

## THE PUBLIC/PRIVATE DISTINCTION IN *RONCARELLI V. DUPLESSIS*

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*Roncarelli v. Duplessis* is remembered for the way it imposed limits on public power. But in imposing these limits, it relied heavily on public/private distinctions inherited from nineteenth-century classical liberalism. The judges invoked public/private distinctions to identify the damage Roncarelli suffered, to consider the purposes for which discretion could be validly exercised, and to determine whether Duplessis had exceeded his authority.

The author argues that this proliferation of public/private concepts echoes the general indeterminacy of these ideas in liberal legal thought. Although the state/civil society distinction is central to liberal notions of public and private, it coexists with parallel thought structures, such as market/family, civilization/state, and, in Canada, dominion/province. These multiple meanings of the public and the private are mutually reinforcing. They also underwrite myths about the natural, consensual, and neutral nature of the private sphere, making it more difficult to think about controlling the exercise of private power. Although ideas about the public and the private have changed since the late nineteenth century (and since 1959), they display a remarkable persistence. Public/private distinctions can be observed at work in contemporary administrative law, in debates about which bodies are subject to judicial review, and which kinds of decisions are subject to judicial review on grounds of procedural fairness.

On se souvient de l'affaire *Roncarelli c. Duplessis* pour les limites qu'elle a imposées au pouvoir public. En imposant ces limites, toutefois, l'arrêt s'est largement basé sur des distinctions public/privé héritées du libéralisme classique du dix-neuvième siècle. Les juges ont invoqué ces distinctions afin d'identifier le préjudice subi par Roncarelli, de prendre en considération les raisons pour lesquelles le pouvoir discrétionnaire pouvait valablement être exercé et de déterminer si Duplessis avait excédé son autorité.

L'auteur soutient que cette prolifération des concepts public/privé reflète l'indétermination générale sur ces idées dans la pensée juridique libérale. Bien que la distinction État/société civile soit au cœur des notions libérales du public et du privé, elle coexiste avec d'autres distinctions telles que marché/famille, civilisation/État et, au Canada, *dominion*/province. Ces nombreux sens des concepts de public et de privé se renforcent mutuellement. Ils entretiennent également des mythes quant au caractère naturel, consensuel et neutre de la sphère privée, faisant en sorte qu'il est plus difficile de concevoir l'exercice d'un contrôle sur le pouvoir privé. Si les conceptions du public et du privé ont évolué depuis la fin du dix-neuvième siècle (et depuis 1959), elles font preuve d'une persistance remarquable. Les distinctions public/privé sont à l'œuvre en droit administratif contemporain et dans les débats cherchant à déterminer quels organismes et quelles décisions sont susceptibles de révision judiciaire sur des bases d'équité procédurale.

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<b>Introduction</b>	463
<b>I. The Public and the Private in <i>Roncarelli</i></b>	464
<i>A. Damage: Is a Liquor Licence Public or Private?</i>	466
<i>B. Discretion: What Is Included in the Public Interest?</i>	467
<i>C. Jurisdiction: Did Duplessis Exceed His Authority?</i>	468
<i>D. Procedure: Did Duplessis Act within “the Exercise of His Functions”?</i>	469
<i>E. The Mingling of Jurisdiction and Discretion for the Purposes of Fault</i>	470
<b>II. Public/Private Distinctions and Critiques</b>	471
<i>A. Stability and Instability</i>	471
<i>B. State/Civil Society (and State/Market) in Classical Liberalism</i>	472
<i>C. Market/Family</i>	477
<i>D. Civilization/State</i>	478
<i>E. Critique and Reinforcement</i>	478
<i>F. Transpositions</i>	481
<i>G. Dominion/Province: A Note on Federalism</i>	483
<i>H. Rights</i>	485
<b>III. The Public and the Private in Administrative Law</b>	486
<i>A. Availability of Judicial Review</i>	486
<i>B. Judicial Review on Procedural Fairness Grounds</i>	488
<b>Conclusion</b>	490

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## Introduction

The decision of the Supreme Court of Canada in *Roncarelli v. Duplessis* is largely remembered for the following dictum by Justice Rand: “In public regulation of this sort there is no such thing as absolute and untrammelled ‘discretion.’”<sup>1</sup> The reasons of Justice Rand and the other majority judges on the Court are centrally concerned with curtailing the abuse of public power. Although *Roncarelli* took the form of an action for delict under article 1053 of the *Civil Code of Lower Canada*, it is rarely taught in courses on civil liability, and is more often encountered in courses on public law (usually administrative law, and sometimes constitutional law). It is often identified as the archetypal Canadian case on the rule of law.

As Lorne Sossin shows, the project of controlling public discretion is an unfinished one: important areas of discretionary public authority remain off limits to judicial review.<sup>2</sup> The purpose of this article, however, is to inquire into the limits that are already presupposed in Justice Rand’s dictum through his use of the category “public regulation”. What work is the word “public” doing here? How would we distinguish public from private regulation? And why would we want to make this distinction?

I argue that, to the extent that the answers to these questions seem self-evident, the power of Justice Rand’s dictum rests on a public/private distinction that is characteristic of nineteenth-century liberal capitalism<sup>3</sup> or classical legal thought.<sup>4</sup> While *Roncarelli* is often presented as bold or innovative, it actually replicates deeply ingrained patterns in liberal legalism.

One key feature of liberal concepts of public and private is their versatility. In *Roncarelli*, the public and the private have different meanings for the purposes of different issues in the judgment. And in liberal legal discourse more generally, the public and the private refer to different things in different contexts. In his study of U.S. labour law, Karl Klare identified an “ever-renewed effort to refract the complexities of social life through the basic conceptual prism comprising the set of fundamental

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<sup>1</sup> *Roncarelli v. Duplessis*, [1959] 1 S.C.R. 121 at 140, 16 D.L.R. (2d) 689, Rand J. [*Roncarelli*].

<sup>2</sup> Lorne Sossin, “The Unfinished Project of *Roncarelli v. Duplessis*: Justiciability, Discretion, and the Limits of the Rule of Law” (2010) 55 McGill L.J. 661.

<sup>3</sup> Boaventura de Sousa Santos, *Toward A New Legal Common Sense: Law, Globalization, And Emancipation*, 2d ed. (London, U.K.: Butterworths, 2002) at 39-61.

<sup>4</sup> Duncan Kennedy, “Three Globalizations of Law and Legal Thought: 1850–2000” in David M. Trubek & Alvaro Santos, eds., *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006) 19 [Kennedy, “Three Globalizations”].

dualities like public/private.”<sup>5</sup> I would suggest, with Klare, that the multiple meanings of the public and the private, while rendering these concepts indeterminate, also make them resilient. Like most instances of public/private discourse, *Roncarelli* at once destabilizes these concepts and reinforces them.

Although Klare saw the public and the private as indeterminate, he explained that these concepts nevertheless performed an ideological function: justifying mainstream political positions and excluding more radical alternatives. Such tendencies are less obvious in *Roncarelli*. Prime Minister Duplessis evidently had a lot of power, and it is hard not to sympathize with efforts to limit that power. But in holding Duplessis accountable, the majority judges nevertheless relied on an intellectual structure that has helped to ensure that other, *private* forms of power are exempt from any comparable form of accountability.

In Part I of this paper, I analyze the public/private distinctions at work in *Roncarelli*. In Part II, I describe the multiple public/private distinctions in classical liberalism and explain how they constitute unstable but resilient structures of thought. In Part III, I explore the persistence of classical liberal ideas about the public and the private in contemporary Canadian administrative law. Liberal structures of public/private thought became dominant in the late nineteenth century. They underwent important changes in the early twentieth century, and they have been further transformed in the fifty years since *Roncarelli* was decided. But to a great extent, they have also been preserved.

## I. The Public and the Private in *Roncarelli*

The public and the private appeared in *Roncarelli* in multiple guises. The overarching legal question was whether Duplessis had caused damage by his fault to another, under article 1053 of the *Civil Code of Lower Canada*. This question implied a number of sub-issues, including the nature of the damage suffered by Roncarelli and the nature of Duplessis’s fault. The issue of fault was further mingled with a jurisdictional question—whether Duplessis had exceeded his authority. Finally, the judges faced a procedural question: Did Roncarelli’s failure to provide Duplessis with one month’s advance notice of the action prohibit them from rendering judgment against Duplessis according to article 88 of the *Civil Code of Procedure*? In answering each of these questions, the judges distinguished between the public and the private.

Before turning to these legal issues, it is worth highlighting how the facts of the case also pitted the public against the private. As David Mul-

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<sup>5</sup> Karl E. Klare, “The Public/Private Distinction in Labor Law” (1982) 130 U. Pa. L. Rev. 1358 at 1416.

lan writes, Roncarelli's victory has come to stand for "the ultimate triumph of the citizenry over unbridled government power exercised at the very highest level; the operation of Diceyan principles in the very best sense."<sup>6</sup> The public and the private in *Roncarelli* generally reflect the liberal distinction between state and civil society.<sup>7</sup> But the state/civil-society distinction appears in more than one form, and it coexists with other meanings of the public and the private. Together, these contrasts produce a powerful impression of public/private conflict.

First, and most obviously, Duplessis's exercise of (public) state power clashed with Roncarelli's (private) business interests.

Second, this was also a case about religion (which is, in the liberal tradition, a private matter). The trial judge, Justice Mackinnon, suggested that "[t]he revocation of the licence appears to have been more as a blow at the activities of the Witnesses of Jehovah than against the plaintiff personally. It was indirectly an effort to discipline the Witnesses as a group."<sup>8</sup> The struggle between the Jehovah's Witnesses and the Quebec state was always in the background.

Third, as understood by commentators at the time,<sup>9</sup> the case implicated the right of personal liberty. Duplessis had sought to punish Roncarelli for giving security bonds for Jehovah's Witnesses who had been arrested. One senses the majority judges' unease about the indirect threat to personal liberty, most palpably in the judgment of Justice Rand, who described the right to give a bond or bail as "unchallengeable".<sup>10</sup>

Fourth, Roncarelli's restaurant was also a *family* business, passed on to him by his father—a fact mentioned in four of the seven sets of reasons. The inheritance of the restaurant reinforces our sense of its private nature: not only had the state clumsily meddled with a business, but it had also, in effect, interfered with the family.

Fifth, the state had rudely interrupted private conversations. The case's most memorable image is that of a physical, spatial invasion, most vividly imagined by Sheppard:

Late diners are finishing their lunch at Frank Roncarelli's fashionable café on Crescent Street, in Montreal. It is almost two o'clock in

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<sup>6</sup> David Mullan, "*Roncarelli v. Duplessis* and Damages for Abuse of Power: For What Did It Stand in 1959 and For What Does It Stand in 2009?" (2010) 55 McGill L.J. 587 [Mullan, "Damages for Abuse of Power"].

<sup>7</sup> See Part II.B below.

<sup>8</sup> *Roncarelli v. Duplessis* (1951), [1952] 1 D.L.R. 680 at 682 (Qc. Sup. Ct.) [*Roncarelli* (Sup. Ct.)].

<sup>9</sup> See e.g. Claude-Armand Sheppard, "*Roncarelli v. Duplessis*: Art. 1053 C.C. Revolutionized" (1960) 6 McGill L.J. 75 at 91-92, reprinted in (2010) 55 McGill L.J. v.

<sup>10</sup> *Roncarelli*, *supra* note 1 at 141, Rand J.

the afternoon of this fourth day of December, 1946. Suddenly, the comfortable hum in the room turns to consternation as burly constables of the Quebec Liquor Police erupt and proceed to the seizure and removal of all the liquor they can find. Then, they vanish.<sup>11</sup>

The (private) restaurant raid sharply distinguishes Roncarelli from his co-religionists, arrested for distributing literature in the (public) street.

Although Roncarelli sued on the basis of harm to his economic interests, he was able to link this claim to alleged state intervention into religion, personal liberty, the family, and even private conversations. These arguments helped to reinforce the overall sense of violation, and to portray the dispute as a clash between public power and private rights.

#### A. *Damage: Is a Liquor Licence Public or Private?*

In order to hold Duplessis liable, it was necessary to establish that Roncarelli had suffered some private injury. But the dispute concerned a licence—a set of rights conferred under statutory authority. In his testimony at trial, Duplessis tried to characterize the licence as a “*privilège*” rather than a “*droit*”.<sup>12</sup> The revocation of the licence would therefore have been an entirely public matter. Duplessis’s views found jurisprudential expression in the dissenting reasons of Justice Cartwright, who alluded to Duplessis’s subjective view that the licence was “a privilege in the gift of the Province.”<sup>13</sup>

Roncarelli’s legal team sought to recharacterize the licence as a private matter whose revocation violated Roncarelli’s rights. The reasons suggest that they employed two strategies. The first was to assimilate the licence to Roncarelli’s quasi-natural economic interests. This satisfied the majority judges. Justice Martland noted that Roncarelli could not operate his business profitably without a liquor licence and had therefore closed it and sold the building. Justice Rand made this argument most explicitly and eloquently:

The continuance of the permit over the years, as in this case, not only recognizes its virtual n[e]cessity to a superior class restaurant

<sup>11</sup> Sheppard, *supra* note 9 at 75.

<sup>12</sup> *Roncarelli*, *supra* note 1 at 134, Rand J. (citing testimony).

<sup>13</sup> *Ibid.* at 164, Cartwright J. Compare *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, 9 Alta. L.R. (5th) 1, McLachlin C.J.C. [*Hutterian Brethren*] (“Driving automobiles on highways is not a right, but a privilege” at para. 98). In administrative law, the rights/privileges distinction is associated with the judicial/administrative distinction, one of the main criteria for procedural fairness requirements at the time (see Part III.B below). This association is also clear in Cartwright J.’s reasons. Cartwright J. held that the Liquor Commission’s discretion in revoking permits was “administrative and not judicial or quasi-judicial” and that Roncarelli therefore lacked procedural rights (*Roncarelli*, *supra* note 1 at 167).

but also its [i]dentification with the business carried on. ... As its exercise continues, the economic life of the holder becomes progressively more deeply implicated with the privilege while at the same time his vocation becomes correspondingly dependent on it.<sup>14</sup>

The second strategy was to treat the licence itself as a form of property. Anticipating, by several years, Reich's concept of "the new property",<sup>15</sup> Roncarelli and his lawyers claimed \$15,000 for "[l]oss of property rights in liquor permit."<sup>16</sup> But no judge was willing to countenance this move. The trial judge, Justice Mackinnon, summarily dismissed this claim with the remark that "he had no such rights."<sup>17</sup> The Supreme Court of Canada also declined to award any damages under this head, although both Justice Martland and Justice Abbott acknowledged Roncarelli's "reasonable expectation of renewal."<sup>18</sup>

### ***B. Discretion: What Is Included in the Public Interest?***

Despite Roncarelli's private interest in the liquor permit, there could be no liability if the permit's cancellation had been a valid exercise of public discretion. In this sense, none of the judges thought of the liquor licence as *entirely* private. It was apparent to all of them that the liquor licensing scheme reflected some notion of the public interest. The debate between majority and dissent, especially between Justice Rand and Justice Cartwright, thus became a debate over how to conceive of this public interest.

The *Alcoholic Liquor Act* granted the Liquor Commission power to "cancel any permit at its discretion."<sup>19</sup> For Justice Cartwright, this meant that the Court could not examine the reasonableness of the exercise of discretion, subject perhaps to a subjective good faith standard. The statute constituted the Liquor Commission and its discretion as "a law unto itself."<sup>20</sup>

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<sup>14</sup> *Ibid.* at 139-40, Rand J. Compare *Hutterian Brethren*, *supra* note 13, LeBel J., dissenting:

I have difficulty understanding what is meant by a 'privilege' in the context of the provision of government services. As long ago as *Roncarelli v. Duplessis*, this Court recognized the profound significance a licence may have on an individual's life or livelihood and that the government is required to exercise its power in administering the licensing system in a fair and constitutional manner (at para. 172 [reference omitted]).

<sup>15</sup> See Charles A. Reich, "The New Property" (1964) 73 Yale L.J. 733.

<sup>16</sup> *Roncarelli*, *supra* note 1 at 187, Abbott J.

<sup>17</sup> *Roncarelli (Sup. Ct.)*, *supra* note 8 at 703.

<sup>18</sup> *Roncarelli*, *supra* note 1 at 159, Martland J. See also *ibid.* at 187, Abbott J.

<sup>19</sup> *Alcoholic Liquor Act*, R.S.Q. 1941, c. 255, s. 35.

<sup>20</sup> *Roncarelli*, *supra* note 1 at 168, Cartwright J.

Justice Rand had much more to say about the interests served by the grant of discretion. He considered the social importance of alcoholic beverages, and their association with food and ritual. He discussed the private interest of licence holders alongside the more general interest in the integrity and impartiality of public administration, including purposive limits on discretion.

One might be tempted to credit Justice Rand with overcoming the public/private distinction in the way he blends together public and private interests. But this would be too generous. For Justice Rand, the purposiveness of the discretion flows from its publicness. And Justice Rand situates this publicness against a background of private economic ordering that he imagines as normal and natural: the licensed restaurant business is “a calling which, in the absence of regulation, would be free and legitimate.”<sup>21</sup>

### *C. Jurisdiction: Did Duplessis Exceed His Authority?*

Civil liability also hinged on whether Duplessis had exceeded his authority. Under the prevailing Diceyan logic, legal authorization was required for any interference with private rights. Officials are civilly liable for any actions beyond their statutory mandates.<sup>22</sup> A state official’s position, or the fact that he was acting in an official capacity, is no defence. The main substantive question in *Roncarelli* was therefore understood to be a jurisdictional one.

All of the judges of the Supreme Court of Canada confronted this question, but it was more determinative for some than for others. Answering the ultra vires question in the affirmative was an essential step in the reasoning of all the majority judges. As Justice Rand put it, Duplessis’s behaviour exceeded his authority and therefore “converted what was done into his personal act.”<sup>23</sup> The reasons of Justice Abbott come closest to such a straightforward jurisdictional analysis. Justice Abbott cited Dicey for “the principle that a public officer is responsible for acts done by him without legal justification.”<sup>24</sup> Passages in Justice Martland’s reasoning also seem to be framed this way: “The respondent intentionally inflicted damage upon the appellant and, therefore, in the absence of lawful justifi-

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<sup>21</sup> *Ibid.* at 140, Rand J.

<sup>22</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. by E.C.S. Wade (London, U.K.: Macmillan, 1959) at 193.

<sup>23</sup> *Ibid.* at 143, Rand J.

<sup>24</sup> *Ibid.* at 184, Abbott J.

cation, which I do not find, he is liable to the appellant for the commission of a fault under art. 1053 of the *Civil Code [of Lower Canada]*.<sup>25</sup>

Although Justice Rand described Duplessis's act as "personal", he also, paradoxically, insisted on its publicness. In *Allen v. Flood*,<sup>26</sup> the House of Lords had held that the malicious or vengeful infliction of economic harm does not in itself give rise to liability. Justice Rand distinguished this case by emphasizing, among other things, that "[h]ere the act done was in relation to a public administration affecting the rights of a citizen to enjoy a public privilege, and a duty implied by the statute toward the victim was violated."<sup>27</sup>

#### ***D. Procedure: Did Duplessis Act within "the Exercise of His Functions"?***

The Supreme Court of Canada grappled with an analogous question in deciding whether to apply article 88 of the *Civil Code of Procedure*. That provision required the plaintiff to give one month's notice of any action against a public official "by reason of any act done by him in the exercise of his functions"<sup>28</sup>—something Roncarelli and his lawyers had not done.

As Robert Leckey explains,<sup>29</sup> the majority judges collapsed the analysis of article 88 of the *Code of Civil Procedure* into their analysis of jurisdiction. They read it to mean that notice was not required where the public official had exceeded his jurisdiction or otherwise acted illegally. In excusing Roncarelli's failure to give notice, Justice Rand invoked a public/private distinction: Duplessis had committed an act "quite beyond the scope of any function or duty committed to him, so far so that it was one done exclusively in a private capacity, however much in fact the influence of public office and power may have carried over into it."<sup>30</sup> Conversely, Justice Taschereau insisted on the publicness of Duplessis's functions and actions.<sup>31</sup> Only Justice Fauteux read article 88 in light of its legislative and jurisprudential history, distinguishing its interpretation from that of other concepts such as jurisdiction. But the majority's jurisdictional reading of article 88 prevailed.

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<sup>25</sup> *Ibid.* at 159, Martland J.

<sup>26</sup> (1897), [1898] A.C. 1, [1895–99] All E.R. Rep. 52 (H.L.).

<sup>27</sup> *Roncarelli*, *supra* note 1 at 143, Rand J.

<sup>28</sup> Art. 88 C.C.P.

<sup>29</sup> Robert Leckey, "Complexifying *Roncarelli's* Rule of Law" (2010) 55 McGill L.J. 721.

<sup>30</sup> *Roncarelli*, *supra* note 1 at 144, Rand J.

<sup>31</sup> *Ibid.* at 127, 130, Taschereau J.

### *E. The Mingling of Jurisdiction and Discretion for the Purposes of Fault*

The majority judges all held that Duplessis had exceeded his authority. But in order to hold Duplessis liable, it was also necessary to establish fault. As Roderick Macdonald has explained, Canadian courts have often been called upon to conflate ultra vires with fault.<sup>32</sup> In *McGillivray v. Kimber*,<sup>33</sup> the Supreme Court of Canada had done just that, holding liable a pilotage authority that had revoked a pilot's licence without following the proper procedures. In that case, it was sufficient for the plaintiff to show that the pilotage authority had breached its statutory duties; the plaintiff was not required to show that the defendant's fault met a higher standard such as bad faith, malice, or fraud. But in *Harris v. Law Society of Alberta*,<sup>34</sup> the Supreme Court of Canada had applied a higher standard of bad faith. The Law Society of Alberta had failed to follow statutorily required procedures in striking one of its members from the rolls. The Court ordered the member reinstated, but declined to hold the Law Society civilly liable.

In *Roncarelli*, we can see the majority judges struggling with the standard of fault.<sup>35</sup> Justice Rand appears to have been inclined to apply a higher standard ("malice"), although he defines malice broadly as "simply acting for a reason and purpose knowingly foreign to the administration."<sup>36</sup> On this view, fault is not equated with ultra vires; the improper exercise of discretion is clearly relevant to the determination of fault (*pace* Sheppard)<sup>37</sup>. Justice Rand made it clear that he would have considered the revocation illegal even if the discretion had been exercised by the Liquor Commission.<sup>38</sup> Justice Abbott came closest to equating ultra vires with fault, although he also noted (in *obiter*, it seems) that the licence was cancelled on an irrelevant basis and therefore "without legal justification."<sup>39</sup> Justice Martland's reasons also blur the jurisdiction and discretion issues. Justice Martland framed the question as involving good faith,<sup>40</sup>

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<sup>32</sup> Roderick A. Macdonald, "Jurisdiction, Illegality and Fault: An Unholy Trinity" (1985) 16 R.G.D. 69.

<sup>33</sup> (1915), 52 S.C.R. 146, 23 D.L.R. 189.

<sup>34</sup> [1936] S.C.R. 88, [1936] 1 D.L.R. 401.

<sup>35</sup> Macdonald, *supra* note 32 at 83-84.

<sup>36</sup> *Roncarelli*, *supra* note 1 at 141, Rand J.

<sup>37</sup> Sheppard argued that Rand J.'s famous pronouncements about discretion are *obiter* and that Duplessis's liability flowed largely from the fact that he had exceeded his jurisdiction. See Sheppard, *supra* note 9 at 90.

<sup>38</sup> *Roncarelli*, *supra* note 1 at 141. For a helpful clarification of this point, see David Dyzenhaus, "The Deep Structure of *Roncarelli v. Duplessis*" (2004) 53 U.N.B.L.J. 111 at 127-29.

<sup>39</sup> *Roncarelli*, *supra* note 1 at 184, Abbott J.

<sup>40</sup> *Ibid.* at 153, Martland J.

and he emphasized that the Liquor Commission itself acted unlawfully, both in exercising its discretion on irrelevant grounds, and by allowing its discretion to be fettered by orders from a third party.<sup>41</sup> But ultimately, Justice Martland's decision on this point seems to rest on Duplessis's lack of authority.<sup>42</sup>

The mingling of jurisdiction and discretion is mirrored in the dissenting reasons of Justice Cartwright, who on both points reached the opposite conclusion. For Justice Cartwright, the Liquor Commission's cancellation of the licence had been lawful, and Roncarelli's loss was therefore a *damnum sine injuria*. Justice Cartwright concluded that Duplessis could not be held liable for directing or approving an act that was itself not wrongful.<sup>43</sup>

As David Mullan explains,<sup>44</sup> discerning what was actually decided in *Roncarelli* on the liability of office holders is a highly problematic exercise. If it seems unclear which standard the majority judges meant to apply, it may be (as Sheppard suggests) that they themselves were unclear on this point.<sup>45</sup> Sheppard interprets the majority reasons as having revolutionized article 1053 of the *Civil Code of Lower Canada* by extending liability to acts that involve directing another to cause damage.<sup>46</sup> While it is possible to extrapolate such a theory of private law from the judgment, I would argue that it is more appropriate to read the majority judges as trying to craft a certain kind of public law outcome with the tools of private law, with no concern for whether they were using these tools properly. The majority judgments in *Roncarelli* are more straightforwardly explained as instrumentalist, result-oriented reasoning than as innovations in private law.

## II. Public/Private Distinctions and Critiques

### A. *Stability and Instability*

The profusion of public/private concepts in *Roncarelli* reflects larger patterns in liberal legal thought. In the twenty-first century, as in 1959, the public and the private are both stable and unstable. They derive their core meaning from the liberal-state/civil-society distinction. This association is so strong that the two are often conflated so that the state/civil-

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<sup>41</sup> *Ibid.* at 155-57, Martland J.

<sup>42</sup> *Ibid.* at 154-55, Martland J.

<sup>43</sup> *Ibid.* at 169-70, Cartwright J.

<sup>44</sup> Mullan, "Damages for Abuse of Power", *supra* note 6.

<sup>45</sup> Sheppard, *supra* note 9 at 95.

<sup>46</sup> *Ibid.* at 96.

society distinction is frequently referred to as *the* public/private distinction. However, as critics have demonstrated, liberalism also involves subsidiary public/private distinctions, notably those of market/family and civilization/state. Tensions and contradictions are therefore already present in liberal ideas of the public and the private.

Moreover, these tensions and contradictions have been exploited and manipulated to such an extent that the public and the private sometimes seem to lack any determinate meaning. As Klare has shown, the public/private distinction is “continuously invoked, refined, and reformulated.”<sup>47</sup> We have had so much practice invoking the public/private distinction that these exercises have come to seem tedious and routine.<sup>48</sup>

And yet in spite of this indeterminacy, the public and the private continue to mean something. They bear the burden of various myths descended from classical liberalism. These myths have been subjected to compelling critiques, but they persist nonetheless. In this section, I argue that such myths persist not only in spite of, but also because of the multiple meanings of the public and the private. Although the meanings often contradict one another, they may also be mutually reinforcing.

### *B. State/Civil Society (and State/Market) in Classical Liberalism*

Although ideas of the public and the private can be observed throughout history, their meanings have changed a great deal. Hannah Arendt analyzed the ancient Greek distinction between the *polis* and the *oikos* (household) and showed how these concepts had been transformed over the course of history.<sup>49</sup> Indeed, modern meanings of the public and the private are in some respects the opposite of their ancient Greek meanings.

Our contemporary understandings of the public and the private have been shaped by liberalism, a political philosophy centred on such ideas as individual freedom, natural rights to property and religion, and the state/civil-society distinction. Historically, liberalism can be understood as a defensive move. Under feudalism, political power had been linked to property relations. As early modern states centralized their power, however, various social actors tried to carve out spheres of immunity, and liberal ideas provided one such defence.<sup>50</sup>

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<sup>47</sup> Klare, *supra* note 5 at 1418.

<sup>48</sup> Duncan Kennedy, “The Stages of the Decline of the Public/Private Distinction” (1982) 130 U. Pa. L. Rev. 1349.

<sup>49</sup> Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958).

<sup>50</sup> Morton J. Horwitz, “The History of the Public/Private Distinction” (1982) 130 U. Pa. L. Rev. 1423 at 1423-24. See also Arendt, *supra* note 49 at 34-35.

Although there are many varieties of liberalism, in this paper I focus on “classical” liberalism, which reached its political zenith in the late nineteenth century. Classical liberalism combines political liberalism with economic liberalism; it employs both intrinsic and instrumental justifications for individual rights. In classical liberalism, liberty thus implies “laissez-faire”. The state/civil-society distinction doubles as a state/market distinction, conducive to the marketization of economies and the accumulation of capital. Classical liberalism is the form of liberalism that insists most strongly on the state/civil-society distinction. To the extent that other versions of liberalism are less categorical about this distinction, my analysis would need to be qualified. However, all versions of liberalism presume some form of state/civil-society distinction.

The state/civil-society distinction was an animating principle of nineteenth-century legal thought.<sup>51</sup> A key dimension of this thought was the separation of “private law” (to coordinate the relations among individuals) from “public law” (to constitute the state and govern its relations with citizens). Morton Horwitz wrote, “Although ... there were earlier anticipations of a distinction between public law and private law, only the nineteenth century produced a fundamental conceptual and architectural division in the way we understand the law.”<sup>52</sup> Private law was reinterpreted through the will theory, centred on individual autonomy. The will theory had a basis in liberal theories of natural rights; it was also linked to the celebration of formalistic, deductive modes of legal reasoning.<sup>53</sup> This was the age of the great codifications of private law, including the *Civil Code of Lower Canada*, which formed the basis for Roncarelli’s lawsuit. Law professors played a leading role in these changes, synthesizing private law into codes and treatises. They were helped by judges and lawyers who hoped to use law as a bulwark against democratic distributive politics.

In English public law (which was exported to Canada), classical liberalism is personified by A.V. Dicey. Dicey imagined a concept of the rule of law built on three “kindred conceptions”: legality (no one should “suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land”);<sup>54</sup> equality before the law (understood to include the subjection of state officials to the “ordinary” law);<sup>55</sup> and the notion that constitutional rights were to be dis-

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<sup>51</sup> See generally De Sousa Santos, *supra* note 3 at 40-45; Kennedy, “Three Globalizations”, *supra* note 4 at 25-31.

<sup>52</sup> Horwitz, *supra* note 50 at 1424.

<sup>53</sup> See generally P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979) at 405-19; Véronique Ranouil, *L’Autonomie de la volonté : naissance et évolution d’un concept* (Paris: Presses universitaires de France, 1980).

<sup>54</sup> Dicey, *supra* note 22 at 188.

<sup>55</sup> *Ibid.* at 193.

tilled from individual cases by the courts.<sup>56</sup> Although Dicey paid deference to parliamentary sovereignty, his theory can best be understood as an attempt to constitutionalize the private rights traditionally protected by the common law, such as personal liberty, property, and freedom of discussion and public meeting.<sup>57</sup>

Liberal thought imbues civil society and the market with three powerful myths.<sup>58</sup> First, civil society is thought to be natural and spontaneous, whereas the state is artificial. Hayek expressed this most succinctly: “Societies form but states are made.”<sup>59</sup> According to Locke, civil society pre-exists the state; members of civil society come together to create a limited form of government that is then bound to respect everyone’s liberty and property.<sup>60</sup>

A second liberal myth is that civil society consists of free, consensual human relations, whereas the state is coercive. In classical liberal thought, freedom is understood in negative terms: each person should have the maximum amount of freedom consistent with the freedom of others; the state should administer its coercive laws only to the extent necessary to guarantee this freedom.<sup>61</sup>

A third liberal myth involves the separation of economics (civil society or the market) from politics (the state). Civil society is seen as a level playing field where individuals can pursue their own ends; it is neutral among individual preferences as well as among the interests of different groups in society. The state should not try to privilege some ends over others. This requires the state to avoid getting involved in production or redistribution. Hayek therefore identified a tension between liberalism

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<sup>56</sup> *Ibid.* at 195.

<sup>57</sup> Murray Hunt, “Constitutionalism and Contractualisation of Government in the United Kingdom” in Michael Taggart, ed., *The Province of Administrative Law* (Oxford: Hart, 1997) 21 at 24-25. As has frequently been pointed out, Dicey’s book (*supra* note 22) is less an accurate description of English law at the time than an attack on the nascent British administrative state. See H.W. Arthurs, “Rethinking Administrative Law: A Slightly Dicey Business” (1979) 17 *Osgoode Hall L.J.* 1 at 6-7 [Arthurs, “Rethinking”].

<sup>58</sup> For an excellent discussion of these myths, see A. Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge: Cambridge University Press, 2003) at 54-59. Cutler also refers to a fourth myth, efficiency, which I leave aside because it was not explicitly invoked in *Roncarelli*.

<sup>59</sup> F.A. Hayek, *Law, Legislation and Liberty: A New Statement of Liberal Principles of Justice and Political Economy*, vol. 3 (Chicago: University of Chicago Press, 1979) at 140 [Hayek, *Law, Legislation and Liberty*].

<sup>60</sup> John Locke, “The Second Treatise of Government: An Essay Concerning the True Original, Extent, and End of Civil Government” in *Two Treatises of Government*, 3d ed. by Peter Laslett (Cambridge: Cambridge University Press, 1988) 265, § 131.

<sup>61</sup> F.A. Hayek, *New Studies in Philosophy, Politics, Economics, and the History of Ideas* (Chicago: University of Chicago Press, 1978) at 132-34.

and democracy, and warned that democracy was likely to lead to the capture of power by organized interest groups.<sup>62</sup> To those who complained about the power of large private corporations, Hayek replied that theirs was a fundamentally different kind of power—one less objectionable than that of governments.<sup>63</sup>

The majority opinions in *Roncarelli* were informed by all three of these myths. Roncarelli's business, together with his related interests in religion and family, were seen as normal and natural, in contrast to the exceptional nature of state regulation. It was presumed that in the absence of such regulation, Roncarelli's business would have been "free and legitimate."<sup>64</sup> Finally, the majority judges established that Roncarelli's business was non-political by distinguishing it from the Jehovah's Witnesses' allegedly seditious pamphleting campaign.<sup>65</sup>

Critics of classical liberalism have debunked these myths one by one. First, whereas classical liberals have claimed that civil society and the market are spontaneous and natural, critics have pointed out that these social relations are constituted by laws (including the laws of property and contract) that are promulgated and enforced by the state. As Polanyi demonstrated, the rise of market economies in eighteenth- and nineteenth-century Europe can be traced to particular legal changes.<sup>66</sup> Arguments against state intervention in the market are therefore absurd. Polanyi wrote, "The accusation of interventionism on the part of liberal writers is thus an empty slogan, implying the denunciation of one and the same set of actions according to whether they happen to approve of them or not."<sup>67</sup>

Second, whereas classical liberals have imagined civil society and the market as consensual, critics have identified their potential coerciveness. One of the most powerful arguments to this effect comes from Karl Marx. In his essay "On the Jewish Question", Marx expressed his doubts about the movement for Jewish emancipation—a movement that involved redefining religion as a private matter.<sup>68</sup> Marx drew a parallel between this

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<sup>62</sup> *Ibid.* at 142-44.

<sup>63</sup> Hayek, *Law, Legislation and Liberty*, *supra* note 59 at 80-83.

<sup>64</sup> *Roncarelli*, *supra* note 1 at 140, Rand J.

<sup>65</sup> "There is no evidence that the appellant was at any time a distributor of this pamphlet and his restaurant and café in Montreal was not used for the distribution or storage of these pamphlets by himself or by anyone else": *Roncarelli*, *supra* note 1 at 146, Martland J.

<sup>66</sup> Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston: Beacon Press, 2001) ("Laissez-faire was planned" at 147).

<sup>67</sup> *Ibid.* at 156.

<sup>68</sup> "Man emancipates himself *politically* from religion by expelling it from the sphere of public law to that of private law": Karl Marx, "On the Jewish Question" in *The Marx-*

privatization of religion and the privatization of property, warning that both institutions (and their potentially oppressive qualities) could actually be strengthened by their relegation to the private sphere. Marx added to this a critique of liberal-rights discourse (including both freedom of religion and property rights), which he saw as turning the state into the guarantor of individual selfishness. He wrote, “Thus man was not liberated from religion; he received religious liberty. He was not liberated from property; he received the liberty to own property. He was not liberated from the egoism of business; he received the liberty to engage in business.”<sup>69</sup>

The American legal realist Robert Hale went even further than Marx in explaining the coercive nature of private economic relations. Hale argued that in a market society, a propertyless person does not negotiate her employment contract *freely*; rather, she is effectively coerced by property owners.<sup>70</sup> Hale linked this argument to the first critique, noting how the rules of property and contract are created and enforced by the state. The coercion in civil society is therefore inseparable from state coercion. An extreme form of this critique is found in the writings of Morris Cohen, who reasoned that the state’s legal protection of property amounts to a delegation of *sovereignty* because it grants property owners a sphere of power in which they can dispose of others’ labour. Cohen argued that it would be more accurate to think of property rights as “sovereign power compelling service and obedience.”<sup>71</sup>

Many critical writers have noted that the myth of consensual private relations serves to insulate the market from democratic pressures. In liberal states, citizens aspire to make their governments democratic and participatory while tolerating discipline and authoritarianism in the relations of production. As Santos has argued,

the economy/politics dichotomy was essential to keep these two pictures incomparable or incommensurable. It kept them separate in such a way that the political form of social relations could never become the model for the economic form of social relations.<sup>72</sup>

Third, whereas classical liberals have tried to separate economics from politics, critics have shown the political choices that are implicit in eco-

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*Engels Reader*, 2d ed. by Robert C. Tucker (New York: W.W. Norton, 1978) 26 at 35 [emphasis in original].

<sup>69</sup> *Ibid.* at 45.

<sup>70</sup> Robert L. Hale, “Coercion and Distribution in a Supposedly Non-Coercive State” (1923) 38 *Pol. Sci. Q.* 470. Hale tried to empty the concept of coercion of any sense of moral judgment, turning it into an analytical tool that could be applied equally to the public and the private.

<sup>71</sup> Morris R. Cohen, “Property and Sovereignty” (1927) 13 *Cornell L.Q.* 8 at 12.

<sup>72</sup> De Sousa Santos, *supra* note 3 at 368.

conomic matters. Hale did this by highlighting how economic laws inevitably favour some interests over others. Recalling the example of the propertyless person who is effectively coerced into working, Hale recognized that workers may sometimes be in a position to withhold their labour (just as customers may refuse to buy). Therefore, Hale did not claim that property owners have *all* the power. People and social groups have various bargaining resources. Their *relative* ability to coerce others depends on the laws governing market transactions as well as other social and political factors.<sup>73</sup> Hale argued that each person's income in the community is likely to be a function of his or her relative coercive power, and since this power is partially constituted by law, law has distributive effects.<sup>74</sup>

### C. *Market/Family*

Although the state/civil-society distinction is the most important form of public/private distinction in classical liberalism, it is not the only one. Classical liberalism also distinguishes between the (public) market and the (private) family or household.

In nineteenth-century Europe and North America, laws governing the family were overwhelmingly conservative and patriarchal. Jurists gradually reconceptualized these laws as involving reciprocal rights and duties. But these rights and duties were codified by the state rather than negotiated by the parties. According to Kennedy, "the will theory came to an end at the family."<sup>75</sup> On the periphery, European colonial regimes also distinguished between the market and the family, applying European legal forms to the market while recognizing religious or "customary" systems of family law.<sup>76</sup>

Olsen showed how the market/family distinction forms another public/private distinction nestled within that of state/civil society. From the perspective of the state, the market is private, but from the perspective of the family, the market is public. Both private spheres are to some extent imagined as natural and autonomous, and analogous arguments are made against "intervention" in each.<sup>77</sup>

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<sup>73</sup> For a helpful discussion of the Halian analysis of markets and coercion, see Duncan Kennedy, "The Stakes of Law, or Hale and Foucault!" (1991) 15 *Legal Stud. F.* 327.

<sup>74</sup> Hale, *supra* note 70 at 477.

<sup>75</sup> Kennedy, "Three Globalizations", *supra* note 4 at 32.

<sup>76</sup> See generally M.B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Oxford: Oxford University Press, 1975); Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History 1400–1900* (Cambridge: Cambridge University Press, 2002).

<sup>77</sup> Frances E. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96 *Harv. L. Rev.* 1497.

#### *D. Civilization/State*

Another classical liberal public/private distinction can be observed in the separation between civilization (the international realm) and the internal affairs of states.<sup>78</sup> Under what came to be known as the Westphalian paradigm, only states could possess sovereignty and thus international legal personality.<sup>79</sup> Moreover, state jurisdiction was to be territorial: states could legislate, adjudicate, and enforce only within their territory, and they were not to intervene in others' affairs. The liberal rights of individuals thus stopped at the border. But in the nineteenth century, most African, Asian, and Pacific polities, as well as those of the indigenous peoples of the Americas, were considered "uncivilized". They were not recognized as states, and they were therefore open to colonization or various forms of unequal treaties involving extraterritorial jurisdiction.<sup>80</sup> International law, including its concept of sovereignty, has been shaped by these unequal relationships.<sup>81</sup> But in the twentieth century, Westphalian sovereignty was universalized, at least in form.<sup>82</sup> The civilization/state distinction is thus another level of the public/private distinction, operating in a manner analogous to the state/civil society and family/market distinctions. All three private spheres are set up against "intervention".

#### *E. Critique and Reinforcement*

As discussed above, many scholars have critiqued the public/private distinction and the myths associated with it. These critiques are hardly new. I have discussed Marx's critique of the state/civil-society distinction, which dates from 1843, and critiques by Hale, Cohen, and Polanyi from the early twentieth century. In 1982, Horwitz remarked,

By 1940, it was a sign of legal sophistication to understand the arbitrariness of the division of law into public and private realms. No advanced legal thinker of that period, I am certain, would have predicted that forty years later the public/private dichotomy would still be alive and, if anything, growing in influence.<sup>83</sup>

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<sup>78</sup> Although international law has complex origins and precursors, not until the nineteenth century did it become a profession and legal subdiscipline: Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge: Cambridge University Press, 2001).

<sup>79</sup> I follow Anghie's use of "Westphalian" as a critical label for the classical international legal paradigm. See Antony Anghie, "The Evolution of International Law: Colonial and Postcolonial Realities" (2006) 27 *Third World Quarterly* 739 at 740.

<sup>80</sup> *Ibid.* at 745-46.

<sup>81</sup> *Ibid.* at 741-42.

<sup>82</sup> *Ibid.* at 748-49.

<sup>83</sup> Horwitz, *supra* note 50 at 1426-27.

Almost thirty years later, Horwitz's comment remains just as appropriate.<sup>84</sup> It is tempting to ask, as did Santos, "[I]f the state/civil society distinction has always been so pregnant with contradictions, why is it so widely accepted, so self-evident and even commonsensical?"<sup>85</sup>

In order to answer this question, it may be helpful to review the structure of the critiques. Critiques of the public/private distinction have often taken the form of assimilating the private to the public. This is illustrated in the critiques of the state/civil-society distinction by Cohen, Hale, Marx, and Polanyi.<sup>86</sup> These authors exposed the myths that civil society is natural, consensual, and economic or apolitical. They showed that private law can be just as artificial, coercive, and political as public law can.

While intellectually compelling, such critiques are politically vulnerable to the reverse move: the assimilation of the public to the private. A good example of this can be found in Dicey. As noted above, Dicey's rule of law included the subjection of state officials to the "ordinary" law of civil liability.<sup>87</sup> No distinction was to be made between public officials and private citizens in this regard. For this reason, Dicey is sometimes given credit for overcoming the distinction between public law and private law.<sup>88</sup> But Dicey did not seek to overcome the public/private distinction so much as to shrink the sphere of the public, and to subject all state institutions to the logic of private ordering.<sup>89</sup>

This reverse move—the assimilation of the public to the private—may at times be a critical one. But it tends to draw its strength from the liberal myths already discussed, especially the myth that the private is natural whereas the public is artificial. Whereas the assimilation of the private to the public calls attention to the artificiality and socially constructed nature of both categories, the assimilation of the public to the private tends to reinforce the myth of naturalness. Some commentators have portrayed

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<sup>84</sup> Likewise, in 1938, Felix Frankfurter lamented the persistence of Diceyan thinking in administrative law and popular understandings of government. See Felix Frankfurter, Foreword, (1938) 47 Yale L.J. 515 at 517-18. Quoting Frankfurter forty years later, Harry Arthurs added that "Frankfurter's remarks might have been written today" (Arthurs, "Rethinking", *supra* note 57 at 4). I would only add, another thirty years later, that they might have been written today as well. For an outrageous example from the popular media, see Editorial, "Judge Marshall and the Rule of Law" *The Globe and Mail* (10 August 2006) A14.

<sup>85</sup> De Sousa Santos, *supra* note 3 at 365.

<sup>86</sup> See *supra* note 66ff. and accompanying text.

<sup>87</sup> Dicey, *supra* note 22 at 193.

<sup>88</sup> See e.g. Carol Harlow, "'Public' and 'Private' Law: Definition Without Distinction" (1980) 43 Mod. L. Rev. 241.

<sup>89</sup> Macdonald, *supra* note 32 at 74.

these moves as equal and opposite forms of critique.<sup>90</sup> But only the former helps to challenge liberal myths.

In the fifty years since *Roncarelli*, this reverse move has been pursued with a vengeance. It is probably best represented by Hayek and the movement generally known as neo-liberalism. Hayek reaffirmed the premise that civil society and markets are natural, whereas states are artificial. For Hayek, law preserves the freedom of individuals to engage in economic competition, which allows for the optimum use of information and thus economic efficiency.<sup>91</sup> Hayek drew on Dicey's concept of the rule of law and his antipathy toward "collectivism".<sup>92</sup>

Neo-liberal economic ideas such as those of Hayek were accompanied by a particular view of politics, generally known as public choice theory.<sup>93</sup> On this view, public institutions are composed of individual actors who engage in self-interested, rationally maximizing behaviour. Economic game theory could then be applied to the processes of state institutions.<sup>94</sup> Neo-liberal thought therefore involves not only a reaffirmation of liberal principles, but also an expansion of the private and the assimilation of the public to the private. Public choice theory combines with neo-liberal economics to produce a set of arguments for a particular kind of state.<sup>95</sup>

In the 1980s and 1990s, these patterns of thought contributed to a global political trend toward "privatization", the ostensible withdrawal of the state from economic matters, and the celebration of "civil society" as a counterweight to the state.<sup>96</sup> Whereas for some countries these changes reflected indigenous policy choices, in many Southern countries they were imposed by international actors, led by the International Monetary Fund and the World Bank. Until the 1990s, these institutions had refrained

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<sup>90</sup> See e.g. Jody Freeman, "The Private Role in Public Governance" (2000) 75 N.Y.U. L. Rev. 543 at 561-63 (discussing how in public choice theory, the public sphere is assimilated into the private sphere).

<sup>91</sup> See generally F.A. Hayek, "The Use of Knowledge in Society" (1945) 35 Am. Econ. Rev. 519.

<sup>92</sup> See Friedrich A. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1944) at 80-96.

<sup>93</sup> See e.g. Michael J. Trebilcock *et al.*, *The Choice of Governing Instrument* (Ottawa: Minister of Supply and Services Canada, 1982).

<sup>94</sup> *Ibid.*

<sup>95</sup> For a helpful analysis of this aspect of neo-liberal thought, see Kerry Rittich, *Recharacterizing Restructuring: Law, Distribution and Gender in Market Reform* (The Hague: Kluwer Law International, 2002) at 99-125.

<sup>96</sup> See generally Michael Taggart, "The Nature and Functions of the State" in Peter Cane & Mark Tushnet, eds., *The Oxford Handbook of Legal Studies* (Oxford: Oxford University Press, 2003) 101 [Taggart, "Nature and Functions"]; H.W. Arthurs, "The Administrative State Goes to Market (and Cries 'Wee, Wee, Wee' All the Way Home)" (2005) 55 U.T.L.J. 797 [Arthurs, "Administrative State"].

from undertaking law reform projects on the basis that such projects were matters of politics rather than economics. But in the 1990s the World Bank began to view many areas of law in economic terms.<sup>97</sup>

### *F. Transpositions*

In the preceding section of this paper, I explained how public/private distinctions can be reinforced by assimilating the public to the private. Another way they can be reinforced is through transpositions. In liberal thought, ideas about the public and the private are frequently transposed from one level to another. And while such transpositions can reveal contradictions, they can also provide the impression of stability.

The best analysis of such transpositions is found in Olsen's study of the family and the market.<sup>98</sup> Olsen observed that the family is private vis-à-vis the market, but that both family and market are part of civil society and therefore private vis-à-vis the state:

The classic laissez-faire arguments against state regulation of the free market find a striking parallel in the arguments against state interference with the private family ... Both are constructed of similar elements and subject to similar attacks; our understanding of each is enriched by our understanding of the other.<sup>99</sup>

Thus, in Olsen's analysis, the supposed naturalness and autonomy of the market indirectly bolsters the idea that the state should refrain from intervening in the family, and vice versa. Images and values of the public and the private are thus shifted from one level to another in ways that reinforce the overall structure.

As discussed above,<sup>100</sup> there are at least three public/private distinctions in classical liberal thought: the state/civil-society and market/family distinctions discussed by Olsen, as well as a third, civilization/state dis-

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<sup>97</sup> Kerry Rittich, "The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social" in David M. Trubek & Alvaro Santos, eds., *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006) 203; Alvaro Santos, "The World Bank's Use of the 'Rule of Law' Promise in Economic Development" in David M. Trubek & Alvaro Santos, eds., *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006) 253.

<sup>98</sup> Olsen, *supra* note 71. Reich's "new property" (*supra* note 15) is another example of a creative use of the public/private distinction that ultimately serves to reinforce the dichotomy. Reich largely ignored the legal realist critiques that had shown the role of the state in constituting even the "old" property. Instead, Reich relied on an essentialized, libertarian image of property and tried to expand the application of this image. Reich highlighted the blurring of public/private categories in the administrative state, but in a way that assumed that these once had some determinate meaning.

<sup>99</sup> Olsen, *supra* note 71 at 1502.

<sup>100</sup> See Parts II.B, II.C, and II.D above.

inction. It may be helpful to imagine these three distinctions as concentric circles corresponding to different geographical scales, with the civilization/state distinction on the outside and the market/family distinction at the centre.

Thus, in addition to transpositions from family to civil society and vice versa, we can observe transpositions from family to state. It is telling that we use the same word “domestic” to refer to both family and state, in opposition to market or civilization respectively. Catharine MacKinnon draws a parallel between the international community’s toleration of wartime rape in Bosnia and the state’s toleration of marital rape and spousal abuse. In both cases, crimes against women are characterized as “domestic”.<sup>101</sup>

Even when different levels of the public and the private are subjected to critical comparisons, the comparisons may perpetuate the overall thought structure. For example, Olsen notes that the critique of selfish individualism in the market has often relied on an essentialized view of altruism within the family. Conversely, the critique of hierarchy in the family has often relied on an essentialized version of freedom and formal equality in the market.<sup>102</sup> Olsen suggests that liberation from the family/market and state/civil-society dichotomies, if it were to occur, must occur simultaneously.<sup>103</sup>

These multiple levels of the public/private distinction produce complex and contradictory political positions. Perhaps this is best exemplified in the liberal ambivalence toward international trade. Because civil society and its economic activity are considered private (*vis-à-vis* the state), they are thought to be contained within the state, which is also private (*vis-à-vis* civilization). Economies are therefore seen as essentially local or national, and states are seen as sovereign over their economies. But since the state is also seen as public (*vis-à-vis* civil society), state regulation is considered an artificial barrier to economic activity. Even at the global scale, the state is believed to be the main threat to freedom.<sup>104</sup>

The Western powers tried to resolve these tensions in the post–World World II “embedded liberal” compromise: stable national welfare states were to coexist with a multilateral system for promoting non-

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<sup>101</sup> Catharine A. MacKinnon, “Rape, Genocide and Women’s Human Rights” (1994) 17 *Harv. Women’s L.J.* 5 at 15. See also Anne Orford, “Locating the International: Military and Monetary Interventions after the Cold War” (1997) 38 *Harv. Int’l L.J.* 443.

<sup>102</sup> Olsen, *supra* note 71 at 1524-25.

<sup>103</sup> *Ibid.* at 1568.

<sup>104</sup> Stanley Hoffmann, “The Crisis of Liberal Internationalism” *Foreign Policy*, No. 98 (Spring 1995) 159.

discrimination in trade.<sup>105</sup> Both Keynesian and classical liberals understood this arrangement to involve state intervention in the market. Keynesian liberals considered this intervention legitimate. But classical liberals such as Röpke challenged this intervention, arguing instead for the separation of *imperium* and *dominium*, i.e., “the largest possible ‘depolitisation’ of the economic sphere with everything that goes with it.”<sup>106</sup> On this view, property everywhere must be independent of state control and left in the hands of a cosmopolitan civil society.<sup>107</sup> For Röpke, national “collectivism” (which would have included embedded liberalism) was incompatible with the world economy.<sup>108</sup>

### G. *Dominion/Province: A Note on Federalism*

In Canada, federalism adds another layer to the public/private distinction, making possible an additional set of transpositions.<sup>109</sup> Under the prevailing constitutional logic, matters of Parliament’s legislative power are seen as public whereas provincial matters are seen as private.<sup>110</sup> Indeed, subsection 92(16) of Canada’s Constitution assigns the provincial legislatures power over “Generally all Matters of a merely local or *private* Nature in the province.”<sup>111</sup>

Such transpositions are evident in the Constitution’s handling of trade and economic activity. The federal system reproduces, in miniature, the

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<sup>105</sup> See John Gerard Ruggie, “International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order” (1982) 36 *Int’l Organization* 379.

<sup>106</sup> Wilhelm Röpke, “Economic Order and International Law” (1954) 86 *Rec. des Cours* 203 at 224.

<sup>107</sup> *Ibid.* at 228-29. Some might argue that Röpke’s vision was realized in a diminished form of sovereignty granted to African and Asian states. See Antony Anghie, “Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations” (2002) 34 *N.Y.U. J. Int’l L. & Pol.* 513.

<sup>108</sup> Röpke, *supra* note 94 at 240.

<sup>109</sup> See R.C.B. Risk, “Constitutional Scholarship in the Late Nineteenth Century: Making Federalism Work” (1996) 46 *U.T.L.J.* 427. “[T]he spheres of power and their sharp limits that defined the relation between the Dominion and the provinces were shaped by ideas about the relation among individuals in the liberal state” (*ibid.* at 442).

<sup>110</sup> See R.C.B. Risk, “Canadian Courts Under the Influence” (1990) 40 *U.T.L.J.* 687. Risk explains that the earliest Canadian judgments on the division of powers reflected an understanding that “the dominion government would be given large and general powers, especially for dealing with the economy and defence, and that the provinces would have responsibility for their local affairs and distinctive cultures” (*ibid.* at 698-99). Compare Albert S. Abel, “The Neglected Logic of 91 and 92” (1969) 19 *U.T.L.J.* 487 at 497ff. Abel argues that (with a few notable exceptions) the division of powers reflects a distinction between economic and social matters.

<sup>111</sup> *Constitution Act, 1867* (U.K.), 30 & 31 *Vict.*, c. 3, s. 92(16), reprinted in R.S.C. 1985, App. II, No. 5 [emphasis added]. See also A.S. Abel, “What Peace, Order and Good Government?” (1968) 7 *West. Ont. L. Rev.* 1.

liberal ambivalence over international trade. Subsection 92(13) of the Constitution provides for provincial legislative power over “Property and Civil Rights in the Province”,<sup>112</sup> thus codifying the transposition of (private) civil society to (private) province. But Subsection 91(2), providing for parliamentary power over “The Regulation of Trade and Commerce”,<sup>113</sup> ensures that civil society (including capital) will not be contained within provincial borders.

When deciding cases of jurisdiction over trade and economic matters, Canadian courts have often conflated international and interprovincial disputes, transposing rules and principles between the two contexts.<sup>114</sup> For example, in *Morguard Investments Ltd. v. De Savoye*, a case about the recognition of an Alberta judgment in British Columbia, Justice La Forest for the Supreme Court of Canada based his reasoning on the growth of international trade and the need for principles of comity and fairness in international relations.<sup>115</sup> He then held that these international trade principles must apply at the interprovincial level in concentrated form.<sup>116</sup> In *Beals v. Saldanha*, a case about the recognition of a Florida judgment in Ontario, the Supreme Court of Canada made the reverse move, extrapolating the *Morguard* doctrine so that it would apply to international cases as well.<sup>117</sup>

The transposition from civil society to province has a particularly powerful history in Quebec. Since 1774, Quebec private law has been expressed in terms of French civil law, but public law has been based on English models. Thus, according to a stylized and oversimplified view, civil law governs civil society and the market, whereas common law governs the state. Following the work of Justice Pierre-Basile Mignault in the early twentieth century, Quebec civil law came to be seen as a bulwark of national identity—a defence against assimilation into English Canada.<sup>118</sup> This transposition from civil society to province is reinforced by other transpositions in legal and popular culture, such as the transposition from

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<sup>112</sup> *Ibid.*, s. 92(13).

<sup>113</sup> *Ibid.*, s. 91(2).

<sup>114</sup> See generally Robert Wai, “In the Name of the International: The Supreme Court of Canada and the Internationalist Transformation of Canadian Private International Law” (2001) 39 Can. Y.B. Int’l Law 117 at 188-92; Nathan Hume, “Four Flaws: Reflections on the Canadian Approach to Private International Law” (2006) Can. Y.B. Int’l Law 161 at 207-11, 224-45.

<sup>115</sup> *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 at 1096-98, 76 D.L.R. (4th) 256 [*Morguard*].

<sup>116</sup> *Ibid.* at 1098-103.

<sup>117</sup> *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416, 234 D.L.R. (4th) 1.

<sup>118</sup> David Howes, “From Polyjurality to Monojurality: The Transformation of Quebec Law, 1875–1929” (1987) 32 McGill L.J. 523.

household to civil society to province evident in Premier Jean Lesage's slogan, "*Maitres chez nous*".<sup>119</sup>

Critical scholars have taken aim at some of these transpositions. For example, Belleau notes that some Quebec feminists have focused their critical energy on Quebec private law.<sup>120</sup> This is because they hope to develop a distinctly *Québécoise* approach to feminism. Belleau applauds their efforts to struggle for women's equality while at the same time taking up the issue of Quebec's national-cultural identity. But she critiques their willingness to accept the public-law/private-law distinction, arguing that it is incumbent upon them to challenge this dichotomy along with all the others.

### *H. Rights*

Finally, a discussion of the public/private distinction would be incomplete without an account of rights. Rights are integral to liberal thought, and rights-based approaches to law draw on the formalistic modes of legal reasoning characteristic of classical legal thought. But there are various approaches to rights within liberalism. Some liberal thinkers, like Dicey, have used rights to emphasize the protection of individuals and groups against state power, and have thus reinforced the state/civil-society distinction. But other liberal rights theorists have attended to the way liberty and dignity may be threatened by private actors, e.g., in the market or in the family. Rights-based legal reasoning therefore does not necessarily reinforce the public/private distinction. It depends on which rights are protected, as well as for and against whom such rights are protected.

As Eric Adams shows, *Roncarelli* was celebrated in 1959 as a contribution to a Canadian jurisprudence of human rights.<sup>121</sup> However, as discussed above, *Roncarelli* was largely understood as a conflict between state and civil society.<sup>122</sup> The rights at stake were therefore consistent with the kind emphasized by classical liberals.

The role of rights in Canadian law has of course vastly expanded since 1959. In some instances, Canadian courts have approached human rights in ways that perpetuate a classical liberal state/civil-society distinction.<sup>123</sup> On other occasions, courts have been more sensitive to the way power is

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<sup>119</sup> See John Dickinson & Brian Young, *A Short History of Quebec*, 3d ed. (Montreal: McGill-Queen's University Press, 2003) at 319.

<sup>120</sup> Marie-Claire Belleau, "La dichotomie droit privé/droit public dans le contexte québécois et canadien et l'intersectionnalité identitaire", Note, (1998) 39 C. de D. 177.

<sup>121</sup> Eric M. Adams, "Building a Law of Human Rights: *Roncarelli v. Duplessis* in Canadian Constitutional Culture" (2010) 55 McGill L.J. 437.

<sup>122</sup> See Part I.A above.

<sup>123</sup> See e.g. *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174.

exercised by other social actors.<sup>124</sup> Perhaps the most significant development, however, is that we have now become accustomed to situating rights-based formalism alongside policy analysis including proportionality, creating tensions that can be resolved only through adjudication.<sup>125</sup>

### III. The Public and the Private in Administrative Law

The Canadian legal system's approaches to the public and the private have changed since 1959, but they have also endured. In this section, I illustrate the persistence of the public/private distinction with examples drawn from contemporary Canadian administrative law. I focus on two issues: (1) which institutions are subject to judicial review, and (2) which rights and interests provide a basis for review on procedural fairness grounds.

#### A. Availability of Judicial Review

In Canadian administrative law, there is no clear test to determine which bodies' decisions are subject to judicial review. On one hand, courts have often made these determinations according to factors other than the public/private distinction. For most of the twentieth century, the availability of judicial review on natural justice grounds depended largely on whether a body's function could be characterized as "judicial" rather than "administrative".<sup>126</sup> And common law judges have a long history of reviewing the procedural decisions of entities that might be understood as private: social clubs, trade unions, sports organizations, and churches.<sup>127</sup> On the other hand, the state/civil-society distinction has clearly played a role. Courts have considered the publicness of institutions in determining whether their decisions should be reviewable. They may use formalistic criteria (the presence or absence of a statutory mandate) or functional ones (ideas about quintessentially governmental activities). In making such decisions, courts have sometimes relied on essentialized versions of the state/civil-society distinction.<sup>128</sup>

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<sup>124</sup> See e.g. *R. v. Mills*, [1999] 3 S.C.R. 668, 244 A.R. 201; *Dunmore v. Ontario (A.G.)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, 207 D.L.R. (4th) 193.

<sup>125</sup> Compare Kennedy, "Three Globalizations", *supra* note 4 at 63-71.

<sup>126</sup> See Part III.B below.

<sup>127</sup> David Mullan, "Administrative Law at the Margins" in Michael Taggart, ed., *The Province of Administrative Law* (Oxford: Hart, 1997) 134 at 137-40 [Mullan, "Administrative Law"]. For a dramatic example from contemporary Canadian jurisprudence, see *Lake-side Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165, 81 Man. R. (2d) 1.

<sup>128</sup> Allan C. Hutchinson, "Mice under a Chair: Democracy, Courts, and the Administrative State" (1990) 40 U.T.L.J. 374. Discussing the case of *R. v. Panel on Take-overs and Mergers, Ex parte Datafin PLC* ((1986), [1987] Q.B. 815, [1987] 2 W.L.R. 699 (C.A.)), Hutchinson states that such a decision "reinforces the hold that the public/private dis-

I noted earlier, the neo-liberal politics of the 1980s and 1990s proclaimed the need to “privatize”, “deregulate”, and otherwise reduce the role of the state.<sup>129</sup> Indeed, since the rise of neo-liberalism, large parts of the administrative state have been downsized, sold, corporatized, or contracted out. These changes have recharacterized certain institutions and functions as private. Just as Reich’s nightmare of “the joyless landscape of the public interest state” now seems dated,<sup>130</sup> Justice Rand’s reference to “expanding administrative regulation of economic activities”<sup>131</sup> now looks overly simplistic.

To the extent that judicial review is reserved for public bodies, neo-liberal institutional reforms have often diminished the availability of judicial review. Such changes have also limited the availability of other processes applicable to public authority, such as access to information, financial audits, or legislative or ombudsman oversight.<sup>132</sup>

However, since there is no general test for determining the availability of judicial review with respect to a particular institution, the privatization of a state function or entity does not *necessarily* remove it from the province of administrative law. Courts have sometimes reviewed the administrative decisions of bodies whose status is ambiguous.<sup>133</sup> Moreover, some administrative law values may be migrating into private law, as for example in general procedural fairness requirements in employment law.<sup>134</sup> Beyond judicial review of administrative action, there may be other ways of ensuring the public accountability of privatized entities. Some administrative lawyers have pondered expanding the applicability of laws on access to information, granting third parties the right to enforce contracts, or developing new kinds of informal regulation.<sup>135</sup> These lawyers accept the “mixed” or “interdependent” public/private nature of governance and prefer to approach it through more context-specific questions of institutional design.<sup>136</sup>

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tion has on the judicial imagination—the idea that the government is the prime threat to individual liberty and social justice” (Hutchinson, *supra* at 390).

<sup>129</sup> See Part II.E above.

<sup>130</sup> Reich, *supra* note 15 at 778, cited in Mark Aronson, “A Public Lawyer’s Response to Privatisation and Outsourcing” in Michael Taggart, ed., *The Province of Administrative Law* (Oxford: Hart, 1997) 40 at 40-41.

<sup>131</sup> *Roncarelli*, *supra* note 1 at 142, Rand J.

<sup>132</sup> See Taggart, “Nature and Functions”, *supra* note 96; Arthurs, “Administrative State”, *supra* note 96.

<sup>133</sup> Mullan, “Administrative Law”, *supra* note 127 at 146-50. See also Hutchinson, *supra* note 119 at 386-96.

<sup>134</sup> Mullan, “Administrative Law”, *supra* note 127.

<sup>135</sup> Aronson, *supra* note 130.

<sup>136</sup> *Ibid.* See also Freeman, *supra* note 90.

Some legal scholars have pointed out that governments are rarely eager to cede control over important areas of policy.<sup>137</sup> The privatization and outsourcing of government functions has often been accompanied by more aggressive regulation. Some public lawyers argue that neo-liberal institutional changes have really only empowered the state and particularly the executive, helping it to better hide its operations.<sup>138</sup>

I tell this story mainly to illustrate the power of public/private concepts. Although judges and lawyers have found other ways of drawing the boundaries of administrative law, the state/civil-society distinction still plays an important role. The availability of judicial review and other legal mechanisms of accountability depend, to a significant extent, on whether an institution is characterized as public or private.

### *B. Judicial Review on Procedural Fairness Grounds*

In the late nineteenth century and for most of the twentieth century, the principles of natural justice applied only to decisions that were judicial rather than administrative. This distinction was closely related to a rights/privileges distinction. In order to be considered judicial, a decision had to affect “pre-existing” rights and liabilities, whereas an administrative decision acted upon “policy and expediency”.<sup>139</sup> Judicial review was thus restricted to those rights traditionally protected by the common law, such as property rights.<sup>140</sup> “Privileges” granted under statutory powers were excluded.<sup>141</sup> A boundary was thus drawn between state and civil society, although contemporary concepts of property included interests like university degrees, government offices, and membership in clubs and societies.<sup>142</sup>

In 1979, following a British precedent,<sup>143</sup> the Supreme Court of Canada collapsed the judicial/administrative distinction.<sup>144</sup> Administrative de-

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<sup>137</sup> See e.g. David Mullan & Antonella Ceddia, “The Impact on Public Law of Privatization, Deregulation, Outsourcing, and Downsizing: A Canadian Perspective” (2003) 10 *Ind. J. Global Legal Stud.* 199 at 211-22. Mullan and Ceddia conclude that “privatization and deregulation do not go hand in hand” (*ibid.* at 222).

<sup>138</sup> Carol Harlow, “The ‘Hidden Paw’ of the State and the Publicisation of Private Law” in David Dyzenhaus, Murray Hunt & Grant Huscroft, eds., *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Oxford: Hart, 2009) 75.

<sup>139</sup> D.M. Gordon, “Administrative’ Tribunals and Courts” (1933) 49 *Law Q. Rev.* 94 at 107.

<sup>140</sup> The classic case of *Cooper v. The Board of Works for the Wandsworth District* ((1863), 143 E.R. 414 (Common Pleas)) is paradigmatic in this regard.

<sup>141</sup> *Nakkuda Ali v. Jayaratne*, [1951] A.C. 66 (P.C.).

<sup>142</sup> See Mullan, “Administrative Law”, *supra* note 127 at 138.

<sup>143</sup> *Ridge v. Baldwin* (1963), [1964] A.C. 40, [1963] 2 W.L.R. 935 (H.L.).

<sup>144</sup> *Nicholson v. Haldimand-Norfolk Regional Police Commissioners* (1978), [1979] 1 S.C.R. 311, 88 D.L.R. (3d) 671 [*Nicholson*].

cisions involving government-granted “privileges” thus were brought into the realm of procedural fairness review. Canadian courts now review administrative decisions for procedural fairness whenever the “rights, privileges or interests of an individual” are affected.<sup>145</sup>

Although the collapse of the judicial/administrative distinction might appear to have overcome one aspect of the state/civil-society distinction, this statement requires several qualifications. First, a distinction is still drawn between administrative and legislative decisions.<sup>146</sup> Second, and more important for the purposes of my argument, state institutions may be exempt from the duty of procedural fairness when they undertake certain kinds of activities, such as employment and the procurement or management of property. Although these functions are carried out by state institutions, the activities involved are thought of as more characteristic of (private) civil society. While the scope of procedural fairness review has been broadened, many activities are thus still excluded and subject to the “ordinary” (private) law. While we no longer draw the public/private boundary according to which individual rights, interests, or privileges are affected, we may continue to draw it according to what kind of function the state is performing.

But this latter statement, too, must be qualified. In some cases, courts have held that duties of procedural fairness apply to government procurement decisions.<sup>147</sup> Moreover, courts have had a hard time drawing a public/private capacity boundary in the context of government employment.<sup>148</sup> However, it also seems plausible to suggest that our notion of the procedural fairness threshold continues to be affected, albeit in a subterranean way, by our notions of property rights. This suggestion was given counterfactual confirmation in a recent Supreme Court of Canada decision concerning dismissal from public office.<sup>149</sup> As one reason for holding that procedural fairness was not owed in that case, the majority empha-

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<sup>145</sup> *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 at 653, 24 D.L.R. (4th) 44 [references omitted].

<sup>146</sup> *Canada (A.G.) v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, 115 D.L.R. (3d) 1. For a critical appraisal of that view, see Geneviève Cartier, “Procedural Fairness in Legislative Functions: The End of Judicial Abstinence?” (2003) 53 U.T.L.J. 217.

<sup>147</sup> See e.g. *Shell Canada Products Ltd. v. Vancouver (City of)*, [1994] 1 S.C.R. 231, 110 D.L.R. (4th) 1.

<sup>148</sup> See e.g. *Nicholson*, *supra* note 144; *Indian Head School Division No. 19 v. Knight*, [1990] 1 S.C.R. 653, 69 D.L.R. (4th) 489; *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, 177 D.L.R. (4th) 73; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, 291 D.L.R. (4th) 577 [*Dunsmuir*]. On this score, it is interesting to note that Rand J. made a point of excluding “ordinary governmental employment” from the scope of his *dicta* on discretion (*Roncarelli*, *supra* note 1 at 142, Rand J.).

<sup>149</sup> *Dunsmuir*, *supra* note 148.

sized that government employment is no longer understood as a property right.<sup>150</sup>

When we move from the threshold into the content of procedural fairness, “[t]he importance of a decision to the individuals affected” becomes one factor to be balanced against several others.<sup>151</sup> It is therefore more difficult to determine the impact of judges’ perceptions of the different kinds of interests involved. But it seems plausible to suggest that the collapse of the rights/privileges distinction, and the openness to procedural fairness whenever any rights, privileges, and interests are at stake, leave judges to fall back on uncritical commonsense assumptions about which kinds of interests are more important than others. To the extent that judges are still influenced by common law conceptions of rights, administrative law may still be geared toward their protection.

## Conclusion

The enduring interest of *Roncarelli* depends on a complex of ideas about the public and the private. *Roncarelli* draws on the meanings that the public and the private had acquired in earlier eras, notably those of classical liberalism. And in the twenty-first century, these meanings remain pervasive, taken-for-granted features of our legal consciousness.

*Roncarelli* demonstrates not only the persistence of these concepts, but also their flexibility. And it is this very flexibility that makes the concepts of the public and the private so resilient. Our ways of thinking about rights and about the administrative state have changed a great deal since Justice Rand’s time, and even more since Dicey’s. Our ideas about the public and the private have changed accordingly.<sup>152</sup> But *Roncarelli* and its legacy demonstrate how much they have also remained the same.

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<sup>150</sup> *Ibid.* at para. 99.

<sup>151</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 26, 174 D.L.R. (4th) 193.

<sup>152</sup> For an excellent contemporary exploration, see Law Commission of Canada, ed., *New Perspectives on the Public-Private Divide* (Vancouver: UBC Press, 2003).