. *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at pp. 166-67.

17. *Jones*, *supra* note 14, at p. 318.

I do not mean to suggest by this that Justice Wilson rigorously applied the philosophical insights of Mill (or Dworkin, or Rawls or any other modern liberal philosopher) in her judicial writing. As Marc Gold has pointed out,¹⁸ judicial decision-making is an exercise in persuasion as well as a statement of the reasoning that leads to a particular conclusion. Specific references to Mill's work are less likely to demonstrate a commitment to the proposition that details of his philosophy accurately define the constitutional rights of Canadians than they are to reflect a sense of the power that appeals to liberal individualism in almost any of its guises have in modern Canadian society.

Even if Justice Wilson's judicial work resists labelling as the product of any particular "school" of liberal philosophy, it is equally evident that hers were moderate liberal views rather than libertarian ones. She did not conceive of individuals as isolated or abstracted from their social context. Thus she was not prepared in *Jones* to define the appellant's constitutionally protected interest in liberty as one that rested solely on his freedom to do as he pleased, rather than on the significance of those choices and the rationales for them within a framework of social relationships. She wrote:

The relations of affection between an individual and his family and his assumption of duties and responsibilities towards them are central to the individual's sense of self and of his place in the world. The right to educate his children is one facet of this larger concept. . . . However, the appellant's proposition that he has a right to educate his children "as he sees fit" goes too far. Having regard to the structure of the constitution and the values it explicitly identifies as worthy of protection, I believe that the liberty interest protected is the parent's right to educate his children in accordance with his conscientious beliefs and I think this is in fact the right the appellant is asserting in this case.¹⁹

Indeed, this sense of the social context in which rights are asserted permeated her thinking about the Charter, as one might expect of a judge who cared intensely about the consequences of her decisions. Most notably, she espoused a view of equality rights in the *Andrews*²⁰ and *Turpin*²¹ cases that was oriented toward the protection of those

18. M. Gold, "The Mask of Objectivity: Politics and Rhetoric in the Supreme Court of Canada" (1985), 7 *Supreme Court L. Rev.* 455.

19. [1986] 2 S.C.R. at pp. 319-20. The same point can be made about the constraints on a woman's freedom to terminate her pregnancy that she accepted as legitimate in *Morgentaler*, *supra* note 16, at [1988] 1 S.C.R. pp. 181-83.

20. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

21. *R. v. Turpin*, [1989] 1 S.C.R. 1296.

who, for historical reasons, had suffered from discrimination, rather than toward the more abstract liberal notion of formal equality. Likewise, she was prepared to join her colleagues in retreating from the tendency, so evident in American constitutional thought, to attribute to artificial persons the characteristics of individuals.²² In the end, however, the individual remained of central importance to her, and I think her dissenting judgment in the *Thompson Newspapers* case²³ is a good illustration of her sense that state power against the individual must be constrained even if this had the incidental effect of undermining state regulatory authority over powerful economic interests.

There is nothing terribly remarkable about the observation that liberal individualism should form the backdrop against which Justice Wilson's image of the state was constructed. As Rod Macdonald has argued, liberalism is the dominant (if not the only) political conception that informs Canadian legal thought,²⁴ and as I have suggested, Justice Wilson's character as a legal professional was not one that would have led her to reject a philosophical construct that underlies much of the conventional lawyer's understanding of the world. What the pragmatic side of her judicial character encouraged her to recognize, however, was that in the modern regulatory welfare state, merely protecting the individual from the coercive power of the state was not a guarantee of individual autonomy. If the individual was to be free to realize his or her goals and ambitions, the positive power of the state would have to be harnessed as well.

Justice Wilson responded to the challenge of recognizing a positive role for the state in the promotion of individual liberty and personal security by adopting a view of the state that legitimated state action through the mechanism of legal accountability. In this conception the state was subtly transformed from a body that threatened the individual by its mere existence (a necessary evil, perhaps, but an evil nonetheless) into a body that contributed both to individual and collective welfare but that became threatening when it sought to exceed its legal bounds, whether those bounds were defined by the constitu-

22. Compare *Irwin Toy Ltd. v. A.G. Quebec*, [1989] 1 S.C.R. 927 with American Supreme Court decisions such as the *Sinking Fund* cases (1879), 99 U.S. 700; *Santa Clara County v. Southern Pacific Railroad Co.* (1886), 118 U.S. 394; and *Wheeling Steel Corp. v. Gander* (1949), 337 U.S. 562.

23. *Thompson Newspapers v. Director of Investigation and Research, Restrictive Trade Practices Commission*, [1990] 1 S.C.R. 425.

24. R. Macdonald, "Understanding Regulation by Regulations" in I. Bemier and A. Lajoie (eds.), *Regulations, Crown Corporations and Administrative Tribunals* (Toronto: University of Toronto Press, 1985) at 81.

tion or by traditional principles of administrative law. Justice Wilson's decisions manifest what I will describe as a modern liberal conception of the accountable state in three ways. First of all, Justice Wilson defined the state itself in a way that promoted the broadest scope for state legal accountability that was consistent with the maintenance of a distinction between the realms of state and private action. This was true even in her pre-Charter decisions. Thus she took a narrow view of Crown immunity from the application of statute in her partially dissenting judgment in *R. v. Eldorado Nuclear Ltd.*²⁵ When we consider her decisions applying the Charter, they are notable for her willingness to subject to judicial scrutiny a very broad range both of governmental activities and public bodies. For example, in the *Operation Dismantle* case²⁶ she decided that the exercise of the royal prerogative was subject to review under the Charter, and in the mandatory retirement cases²⁷ she was prepared to treat universities and hospitals as governmental entities for purposes of Charter applicability. She did not see this expansive vision of the state as one that broke down the distinction between public and private bodies (as is reflected by her concurrence with the majority decision in the *Dolphin Delivery* case²⁸) but she did take a broader view of what fell within the public realm than most of her colleagues.

Secondly, Justice Wilson was very active in expanding the mechanisms for governmental accountability through law. Sometimes this tendency manifested itself in her application of fairly conventional administrative law concepts, such her use of the relevant considerations doctrine in *Oakwood Development Ltd. v. Rural Municipality of St. Francois Xavier*,²⁹ or her application of the "patently unreasonable interpretation" test in her dissenting judgment in the *Paccar* case.³⁰

25. [1983] 2 S.C.R. 551.

26. *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441.

27. *University of British Columbia v. Connell*, [1990] 3 S.C.R. 451; *McKinney v. Guelph University*, [1990] 3 S.C.R. 457; *Vancouver General Hospital v. Stoffman*, [1990] 3 S.C.R. 483; *In re Douglas College*, [1990] 3 S.C.R. 570.

28. *RWSDU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 713.

29. [1985] 2 S.C.R. 164.

30. *Paccar of Canada Ltd. v. CAIMAW, Local 14*, *supra* note 14. Her dissent in this case is notable for placing an obligation on an administrative agency to interpret its governing statute in a way that is consonant with the principles underlying the legislation, even if this interpretation does some violence to the plain meaning of the words of the enactment. This view of the role of the courts in jurisdictional review cases stands in sharp contrast to the more traditional sense that the courts are obliged to constrain administrative agency attempts at creative problem-solving where such efforts would take the agency beyond the limits of its legislative mandate. See *Re Syndicat des Employés de Production du Québec et de l'Acadie and C.L.R.B.*, [1984] 2 S.C.R. 412.

On other occasions she extended private law concepts (such as the breach of fiduciary duty in *Guerin v. The Queen*³¹ and the tort of negligence in *Nielsen v. Kamloops*³²) in ways that enhanced the accountability of public bodies to those affected by their decisions. Of greatest significance, however, was her willingness in *Singh v. Minister of Employment and Immigration*³³ to extend the procedural protection of s. 7 of the Charter to individuals laying claim to benefits provided by statute where governmental failure to confer those benefits impinged on the personal security of those individuals. Indeed, *Singh* was a paradigm case in which the efforts of the positive state were required to enhance individual autonomy, yet in which it was equally important that these efforts were subjected to a regime of legal accountability.

The third manifestation of Justice Wilson's commitment to an accountable state was her continued willingness to stringently apply the *Oakes*³⁴ test for government justification under s. 1 of the Charter of the infringement of rights guaranteed by the Charter. In many ways the *Edwards Books* case³⁵, decided late in 1986, represented a watershed decision for the Court on the application of the *Oakes* test outside of the criminal law context, and from that point onward Justice Wilson found herself increasingly isolated in her attempts to confine justifiable infringements of rights and freedoms to those that represented a minimal impairment of the interests protected by the Charter.³⁶ Indeed, as I shall suggest shortly, Justice Wilson was not entirely consistent herself on this score. As a general rule, however, she was more willing than any of her colleagues on the Court to impose on the state an obligation to respond more creatively to the need to protect the rights and freedoms enshrined in the Charter as it pursued other socially desirable goals.

Justice Wilson did not envisage the modern regulatory welfare state as the home of what Lord Hewart described as "the new despotism".³⁷ The image of the Canadian state that appears most frequently in her judicial work is that of an entity that not only strives to serve the

31. [1984] 2 S.C.R. 335.

32. [1984] 2 S.C.R. 2. See also *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181 and *Vernon v. Manolagos*, [1989] 2 S.C.R. 1529.

33. [1985] 1 S.C.R. 177.

34. *R. v. Oakes*, [1986] 1 S.C.R. 103.

35. *R. v. Edwards Books*, [1986] 2 S.C.R. 713.

36. See R. Elliot, "The Supreme Court of Canada and Section 1: The Erosion of the Common Front" (1987), 12 *Queens L.J.* 277.

37. Lord Hewart, *The New Despotism* (London: E. Benn, 1929).

needs and aspirations of individuals, but to a certain extent succeeds in doing so. Justice Wilson saw, however, that in the course of this service the state has a tendency to constrain individual freedom without sufficient justification. The main critique that emerges from such a vision is that the state is clumsy rather than that it is malevolent. The role of the law in this state is to ensure that such justifications as might exist for the state's constraint on the individual's freedom are put forward in court, scrutinized with care and rejected when the state's legitimate goals can be achieved with less intrusion on individual liberty.

III. Justice Wilson and the Organic State – Respect for Tradition

I wrote earlier that I believed that the dominant view of the state that is found in Justice Wilson's judicial work is the picture of the accountable state that I have just described. There is, however, another side to the state that is represented in her decisions and I believe it is one that should not be ignored. That is a view of the state as an organic entity that cannot be separated from its history and traditions. I am reluctant to describe this as a communitarian view because I suspect that in Justice Wilson's case it had more to do with the triumph of experience over logic³⁸ than it did with the legal recognition of the rights claims of groups as opposed to individuals. My point here is that Justice Wilson's idealized view of an accountable state in Canadian law is one that is bounded by the messy reality of the Canadian state as it emerged in history, and Justice Wilson's professional respect for tradition and her store of practical wisdom was sufficiently great that she was frequently reluctant to press the claims of the state as she might want it to be on the state as it actually existed.

The first example I will give of this respect for tradition is Justice Wilson's acceptance of the conventions of legal discourse themselves. This is nicely illustrated by her partial dissent in the *Eldorado Nuclear* case³⁹ that I mentioned earlier. The logic of the accountable state is one that at least presumptively renders the concept of Crown immunity from statute obsolete. On this view of what was required to do justice in the case, there would be no reason to draw a distinction between the two defendant Crown corporations, yet Justice Wilson did accept such a distinction and would have accorded Crown immu-

38. "The life of the law has not been logic: it has been experience." Oliver Wendell Holmes Jr., *The Common Law* (Boston: Little, 1881) at p. 1.

39. *Supra* note 25.

nity from the application of the competition laws to Uranium Canada but not to Eldorado Nuclear. The reason she did this was that her review of the relevant legal authorities supported such a distinction and she was not prepared to ignore the constraints that those authorities placed upon her. My point here is that Justice Wilson may have been a result oriented judge, but she was above all else a professional who respected the constraints that professionalism imposes on the holders of judicial office.

The second type of example of Justice Wilson's sensitivity to historical context is her willingness in at least some situations to limit the obligation of the state to be creative in its avoidance of excessive impingement on constitutionally protected rights and freedoms. For instance, if one looks only at the legal principles at stake, I find it difficult to reconcile Justice Wilson's dissent in *Edwards Books*⁴⁰ with the judgment she wrote for the Court in the *Ontario Education Act Reference*.⁴¹ In both situations there were means by which the government of Ontario could have achieved its objectives while showing greater respect for the religious freedom of those who would be affected by its plans, yet Justice Wilson would have required the government to adopt these measures in one case but not the other. As a technical matter, Justice Wilson avoided the issue of minimal impairment of religious freedom in the *Ontario Education Act Reference* by deciding that the Charter did not apply to religious minority education obligations undertaken pursuant to s. 93 of the Constitution Act 1867. It seems to me, however, that this does not completely answer the argument that, once the Charter came into effect, the province had an obligation to develop a mechanism for the financing of *all* forms of religious education that was comparable to the plan used to fund Roman Catholic schools. Rather than being a function of the inexorable logic of the interaction between Canada's 1867 and 1982 constitutional documents, therefore, I believe this decision has to be understood as the product of a practical judgment that the preservation of certain historical relationships was more important than adherence to the principle that an accountable state should structure its affairs in a way that does not favour one religion over another.

The similar point can be made by comparing Justice Wilson's willingness to concur with the majority judgment in *R. v. Keegstra*⁴² with her defence of freedom of expression in her dissenting judgment

40. *Supra* note 35..

41. [1987] 1 S.C.R. 1148.

42. [1990] 3 S.C.R. 697.

in the street prostitution cases.⁴³ The cornerstone of Justice Wilson's argument in the latter cases is her conclusion that the Criminal Code's restriction of the freedom of prostitutes and their customers to communicate in public for purposes of the sale of sex was not proportionate to the objectives sought to be achieved. In other words, the legislation was not sufficiently tailored to meet the government's legitimate objectives while offering minimal impairment of the individual interests protected by the Charter. This is the same line of argument that was advanced by the dissenting judges in *Keegstra*, and it is not obvious to me that Canada's hate propaganda laws are significantly more successful at striking the right balance between important state policy and the minimal impairment of freedom of speech than is the criminal regime we have chosen to use in regulating street prostitution. In my view, Justice Wilson's support of the majority in *Keegstra* is a reflection of her sense that the history of the persecution of racial and religious minorities in our own and other countries was of such overwhelming significance that the courts should not weigh with too fine a hand the balance between the government's effort to protect the freedom and security of those individuals and the expression rights of those who might seek to vilify them.

The third example I would offer of Justice Wilson's sensitivity to the organic nature of the state is her willingness, exhibited only late in her judicial career,⁴⁴ to envisage legal accountability as something that was available through agencies other than the courts. To an administrative lawyer, her concurring opinion in *American Farm*⁴⁵ and her dissenting judgment in the *Lester* case⁴⁶ are remarkable for two reasons. The first is Justice Wilson's express rejection of the tendency of our courts to apply Dicey's nineteenth century liberal view of the administrative state in twentieth century Canadian society.⁴⁷ The second, and really more interesting point, is her recognition that by enhancing the accountability of administrative tribunals to the courts through an expansive conception of the grounds for jurisdictional

43. Reference re Sections 193 and 195.1(1)(c) of the Criminal Code, [1990] 1 S.C.R. 1123; *R. v. Stagnitta*, [1990] 1 S.C.R. 1226; *R. v. Skinner*, [1990] 1 S.C.R. 1235.

44. In the earlier part of her judicial career, Justice Wilson was inclined to elevate the role of the courts as vehicles for vindicating the rights of individuals, even if alternative arrangements for such vindication existed through administrative agencies. See, eg., *Bhadawria v. Board of Governors of Seneca College* (1979), 27 O.R. (2d) 142 (C.A.), rev'd [1981] 2 S.C.R. 181.

45. *American Farm Bureau Federation v. Canadian Import Tribunal*, supra note 14.

46. *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740 v. W.W. Lester Ltd.*, [1990] 3 S.C.R. 644.

47. See *American Farm*, supra note 14, at pp. 1332-46; *Lester*, supra note 46, at pp. 650-51.

review, we run the risk of diminishing the state's ability to serve the needs of individuals for the prompt and conclusive resolution of disputes in a forum other than the courts.⁴⁸ Here the pragmatic recognition of what makes for legal accountability in the regulatory state as it has emerged triumphs over the principled account of administrative agency accountability in law through the courts.

My point in raising these examples is neither to criticize Justice Wilson for inconsistency in her decisions nor to comment upon the development of her judicial thinking over time. Indeed, in a judicial career that spanned fifteen years and in which Justice Wilson participated in significant changes to the very structure of Canadian public law, it would be remarkable if inconsistency and the development of new ideas were not present in her judgments. Rather, I raise them because I believe they illustrate the complexity of Justice Wilson's view of the modern state, and her willingness to be moved by the claims of tradition and of pragmatism, as well as by the claims of principle, in her understanding of the relationships among the individual, the courts and the other arms of government.

In his book *The Needs of Strangers*, Michael Ignatieff describes the conflict between the freedom of individuals in a society to choose what will be recognized as needs that must be satisfied and the type of freedom that can only exist in a social setting that defines for us when these choices have been made correctly. Near the end of the book, he makes the following observation:

It is a recurring temptation in political argument to suppose that these conflicts can be resolved in principle, to believe that we can rank human needs in an order of priority which will avoid dispute. Yet who really knows whether we need freedom more than we need solidarity, or fraternity more than equality? Modern secular humanism is empty if it supposes that the human good is without internal contradiction. These contradictions cannot be resolved in principle, only in practice.⁴⁹

Our understanding of Justice Wilson's view of the state cannot be complete unless we grasp the truth of this observation. In the previous part of this paper, I described the dominant conception of the state in Justice Wilson's judicial work as the modern liberal one of a state that must be made accountable through law for its impact on the freedom of individuals. I do not think I detract from the essential truth of that observation by suggesting that throughout her judicial career, Justice

48. See *American Farm*, *supra* note 14, at pp. 1334-35; *Lester*, *supra* note 46, at p. 650.

49. M. Ignatieff, *The Needs of Strangers* (London: Chatto & Windus, 1984) at 137.

Wilson did not operate on the assumption that the values implicit in liberal individualism were the only ones worth pursuing or the only ones that received legal sanction within our system of government. Her way of resolving in practice the inevitable contradictions that arose was to ground herself in the best traditions of the legal profession and the form of discourse on questions of great importance that arises within those traditions. In this, as in so much else, we would do well to emulate her.

Conclusion

I would like to conclude by returning to Justice Wilson's characteristics as a judge in order to make a final observation about their implications for the Canadian state as we know it. In my view, Justice Wilson was a remarkable judge because of the way in which she sought to fuse traditional legal approaches with fresh insights into our social and political relationships with each other. In so doing, she risked (and often experienced) isolation both from those who were unwilling to move beyond a very conventional view of the demands of tradition and from those who wished to be freed completely from the shackles that such traditions represent. As the Canadian state lurches toward either the rediscovery of itself or its disintegration in the months ahead, we will have to learn whether we can find in ourselves even a pale reflection of the qualities that Justice Wilson brought to the understanding of Canada as a nation. Only time will tell whether we will succeed in this endeavour, but if we do I believe that future generations will look back on Justice Wilson's contribution to Canadian law and Canadian life as a source of inspiration.