

## WAS DUPLESSIS RIGHT?

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Given the inclination of legal scholars to progressively displace the meaning of a judicial decision from its context toward abstract propositions, it is no surprise that at its fiftieth anniversary, *Roncarelli v. Duplessis* has come to be interpreted in Manichean terms. The complex currents of postwar society and politics in Quebec are reduced to a simple story of good and evil in which evil is incarnated in Duplessis's "persecution" of Roncarelli.

In this paper the author argues for a more nuanced interpretation of the case. He suggests that the thirteen opinions delivered at trial and on appeal reflect several debates about society, the state and law that are as important now as half a century ago. The personal socio-demography of the judges authoring these opinions may have predisposed them to decide one way or the other; however, the majority and dissenting opinions also diverged (even if unconsciously) in their philosophical leanings in relation to social theory (internormative pluralism), political theory (communitarianism), and legal theory (pragmatic instrumentalism). Today, these dimensions can be seen to provide support for each of the positions argued by Duplessis's counsel in *Roncarelli* given the state of the law in 1946.

Étant donné la tendance qu'ont les juristes à extraire la signification d'une décision judiciaire de son contexte pour l'amener vers des propositions abstraites, il n'est pas surprenant que l'arrêt *Roncarelli c. Duplessis*, dont c'est le cinquantième anniversaire, soit interprété d'une manière manichéenne. Les courants sociopolitiques complexes du Québec de l'après-guerre sont réduits à une simple histoire de bien et de mal dans laquelle la « persécution » de Roncarelli par Duplessis incarne le mal.

Dans cet essai, l'auteur propose une interprétation plus nuancée de l'arrêt. Il suggère que les treize jugements prononcés en première instance et en appel reflètent plusieurs débats sur la société, sur l'État et sur le droit qui sont tout aussi pertinents aujourd'hui qu'il y a un demi-siècle. L'identité sociodémographique des juges qui ont rédigé ces jugements les a peut-être prédisposés à décider dans un sens ou dans l'autre. Toutefois, les opinions majoritaires et dissidentes détachent (peut-être inconsciemment) de cette identité à travers des penchants philosophiques quant à la théorie sociale (le pluralisme internormatif), à la théorie politique (le communautarisme) et à la théorie juridique (l'instrumentalisme pragmatique). Aujourd'hui, ces théories pourraient être vues comme soutenant chacun des arguments plaidés par les avocats de Duplessis dans l'affaire *Roncarelli* compte tenu de l'état du droit en 1946.

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## Introduction

The year 1959 is remembered by Canadian public lawyers for the Supreme Court of Canada's decision in *Roncarelli v. Duplessis*.<sup>1</sup> For many at the time, the case was not just about the relationship of law and politics. It reflected a larger issue that was also current in the United Kingdom and the United States—namely, the perennial debate between the proponents of positivism and those of natural law. In the United Kingdom, the salient contemporary events were the delivery, under the title “The Enforcement of Morals”,<sup>2</sup> of the Maccabean Lecture at the British Academy by Law Lord Patrick Devlin and the riposte by Oxford professor H.L.A. Hart.<sup>3</sup> In the United States, Hart's Holmes Lecture at Harvard entitled “Positivism and the Separation of Law and Morals”,<sup>4</sup> and the reply by Lon Fuller,<sup>5</sup> occupied a similar intellectual space. In the Canadian judicial instantiation of this debate, which was overlain by consideration of the state's role in preserving traditional values against unbridled liberalism,<sup>6</sup> the arguments advanced on behalf of Duplessis were quickly dismissed as erroneous, opportunistic, and theoretically ungrounded. By contrast, those presented by counsel for Roncarelli attracted scholarly favour for their legal and jurisprudential acuity.<sup>7</sup>

Unsurprisingly, given the inclination of legal scholars to progressively displace the meaning of a judicial decision from its context toward abstract propositions, at its fiftieth anniversary, *Roncarelli* has come to be

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<sup>1</sup> [1959] S.C.R. 121, 16 D.L.R. (2d) 689 [*Roncarelli* cited to S.C.R.].

<sup>2</sup> Lord Devlin's initial lecture of 1958 was later expanded into a book of the same title. See Patrick Devlin, *The Enforcement of Morals* (London, U.K.: Oxford University Press, 1965).

<sup>3</sup> The Harry Camp Lectures were delivered at Stanford Law School and published thereafter: H.L.A. Hart, *Law, Liberty and Morality* (Stanford: Stanford University Press, 1963).

<sup>4</sup> H.L.A. Hart, “Positivism and the Separation of Law and Morals” (1958) 71 Harv. L. Rev. 593 [Hart, “Positivism”].

<sup>5</sup> Lon L. Fuller, “Positivism and Fidelity to Law—A Reply to Professor Hart” (1958) 71 Harv. L. Rev. 630 [Fuller, “Positivism and Fidelity”].

<sup>6</sup> Compare the political theory advanced in the following: Province of Quebec, *Report of the Royal Commission of Inquiry on Constitutional Problems* (Quebec: Government of Quebec, 1956) (chaired by Justice Thomas Tremblay) [*Tremblay Report*]; Canada, *Report of the Royal Commission on Dominion-Provincial Relations* (Ottawa: Queen's Printer, 1954) (chaired by Newton Wesley Rowell and Joseph Sirois) [*Rowell-Sirois Report*].

<sup>7</sup> For scholarly reaction to the *Roncarelli* decision at the time that it was rendered, see Claude-Armand Sheppard, “*Roncarelli v. Duplessis*: Art. 1053 C.C. Revolutionized” (1960) 6 McGill L.J. 75, reprinted in (2010) 55 McGill L.J. v; Edward McWhinney, Case Comment on *Roncarelli v. Duplessis* (S.C.C.), (1959) 37 Can. Bar Rev. 503. For a thorough review of the socio-political context of the case, see Michel Sarra-Bournet, *L'affaire Roncarelli : Duplessis contre les Témoins de Jéhovah* (Quebec: Institut québécois de recherche sur la culture, 1986).

interpreted in Manichean terms. So, for example, the complex currents of postwar society and politics in Quebec are reduced to a simple story of good and evil. In this story, evil is incarnated in Duplessis's "persecution" of Roncarelli. Few sympathize with the prime minister's struggle from 1944 through 1959 to defend a particular conception of Quebec society against two external threats that Roncarelli's actions were seen to symbolize. One was the increasing attraction of an individualistic, economic-liberal conception of the state in the north atlantic region. The second was the pressure to legislate a big-brother *État-providence* of the type articulated by Franklin Roosevelt's New Deal in the United States, the Rowell-Sirois Commission in Canada, and the Beveridge Report in the United Kingdom. History is written by winners and so it was predictable that *Roncarelli* would eventually be celebrated as the vindication of the rule of law against an oppressive, rights-disrespecting government.<sup>8</sup>

In this paper I argue for a more nuanced interpretation of the case. I suggest that the thirteen opinions delivered at trial and on appeal reflect several social and intellectual debates about society, the state, and law that are as important today as they were half a century ago. While the personal socio-demography of the judges authoring these opinions may have predisposed them to decide one way or the other (Part I), the majority and dissenting opinions also reflected—even if unconsciously—divergent philosophical leanings in relation to social theory (Part II), political theory (Part III), and legal theory (Part IV). In each of these dimensions Duplessis's position finds powerful support: the social theory of Patrick Devlin and George Grant rather than that espoused by H.L.A. Hart and F.R. Scott; the political theory of the Tremblay Commission and Charles Taylor rather than that of the Rowell-Sirois Report and Pierre Trudeau; and the legal theory of Lon Fuller and John Willis rather than that advocated by H.L.A. Hart and J.C. McRuer.

Before proceeding, a caveat is in order. Let me be clear that I am not claiming sainthood for Duplessis. I do not believe that Duplessis's contention that all permits and other forms of "new property" are exclusively state-granted privileges is appropriate to a robust, democratic, multicultural state—even if some contemporary forms of indirect governance remain of this character.<sup>9</sup> Nor do I believe that all the quasi-privative

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<sup>8</sup> For an elaboration of this standard, English-language, pro-Jehovah's Witnesses account of Duplessis's actions, see William Kaplan, *State and Salvation: The Jehovah's Witnesses and Their Fight for Civil Rights* (Toronto: University of Toronto Press, 1989) c. 8. For a more sympathetic narrative of Duplessis's motives and actions, see Conrad Black, *Duplessis* (Toronto: McClelland & Stewart, 1977).

<sup>9</sup> For an analysis of franchises, exclusive-dealing contracts, public-private partnerships, and other modern tools of indirect government by which states achieve regulatory ends by enlisting private parties, see Lester M. Salamon, ed., *The Tools of Government: A Guide to the New Governance* (New York: Oxford University Press, 2002).

clauses<sup>10</sup> that procedurally impeded Roncarelli's quest for vindication are fully justifiable today—even if similar (and stronger) limitations on a citizen's right to sue the Crown and its agents were part of the law everywhere else in Canada in 1947.<sup>11</sup> Nor, finally, do I seek to justify the manner in which Duplessis used the crusade against Jehovah's Witnesses as a political strategy.<sup>12</sup>

My goal is more modest. It is to trace out summarily the conception of a society, of a state, and of the relationship between the several normative orders that comprise a modern multicultural state that can be viewed as having potentially grounded Duplessis's claim. In doing so, I do not offer a thoroughgoing defence of the relevant theories. I aim only to draw attention to them in the hopes that scholars can gain a fuller understanding of the case in its social and historical context.

## I. The Judgments and the Judges

A brief scan of references to *Roncarelli* in public law texts reveals that it is rarely cited for any propositions other than an abstract, judicially enforceable rule of law claim that no official is above the law.<sup>13</sup> Although one contemporary commentator understood the case as primarily about a novel extension of the principle of civil liability in article 1053 of the *Civil Code of Lower Canada* to decisions of public officials,<sup>14</sup> and another as il-

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<sup>10</sup> Two in particular are, in today's light, suspect: the requirement of judicial permission to sue employees of the Quebec Liquor Commission, and the obligation to obtain the permission of the Attorney General to sue the Quebec Liquor Commission. See *Alcoholic Liquor Act*, R.S.Q. 1941, c. 255, ss. 12(1), 12(2). As I argue in Part IV below, however, the provision under which it was necessary to give a one-month advance notice of an intention to sue public servants (art. 88 C.C.P.) is of a different character and can be justified on public policy grounds.

<sup>11</sup> The proceedings were launched in the 1940s when it was still necessary to obtain a fiat from the Attorney General prior to the enactment of the *Crown Proceedings Act, 1947* ((U.K.), 10 & 11 Geo. VI, c. 44), which was adopted throughout Canada between 1951 and 1954. See Peter W. Hogg & Patrick J. Monahan, *Liability of the Crown*, 3d ed. (Scarborough, Ont.: Carswell, 2000) c. 1 [Hogg & Monahan, *Liability*].

<sup>12</sup> See Sarra-Bournet, *supra* note 7.

<sup>13</sup> See e.g. Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2009) (citing the case twice without elaboration); The Constitutional Law Group, *Canadian Constitutional Law*, 3d ed. (Toronto: Emond Montgomery, 2003) at 640-44 (citing *Roncarelli* simply as a case protecting rights); Gérald-A. Beaudoin, *La Constitution du Canada : institutions, partage des pouvoirs, droits et libertés* (Montreal: Wilson & Lafleur, 1990) (citing the case seven times, notably in the introduction under the rule of law); Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 5th ed. (Cowansville, Qc.: Yvon Blais, 2008) at 690 (citing the case four times, notably under the section on the rule of law).

<sup>14</sup> Sheppard, *supra* note 7 at 97.

illustrating a conflict of legal traditions,<sup>15</sup> *Roncarelli* is today cited as an example of jurisdictional error for abuse of discretion, acting under dictation and usurpation of authority.<sup>16</sup>

The case was originally decided in the Quebec Superior Court<sup>17</sup> by Justice Mackinnon,<sup>18</sup> who found for Roncarelli in a judgment dated 2 May 1951. Upon appeal to the Quebec Court of Queen's Bench (Court of Appeal), in a judgment rendered on 12 April 1956,<sup>19</sup> the Quebec Superior Court decision was reversed (per Justices Bissonnette,<sup>20</sup> Pratte,<sup>21</sup> Casey,<sup>22</sup>

<sup>15</sup> McWhinney, *supra* note 7 at 506-507, 510-12.

<sup>16</sup> See e.g. David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) (citing the case seven times for these propositions); Colleen M. Flood & Lorne Sossin, eds., *Administrative Law in Context* (Toronto: Emond Montgomery, 2008) at 87-90 (on the rule of law), 275-78 (on discretion); Patrice Garant, *Droit administratif*, 5th ed. (Cowansville, Qc.: Yvon Blais, 2004) at 207, 243, 258 (citing the case ten times primarily on discretion), at 960 (on the civil liability of officials).

<sup>17</sup> *Roncarelli v. Duplessis* (1951), [1952] 1 D.L.R. 680 (Qc. Sup. Ct.). The action was launched in June 1947 and came on for trial in May 1950. Judgment was rendered a year later. Whether because the case was written in English, because of its subject matter, or both, the case was not reported in the official *Rapports judiciaires du Québec—Cour supérieure*. Nonetheless, it attracted at least one academic comment by Wade, who was then editor of A.V. Dicey's *Introduction to the Study of the Law of the Constitution* (10th ed. by E.C.S. Wade (London, U.K.: Macmillan, 1959)). See E.C.S. Wade, Case Comment on *Roncarelli v. Duplessis* (*Sup. Ct.*), (1951) 29 Can. Bar Rev. 665.

<sup>18</sup> Cecil Gordon Mackinnon was born in Cowansville, Qc., in 1879 and studied at Bishop's (B.A.), McGill (B.C.L.), and Montpellier. He practised in Montreal with a Conservative firm (Senator George Foster), served as a field-grade officer in World War I, and was appointed to the Quebec Superior Court on 25 February 1934, retiring on 1 February 1953. A scan of the official *Rapports judiciaires du Québec—Cour supérieure* reveals eighty-three decisions by Mackinnon J. between 1935 and 1952, none of which deals with an issue of civil liberties and none of which is particularly remarkable. See I.-J. Deslauriers, *La Cour supérieure du Québec et ses juges : 1849–1<sup>er</sup> janvier 1980*, (Quebec: n.p., 1980) at 205.

<sup>19</sup> *Duplessis v. Roncarelli*, [1956] B.R. 447 (C.A.) [*Roncarelli* (C.A.)]. See also Benjamin J. Greenberg, Case Comment on *Duplessis v. Roncarelli* (C.A.), (1956) 3 McGill L.J. 82. The case had been argued in November 1954 and judgment was released on 12 April 1956.

<sup>20</sup> Bernard Bissonnette was born in Saint-Esprit (Montcalm County) in 1898 and graduated in law from the University of Montreal in 1927. He practised in Montreal with a Liberal firm (Honoré Mercier, Gérald Fauteux) and was elected to the Legislative Assembly in 1939, serving as Speaker until 8 May 1942, when he was appointed to the Court of King's Bench (Montreal division), from which he retired in 1964. See Comité général des juges de la cour supérieure de la province de Québec, Bulletin No. 38, *La Cour d'appel du Québec et ses juges, 1849 à 1980* by Ignace-J. Deslauriers (Montreal: Cour supérieure de la Province de Québec, 1980) at 46.

<sup>21</sup> Garon Pratte was born in Rivière-du-Loup in 1900. He studied at the University of Ottawa (B.A.) and Laval (LL.L.), and practised with a Liberal firm (the Right Honourable Ernest Lapointe) in Quebec City from 1923 until 1937, when he was appointed to the Quebec Superior Court. On 2 October 1945, he was appointed to the Court of King's Bench (Quebec Division), where he served until 1968. In 1943 he served on the Royal Commission of Inquiry into Labour Difficulties in the Pulp and Paper Industry in Sa-

and Martineau,<sup>23</sup> with Justice Rinfret<sup>24</sup> dissenting). Upon further appeal to the Supreme Court of Canada, the trial judgment was restored (per Chief Justice Kerwin and Justices Locke, Rand, Martland, Judson, and Abbott, with Justices Taschereau, Cartwright, and Fauteux dissenting).<sup>25</sup>

### A. *Brief Summary of the Judgments*

Five main issues were raised in the pleadings and addressed by one or more of the thirteen judges who drafted opinions in the case: (1) Did Duplessis “order” the cancellation, or, if he did not actually “order” the cancellation, was his opinion determinative? (2) Did Duplessis have the legal authority to make such an order? (3) Was the discretion of the head of the Quebec Liquor Commission properly exercised? (4) Was Duplessis immune from a civil action? and (5) Did the failure to give Duplessis notice as required by article 88 of the *Code of Civil Procedure* (C.C.P.) bar Roncarelli’s claim?

Justice Mackinnon at trial, Justice Rinfret dissenting on appeal, and Justice Abbott in the Supreme Court of Canada answered all these questions identically. For them, Duplessis actually ordered the cancellation; his order was determinative; he had no authority to do so; his actions improperly influenced the discretion of the head of the Quebec Liquor Commission; he was not immune from suit either as prime minister or as a

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guenay-Lac Saint-Jean. He is the father of former Supreme Court Justice Yves Pratte. See *ibid.* at 32.

<sup>22</sup> Paul Casey was born in Montreal in 1904 and studied at Loyola (B.A.) and McGill (B.C.L.). He practised in Montreal with a Liberal firm (the Right Honourable Douglas Abbott) from 1929 until his appointment to the Court of King’s Bench (Montreal Division) on 27 December 1946. He retired in 1979. See *ibid.* at 31.

<sup>23</sup> Jean Martineau was born in Saint Hyacinthe in 1895 and studied at the Collège de Saint-Jean (B.A.) and the University of Montreal (LL.L.). He practised law in Montreal from 1919 until he was appointed to the Court of Queen’s Bench (Montreal Division) on 18 August 1954. His father was a Quebec Superior Court judge and he was a member of the Bloc populaire in the 1930s and 1940s. He resigned from the court in 1959 and rejoined his firm (Martineau, Walker) having written no other judgments in notable cases during his tenure. See *ibid.* at 32.

<sup>24</sup> G.-Édouard Rinfret was born in Saint-Jérôme in 1905 and studied at the Collège Sainte-Marie (Montreal) (B.A.), McGill (B.C.L.), and the University of Montreal (LL.M.). From 1928, he practised law with Liberal firms in Montreal, and in 1934 was first president of the Association de la jeunesse libérale du Québec. He was Member of Parliament for Outremont from 1945, and was Postmaster General from 1949 until his appointment to the Court of King’s Bench (Montreal Division) on 13 February 1952. He was appointed Chief Justice of Quebec in 1977 and retired in 1980. He is the son of the Right Honourable Thibodeau Rinfret, Chief Justice of Canada (1944–54). See *ibid.* at 33–34.

<sup>25</sup> See *Roncarelli*, *supra* note 1. See the summary biographies of justices of the Supreme Court of Canada, online: Supreme Court of Canada <<http://www.scc-csc.gc.ca>>.

private citizen; and he could not invoke article 88 C.C.P. as a defence since he was acting outside the scope of his office.

The other five majority judges of the Supreme Court of Canada answered identically to these three, except that they did not opine on the question of whether Duplessis would be immune from liability if he were acting in his official capacity, for them a counterfactual hypothetical.

Each of the four majority judges in the Quebec Court of Appeal wrote a separate judgment, finding either that Duplessis did not order the cancellation, or, in the case of Justice Pratte, that he ordered the cancellation but without determinative effect since the head of the Liquor Commission had already decided on his own to do so. None held that Duplessis was immune from suit, and two expressly stated that even as prime minister and Attorney General he was not so immune. Finally, none found it necessary to address the questions of whether Duplessis was acting within the scope of his authority and whether he could plead the benefit of article 88.

The three dissenting judges in the Supreme Court of Canada decided the case on different grounds. Two judges, Justices Cartwright and Fauteux, concluded that Duplessis ordered the cancellation. Justice Fauteux found that Duplessis had no authority to interfere but that the claim was barred by article 88. Justice Taschereau agreed with the latter conclusion, arguing also that Duplessis did not cease to be acting in his official capacity simply because he might have committed a mistake. Justice Cartwright did not expressly find that Duplessis had the authority to order the cancellation, but concluded that the manager of the Liquor Commission had an unfettered discretion to revoke the permit. Consequently, the manager was entitled to take whatever counsel he wished, from whom-ever he wished, and no orders or influence exercised by Duplessis could give rise to a civil wrong.

Curiously, twelve of the fifteen judges wrote lengthy opinions on the irrelevant question, now perceived as central, of whether the discretion of the manager of the Liquor Commission was properly exercised—with eight finding that it was not and four finding that it was.<sup>26</sup> The action was not brought to have the decision set aside on that basis. Nor was the action directed against either the Liquor Commission or its manager, Archambault. Only Justices Pratte, Taschereau, and Fauteux appear to have understood that the judgment of the majority would have been the same had Duplessis actually ordered Archambault *not* to revoke the licence. Of course, there would then have been no harm to Roncarelli compensable by damages. But, on the logic of the majority, by wrongfully dic-

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<sup>26</sup> See Sheppard, *supra* note 7 at 90-92. Mackinnon J., Rinfret J.A., Kerwin C.J.C., Rand, Martland, Abbott, Locke, and Judson JJ. found an improper exercise of discretion; Bissonnette, Martineau, and Casey J.J.A. and Cartwright J. found no improper exercise.

tating to Archambault how to exercise his discretion, Duplessis would have committed a legal fault nonetheless, and in following these orders Archambault would have abused his discretion.

### *B. Socio-demographic Profiles of the Judges*

It is often not enough to know the reasons judges give in their judgments. Two other sometimes unacknowledged factors can bear on a decision. First, judges have their own distinctive socio-demographic background that can influence their decisions regardless of the facts of particular cases. Second, they also have certain ideological predispositions to find in certain ways, again regardless of the facts of the case before them.<sup>27</sup>

Every judge is an individual with a particular constellation of identity characteristics and a unique life experience. While it may be that being left-handed or vegetarian will be found to play a determinative role at some future time, given present knowledge, one can identify six significant socio-demographic criteria that appear to correlate with judicial outcomes in Canada: gender,<sup>28</sup> class,<sup>29</sup> language, geography, religion, and political party of appointment.

Taking these factors together, one can develop a profile of the judge who voted pro-Duplessis: any combination of being three or more of (1) francophone, (2) from Quebec, (3) Roman Catholic, and (4) appointed by a Liberal government. Five judges—Bissonnette, Pratte, Martineau, Taschereau, and Fauteux—score four of four; and one judge—Casey, an anglophone—scores three of four.

The profile of the judge who voted pro-Roncarelli is as follows: any combination of being three or more of (1) anglophone, (2) not from Quebec, (3) not Roman Catholic, and (4) appointed by a Conservative government. Two judges—Martland and Judson—score four of four. And four judges—Mackinnon (from Quebec), Rand and Locke (Liberal appointments), and Kerwin (Roman Catholic)—score three of four.

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<sup>27</sup> I assume these two points are uncontroversial and forego citation to the plethora of articles and monographs teasing out their permutations.

<sup>28</sup> All the judges were male; there is no publicly available evidence as to sexual orientation.

<sup>29</sup> There is insufficient data to assess the impact of social class on the decision, although it would appear that at least Rand J., and possibly Kerwin C.J.C. and Locke J., came from working class backgrounds. Both Martland and Judson JJ. were born in England. All others were born in Canada. Among the Quebec judges, none could be said to have come from modest circumstances, and most were from families with a legal background. All were born in Quebec.

	Court	Judge	Francophone	From Quebec	Roman Catholic	Liberal appointee
Pro-Duplessis	C.A.	Bissonnette J.A.				
		Casey J.A.				
		Martineau J.A.				
		Pratte J.A.				
	S.C.C.	Cartwright J.				
		Fauteux J.				
		Taschereau J.				
Pro-Roncarelli	Sup.Ct.	Mackinnon J.				
	C.A.	Rinfret J.A.				
	S.C.C.	Abbott J.				
		Judson J.				
		Kerwin C.J.C.				
		Locke J.				
		Martland J.				
		Rand J.				

Only three judges did not fit these profiles: Rinfret (francophone, Roman Catholic, from Quebec, and appointed by a Liberal government), who voted pro-Roncarelli despite having four pro-Duplessis characteristics; Cartwright (anglophone, not Roman Catholic, not from Quebec, and appointed by a Liberal government), who voted pro-Duplessis despite having three pro-Roncarelli characteristics; and Abbott (anglophone, non-Roman Catholic, from Quebec, and appointed by a Liberal government) who voted pro-Roncarelli despite having two pro-Duplessis characteristics.

More generally, if one takes account of all judges who heard what have come to be understood as the Quebec “fundamental freedoms” cases of the 1950s, one discovers that (1) with only three exceptions, no Quebec-based, Roman Catholic, francophone judge on the Supreme Court of Canada ever decided a case against the government,<sup>30</sup> and (2) no anglophone judge on the Supreme Court of Canada except Justice Cartwright (three

<sup>30</sup> *Boucher v. R.* (1950), [1951] S.C.R. 265, [1951] 2 D.L.R. 369 [*Boucher*]; *Saumur v. Quebec (City of)*, [1953] 2 S.C.R. 299, [1953] 4 D.L.R. 641 [*Saumur*]; *Chaput v. Romain*, [1955] S.C.R. 834, 1 D.L.R. (2d) 241 [*Chaput*]; *Henry Birks & Sons (Montreal) Ltd. v. Montreal (City of)*, [1955] S.C.R. 799, [1955] 5 D.L.R. 321 [*Henry Birks*]; *Switzman v. Elbling*, [1957] S.C.R. 285, 7 D.L.R. (2d) 337 [*Switzman*]; *Roncarelli*, *supra* note 1; *Lamb v. Benoit*, [1959] S.C.R. 321, 17 D.L.R. (2d) 369 [*Lamb*]. The exceptions were Fauteux and Taschereau JJ. in *Chaput* and *Henry Birks* (both unanimous decisions, and in *Henry Birks* the issue was Sunday closing laws, irrelevant to either communistic propaganda or Jehovah’s Witnesses), and Fauteux J. in *Switzman*.

times) and Justice Abbott (once) ever found for the government.<sup>31</sup> In the Quebec Court of Appeal, apart from the dissent of Justice Rinfret in *Roncarelli*, in each of these “fundamental freedoms” cases, no francophone, Roman Catholic judge ever found for the plaintiff, while no anglophone, non-Catholic judge ever found for the government.<sup>32</sup> I elaborate the significance of these profiles in the remainder of this section.

### C. Ideological Profiles of the Judges

While *Roncarelli* was wending its way up the courts, a new empirical approach to understanding judicial decision-making, scalogram analysis, was becoming popular. Scalogram analysis focuses on the actual outcomes of contested appellate decisions, organizing cases according to the key legal principle at issue and comparing individual judicial outcomes along each policy dimension. Two studies—one covering the period from 1950 to 1960,<sup>33</sup> and the other the period from 1958 to 1967<sup>34</sup>—present data sets relevant for understanding the *Roncarelli* decision of the Supreme Court of Canada.<sup>35</sup>

The first study cross-tabulated data from all non-unanimous decisions dealing with “public policy” questions relating to civil liberties<sup>36</sup> and eco-

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<sup>31</sup> Cartwright J. found for the government in *Boucher*, *Saumur*, and *Roncarelli* on substantive grounds, and Abbott J. found for the government in *Lamb* on procedural grounds. Kerwin C.J.C., the only anglophone Roman Catholic on the Supreme Court of Canada, consistently found for the plaintiff, perhaps a reflection of the minority position of Roman Catholics in largely Protestant Ontario.

<sup>32</sup> In each case cited in *supra* note 30 in which they appeared, Bissonnette, Pratte, and Martineau J.J.A. (and except in *Roncarelli* (C.A.), Rinfret J.A.) supported the government. Casey J., a non-francophone Roman Catholic, found against the plaintiff in *Roncarelli*, *Lamb*, *Chaput*, and *Henry Birks*, the only fundamental freedoms decisions in which he participated.

<sup>33</sup> Donald E. Fouts, “Policy-Making in the Supreme Court of Canada, 1950–1960” in Glendon Schubert & David J. Danelski, eds., *Comparative Judicial Behavior: Cross-Cultural Studies of Political Decision-Making in the East and West* (New York: Oxford University Press, 1969) 257.

<sup>34</sup> Sydney R. Peck, “A Scalogram Analysis of the Supreme Court of Canada, 1958–1967” in Schubert & Danelski, *supra* note 33, 293.

<sup>35</sup> In preparation of this article, I attempted a rudimentary scalogram analysis of fundamental freedoms, criminal law, and administrative law decisions taken between 1946 and 1960 by the five appeal court judges who sat on *Roncarelli*. No statistically significant information apart from that already reported (see text accompanying *supra* notes 31–32) could be gleaned from this tabulation.

<sup>36</sup> The most pro-civil liberties judge was Cartwright J., who voted 39 times pro-claimant to 4 times pro-defendant. Three others were generally pro-civil liberties: Martland J. (5–2); Rand J. (19–12); and Kerwin C.J.C. (21–12). The least pro-civil liberties judges were from Quebec: Rinfret J.A. (2–10), Abbott J. (6–12), Fauteux J. (6–39), and Taschereau J. (7–35).

nomic regulation<sup>37</sup> in a four-cell table. The pro-civil liberties and pro-economic regulation judges are characterized as liberal (Justice Rand, and less so Chief Justice Kerwin and Justice Judson); the pro-civil liberties and anti-economic regulation judges are labelled as individualist (Justice Cartwright, and less so Justice Martland); the anti-civil liberties and pro-economic regulation judges are characterized as authoritarian (Justices Fauteux, Taschereau, and Abbott); and the anti-civil liberties and anti-economic regulation judges are labelled as conservative (Justice Locke).<sup>38</sup>

The second study sought to determine how judges responded on a pro-government or anti-government scale, by examining several policy areas: criminal law, civil liberties, economic regulation, economic underdog, labour, taxation, and federal authority. The period covered was 1958 to 1967, so many fewer decisions taken by the judges in *Roncarelli* were reported. Overall, it appears that Justices Cartwright and Locke were the most pro-private party, pro-federal, and pro-freedom of religion, while Justices Taschereau, Fauteux, Abbott, and Judson were most pro-government, pro-provincial, and anti-freedom of religion. Justice Rand was pro-government, pro-freedom of religion, and pro-provincial. By contrast, Chief Justice Kerwin and Justice Martland were pro-private party, pro-freedom of religion, and pro-provincial.<sup>39</sup>

The conclusion that may be drawn from these two studies is that the vote in *Roncarelli* was (1) strongly consistent with the general pattern of Justices Rand, Taschereau, and Fauteux; (2) moderately consistent with the general pattern of Chief Justice Kerwin and Justices Martland and Judson; (3) moderately inconsistent with the pattern of Justices Locke and Abbott; and (4) strongly inconsistent with the pattern of Justice Cartwright. Continuing the tabulation, scoring four for strong consistency and one for strong inconsistency, of a potential consistency total of thirty-six, the *Roncarelli* decision scored twenty-six or almost a seventy-five per cent weighted consistency.

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<sup>37</sup> On the economic regulation scale, in non-labour relations matters, Abbott J. (13–4), Kerwin C.J.C. (29–9), Rand J. (20–8), Fauteux J. (18–6), Judson J. (6–4), and Taschereau J. (19–12) all scored above sixty per cent in favour of government regulatory initiatives, while Martland J. (5–6), Locke J. (13–23), and Cartwright J. (6–32) scored below fifty per cent.

<sup>38</sup> For an alternative interpretation of these intellectual positions, see Gad Horowitz, *Canadian Labour in Politics* (Toronto: University of Toronto Press, 1968) c. 1 at 3 (“Conservatism, Liberalism, and Socialism in Canada: An Interpretation”).

<sup>39</sup> While Martland J. was generally pro-province, this orientation was absent where it conflicted with his perception that a case involved the rights of private parties or freedom of religion. Abbott J. departed from his usual pattern and found for *Roncarelli*.

#### *D. Synthesizing This Context*

While much additional information and further analysis would be required to advance plausible causal hypotheses in relation to the correlations reported in these studies, some general inferences can be suggested.

Those judges who found for Roncarelli were typically anglophone (seven of eight), not from Quebec (five of eight), and not Roman Catholic (six of eight). But if from Quebec, they were educated in law at McGill University (three of three) and involved in federal, rather than provincial, politics (three of three). Their opinions reflected either an individualist preoccupation with controlling the state (Justices Rand, Locke, Martland, and Judson), a High Tory sense of outrage at Duplessis's actions (Justice Mackinnon), the sensibilities of a religious minority (Chief Justice Kerwin, a Roman Catholic from Ontario), or the reflexes of a long-time political opponent of Duplessis in federal politics (Justices Abbott and Rinfret, the latter being the only Quebec-based, Roman Catholic francophone judge who had been a member of the Parliament of Canada).

Those judges who found for Duplessis were typically francophone (five of seven), Quebec-based (six of seven), Roman Catholic (six of seven), and active in provincial Liberal politics in Quebec (six of seven); and, if from Quebec, not from the Montreal region (five of six), not educated in law at McGill (five of six), and generally of nationalist socio-political orientation, committed to a provincial-rights, compact theory of the *BNA Act*<sup>40</sup> (four of six). The only exceptions were Justice Casey who was neither francophone nor from outside Montreal, but a Roman Catholic and educated at McGill, and Justice Cartwright, who was an anglophone, Protestant, not from Quebec, and strongly pro-defendant in criminal cases.

Half a century after the decision, commentators have largely forgotten this context. They have tended to view the majority and dissenting opinions expressed in the judgment as reflecting, respectively, universal ideas of law and liberal legalism in one case, and local, corrupt *realpolitik* in the other. The above data about the judges who heard the *Roncarelli* case suggest that those whose decisions reflected the position we today associate with universalizable law had a politically contingent intellectual location.<sup>41</sup> By contrast, judges with—broadly speaking—a more collectivist world view tended to side with a government anxious to protect citizens from the siren song of liberal individualism. That is, the difference between majority and minority positions does not automatically map onto the now familiar distinctions: law *vs.* politics, rule of law *vs.* rule of man,

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<sup>40</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [*BNA Act*].

<sup>41</sup> This point is adverted to but not developed by McWhinney (*supra* note 7 at 506).

and rights-respecting limited government *vs.* arbitrary and unfettered discretion.

In the following sections of this paper, I locate the arguments advanced by Duplessis's counsel within a framework of social, political, and legal theory that helps to explain their attractiveness to those Quebec-based judges who supported his position.<sup>42</sup> My objective is not to claim that these theoretical positions justify the conclusions that Duplessis drew from them—although they show those conclusions to be more defensible than is commonly thought in our day. It is, rather, to gesture toward their potential for providing an alternative, normatively plausible framework for deciding issues of governance, civil liberties, and the rule of law.

## II. The Social Theory of Patrick Devlin and George Grant

The post-depression period posed several economic, political, and social challenges for democracies in the North Atlantic. Among the social challenges were increased non-traditional immigration (from the Mediterranean and southern Asia), urbanization, industrialization, declining agriculture, and the shift of the socio-cultural locus from Europe to the United States (with its civil rights struggles). *Roncarelli* can be seen as one site where these social changes played out in Canada; another was the debate as to the kind of society Canadian governments should be promoting, reflected notably in the contrasting visions of George Grant and F.R. Scott. A flashpoint for discussion about how the state should respond to increasing cultural and religious pluralism was the role of the criminal law in regulating individual expressive freedom. This was the context of Lord Devlin's 1958 lecture, *The Enforcement of Morals*.<sup>43</sup>

### A. *The Enforcement of Morals*

Devlin's reflections targeted the *Report of the Committee on Homosexual Offences and Prostitution (Wolfenden Report)*.<sup>44</sup> The *Wolfenden Report* had concluded that the criminal law of England should not concern itself with the enforcement of morals and punish sin or immorality as such. Lord Devlin disagreed with this response, arguing two propositions. First,

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<sup>42</sup> I do not consider the judgment of Cartwright J., since he argues for a concept of "absolute" discretion in relation to "administrative" decisions (see *Roncarelli*, *supra* note 1 at 167). While historically accepted in the common law (*Re Ashby*, [1934] O.R. 421, [1934] 3 D.L.R. 565 (C.A.)), this concept attracted little favourable comment by the mid-twentieth century.

<sup>43</sup> Devlin, *supra* note 2.

<sup>44</sup> U.K., H.C., "Report of the Committee on Homosexual Offences and Prostitution", Cmnd 247 in *Sessional Papers*, vol. 14 (1956–57) 85, reprinted as *The Wolfenden Report: Report of the Committee on Homosexual Offences and Prostitution* (New York: Stein and Day, 1963).

society has a right to pass judgment in matters of morals; there is a public morality and morals are not always a matter for private judgment. Second, because society has a right to pass such judgment, it also has a right to use its primary regulatory instrument, the law, to enforce the morality it upholds. Devlin believed that morality is the cement of society and that without *some* shared morality, society would collapse. Hence, a state may use the criminal law to preserve morality the same way that it uses law to safeguard anything else it deems essential to its existence.<sup>45</sup>

Shortly thereafter, Professor Hart delivered a conventional Millian rebuke to Devlin. He was prepared to concede that certain conduct might be proscribed by the criminal law for paternalistic reasons (e.g., abortion, suicide, duelling, euthanasia), but that this did not mean that society was thereby enforcing morality. Hart acknowledged that while a society could not exist without a morality that mirrored and supplemented the legal proscription of conduct injurious to others, the law had no warrant to criminalize immorality as such.<sup>46</sup>

In his 1965 book responding to Hart's lectures, Devlin expanded his thesis to include fields of law besides crime: family, property, tort, contract, and public law generally. He noted that judges, administrative decision-makers, and the police—as well as legislators—are constantly being confronted with claims about morality pleaded in justification of forbearance, of mitigation, or even of a positive entitlement to a favourable decision. However much Hart, as legal theorist, would wish a polity where a sharp distinction and separation could be drawn between law and non-law—in this instance, morality, social practice, culture—for Devlin, in the world inhabited by judges, such sharp dissociations are impossible to maintain.

### ***B. Lament for a Nation***

The Devlin-Hart debate reflected a contemporaneous dispute in Canada in the 1950s and 1960s. The ideological foundations of this debate were carefully elaborated in George Grant's *Lament for a Nation*,<sup>47</sup> an essay that advances a social theory which sharply contrasts with that argued by F.R. Scott, one of Roncarelli's counsel.<sup>48</sup>

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<sup>45</sup> Devlin, *supra* note 2.

<sup>46</sup> Hart, "Positivism", *supra* note 4 at 604-605.

<sup>47</sup> George Grant, *Lament for a Nation: The Defeat of Canadian Nationalism* (Toronto: McClelland & Stewart, 1970) [Grant, *Lament for a Nation*]. For later development, see George Grant, *English-Speaking Justice* (Toronto: Anansi, 1998).

<sup>48</sup> Scott's ideas were published as a multidecade compendium: Frank R. Scott, *Essays on the Constitution: Aspects of Canadian Law and Politics* (Toronto: University of Toronto Press, 1977).

Grant was particularly concerned by what he saw as the ill-considered rush to embrace the technological society in which human beings are seen as a collection of autonomous, free-willing individuals rationally choosing the institutions, life plans, and social practices that give meaning to life. A self-proclaimed Tory, Grant felt that politicians in Quebec better understood the threat to the existence of a society in which longstanding religious institutions and cultural practices provided anchorage for human flourishing, and he sought a strategic alliance between francophone and anglophone nationalists. Nonetheless, however much he agreed with the need to protect the church against social critique, he also felt that Duplessis's bargain with American capital would ultimately spell the end of Quebec's autonomous culture.<sup>49</sup>

Scott, by contrast, held to a Whig view of society. Despite his commitment to the Fabian socialist Cooperative Commonwealth Federation (forerunner to the New Democratic Party), he neither understood nor cared for an organic society that acknowledged differentiation and interdependence. Scott's civil libertarian vision was aimed at illegitimate exercises of authority that constrained individual liberty. He did not, that is, contest the need for authority or its necessary exercise to protect social order.<sup>50</sup> Barely a decade after *Roncarelli*, which he proclaimed as a victory for the rule of law against broad grants of discretionary authority, Scott publicly expressed support for Trudeau's proclamation of the *War Measures Act*<sup>51</sup>—a proclamation denounced by most civil libertarians as granting excessive discretionary power to the government—and defended Trudeau on “preservation of the social order” grounds not dissimilar to those invoked by Duplessis.<sup>52</sup>

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<sup>49</sup> See Grant, *Lament for a Nation*, *supra* note 47 at 72-80. For fuller development of Grant's arguments about Quebec, see Jacques-Yvan Morin, “Préface” in George Grant, *Est-ce la fin du Canada? : lamentation sur l'échec du nationalisme canadien*, trans. by Gaston Laurion (LaSalle, Qc.: Hurtubise, 1987) IX.

<sup>50</sup> A close reading of essays about Scott's conception of civil liberties reveals that he was a strong advocate of Dicey's conception of the rule of law, even where this resulted in judicial overruling of “socialist” legislative programs. See e.g. Walter Tarnopolsky, “F.R. Scott: Civil Libertarian” in Sandra Djwa & R. St J. Macdonald, eds., *On F.R. Scott: Essays on His Contributions to Law, Literature, and Politics* (Montreal: McGill-Queen's University Press, 1983) 133; Douglas Sanders, “Law and Social Change: The Experience of F.R. Scott” in Djwa & Macdonald, *supra*, 121.

<sup>51</sup> R.S.C. 1927, c. 206.

<sup>52</sup> For an interpretation of Scott's motives that draws on commentary about his relatively unsuccessful deanship at the McGill Faculty of Law (1960–64), see Roderick A. Macdonald, “F.R. Scott's Constitution (Inaugural Lecture)” (1997) 42 McGill L.J. 11.

### C. *Justices Pratte and Martineau's Social Theory*

Two of the Quebec Court of Appeal judgments in support of Duplessis's position can be read as consistent with the social theory reflected in the ideas of Devlin and Grant.<sup>53</sup> Justice Pratte acknowledged that Duplessis ordered Archambault to cancel the permit, and that the determining motive for doing so was Roncarelli's support of the campaigns of the Jehovah's Witnesses against the population of Quebec. He observed that on 21 November 1946, Duplessis expressly warned those who gave comfort to the Jehovah's Witnesses to cease troubling the peace:

*[L]es Témoins de Jéhovah causaient beaucoup de désordre dans la province, provoquaient la population, attaquaient le clergé et s'attaquaient à nos traditions les plus chères ...*

*[L]es assemblées des Témoins de Jéhovah étaient des causes d'ennuis sérieux pour la population et des causes de désordre.<sup>54</sup>*

The policy question was whether the population's shared belief about the centrality of a particular cultural practice or religious view (i.e., Roman Catholicism) was sufficient to justify allocating franchises to exploit a public monopoly only to those who supported them. Justice Pratte concluded that a society has a right to defend itself; while no one could be prevented from granting bail even to those who engage in close-to-seditious conduct, if the economic means for granting the bail derived from a discretionary statutory monopoly, it was justifiable for that privilege to be cancelled.<sup>55</sup>

This position was expressed even more clearly in the judgment of Justice Martineau, who, of all the judges, provided the most thorough review of the facts. His goal was to show the public offence that was being committed by Jehovah's Witnesses:

*[Ils] réclamait le monopole de la vérité et était extrêmement agressif. Comme question de fait, sa propagande ressemblait trop souvent à ces méthodes modernes de vente, appelées high pressure salesmanship, méthodes qui ne tiennent aucun compte du désir légitime de chacun de ne pas être importuné ou ennuyé par des étrangers,*

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<sup>53</sup> I should be clear about two points. First, I do not argue that any of the judges whose judgments I discuss intended to articulate a particular political philosophy. I claim only that their judgments are consistent with respectable (although minority) social theories and can be engaged on these theoretical grounds. Second, I do not claim that, for example, Pratte and Martineau J.J.A. alone (and no other pro-Duplessis judges) wrote judgments that could be interpreted in the light of Devlin's and Grant's ideas. Likewise, I do not claim that the judgments of Pratte and Martineau J.J.A. did not also reflect ideas of Tremblay, Taylor, Fuller, and Willis. I selected these two judgments here because the quoted passages can easily be seen as coherent with the relevant social theories. The same is true of the judges and judgments highlighted in Part II.C and Part II.D below.

<sup>54</sup> *Roncarelli (C.A.)*, *supra* note 19 at 463-64, Pratte J.A. (quoting testimony of Duplessis).

<sup>55</sup> *Ibid.* at 464-65.

*surtout dans sa demeure. De plus, le zèle ardent, mais outré et fanatique, de ses membres les poussait à des exagérations de langage regrettables et les incitait à condamner violemment et totalement toutes les autres pratiques religieuses.*<sup>56</sup>

Justice Martineau went on to observe that the campaign reached a crescendo in November 1946 with the publication of the pamphlet *La haine ardente du Québec, pour Dieu, pour Christ, et pour la liberté, est un sujet de honte pour tout le Canada*.<sup>57</sup> Though by this point the Montreal Court Recorder indicated he would no longer accept Roncarelli as bailsmen, Justice Martineau concluded that Duplessis quite appropriately feared the public disorder that this scurrilous, and seditious propaganda would generate.<sup>58</sup> Given the hatred the pamphlet raised and the discretionary nature of the liquor licence, cancellation would not automatically be a civil fault, even if in fact Duplessis had given such instructions to Commissioner Archambault.<sup>59</sup> In Justice Martineau's view, the state is allowed to use those property entitlements within its gift to protect society's values.<sup>60</sup> The actions of Duplessis and Archambault constituted a decision by public officials about an entitlement to a public benefit, a situation entirely unlike the unwarranted and illegal police action undertaken by the defendants in *Chaput*.<sup>61</sup>

#### ***D. Internormative Pluralism***

Devlin, Grant, Justice Pratte, and Justice Martineau argue that every society has its own particular conception of virtue. The hard work sustaining coordinated human interaction occurs in unofficial normative orders—whether highly institutionalized and explicit like the church, or implicit like many cultural settings or the family.<sup>62</sup> While the law of the state is not required to mirror in detail this underlying normativity, every viable political state must attend to it to some degree in official norms, concepts, and governance institutions. In being responsive to this underlying normativity, governments in modern democratic states ought neither to constrain freedom of expression beyond the scope of libel and sedition, nor

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<sup>56</sup> *Ibid.* at 477-78.

<sup>57</sup> *La haine ardente du Québec, pour Dieu, pour Christ, et pour la liberté, est un sujet de honte pour tout le Canada* (Toronto: Watch Tower Bible and Tract Society, 1946).

<sup>58</sup> *Roncarelli (C.A.)*, *supra* note 19 at 475ff.

<sup>59</sup> *Ibid.* at 486.

<sup>60</sup> *Ibid.* at 490.

<sup>61</sup> *Ibid.* at 494, referring to *Chaput*, *supra* note 30.

<sup>62</sup> For a typology elaborating the role of these various normative institutions, see Roderick A. Macdonald, "Les Vieilles Gardes. Hypothèses sur l'émergence des normes, l'internormativité et le désordre à travers une typologie des institutions normatives" in Jean-Guy Belley, ed., *Le droit soluble : contributions québécoises à l'étude de l'internormativité* (Paris: Librairie générale de droit et de jurisprudence, 1996) 233.

prevent citizens from exercising their civil liberties (e.g., freedom of association and the right to stand bail).<sup>63</sup> But, they need not provide the resources for citizens to undermine the public morality that holds a society together. The reason is that, within the constraints of basic civil liberties, society has a right to pass judgment on matters of morals, and it also has a right to use its primary regulatory instrument, the law—whether in the form of franchises like liquor licences, direct grants like today’s federal Court Challenges Program,<sup>64</sup> or in the form of the criminal law or taxing statutes<sup>65</sup>—to enforce the morality it upholds.<sup>66</sup> That is, the public purposes associated with a liquor licensing regime might include broader moral matters and not only “fitness” narrowly defined.<sup>67</sup>

### III. The Political Theory of the Tremblay Commission and Charles Taylor

The Confederation arrangement of 1867 confirmed a salient feature of the political state that is now Canada. It was an attempt to reconcile the divergent national histories of Quebec’s francophone, Roman Catholic population possessed of a civil law legal tradition and the rest of British North America’s anglophone, largely Protestant, United Empire Loyalist population. For the latter, Confederation was a post-colonial state-building project meant for anglophone citizens; for the former, it was a cultural survival compact between two nations meant for francophone citizens.<sup>68</sup> This fourth constitutional arrangement worked relatively well for about sixty years, but World War I, the development of a manufacturing and wage labour economy, and the economic depression of the 1930s

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<sup>63</sup> In other words, Martineau J.A.’s conclusion in *Roncarelli (C.A.)* (*supra* note 19 at 495) that Roncarelli’s behaviour would excuse a “civil wrong” committed by Duplessis or Archambault must be incorrect. See Sheppard, *supra* note 7 at 91-92.

<sup>64</sup> See generally Court Challenges Program of Canada, online: CCP <[www.ccpcj.ca](http://www.ccpcj.ca)>.

<sup>65</sup> The strong claim made by Martineau J.A. appears excessive today. In what way should permits to practice medicine, or drivers’ licences, or building permits, or radio licences, all be considered as necessary to uphold the social order? Not all tools of government bear on public morality, and decisions about which such tools do so are necessarily contingent.

<sup>66</sup> As Devlin and Grant argue, not all aspects of morality call forth the sanction of the state, and not all exercises of legislative authority in support of morality are consistent with respect for civil liberties. The point is that these are questions of political (and judicial) judgment, not matters that lend themselves to decision by appeal to abstract absolutes.

<sup>67</sup> In other words, the issue that Pratte and Martineau J.J.A. should have addressed is not whether a legislature may confer the right to cancel liquor permits in such cases, but whether it had done so in this case (whether explicitly or by implication); that is, was there a legal justification for Archambault’s action? This question is considered in Part III.

<sup>68</sup> For an overview of these competing narratives, see Roderick A. Macdonald, “Three Centuries of Constitution Making in Canada: Will There Be a Fourth?” (1996) 30 U.B.C. L. Rev. 211.

led to demands (especially outside Quebec) for aggressive federal initiatives. The stalking horse of the expansion of federal jurisdiction was the Rowell-Sirois Commission,<sup>69</sup> which proposed a bevy of new pan-Canadian policy instruments.

#### A. “*The Province of Quebec and the French-Canadian Case*”

Maurice Duplessis, who was first elected premier of Quebec in 1936, was re-elected in 1944 after a four-year hiatus. Within the province, the wartime economic boom contributed to rapid social change, industrialization, and urbanization, all of which increased demand for social services and strained provincial resources beyond constitutional tax powers and existing tax rental agreements.<sup>70</sup> To counter the centralized welfare-state logic of the *Rowell-Sirois Report*, Duplessis appointed a *Royal Commission on Constitutional Problems*<sup>71</sup> in February 1953 (Tremblay Commission). While its constitutive Order-in-Council ostensibly limited the inquiry to fiscal powers and federal encroachment on provincial jurisdiction, the Tremblay Commission produced “nothing less than an examination in depth of the philosophical and moral basis of French-Canadian society and a restatement of its *raison d’être*.”<sup>72</sup>

Until the 1950s, Quebec’s basic constitutional position had been to defend the original distribution of legislative powers under the *BNA Act*.<sup>73</sup> French-Canadian culture would be promoted not through government social programs but by bolstering non-governmental institutions such as the Roman Catholic Church. This would be accomplished by deploying what are characterized today as indirect tools of government rather than through state ownership,<sup>74</sup> and by contesting federal welfare spending programs like unemployment insurance, family allowances, and old-age pensions. This perspective found a theoretical framing in Part Three of the *Tremblay Report* entitled “The Province of Quebec and the French-

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<sup>69</sup> *Rowell-Sirois Report*, *supra* note 6.

<sup>70</sup> For a comprehensive compendium of papers assessing the origins and evolution of the federal spending and taxation power, and related policy instruments, see *Open Federalism and the Spending Power* (2008) 34 Queen’s L.J. 1-425.

<sup>71</sup> See *Tremblay Report*, *supra* note 6.

<sup>72</sup> David Kwavnick, ed., *The Tremblay Report: Report of the Royal Commission of Inquiry on Constitutional Problems* (Toronto: McClelland & Stewart, 1973) vii at vii (“Editor’s Introduction”). See also Robert Comeau *et al.*, eds., “La Commission Tremblay (1953–1956) : cinquante ans de débats sur le déséquilibre fiscal” (2007) 16 Bull. d’histoire politique 1-63.

<sup>73</sup> *Supra* note 40, ss. 91, 92.

<sup>74</sup> The idea of indirect governance is developed by Salamon, who characterizes tools like subsidies, franchises, tax relief agreements, loan guarantees, and infrastructure support as examples of indirect governance (*supra* note 9).

Canadian Case”.<sup>75</sup> The *Tremblay Report* concluded that the federal government was unilaterally undermining the Confederation “compact” by arrogating to itself an unfair proportion of available tax room, pursuing constitutional amendments over Quebec’s objections, infringing upon fields of exclusive provincial jurisdiction, and imposing spending programs meant to promote a singular, Anglo-Protestant social and cultural ideal of Canada.<sup>76</sup>

The key ambition of the Tremblay Commission was to present an alternative philosophical vision of the modern Canadian state. In this vision, Quebec would be the guardian of a traditional French-Catholic rural arcadia whose culture and values could resist the encroachments of North American, liberal, and secular capitalism. The *Tremblay Report* offered a coherent diagnosis of the distinctiveness of the French-Canadian culture, a recipe for how church and state in Quebec could together continue to build Quebec society, and a constitutional strategy for promoting that distinctiveness. Yet, in large part because the Tremblay Commission rejected the political compromises Duplessis had made with anglophone commercial interests in pursuing economic development through indirect government (e.g., permits and franchises to exploit forestry, mining, and hydro resources in “Nouveau-Québec”), its broader recommendations were never pursued.

### *B. The Making of the Modern Québécois Identity*

Since *Roncarelli*, the program traced by the Tremblay Commission has been recast from one of traditional, small-government French-Canadian nationalism played out by two pragmatic French-Canadian politicians, Louis St. Laurent and Duplessis. With the collapse of religion as ideology and the church as a social-welfare institution after 1960, language became the cultural rallying point and the Quebec state became the replacement vehicle for transforming French-Canadian identity into a newly emerging Québécois identity. After Jean Lesage and Lester Pearson succeeded Duplessis and St. Laurent, respectively, Quebec politicians developed a much more realistic appreciation of the role of government in exploiting provincial constitutional jurisdiction: the ambition of the

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<sup>75</sup> *Tremblay Report*, *supra* note 6, Part 3.

<sup>76</sup> The Tremblay Commission further noted that the abolition of appeals to the Judicial Committee of the Privy Council made the Supreme Court of Canada, a unilaterally created federal institution, the final arbiter of constitutional authority. See *An Act to Amend the Supreme Court Act*, S.C. 1949, c. 37, amending R.S.C. 1927, c. 35.

Tremblay Commission was transformed from traditional nationalism (*la survivance*) into state nationalism (*maîtres chez nous*).<sup>77</sup>

The thrust of the relationship of state and society in Quebec's new nationalism was most evident in debates between Pierre Trudeau and René Lévesque. Trudeau sought to create a new Canadian civic patriotism responsive to both francophone and anglophone populations through the entrenchment of a charter of rights and freedoms. Rather than "national" identity grounded in a thick conception of social citizenship, Canadian identity would be founded on a thinner conception of political citizenship.<sup>78</sup> Lévesque, more cosmopolitan and therefore more pessimistic than Judge Tremblay, believed that in order to flourish, a threatened language and culture would have to be preserved either within a relatively homogeneous national society or a separate state. Since Quebec was no longer (if it truly ever was) the monocultural society portrayed by the Tremblay Commission, political independence was the only alternative to the undesirable *métissage* of the modern heterogeneous bi- or multicultural state.

The best contemporary expression of the political theory argued in the *Tremblay Report* has been offered by Charles Taylor. In opposition to Trudeau's minimalist view of citizenship as simply legal status and constitutional commitment, Taylor advances a most robust conception of a political culture.<sup>79</sup> Taylor's position is grounded in an organic view of society in which social solidarity is a central theme. People are not born as decontextualized individuals, but enter this world shaped by comprehensive community attachments. A political culture exists not just to make possible the pursuit of individual freedom, but also to promote collective identity and provide a structure of beliefs and practices conducive to the pursuit of virtue.<sup>80</sup>

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<sup>77</sup> For an elaboration of these changes and their effect on governing institutions, see Roderick A. Macdonald & Robert Wolfe, "Canada's Third National Policy: The Epiphenomenal or the Real Constitution?" (2009) 59 U.T.L.J. 469.

<sup>78</sup> See e.g. Pierre Elliott Trudeau, *Federalism and the French Canadians* (Toronto: Macmillan, 1968); Pierre Elliott Trudeau, *Pierre Trudeau Speaks Out on Meech Lake*, rev. ed. by Donald J. Johnston (Toronto: General Paperbacks, 1990).

<sup>79</sup> See Charles Taylor, *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism*, ed. by Guy Laforest (Montreal: McGill-Queen's University Press, 1993). See especially Taylor's essays "Why Do Nations Have to Become States?" (*ibid.* at 40ff.) and "The Tradition of a Situation" (*ibid.* at 135ff.).

<sup>80</sup> See Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge, Mass.: Harvard University Press, 1989); Charles Taylor, *The Malaise of Modernity* (Concord, Ont.: Anansi, 1991); Charles Taylor, *A Secular Age* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2007).

### C. *Justices Bissonnette and Casey's Organic Political Theory*

As noted in the previous section, Justices Pratte and Martineau focused on the social theory that lay behind Duplessis's belief that the government was authorized to use the revocation of Roncarelli's liquor licence as a means to protect social order in Quebec. By contrast, Justices Bissonnette and Casey paid more attention to the political dynamic of the case and wrote judgments that resonate with the political theory of the *Tremblay Report*, as later developed by Charles Taylor.

Justice Bissonnette found as a fact (reversing the trial judge on this point) that Archambault, having concluded that he should cancel the permit, acted alone in doing so. After closely analyzing several provincial acts, Justice Bissonnette concluded that Duplessis had no statutory or residual common law authority to intervene either as prime minister or as Attorney General.<sup>81</sup> He then examined the de facto relationship between Duplessis and Archambault, acknowledging that Archambault's "at pleasure" appointment might suggest a factual subordination. Of course, were this the case, all "at pleasure" appointments would be suspect, a position that even today is not seriously advanced outside the judicial sphere. Moreover, because the Liquor Commission was not an executive or administrative agency, but rather an independent state-owned commercial operation, Justice Bissonnette held that Archambault had an unfettered discretion to revoke the permit, and doing so was no different from the lawful termination of employment.<sup>82</sup> That said, he nonetheless felt that Archambault's decision was

*l'expression naturelle de l'opinion de la Province de Québec ...*

*La Commission des liqueurs est un organisme d'intérêt public. Or, son gérant, s'il estimait que les agissements du demandeur étaient subversifs et constituaient un mal que ses pouvoirs permettaient de supprimer, avait la faculté, plus que cela, le devoir d'intervenir efficacement.*<sup>83</sup>

Justice Casey also found that Duplessis did not order the cancellation, and decided that there was neither a legal nor a de facto subordination of Archambault to Duplessis.<sup>84</sup> Duplessis was free to offer his opinion to Archambault in the same manner as the Chief of Police, the local priest, or any citizen, and Archambault was free to accept or reject that advice. Absent specific evidence that Archambault acted under Duplessis's direction, there could be no reason for so concluding, even if for his own political reasons Duplessis publicly affirmed that he had "ordered" the cancella-

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<sup>81</sup> *Roncarelli (C.A.)*, *supra* note 19 at 451-55.

<sup>82</sup> *Ibid.* at 457.

<sup>83</sup> *Ibid.* at 458.

<sup>84</sup> *Ibid.* at 467.

tion.<sup>85</sup> But, by contrast with Justice Bissonnette, Justice Casey found that the manager's discretion under subsection 35(1) of the *Alcoholic Liquor Act* was not absolute or unfettered:

[T]his discretion must be exercised in accordance with what the Commission believes to be the public interest and welfare. If the law be viewed in this light and if one use the public interest and welfare as a yardstick, it follows that a permit should be refused when the applicant is not of good moral character or for any other reason not a suitable person to exercise the privilege sought.<sup>86</sup>

Justice Casey correctly posed the key legal issues: First, did the *Alcoholic Liquor Act* explicitly or by implication authorize Archambault to refuse to issue, or to revoke, a licence if the holder were not of good moral character or otherwise unsuitable to exercise a public privilege? And second, did Archambault have reasonable grounds for believing that the plaintiff was engaged directly or indirectly in subversive activities and was therefore unworthy of holding a liquor permit?<sup>87</sup> On the first issue, Justice Casey concluded that the liquor licence was not a pure property entitlement vesting rights in holders that could be taken away only on narrowly circumscribed economic or ultra vires grounds; liquor licences were an instrument of policy. On the second issue, after reviewing the facts, he determined that while the right to stand bail was a constitutional right that could not be denied (even when used to liberate those charged with morally repugnant or seditious behaviour), the state was not obliged to facilitate any citizen's economic capacity to act as bailman through the attribution or continuation of a regulatory privilege.

#### *D. Communitarianism*

Tremblay, Taylor, Justice Bissonnette, and Justice Casey argue—directly or indirectly—that the basic political decisions in a state are shaped by conceptions of “man” and “society”. Whether social welfare should be a matter of the state or the non-governmental sector, whether the operations of government should be solicitous of social differentiation in the guise of multiculturalism or interculturalism, whether policy should favour rural or urban development, and whether policy should favour economic monopolies through agricultural marketing boards and trade unions are not simply discrete policy choices made by governments for conjunctural political gain. Where the state chooses to play a smaller role in social organization, and to make its regulatory choices through governance instruments that rely on partnerships with non-governmental agencies—franchises, subsidies, contracts, procurement, permits, or

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<sup>85</sup> *Ibid.* at 468.

<sup>86</sup> *Ibid.* at 470.

<sup>87</sup> *Ibid.* at 473.

public-private partnerships—it is entitled to monitor how well these regulatory instruments are being deployed to advance public policy. Of course, many more forms of what have been characterized as “new property” are now seen less as privileges than as entitlements that, once allocated, can be revoked only for reasons specifically related to prescribed statutory conditions and explicitly stated legislative purposes. But this was not the case in 1946, when franchises and permits were allocated to “appropriate holders” as tools of governance in pursuit of a broader, often unstated, policy agenda. Even today, states can legitimately differ as to which franchises are entitlements and which are privileges allocated to advance public policy. Where the latter, governments may quite properly insist that beneficiaries be of good moral character and not use the regulatory tool (directly or indirectly) to further aggressive attacks upon society or the state itself.<sup>88</sup>

#### IV. The Legal Theory of Lon Fuller and John Willis

For many Canadian legal theorists, the debate evoked by *Roncarelli* was importantly about the general postwar movement toward constitutionalization of civil liberties and fundamental freedoms. In 1947, Saskatchewan enacted Canada’s first bill of rights,<sup>89</sup> and later that year the House of Commons resolved to establish a joint committee on the subject of fundamental rights and freedoms. In 1958, the House began considering Bill C-79, which ultimately resulted in the *Canadian Bill of Rights*.<sup>90</sup> Notwithstanding these legislative developments, the 1950s were particularly noteworthy for the decisions of the Supreme Court of Canada protecting civil liberties under the guise of an “implied bill of rights”.<sup>91</sup> Scholars tended to focus on the freedom of speech and assembly cases arising in

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<sup>88</sup> To repeat, these judgments are deeply contingent on both history and culture. For example, in 1946 and 2009, the case for treating drivers’ licences as policy tools is weak. In 1946 and 2009, the case for treating franchises to operate passport offices as policy tools is strong. In 1946 in Quebec, but not in 2009 in Canada (except perhaps in special cases like Nunavut), the case for a province treating liquor permits as policy tools was highly plausible. The appropriate legal means for operationalizing such concerns are discussed in Part IV below.

<sup>89</sup> *Saskatchewan Bill of Rights*, S.S. 1947, c. 35. It is now a part of the *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1.

<sup>90</sup> *Canadian Bill of Rights*, S.C. 1960, c. 44. See Walter Surma Tarnopolsky, *The Canadian Bill of Rights*, 2d ed. (Toronto: McClelland & Stewart, 1975).

<sup>91</sup> See Dale Gibson, “Constitutional Amendment and the Implied Bill of Rights” (1966–67) 12 McGill L.J. 497.

Quebec,<sup>92</sup> but the record began thirty years earlier, also embraced non-Quebec cases, and has continued to the present.<sup>93</sup>

### A. *Implicit Law and Fidelity to Law*

The “implied bill of rights” cases were the precursor to the judgments of the Supreme Court of Canada expressly recognizing the role in Canadian law of implied principles of the common law constitution.<sup>94</sup> Lon Fuller was one of the first to theorize why, in any constitutional order, there must always be unwritten principles upon which a written constitution will rest.<sup>95</sup> Fuller maintained that fidelity to law required attending to law’s purposive character, and to the often-implicit principles of legality that enabled law to function as a vehicle to facilitate human interaction.<sup>96</sup> He also argued that fidelity to law required attending to interpretation as a central act of legality. Because legal texts are not self-applying, interpreters (whether judges, administrators, lawyers, or citizens) always face a moment of uncertainty about the meaning of a written norm where it is necessary to engage in purposive inquiry that reaches beyond the words found therein. This is as true of procedural rules by which law is made (the laws of lawmaking), interpreted (the canons of statutory construction, and the theory of the “common law”), and institutionally organized (the rules of judicature and civil procedure), as it is of substantive rules of law.<sup>97</sup>

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<sup>92</sup> See the cases from Quebec cited in *supra* note 30. See also *Brodie v. R.*, [1962] S.C.R. 681, 32 D.L.R. (2d) 507.

<sup>93</sup> For a review of the cases to 1993, see Roderick A. Macdonald, “The New Zealand Bill of Rights Act: How Far Does It or Should It Stretch?” in *Proceedings of the 1993 New Zealand Law Conference* (Wellington: New Zealand Law Society, 1993) 94 at 116-26. See also Ian Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (Montreal: McGill-Queen’s University Press, 1992) c. 23 at 312ff. (“The Implied Bill of Rights”).

<sup>94</sup> See *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, 150 D.L.R. (4th) 577; *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385. For a discussion of implicit constitutional law, see Mark D. Walters, “Written Constitutions and Unwritten Constitutionalism” in Grant Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory* (New York: Cambridge University Press, 2008) 245.

<sup>95</sup> Lon L. Fuller, *Anatomy of the Law* (New York: Frederick A. Praeger, 1968) at 57-69 (implicit elements in made law). The idea of a common law constitution was not, of course, unknown in England. See e.g. H.W.R. Wade, “The Basis of Legal Sovereignty” (1955) Cambridge L.J. 172; Rt. Hon. Sir Owen Dixon, “The Common Law as an Ultimate Constitutional Foundation” (1957) 31 Austl. L.J. 240.

<sup>96</sup> Fuller, “Positivism and Fidelity”, *supra* note 5. See also Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969) c. 2, 5.

<sup>97</sup> See Lon L. Fuller “Means and Ends” in *The Principles of Social Order: Selected Essays of Lon L. Fuller*, rev. ed. by Kenneth I. Winston (Oxford: Hart, 2001) 61 [*Principles of*

Fuller's intellectual antagonist, H.L.A. Hart, asserted that inquiry into customary social conventions and practices, morality, or even the internal coherence of legal regulation was unnecessary for deciding what constituted law.<sup>98</sup> In particular, Hart denied Fuller's claim that law was a human creation intended to enable the pursuit of human purposes. It followed for Hart that there were neither any fundamental premises as to the substantive aims that could be pursued by law, nor any procedural norms inherent in the making and application of law.<sup>99</sup> Of course, Hart did not deny the importance of Fuller's principles of legality; he simply thought they were matters of ethics, and not principles inherent to legality itself.<sup>100</sup>

Hart and Fuller were both concerned with the central question of fidelity to law. Their debate was carried on over several years around several issues, two of which are central to the *Roncarelli* case: (1) What is the relationship between formal, explicit, framework (or institutional) rules and informal, implicit, organic rules in guiding discretion? (2) How does one create, manage, and supervise public bureaucracies that exercise legitimated, politically accountable authority appropriate to the situation in view? For Hart, the idea of morality was an external tool for evaluating the "goodness or badness" of law; for Fuller, it was internal to the concept of law itself. Fidelity to law involved the quest for good and workable social arrangements ("economics"), implying procedures and institutions of good governance.<sup>101</sup>

### *B. Lawyers' Values and Civil Servants' Values*

In Canada, a similar debate was carried on between J.C. McRuer, who adopted an *ex ante* formalistic vision of the rule of law,<sup>102</sup> and his critic,

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*Social Order*]. See also Lon L. Fuller, "Irrigation and Tyranny" in *Principles of Social Order*, *supra*, 207.

<sup>98</sup> Hart, "Positivism", *supra* note 4.

<sup>99</sup> H.L.A. Hart, Book Review of *The Morality of Law* by Lon L. Fuller, (1965) 78 Harv. L. Rev. 1281.

<sup>100</sup> For a detailed elaboration, see the papers presented at the symposium, *The Hart-Fuller Debate at Fifty* (2008) 83 N.Y.U. L. Rev. 993-1388.

<sup>101</sup> For Fuller's first development of the idea of "economics", see Lon L. Fuller, "American Legal Philosophy at Mid-Century: A Review of Edwin W. Patterson's *Jurisprudence, Men and Ideas of the Law*" (1953-54) 6 J. Legal Educ. 457. See also Lon L. Fuller, "Freedom as a Problem of Allocating Choice" (1968) 112 Proceedings of the American Philosophical Society 101. More recently, Olsen and Toddington have developed Fuller's theory of "economics": Henrik Palmer Olsen & Stuart Toddington, *Architectures of Justice: Legal Theory and the Idea of Institutional Design* (Aldershot, Eng.: Ashgate, 2007).

<sup>102</sup> Royal Commission Inquiry into Civil Rights, *Report One* (Toronto: Queen's Printer, 1968-71) c. 3 at 56 ("The Rule of Law").

John Willis, who argued for an *ex post* pragmatic conception of legality.<sup>103</sup> Willis saw good governance arising under two conditions. First, the processes of social ordering under which different legal tasks are accomplished must be appropriate to the task at hand. Managerial-allocational tasks cannot be subjected to the procedural limitations of adversarial adjudication. Nor can mediation be regulated by the procedural logic of markets. Nor can elections be disciplined by the protocols of contractual ordering.<sup>104</sup> Second, administrative decision-makers and agencies must be subject to the discipline not only of their organic law, but also of their own internal law. The central problem of contemporary governance resides in a “conflict of commitments” between public servants and the legal profession over how best to pursue public policy according to law.<sup>105</sup>

McRuer, by contrast, was an unreconstructed Diceyan. In other words, his approach was legalistic and conceptual in addressing the challenges of modern governance. He focused on a single way of imagining law (statutory rules); a single way of imagining legal decision-making (adversarial adjudication); a single institution for ensuring substantive and procedural accountability (courts); and a single process for ensuring respect for the rule of law (judicial review).<sup>106</sup> McRuer felt that nothing less than this “lawyer’s constitution” could guarantee accountability in public governance and ensure that the supervening political control over agencies by government was constrained by law.

A prominent point of divergence between McRuer and Willis was traced by the latter to the former’s fidelity not to law, but to the normal biases of private-sector lawyers: (1) empathy with the individual client as opposed to the community or the general public; (2) a commitment to the necessary superiority of detailed legislative instruments as ways of authorizing public action; and (3) a lack of familiarity of, and therefore a lack of interest in, the actual facts of governmental life.<sup>107</sup> Focused on pro-

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<sup>103</sup> John Willis, “Foreword” in D.W. Buchanan *et al.*, *Canadian Boards at Work*, ed. by John Willis (Toronto: Macmillan, 1941) v at ix.

<sup>104</sup> In this respect, Willis’s views aligned with those of Henry M. Hart Jr. and Albert M. Sacks. See Henry M. Hart & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, ed. by William N. Eskridge Jr. & Philip P. Frickey (Westbury, N.Y.: Foundation Press, 1994).

<sup>105</sup> See e.g. John Willis, “What I Like and What I Don’t Like About Lawyers: A Convocation Address” (1969) 76 *Queen’s Quarterly* 1. For Willis, man is as man does. Lawyers must be measured against what they do and how they do it.

<sup>106</sup> See *Principles of Social Order*, *supra* note 97, vol. 1, at 15-59. For a careful elaboration of McRuer’s perspective, see Patrick Boyer, *A Passion for Justice: The Legacy of James Chalmers McRuer* (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 1994) c. 14 at 297ff. (“Civil Rights and the State”).

<sup>107</sup> John Willis, “The McRuer Report: Lawyers’ Values and Civil Servants’ Values” (1968) 18 *U.T.L.J.* 351 at 353; John Willis, “Foreign Borrowings”, Book Review on *The McRuer Report*, (1970) 20 *U.T.L.J.* 274.

protecting client interests, lawyers typically are either against or indifferent to the public interest and, in any event, mistrust the ability of the government to express the public interest. After all, parliaments typically want democratic political accountability rather than the historical weight of the common law to operate as the normative backdrop of governance.<sup>108</sup> In such a perspective, strict compliance with lawyers' procedural law is an obligation falling on all public administrators, but such procedural constraints may be dispensed with when necessary to preserve a remedy against public administrators.

### C. *Justices Fauteux and Taschereau's Morality of Law*

Of all fifteen judgments rendered in the *Roncarelli* case, those of Justices Taschereau and Fauteux most respected the process and governance concerns raised by Fuller and Willis. Fidelity to law was achieved by scrupulously following the procedural principles implied by each different institutional form through which human beings live normative lives together.<sup>109</sup> For Justices Taschereau and Fauteux, the rule of law requires courts and public agencies to attend to statutory mandates and the processes by which legal rights and remedies are claimed. Both felt that the question whether article 88 of the *Civil Code of Procedure* applied to bar the plaintiff's action could not be finessed or cavalierly dismissed.<sup>110</sup>

Justice Mackinnon, at trial, Justice Rinfret, dissenting in the Quebec Court of Appeal, and Chief Justice Kerwin, and Justices Rand, Martland, and Abbott of the Supreme Court of Canada all concluded that Duplessis was not acting in the exercise of his functions, and could not, therefore, plead article 88 C.C.P. It is true that the common law distinguishes between what might be called the "abuse" of a function (whether in good faith or bad faith) and "usurping" authority, with only the former being protected by provisions like article 88.<sup>111</sup>

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<sup>108</sup> For a contemporary iteration of this theme, see Salamon, *supra* note 9.

<sup>109</sup> See Lon L. Fuller, "Two Principles of Human Association" in *Principles of Social Order*, *supra* note 97, 81.

<sup>110</sup> Art. 88, para. 1 C.C.P. provided: "No public officer or other person fulfilling any public function or duty can be sued for damages by reason of any act done by him in the exercise of his functions ... unless notice of such action has been given him at least one month before the issue of the writ of summons."

<sup>111</sup> The distinction is difficult to draw, and at least one commentator believes that the effect of the majority decision of the Supreme Court of Canada was to render art. 88 C.C.P. nugatory. See Amnon Rubinstein, *Jurisdiction and Illegality: A Study in Public Law* (Oxford: Clarendon Press, 1965) at 143-44. For a detailed discussion of the real problems of interpretation raised by art. 88 C.C.P. and the inadequacy of Rand J.'s judgment, see Robert Leckey, "Complexifying *Roncarelli's* Rule of Law" (2010) 55 McGill L.J. 721. Compare David Dyzenhaus, "Rand's Legal Republicanism" (2010) 55 McGill L.J. 491.

Justice Taschereau's judgment is laconic on this point. He simply affirms that Duplessis was consulted by Archambault in his capacity as Attorney General—that is, in his quality as legal adviser to the Liquor Commission. That Duplessis may have made a mistake in the advice he gave is immaterial to the question whether he was acting in an official capacity. Justice Taschereau states:

*Je demeure convaincu que même si les paroles de l'intimé ont pu avoir quelque influence sur la décision qui a été prise, ce dernier demeurait quand même un officier public, agissant dans l'exercice de ses fonctions, et qu'il était essentiel de lui donner l'avis requis par l'art. 88 C.P.C. ...*

*L'intimé est sûrement un officier public, et il me semble clair qu'il n'a pas agi en sa qualité personnelle. ...*

*[J]e ne puis admettre le fallacieux principe qu'une erreur commise par un officier public, en posant un acte qui se rattache cependant à l'objet de son mandat, enlève à cet acte son caractère officiel, et que l'auteur de ce même acte fautif cesse alors d'agir dans l'exécution de ses fonctions.<sup>112</sup>*

The judgment of Justice Fauteux is more elaborate, and his reasoning was later followed by all three dissenting judges in the companion case *Lamb*.<sup>113</sup> He begins by noting that Justice Rinfret of the Quebec Court of Appeal and the majority judges in the Supreme Court of Canada erred in holding that jurisprudence under article 1054 of the *Civil Code of Lower Canada* on employer's vicarious liability was applicable to this case. He continued:

*L'intimé, agissant en sa qualité de Procureur Général, n'est le préposé de personne. Il n'a pas de commettant. La fonction qu'il exerce, il la tient de la loi. L'article 88 C.P.C. n'affecte en rien la question de responsabilité. Il accorde, en ce qui concerne la procédure seulement, un traitement spécial au bénéfice des officiers publics en raison de la nature même de la fonction.<sup>114</sup>*

Justice Fauteux further noted that the conditions of applicability of article 88 had been settled since the 1930s and that the defendant's good or bad faith is not a relevant consideration. *À propos de Duplessis*, he ob-

<sup>112</sup> *Roncarelli*, *supra* note 1 at 129-30 [emphasis in original].

<sup>113</sup> *Supra* note 30, Taschereau, Fauteux and Abbott JJ., dissenting. The judgment of Fauteux J. in this case was a further elaboration of his reasoning in *Roncarelli*, although it focused on the character of the six-month limitation period in s. 24 of *An Act respecting the Provincial Police Force and the Liquor Police Force* (R.S.Q. 1941, c. 47). Interestingly, the uncertainty of Abbott J. on this issue in *Roncarelli* is reflected in his joining his civil law colleagues Fauteux and Taschereau JJ. in dissent in *Lamb*. By contrast, Cartwright J.—who dissented for substantive reasons in *Roncarelli*—joined his five common law colleagues in deciding, incorrectly, a question of Quebec procedural law in *Lamb*.

<sup>114</sup> *Roncarelli*, *supra* note 1 at 178.

served that Duplessis did not abuse his authority as Attorney General to pursue an illicit purpose; he acted as he did because he believed that so doing was fulfilling his role as Attorney General:

*Il a fait ce qu'il n'avait pas le droit de faire ... pour s'acquitter de ses responsabilités comme Procureur Général chargé de l'administration de la justice, du maintien de l'ordre et de la paix dans la province et de ses devoirs comme conseiller juridique du gouvernement de la province. Il n'a pas pris occasion de sa fonction pour commettre cette illégalité. Il ne l'a pas commise à l'occasion de l'exercice de ses fonctions. Il l'a commise à cause de ses fonctions.*<sup>115</sup>

Surprisingly, those who would cite the judgment of Justice Rand as an exemplar of respect for the rule of law fail to note that he cavalierly and tautologically evacuates article 88 of its most plausible meaning, given its history, the civil law tradition, and the “*jurisprudence constante*” of the Quebec Court of Appeal since 1936. He states:

[T]he act was 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. It would be only through an assumption of a general overriding power of executive direction in statutory administrative matters that any colour of propriety in the act could be found. But such an assumption would be in direct conflict with fundamental postulates of our provincial as well as dominion government; and in the actual circumstances there is not a shadow of justification for it in the statutory language.<sup>116</sup>

#### *D. Pragmatic Instrumentalism*

Fuller, Willis, Justice Taschereau, and Justice Fauteux argue that the notion of the rule of law is much more complex than imagined by Hart, McRuer, and Justice Rand. The “law” in the rule of law is not just “ordinary law” setting out rules of duty and entitlement. Fundamental processes of social ordering in the modern state have their own internal procedural logic, their own internal morality of operation, and their own structural preconditions. Social institutions are not infinitely pliable. The role of courts is not to impose upon governmental and non-governmental actors a particular adjudicative version of “due process”. Rather, it is to ensure that decision makers are faithful to the procedural aspirations of the institutional practices they instantiate. In this respect, the decisions (1) to grant a “broad discretion” to decision makers, (2) to organize agencies as regulatory vehicles to advance government policy and not as independent agencies modelled on courts and performing quasi-judicial functions, and (3) to promote amicable settlement of claims by requiring a fiat

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<sup>115</sup> *Ibid.* at 181.

<sup>116</sup> *Ibid.* at 144, Rand J.

to sue (as was the case elsewhere in Canada in 1946) or a mandatory prior notice of an intention to do so (article 88 C.C.P.) are not in conflict with the basic premises of contemporary democratic government. When such decisions have been taken, it is not the role of courts to undermine the internal morality of the rule of law in the guise of protecting some other fundamental values.<sup>117</sup> One would have thought that fidelity to the rule of law would have induced a common law-trained judge seeking to interpret a provision of Quebec's *Code of Civil Procedure* to have devoted more attention to the design of the legislative regime (that is, to the structural features of civil litigation in Quebec), to its interpretive history in Quebec courts, and to the policy rationale (the purposes) for such a provision, rather than simply presuming to know what fidelity to law requires.

## Conclusion

The historicist fallacy is endemic to modern legal scholarship.<sup>118</sup> In part, the gravamen of this essay is to show how *Roncarelli* has been abstracted from its time and place, and made to speak for propositions not present at the moment of Duplessis's actions or the Supreme Court of Canada's decision. Today the deep context of the case has largely been forgotten. Even those scholars who acknowledge this context are often victim to the contemporary propensity either to ignore the insights of pragmatic legal realism or to read the case in the light of desired political outcomes. Both intellectual errors mar much reflection about the *Roncarelli* case and lead commentators uncritically to dismiss the social, political, and legal theory that could be seen to underlie Duplessis's arguments.

A close look at the socio-demographic background of the fifteen judges who heard the case reveals the impact of language, religion, and geography on outcome.<sup>119</sup> Only Justices Cartwright and Rinfret wrote judgments inconsistent with the decisions of their socio-demographic peers. A close look at the social and legal philosophy of these judges as reflected in their historical voting record also reveals that they display a policy-based rather than a doctrine-based consistency in decision making.<sup>120</sup> Only Justices Cartwright and Rinfret (strongly) and Justice Abbott (moderately)

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<sup>117</sup> The scope of the court's role in such cases depends on the fundamental architecture of the Canadian legal system. In 2009, this role is performed by the courts under the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Canadian Charter*]). It was not self-evidently a role assigned to courts in 1946. Moreover, on the substance of art. 88 C.C.P. there is no evidence that any post-1982 decision of the Supreme Court of Canada would give comfort to those who would see the *Canadian Charter* as licensing a wholesale rewriting of basic procedural principles of adversarial adjudication.

<sup>118</sup> Robert W. Gordon, "Historicism in Legal Scholarship" (1981) 90 *Yale L.J.* 1017.

<sup>119</sup> See Part I.B above.

<sup>120</sup> See Part I.C above.

wrote judgments inconsistent with their respective general patterns of voting in such types of cases.

As a first approach to reassessing the impact of social and political context on judicial decision-making in *Roncarelli*, consider the following two counterfactual comparators:

- (1) Would the outcome have been the same if the Jehovah's Witnesses had circulated a pamphlet in 1948 entitled *La haine ardente du ...* [insert any one of: *musulman, hindou, bouddhiste, Mormon, doukhobor, juif*] ... *pour Dieu, pour Christ et pour la liberté est un sujet de honte pour tout le Canada*?
- (2) Would the outcome have been the same had Duplessis chosen to appeal the case to the neutral arbitration of the Judicial Committee of the Privy Council, a body historically more sensitive to issues of federalism, provincial rights, and Quebec's place in the Canadian state?<sup>121</sup>

Similar questions can be raised about the legal-procedural issues brought forward for decision:

- (1) If Duplessis were in fact the defendant in this case, and was liable for interfering in a decision that was not his to make, it is irrelevant whether Archambault properly exercised his discretion. Consequently, was it not highly presumptuous for a Protestant, anglophone, common lawyer to lecture Roman Catholic, francophone, civil law judges about their law in a lengthy *obiter dictum*?
- (2) Why should the court in 1959 apply a standard about a political figure's relationship to an administrative officer in Quebec and the ensuing liability of public officials for acting without authority that it was not also applying to administrative decision-makers elsewhere in Canada at the same time?<sup>122</sup>

Of course, in making these points I do not mean to argue that the moral, political, and legal theories advanced by Duplessis to justify his actions in *Roncarelli* provide a general basis for his political "*guerre sans merci*". In particular, I acknowledge that they cannot be extended unproblematically to other 1950s cases involving the propagation of communist ideology or proselytizing by Jehovah's Witnesses or to the actions of municipal and educational officials and police officers.<sup>123</sup> Cases should be de-

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<sup>121</sup> See Alan C. Cairns, "The Judicial Committee and Its Critics" (1971) 4 Can. J. Pol. Sc. 301.

<sup>122</sup> For the common law of Crown liability in 1946, see Hogg & Monahan, *Liability*, *supra* note 11.

<sup>123</sup> See the litany of cases and incidents reported in Sarra-Bournet, *supra* note 7 at 29-55.

cided and later be interpreted and understood with due attention to their context.

I do, however, suggest that there are plausible social theories (the internormative pluralism of Devlin and Grant), political theories (the communitarianism of Tremblay and Taylor), and legal theories (the pragmatic instrumentalism of Fuller and Willis) that provide support for each of the positions argued by Duplessis's counsel in *Roncarelli* given the state of the law in 1946. In so doing, however, I also leave open the question whether these same theoretical perspectives would today lead to a judgment in favour of Roncarelli, rather than Duplessis.<sup>124</sup> If this essay on the fiftieth anniversary of the Supreme Court of Canada decision helps advance an appreciation of this point, I shall be content.

## Appendix

MACDONALD J. —

The case under appeal raises five questions for consideration by this court.

A. *Did Duplessis order the cancellation of the liquor licence or otherwise induce Archambault to do so?*

[1] It was argued that Duplessis ordered the cancellation, or at least strongly intimated to Archambault that this was his wish. Indeed, Duplessis himself admitted that he thought this was what he was doing. Yet Archambault testified that he had determined to cancel the licence on his own, prior to receiving a call from Duplessis. On what theory of human motivation would my decision become not my own simply because someone else thinks I acted because he told me to do so? Nonetheless, the trial judge found as fact that Duplessis ordered the cancellation and since there was evidence upon which this finding could be based, the procedural rules of the *Code of Civil Procedure* disentitle this court from reversing that finding.

B. *Did Duplessis have the legal authority to make such an order?*

[2] On the assumption that Duplessis did in fact order the cancellation and that this order was the reason why Archambault cancelled the licence, the question arises whether Duplessis was vested with the legal authority to do so. The *Alcoholic Liquor Act* grants decision-making authority to the head of the Liquor Commission. In the common law tradition—which has since 1763 applied to the public law of the province of Quebec—where an agency is acting as a delegate of the legislature and is not given a ministerial department through which to report to the legislature, it is the Attorney General who acts as the legal officer of that agency. Unless the statute contemplates that the head of the Liquor Commission is a delegate of a power vested in the prime minister or the Attorney General, Duplessis had no authority to “order” a cancellation. Nonetheless, acting as legal adviser, the Attorney General does have au-

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<sup>124</sup> To illustrate the gravamen of my claim, I have attempted to draft a judgment of the Supreme Court of Canada that attends to these theoretical perspectives. See Appendix, below.

thority to counsel an administrative decision-maker and, like all legal counsel, in so advising is perfectly entitled to take into account a broad range of factors in formulating his advice. Today in 1959, administrative agencies typically have separate legal departments or “rent” counsel from the Department of Justice. In 1946, in Quebec they did not. The structural change since then would argue for the Attorney General not retaining an operational role as counsel to an agency, although the common law authority of the Attorney General as Her Majesty’s chief law officer remains. So while Duplessis most certainly had the authority as Attorney General to advise the head of the Liquor Commission as to an appropriate course of action, under the statute as then written, he did not have authority to order a cancellation.

C. *Did the head of the Quebec Liquor Commission properly exercise his discretion?*

[3] Counsel argued at length that the head of the Liquor Commission improperly exercised his discretion. This is an irrelevant issue, since the head of the Liquor Commission is not a party to this action. If we assume, however, either that Duplessis was the repository of the authority to cancel the licence or that Archambault was a party to these proceedings, the question could be addressed by this court. Duplessis claims that a liquor licence is a statutory privilege, not an entitlement. He further claims that, as a matter of public policy, the Government of Quebec has decided not to create a statutory monopoly for the purveyance of alcohol in all circumstances, but to regulate the consumption of alcohol by franchising the right to serve alcohol to designated private-sector actors who meet appropriate standards of sobriety, public health, and good morals. Given the importance of preventing alcoholism and limiting excessive consumption, and given that liquor licences were, in 1946, a tool of public governance, it is an appropriate exercise of discretion to inquire into the activities of those holding licences when it is alleged that the economic benefit of the licence is being deployed to undermine public policy announced by a democratically elected government. Whether this inquiry is appropriate for all licences in all cases at all times, and what types of activity are inappropriate for a licence holder, are matters of political and legislative judgment in individual cases. In 1946, in Quebec, facilitating the distribution of literature that the Quebec Court of Appeal had deemed to be defamatory and seditious was an action that the government could properly view as contrary to the purposes of the grant of a regulatory privilege.

[4] Counsel also argued that, even were this characterization of liquor permits accurate, the public policy grounds for cancellation would have to be spelled out in the relevant statute. It is to be recalled that the *Alcoholic Liquor Act* stated explicitly that holders of liquor licences must be of “good moral character”, a criterion that is not elaborated further in section 148. While a liquor licence could not be revoked on a ground extraneous to the public policy pursued in alcoholic regulation—for example, on the simple ground that Roncarelli was a Jehovah’s Witness, or because the head of the Liquor Commission had a personal animus against Roncarelli—that, arguably, was not the case here. This said, Duplessis did not provide this court with sufficient evidence linking the public policy concerning liquor regulation and the criterion of good moral character with the specific breaches of good morals that would justify revocation. Nonetheless, this court accepts that had such evidence been forthcoming, it would not have been contrary to law for the licence to have been revoked

on broad grounds of public policy relating to the regulatory purposes being pursued in the *Alcoholic Liquor Act*.

D. *Was Duplessis immune from a civil action?*

[5] Under long-standing principles of constitutional law, all public officials are liable for the wrongs they commit unless they are declared immune from such liability by an act of the legislature. No such legislative immunity is given to the defendant in this case by the *Alcoholic Liquor Act*, the *Attorney-General Act*, or the *Code of Civil Procedure*.

E. *Did the failure to give Duplessis notice as required by article 88 C.C.P. bar Roncarelli's claim?*

[6] According to long-settled jurisprudence of the Quebec Court of Appeal, article 88 C.C.P. is applicable whether a public official is acting in good or bad faith, whether a public official is acting legally or illegally, and whether a public official is acting with or without statutory authority. The test for whether an official is acting as a public official is whether the language of the purported statutory or common law authority envisions the generic types of acts undertaken, and whether the purported exercise of authority is consistent with the purposes for which such authority (or presumed authority) is delegated. It is not relevant that Duplessis, as a politician, was waging a "*guerre sans merci*" against Jehovah's Witnesses; nor is it relevant that for political reasons he stated his intention to revoke the licence. Unless it could be shown either that the act of "ordering the cancellation" could not be plausibly connected to the common law role of the Attorney General as Her Majesty's law officer, or to his role as legal adviser to the Quebec Liquor Commission, and that the decision was taken on grounds of personal malice not relevant to an assessment of the purposes attached to such a role, article 88 applies to Duplessis's actions. It is true that the combination of the fiat requirement for proceeding against the Liquor Commission or its general manager, combined with the requirement to give notice, appears to have left Roncarelli without a remedy. However much it is to be hoped that these discretionary fiat requirements will be abolished in the future, the thirty-day notice requirement does not confer a judicial discretion to dispense with it. It is, moreover, perfectly consistent with the logic of the *Code of Civil Procedure* in respect of actions against public officials. The appropriate remedy for Roncarelli, faced with the refusal of Duplessis, as Attorney General, to permit proceedings against the Liquor Commission, and the refusal of Chief Justice Létourneau to authorize proceedings against the manager of the Quebec Liquor Commission, would have been to bring judicial review proceedings to have those refusals set aside. Had he done so, given the facts as established by Justice Mackinnon at trial, the request to quash the refusals would have been granted. The mere fact that article 88 bars Roncarelli's action in damages against Duplessis is no justification for undermining the procedural regime by which the rule of law is preserved in cases of actions brought against public officials.

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