

Rand's Legal Republicanism

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Résumé de l'article

Le jugement du juge Rand dans l'affaire *Roncarelli c. Duplessis* se comprend le mieux à la lumière de la théorie politique et juridique récente qui défend l'importance de l'idéal républicain de « non-domination ». En effet, l'approche de Rand quant à la primauté du droit exprime bien cet idéal, qui est à son tour basé sur l'idéal plus fondamental du respect des personnes. Selon Rand, Roncarelli était membre d'une minorité qui n'était pas appréciée, il a été pointé du doigt et persécuté alors qu'il n'avait rien fait d'autre que d'exercer ses droits en tant que sujet libre et égal de la loi. Ceux qui l'ont persécuté ont tenté d'atteindre leurs objectifs par l'entremise du droit.

Toutefois, comme l'a appris Duplessis, le fait pour un gouvernement d'être soumis au droit aide à garantir la « non-domination », c'est-à-dire la primauté du droit et non l'état arbitraire de l'homme, et rend plus difficile l'utilisation du droit pour viser un individu afin de le dominer. Peu importe son emprise sur le pouvoir, une personne pourrait découvrir que ses objectifs ne constituent pas des objectifs publics dans le cadre d'un système de droit public puisqu'un tel système est fondé sur le respect des personnes qui sont sujettes à son autorité.

RAND'S LEGAL REPUBLICANISM

*David Dyzenhaus**

Justice Rand's judgment in *Roncarelli v. Duplessis* is best understood in light of recent political and legal theory that argues for the importance of the republican ideal of non-domination for in it he sets out an account of the rule of law that gives clear expression to that ideal, one founded in a more basic ideal of respect for persons. As Rand understood things, Roncarelli was a member of a disliked minority, who was singled out for persecution when he had done nothing more than exercise his rights as a free and equal subject of the law. Those who singled him out for persecution sought to achieve their ends through law.

The author argues that since government under law is valuable because it helps to secure non-domination (the rule of law rather than the arbitrary rule of men), to use law to single out an individual for domination is, as Duplessis discovered, rather a complex business. No matter one's grip on power, one might find that one's ends simply do not count as public ends within a system of public law because such a system is predicated on respect for the persons who are subject to its authority.

Le jugement du juge Rand dans l'affaire *Roncarelli c. Duplessis* se comprend le mieux à la lumière de la théorie politique et juridique récente qui défend l'importance de l'idéal républicain de « non-domination ». En effet, l'approche de Rand quant à la primauté du droit exprime bien cet idéal, qui est à son tour basé sur l'idéal plus fondamental du respect des personnes. Selon Rand, Roncarelli était membre d'une minorité qui n'était pas appréciée, il a été pointé du doigt et persécuté alors qu'il n'avait rien fait d'autre que d'exercer ses droits en tant que sujet libre et égal de la loi. Ceux qui l'ont persécuté ont tenté d'atteindre leurs objectifs par l'entremise du droit.

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* Professor of Law and Philosophy, University of Toronto. I thank all of the participants at the symposium for two days of exhausting but very illuminating discussion, and Robert Leckey for written comments. Most of all, I thank our organizer, Geneviève Cartier, not only for her work in regard to the symposium, but also because the central idea in my contribution (the problem of the legalization of illegality) is something to which she drew my attention some years ago.

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Introduction

The decisions of apex courts are immortal in the way that very famous people are: they live on in the public record, even if much of that record fades from active memory. And like a small group among the very famous, a decision such as *Roncarelli v. Duplessis*¹ lives on not only through its place in the public record, but also because it is part of active memory. It is remembered as having a significance beyond the fact that the apex court of the land considered the legal issue in the case fit for its scrutiny and resolution.

That the Supreme Court of Canada considered an issue fit for its consideration is in itself supposed to indicate that the issue and its resolution are matters of national legal importance. But often the Court's view is not borne out by the attention the decision gets—at least not beyond the ritual of recital by lawyers and in judgments in related matters of its style of cause for some years afterwards. Even when the Supreme Court of Canada specifically articulates its view that a decision is a particularly important contribution to the law, intended to provide a definitive resolution of some difficult and important issue, that decision might earn more ritualistic respect than others for a time, but be doomed to fade from active memory if neither its reasoning nor its rhetorical power suffices to capture the legal imagination of lawyers, whether in the academy or in practice.² Rhetorical power, however, is not a necessary element for such capture. Powerful reasoning may not be memorably expressed, though many decisions are remembered for a passage that exhibits the rhetorical power with which a judge articulated some general insight rather than for any bit of substantive reasoning.

Justice Rand, of course, had a rare gift for both rhetoric and reasoning, which is why, as Thomas Berger put it in *Fragile Freedoms*, his “judgements ... cannot be read swiftly, and certainly they require thought, but the truths they yield make a careful reading of them deeply worthwhile. [They] are the Canadian judiciary's greatest monument”;³ that is, Justice Rand's judgments are remembered as a part of active memory, both for what they conveyed and how they conveyed it, though as Berger suggests, the “how” sometimes gets in the way of the “what”.

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

² I would predict that the recent decision by the Supreme Court of Canada in *Dunsmuir v. New Brunswick* is an example of a case where the billing given by the Court to its own decision will not be vindicated, precisely because there is nothing in either the reasoning or the rhetoric of the majority that is capable of capturing the legal imagination (2008 SCC 9, [2008] 1 S.C.R. 190, 291 D.R.L. (4th) 577).

³ Thomas R. Berger, *Fragile Freedoms: Human Rights and Dissent in Canada* (Toronto: Clarke, Irwin & Company, 1981) at 182-83.

Such obstruction happens with Justice Rand for two reasons. First, he on occasion allowed rhetorical power to substitute for reasoning so that even the sympathetic reader might conclude that Justice Rand was engaging in rhetoric for effect rather than for insight. This is, in my view, a markedly and unfortunately persistent feature of his extracurial writings. Second, on occasion, his rhetoric alerts us to the fact that he needs to convey an insight that is part of or encapsulates a powerful chain of reasoning but one that he cannot render wholly explicit. Here we might say that rhetoric outstrips reasoning but does not substitute for it.

In my view, this second feature characterizes the judgments that make up his monumental contribution to Canadian public law. And for a set of judgments to have this claim, they must do more than mark some discrete events; they must also stand as an enduring contribution to our legal life. They must remind us of principles that would be foolish—even dangerous—to forget, since their articulation in the judgment is particularly apt and, more importantly, are capable of providing us with new insights into our contemporary situation.

As such, these judgments differ from even the small group among the very famous people who live on in our active memory, for the judgments remain live interlocutors in our debates. While those who examine the life of another in a search for its meaning might imagine themselves as engaged in a conversation, there is something different about a judgment since, if we are engaged with it, it is as alive on its fiftieth anniversary as it was on the day it was issued.

So one of the reasons we gathered to celebrate the fiftieth anniversary of *Roncarelli* is that we started with the assumption that there is much in Justice Rand's judgment that is still capable of providing us with such new insights. Perhaps there is even a kind of necessary aspect to the fact that some, perhaps many, great judgments are great precisely because their reasoning can never be rendered wholly explicit. For it is only with time that we understand them, or—so we suppose at any particular point of time—understand them better.

The ambition of this symposium was correspondingly to come to some new understandings, even if we differed about what they are. And even if, as the symposium proved, we should now think that the dissenting judgments in *Roncarelli* are valuable in ways that have not been hitherto appreciated, we might want to be more critical of Justice Rand's jurisprudence. For even if that critical stance is the correct one, we would not have been led to adopt it, as the symposium also proved, if Justice Rand had simply concurred in one of the other majority judgments in *Roncarelli*. Justice Rand's judgment remains the reason we read and reread *Roncarelli*, however differently we may read it at different times.

I have already made my own attempt at a detailed reading of *Roncarelli* in a Rand Lecture at the University of New Brunswick,⁴ and the five-year gap since that attempt has not been sufficient for me to develop any new ideas. Instead, I choose here to refine and elaborate my understanding of the passage I used as an epigraph to that lecture. I had not given the paragraph any sustained attention at that time, however, because while clearly I had found its message attractive, I could not then, as it were, decipher its meaning.

The passage is taken from an extracurial writing, an essay penned soon after *Roncarelli* was handed down. As we will now see, it is to a large extent an example of rhetoric substituting for reasoning in Rand. There is no clear connection between the individual sentences, and none of the sentences by itself expresses a clear thought. I will argue, however, that the paragraph, when read together with *Roncarelli*, expresses an attractive legal theory that is aptly termed “legal republicanism”.⁵

I. Liberalism and Its Critics

The absence of express constitutional limitations to legislative action has not remitted the individual to the sometimes precarious and sluggish security of public opinion and legislation. The matrix of legislation in a common law parliamentary sovereignty is instinct with the paramount purpose of sustaining democratic institutions toward which the judicial process of interpretation should be both responsive and resourceful. The urgency for their effective assertion comes into play in times of stress and danger; it is then, in the confusion of fear, distrust and fanaticism, that voices uttering the deep postulates of free men should be heard and felt.⁶

As I have just indicated, this is a somewhat dark and incoherent passage. Yet there is something intriguing in it. It starts with the idea that the legal subject is not abandoned to the play of public power in the absence of express constitutional limitations. It then indicates that legislation itself provides protection in a system of parliamentary sovereignty, that the protection is inherently democratic, and that judges have a special responsibility to maintain that democratic quality. Finally, Rand suggests that the assertion of these democratic institutions is particularly important in times of stress and that it is in such times that the funda-

⁴ See David Dyzenhaus, “The Deep Structure of *Roncarelli v. Duplessis*” (2004) 53 U.N.B.L.J. 111.

⁵ In this regard, my argument resonates with several of the other contributions to this Special Issue. See especially Evan Fox-Decent, “Democratizing Common Law Constitutionalism” (2010) 55 McGill L.J. 511; Matthew Lewans, “*Roncarelli*’s Green Card: The Role of Citizenship in Randian Constitutionalism” (2010) 55 McGill L.J. 537.

⁶ Ivan C. Rand, “Some Aspects of Canadian Constitutionalism” (1960) 38 Can. Bar Rev. 135 at 160 (the original text reads “the deep postulates of free men”).

mental postulates of legal order—the “deep postulates of free men”—must be forced into view.⁷

This set of ideas resonates with the recent revival in legal and political theory of republicanism. Republicans present themselves as critics of liberalism, but, as they often recognize, they have considerable difficulty distinguishing themselves from the liberal tradition broadly conceived.⁸ It is probably safe to predict that, as with the debate between liberalism and communitarianism, liberalism will “win” the debate against republicanism since, like communitarians, republicans are not utopian thinkers—dreamers of an absolute in which all the institutions of liberal democracy are to be smashed and replaced with some radically different, though vaguely conceived new order. But it is also safe to predict that, while this will be a victory for liberalism as it continues to be the dominant mode of discourse in political and legal theory and republicanism virtually disappears as a banner for critics, the discourse of political and legal theory will nevertheless be deeply affected. We can appreciate this through a quick look back at the debate between liberals and communitarians.

Liberalism won that debate because liberals were able to show not only that strands within the liberal tradition had as a matter of history been attentive to the concern of communitarianism with the place of tradition and community in shaping and nurturing individual autonomy, but also that as a matter of normative argument, it was important for liberalism to revive those resources in order to focus on that kind of concern. Moreover, the issue was, of course, not driven by considerations completely internal to academic debate. The political, social, and economic standing of minorities, whether immigrant, aboriginal, or national within nation states, was and is at stake in that debate; and it was no accident that the academic debate happened at a time when such issues were coming to the fore.

I do not mean to suggest that liberalism solved the problem of minority standing either at a theoretical or at a practical level. Rather, it more or less successfully internalized the problem, making it one for liberal political and legal theory, with the concern of the communitarians taken over by the “multiculturalists”, a group who argue for both theoretical and practical reforms, but who make their arguments as liberals, not as critics of liberalism. So my prediction for republicanism is that its critique of liberalism will be internalized in the same way as the communitarian cri-

⁷ *Ibid.*

⁸ See e.g. Samantha Besson & José Luis Martí, “Law and Republicanism: Mapping the Issues” in Samantha Besson & José Luis Martí, eds., *Legal Republicanism: National and International Perspectives* (Oxford: Oxford University Press, 2009) 3 (making strenuous and not very convincing attempts to distinguish themselves from liberals).

tique was internalized, but also that the importance of the normative claim that is central to the critique will force a shift in liberal inquiry.

As I have suggested, for such a shift to happen, two conditions must be in place. First, the liberal tradition must be composed of strands that in fact provide the normative resources for it to make the shift. Second, there must be practical considerations that make it normatively imperative that such a shift occur. But before I embark on discussion of these conditions, it is important first to establish both an understanding of republicanism, especially legal republicanism, and an understanding of why Justice Rand's decision in *Roncarelli* is quintessentially and illuminatingly republican.

II. Legal Republicanism

There is no uncontroversial way of describing republicanism's central concern. However, one republican theme, most powerfully articulated by the philosopher Philip Pettit, is that of non-domination.⁹ It seems to be becoming a dominant theme, in part because of its inherent importance, and in part because it is the best candidate for establishing republicanism as a distinct position within political theory. In this second regard, we should note that republicanism has to distinguish itself not only from liberal theory, but also from those democratic positions that argue for an enhanced role for parliaments in political life and regard liberalism as committed to taking political power away from "the people" by making judges the ultimate deciders on fundamental questions of political morality. I will call these positions parliamentarist, an ugly label but one that avoids the question begged in supposing that there is something quintessentially democratic about them; that is, it avoids the definitional fiat that implies that liberal positions are undemocratic.

Pettit and other contemporary republicans identify liberalism with the idea of liberty as non-interference—an idea coined by Thomas Hobbes,¹⁰ entrenched by Jeremy Bentham,¹¹ and rearticulated in the twentieth century by Isaiah Berlin in his contrast between negative and positive liberty.¹² Republican liberty, by contrast, is what one has when one is not subject to the domination or mastery of other individuals or the state. As

⁹ Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon Press, 1997) at 21.

¹⁰ Thomas Hobbes, *Leviathan*, rev. student ed. by Richard Tuck (Cambridge: Cambridge University Press, 1996).

¹¹ See generally Jeremy Bentham, *The Works of Jeremy Bentham* (New York: Russell & Russell, 1962).

¹² Isaiah Berlin, "Two Concepts of Liberty" in *Four Essays on Liberty* (Oxford: Oxford University Press, 1969) 118.

Pettit points out in the pioneering philosophical analysis of republicanism, “mastery and interference do not amount to the same thing.”¹³ One is subject to mastery when one is in practice or potentially subject to the decisions of another who is permitted to decide arbitrarily, that is, as he likes, without regard to what will serve the interests of those subject to his decisions.¹⁴ In contrast, if someone is allowed to interfere with me, but only on condition that the interference promises to further my interests and in accordance with opinions I share, there is no domination since the interference is not on an arbitrary basis: “The person envisaged relates to me, not as a master, but more in the fashion of an agent who enjoys a power of attorney in my affairs.”¹⁵

The idea of freedom as non-domination is politically significant for at least the following reasons. It allows us, first, to pinpoint what is wrong with the situation where a slave has a generous master who hardly interferes at all with the slave’s decisions. While the master does not in fact interfere in the slave’s life, he is entitled to do so at whim, so the slave remains in a condition of “unfreedom”—he is still subject to the dominion of the master. However, on the negative liberty view of freedom, where only actual interference counts, the slave not only is free but also has more freedom than the citizen of a social welfare state, where the state interferes constantly in the lives of its subjects.

Second, the idea does not commit its adherents to supposing that any interference in one’s life is dominating. On the negative liberty view of freedom, any interference limits liberty and so has to be counted as a moral loss. While this view contemplates that some interferences are necessary, to keep at bay the state of nature in Hobbes, or to promote overall utility in Bentham, the question with each interference is whether there is some benefit that outweighs the moral loss incurred. There is thus something morally problematic about any interference, which is why those who hold the negative liberty view of freedom distrust state intervention and are inclined to entrust the judiciary with guarding the space of negative liberty against the interferences mandated by legislatures.

In other words, there is supposed to be a distrust of parliaments and an emphasis on judicial guardianship of individual negative liberty inherent in the liberal position. In contrast, republicans are not opposed to interference as such and are open to arguments about what form of institutional arrangements will make state interferences non-dominating so that state interference in general is not regarded with suspicion, but rightly regarded as legitimate as long as it serves the cause of non-domination.

¹³ Pettit, *supra* note 9.

¹⁴ *Ibid.* at 22-23.

¹⁵ *Ibid.* at 23.

Third, the view of freedom as non-domination does not fall prey to a supposed liberal obsession with state interference in the lives of individuals; that is, republicans oppose not interference but dominating interference. But since what they oppose is dominating interference, they oppose it whatever its source. Thus they will be alert in a way that liberals are not to non-state or private sources of domination, whether the domination is exercised by economic elites, or by men over women, or by one ethnic group over others. Correspondingly, they will be more concerned with furthering the cause of substantive equality than liberals. Since, by the second reason, republicans have no moral aversion to non-dominating interference, and, by the third reason, will welcome interference when it not only is non-dominating but also actively removes sources of domination, republicans can unproblematically suppose that a state that actively promotes social welfare is promoting freedom, as long as what it does is done in the right way.

That of course leaves the question of how to tell when interference is non-dominating—that is, when it is arbitrary and when it is not—which brings us back to the first reason. Republicans tend to embrace some form of the parliamentarist position because they associate monarchical rule with arbitrary despotism. Thus they regard the political struggles to wrest political power from the monarch in order to locate it in Parliament as furthering the cause of republicanism. But, it is important to see that there are two quite independent arguments about why this relocation of political power might be considered republican. One we can call the representation argument, since it puts forward the familiar thesis that with universal suffrage in place and Parliament as the sole legislative body, public political decisions will be decisions in which formally all can be said to participate. Such decisions are more likely than those produced by any other procedure to track the interests of those subject to them, and thus will be non-dominating. The other we can call the rule-of-law argument, since it focuses on the fact that if political power is located in Parliament, the exercise of power will be in the form of general laws to which public officials can be held accountable; and this accountability to law is what renders the exercise of power non-dominating.

As I will argue below, there is no immediate inconsistency in putting forward both arguments. But they do not necessarily reinforce each other. Parliament may, for example, delegate power by law to the executive in such a way that the executive is by law entitled to act in an arbitrary fashion. Consider, for example, Justice Cartwright's dissent in *Roncarelli*. While Justice Cartwright held the view that Duplessis had not influenced the decision to cancel Roncarelli's licence to any great degree, he was prepared to assume that Duplessis's instructions to Archambault constituted

a “determining factor” for the purposes of the legal discussion.¹⁶ But, after reviewing the statutory framework, he observed:

On a consideration of these sections and of the remainder of the Act I am unable to find that the Legislature has, either expressly or by necessary implication, laid down any rules to guide the commission as to the circumstances under which it may refuse to grant a permit or may cancel a permit already granted. In my opinion the intention of the legislature, to be gathered from the whole Act, was to enumerate (i) certain cases in which the granting of a permit is forbidden, and (ii) certain cases in which the cancellation of a permit is mandatory, and, in all other cases to commit the decision as to whether a permit should be granted, refused or cancelled to the unfettered discretion of the commission. I conclude that the function of the commission in making that decision is administrative and not judicial or quasi-judicial.¹⁷

And he invoked Justice Masten in *Re Ashby*, stating that the legislature intended the bearer of such administrative discretion to be “a law unto itself.”¹⁸

Since an official who is a law unto himself by definition wields arbitrary, dominating power, republicans cannot rest with the representation argument alone; they need to bring in the rule of law argument in order to forestall the prospect of an executive that is empowered by statute to wield arbitrary power. They want, in other words, not merely rule by Parliament’s statute law, but also rule in accordance with the rule of law.

Now there is an account of the rule of law that tries to restrict its operation to principles that help to determine a content of particular laws so that the law to which officials are held accountable is the law with the content that one can plausibly claim that Parliament, as a matter of fact, intended that law to have. This “legal positivist” account of the rule of law might well seem to be attractive to republicans, since if they accept the representation argument, they will want the law made by Parliament to be interpreted in accordance with principles that seek to determine a content of this sort. So, for example, Samantha Besson and José Martí suggest that “legal republicanism ought to encompass a positivist theory of law, because it cannot rely on the existence of a natural, pre-political validity.”¹⁹

Their point, though rather obscurely put and unelaborated in their essay on legal republicanism, is, I take it, as follows. The alternatives to

¹⁶ *Roncarelli*, *supra* note 1 at 164.

¹⁷ *Ibid.* at 166-67.

¹⁸ [1934] O.R. 421 at 428, [1934] 3 D.L.R. 565 (C.A.), cited in *Roncarelli*, *supra* note 1 at 167.

¹⁹ Besson & Martí, *supra* note 8 at 32.

positivist accounts of the rule of law are natural law positions, which hold that the principles of the rule of law are moral principles whose content is established by arguments that are prior to, or transcend, politics. Since Besson and Martí reject the claim that there are such prior moral principles, they must suppose that moral principles are simply the principles that a republican political order decides on. It thus seems to follow that republicanism must content itself with an account of the rule of law that is instrumental to the production of principles. The principles of the rule of law are then not moral. They are simply principles of efficacy, which ensure that the rule of law is the rule of *the* law—of the law with a republican content.

Any such account of the rule of law must, however, cope with the problem of indeterminacy in law, those occasions when there is no uncontroversial candidate for the content of the law in this positivist sense. And that problem is writ large in the administrative state because of the explicit delegations to officials of discretion as to both how to interpret the law and how to implement it. Moreover, it is easy to see how the positivist account can lead to conclusions such as the one Justice Cartwright drew in *Roncarelli*: since the legislature did not intend as a matter of fact the discretion to be controlled, it is uncontrolled. This problem alone thus attracts republicans to richer accounts of the rule of law than the positivist one. On such accounts, judges are entitled on the basis of principles of fairness and justice to interpret statutes so as to find that officials are controlled by law, where law means not only the content of the positive law, but also whatever principles of legality are plausibly claimed to be part and parcel of the rule of law.

On such accounts, judges are entitled to attribute to Parliament the intention to abide by these principles so that, in a situation such as that presented by the statute in *Roncarelli*, the official's discretion is controlled by such principles. Moreover, Parliament is assumed to have that intention as a matter of its place in a legal order that is committed to constitutional government—government according to law in both the senses sketched above. And that assumption has the following consequence: judges should always attempt to find that the content the law has is one that furthers rather than frustrates those principles. So if one interpretation of a law seems to frustrate these principles, and another plausible interpretation furthers them, judges are under a duty to choose the latter. In this situation, if the first interpretation is the one that is suggested by a positivistic account of the rule of law, it should still be rejected.

Consider, for example, that article 88 of the Quebec *Code of Civil Procedure* (C.C.P.) required that those who wished to bring suit against a public official give that official thirty day's notice, and *Roncarelli* failed to

give such notice. As Robert Leckey points out,²⁰ Justice Fauteux's dissent in *Roncarelli* pivoted on an interpretation of article 88 C.C.P. as making sense only if it was understood to confer procedural protection on acts that might ultimately in substance be characterized as illegal—an interpretation that he arrived at by reading its text literally and by looking to actual indications of legislative intent. But this interpretation should be anathema to both republicans and liberals, not only because they would be averse to the legalization of illegality, but also because the six-month limitation period during which Roncarelli would had to have given his notice had expired.

Republicans, we can now see, find themselves in a dilemma. On the one hand, their position threatens to collapse into the parliamentarist one, which is that as long as the content of the law is determined exclusively by a democratically elected parliament, the law is legitimate. It follows from that position that one should adopt a positivist theory of the rule of law, one that includes only principles that serve a factual inquiry into the content of legislative intention. On the other hand, their position threatens to collapse into a liberal one, which requires that legitimate law be law interpreted in accordance with the principles of a rich account of the rule of law, with judges given ultimate authority on matters of principle.

But we should note that there is something odd about regarding this dilemma as particularly problematic. It exists only if one supposes that it is crucially important for republicans to show more than that they have an important normative claim to make about non-domination; that is, they must show that their claim can be made only by taking a position distinct from both liberalism and parliamentarism. The claim to such distinctiveness, while hardly limited to republicans, involves those who make it in an endless and generally fruitless exercise of classification—an exercise I have seen aptly titled “the narcissism of small differences.” It thus distracts them from the task of elaborating the content of their main normative claim.²¹

This exercise is a pity, especially when the claim is an important one, as I believe the claim about freedom as non-domination to be. It is important in political theory, especially because, as suggested above, it alerts us to the fact that the exercise of social or private power can be dominating, and even more oppressively so than the exercise of state power. It is not that liberals are blind to this fact. John Stuart Mill's *On Liberty* and *The Subjection of Women* are prominent examples of a liberalism that regards

²⁰ Robert Leckey, “Complexifying *Roncarelli*'s Rule of Law” (2010) 55 McGill L.J. 721 at 726ff.

²¹ Even a quick glance at the essays collected in Besson & Martí (*supra* note 8), as well as at their own essay, will reveal that a startlingly small proportion of the book is devoted to unpacking what words like “legal” and “law” mean for republicans.

social power as potentially more dangerous than public power because it tends to work more insidiously.²² Once this fact comes into view, we are also in a better position to inquire into how legal and social mechanisms of domination reinforce one another. It might well be the case, for example, that inquiry would reveal that the Duplessis government's legal battle against Jehovah's Witnesses was prompted by a sense of insecurity in Quebec's political elites and among the francophone majority about the ability of tradition to maintain unaided the kind of cultural identity that they considered to underpin the core of their society.

I wish, however, to focus on legal republicanism—the legal manifestation of the principle of non-domination. And in this regard I want to claim that the principle of non-domination is the best and perhaps the only way to understand the virtue of the rule of law. Recall that from the dark passage I quoted in Rand's essay above,²³ I disinterred the following ideas: (1) the legal subject is not abandoned to the play of public power in the absence of express constitutional limitations; (2) legislation itself provides protection in a system of parliamentary sovereignty that is inherently democratic, and judges have a special responsibility to maintain that democratic quality; and (3) the assertion of these democratic institutions is particularly important in times of stress and it is in such times that the fundamental postulates of legal order—the “deep postulates of f[r]ee men”²⁴—must be forced into view.

These ideas are all exemplified and given a more coherent basis in Justice Rand's judgment in *Roncarelli*. It was clear to the Court that Duplessis's government was in the grip of a kind of moral panic about Jehovah's Witnesses, as it regarded their proselytizing as a threat to the very foundations of Quebec society. It was thus, Justice Rand thought, important to emphasize that Roncarelli had standing as a free and equal citizen:

To deny or revoke a permit because a citizen exercises an unchallengeable right totally irrelevant to the sale of liquor in a restaurant is equally beyond the scope of the discretion conferred. There was here not only revocation of the existing permit but a declaration of a future, definitive disqualification of the appellant to obtain one: it was to be “forever”. This purports to divest his citizenship status of its incident of membership in the class of those of the public to whom such a privilege could be extended. Under the statutory language

²² For a collection of both works, see John Stuart Mill, *Three Essays* (London, U.K.: Oxford University Press, 1975).

²³ See *supra* note 6 and accompanying text.

²⁴ *Ibid.*

here, that is not competent to the Commission and *a fortiori* to the government or the respondent.²⁵

The Jehovah's Witnesses for whom Roncarelli had posted surety bail were being arrested under a municipal by-law that had a democratic provenance. But in his case, there was no legal issue of the sort that might make us suppose that the judges had to choose, as it were, between individual liberty and democracy. As we have seen, Justice Cartwright did suggest that the liquor licensing law had to be interpreted as imposing no controls on the exercise of discretion under it other than the controls it explicitly announced. But, as I have indicated, such an interpretation is compelled only if one is inclined to the parliamentarist view of democracy. Justice Rand, in contrast, supposes that a democratic state is also a constitutional state (one committed to government under law) which entails that public officials be accountable to law. For a judge to hold otherwise would be to allow

an administration according to law ... to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, [which] would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure.²⁶

Indeed, the only candidate in the case for creating a dilemma between democracy and liberty was article 88 C.C.P., which, as Leckey points out, presented a more formidable obstacle to Justice Rand's reasoning than he and commentators, including myself, have noted. Leckey argues that the effect of article 88 C.C.P. was not like that of a privative clause to exclude jurisdiction, but only to limit jurisdiction.²⁷ Since Justice Fauteux found both that Duplessis had acted illegally and that the illegality was encompassed by article 88 C.C.P., he could be said to have upheld the rule of law in a double sense: he signalled that a high official was guilty of an illegal act and that he as a judge was constrained by law to protect that illegality. In this second regard, Justice Fauteux displayed, more than Justice Rand, a sensitivity to the demands of the rule of law, since he took seriously the idea that judges, like all public office holders, are subject to law's discipline. Leckey wonders whether the neglect of both article 88 C.C.P. and of decades of local judicial interpretation of it by commentators might be the effect of an "effort to conscript a judicial text into the service of a transnational—Commonwealth or global—common law constitution or rule of law project," one which he believes will "tend to efface the jurisdiction-specific, the local law."²⁸

²⁵ *Roncarelli*, *supra* note 1 at 141 [reference omitted].

²⁶ *Ibid.* at 142.

²⁷ Leckey, *supra* note 20 at 724.

²⁸ *Ibid.* at 739.

While I must confess my utter complicity in the effort at such con-
 scription, I want to point out the complexity of determining what the local
 law was. First, we should notice that Justice Rand began his judgment at
 the most local level possible, in the thick of a legal dispute between an in-
 dividual described with due respect for his particularity, and an account of
 a political campaign against him and other adherents of his religion by
 those who wielded political power. In other words, in issue in that dispute
 was whether those with political power also had the *legal* authority to in-
 flict a harm on Roncarelli.

Second, one should conclude that the effect of Justice Rand's judgment
 was to reduce the autonomy of Quebec's public law within the Canadian
 federation if and only if the best interpretation of Quebec's public law was
 that it sought to protect official illegality in cases such as that of Ron-
 carelli.

Third, Justice Rand's judgment has a distinct rule of law edge on that
 of Justice Fauteux: it forces the Quebec legislature to decide whether it
 wishes to overrule the Supreme Court of Canada by declaring explicitly
 within the text of article 88 C.C.P. that the article protects particular ille-
 gal acts, including acts done in bad faith.²⁹ That is, the legislature would
 have to announce publicly that this is a society that is prepared to sacri-
 fice the interest of its citizens in non-domination. If the epithet "public" in
 the phrase "Quebec public law" is to be given any content, one could then
 argue that Justice Rand's judgment also has the merit of upholding Que-
 bec's *public* law system by refusing to give it an interpretation that makes
 citizens more vulnerable to dominating interferences by powerful political
 actors.

This point can be elaborated by considering Dicey's discussion not of a
 prospective procedural protection of officials against actions on the basis
 of alleged illegalities, but of the retrospective procedural protection pro-
 vided by an "Act of Indemnity".³⁰ This discussion occurs in the context of
 Dicey's argument that even in times of great stress and danger, martial
 law "in the proper sense of that term, in which it means the suspension of
 ordinary law and the temporary government of a country or parts of it by

²⁹ This would still leave open the question of whether such protection would be extended
 when an official had actively and in bad faith sought to bring himself within the scope
 of the protection. It is important in this regard to recall that Duplessis had actively put
 obstacles in the way of the various courses of legal action attempted by Roncarelli so
 that, when he and his lawyers decided as a last resort to bring a private law action, it
 was too late for them to give the requisite notice.

³⁰ A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London,
 U.K.: Macmillan, 1915) at 233. I use this edition because it is the last to contain Dicey's
 note on "Martial Law in England during Time of War or Insurrection" (*ibid.* at 538ff.).
 For an illuminating comparison of Rand and Dicey, see Mark D. Walters, "Legality as
 Reason: Dicey, Rand, and the Rule of Law" (2010) 55 McGill L.J. 563.

military tribunals, is unknown to the law of England.”³¹ This, in his view, was “unmistakable proof of the permanent supremacy of the law under our constitution.”³²

Dicey recognized that there might be legitimate recourse by officials to illegality in such times—that is, to actions that cannot be justified by the defence of necessity. It is this category of morally justified but illegal acts that an Act of Indemnity, properly so called, is meant to cover. But the fact that such a statute, one that retrospectively grants criminal and civil immunity to officials for their acts, amounts (in Dicey’s words) to the “legalisation of illegality”,³³ and vindicates, in his view, the claim that the English Constitution does not know martial law.

As I have argued in more detail elsewhere, in order to understand Dicey’s analysis of Acts of Indemnity, we have to notice the distinctions between three classes of acts that are candidates for retrospective authorization.³⁴ First, there are those acts that would be justified by the defence of necessity if an official were called to account before a court of law. Such acts are legally justified on a test amenable to judicial evaluation and thus, strictly speaking, there is no need for retrospective legalization, though an Act of Indemnity may serve the purpose of economy in preempting actions against officials that would otherwise have to be decided one by one. Second, there are those acts that, while not legally justified, are justifiable in that they were done in good faith and reasonable in the circumstances. In respect of this class of acts, an Act of Indemnity is required, both because the officials might otherwise be vulnerable to legal sanctions and for the sake of legality, with the latter, as I will show below, being the more important reason. Finally, there are those acts that are never legally justifiable because they cannot comply with legality, whether or not these requirements are formally entrenched.

Now as a matter of practice, it might be that the third class of acts is more likely to attract criminal prosecutions than the second, as the former is more likely to occasion individual and public outrage. That is, in practice, the second class might not require an Act of Indemnity, at least not to the same extent as the third. But for Dicey, on my interpretation, even if the officials will not in practice be called to account for illegalities in the second class, the legal order needs to repair itself for the sake of legality, as is revealed in the following passage:

³¹ Dicey, *supra* note 30 at 283-84.

³² *Ibid.*

³³ *Ibid.* at 233.

³⁴ David Dyzenhaus, “The ‘Organic Law’ of *Ex Parte Milligan*” in Austin Sarat, ed., *Sovereignty, Emergency, Legality* (New York: Cambridge University Press, 2010) 16.

An Act of Indemnity ... though it is the legalisation of illegality, is also ... itself a law. It is something in its essential character, therefore, very different from the proclamation of martial law, the establishment of a state of siege, or any other proceeding by which the executive government at its own will suspends the law of the land. It is no doubt an exercise of arbitrary sovereign power; but where the legal sovereign is a Parliamentary assembly, even acts of state assume the form of regular legislation, and this fact of itself maintains in no small degree the real no less than the apparent supremacy of law.³⁵

This is the more important reason for an Act of Indemnity. In its absence, the legal order undermines its commitment to legality—to the principle that all official acts must be able to display a legal warrant, especially acts that infringe the most fundamental of individual interests. Most prominent is the emergency context, where the interest in liberty is protected by habeas corpus.

In the passage above, Dicey acknowledges that a retrospectively bestowed legal warrant is arbitrary, since it is itself not controlled by law; yet, he wants to claim that it is qualitatively significant since it asserts the supremacy of law. From Dicey's analysis, we can extract the thought that all that is wrong with these executive acts is that they are arbitrary: they are both unjustifiable by the defence of necessity and not legally authorized in advance. But they are, to use my own term, "legalizable", that is, they are acts fit to be governed by a prospective regime of legality.³⁶ They thus contrast with acts in the third class that are "unlegalizable" in that they are not only legally unjustified, but also legally unjustifiable.

Dicey was, of course, aware that an Act of Indemnity could go far beyond what he considered to be its proper, moderate scope of covering acts that were done in good faith and reasonably.³⁷ But it is clear that for him, official acts that fall into the third class, the class of legally unjustifiable or unlegalizable acts, are not the proper subjects of an Act of Indemnity.

Thus a statute that indemnified retrospectively "all acts done by the executive in the course of dealing with the emergency" would not cover acts done in bad faith or unreasonably. To cover such an act, the statute would have to refer to "all acts, including acts done in bad faith or unreasonably" and even such a wide-ranging authorization would not be taken to include, for example, the authority to torture. It is not entailed in this position that judges are able to resist the legislature if it is explicit in this way. But even if they must defer, the reason of the common law still controls the intention of Parliament by forcing Parliament to be altogether

³⁵ Dicey, *supra* note 30 at 233.

³⁶ For Dicey's discussion of a statute that gave wide powers to the Irish executive in 1881, see *ibid.* at 227-28.

³⁷ *Ibid.* at 230-33.

explicit should it want to legalize the unlegalizable, which is an altogether different affair from legalizing illegality.

By analogy, if Parliament wishes prospectively to legalize the unlegalizable, it must do so altogether explicitly. And one should be careful not to diminish the normative significance of what judges have achieved, even when they have to defer to a clearly expressed intention to legalize the unlegalizable. For the judicially enforced requirement of explicit articulation of such an intention, what is called a clear statement rule in the United States, serves both legality and democracy by requiring a public statement by the legislature that it wishes to govern outside of the scope of the rule of law and thus to govern in an arbitrary way. And such a law, in Justice Rand's words, signals the "beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure."³⁸

Note in this regard that Justice Rand displayed no hostility at all to either statute law or more generally to the administrative state. He clearly accepted the legitimacy of statute-based regulatory regimes but wished to emphasize that in an era when our lives have become increasingly subject to public regulation, such regulation should not be arbitrary.³⁹

A better way of putting this point would be to say that Justice Rand might suppose that there is a false opposition in thinking of the problem the Court faced as one in which there is a choice between freedom and democracy. Rather, on his view, it is the case that the postulates of free men are what undergirds both democracy and the rule of law, and that

³⁸ *Roncarelli*, *supra* note 1 at 142. I should mention that I do not in this context accept the distinction Robert Leckey makes between legalizing an illegality and precluding an award of damages under the applicable general law of civil liability. Leckey points out that there are numerous legal constraints on claims for civil damages that might be engaged with a government official defendant—a notice requirement, a limitation period, even restrictions on the kind of harm that is compensable—that are not appropriately regarded, when they operate, as legalizing an illegality (Leckey, *supra* note 20). Thus, in Leckey's view, my clinging to the language of legality/illegality shows some resistance to recognizing that *Roncarelli* is a torts case and not a public law proceeding for quashing an administrative decision. However, Dicey's discussion of Acts of Indemnity is about statutes that give either criminal or civil immunity against actions for harm suffered as a result of official wrongdoing. It is, of course, true that *Roncarelli*'s action in tort was aimed in part at recovering damages, as the actions would be precluded by the civil immunity that Dicey contemplates. But, as Lorne Sossin argues, *Roncarelli*'s action should also be seen as an action to remedy a wrong to the society as a whole; one could say it was about restoring the integrity of the rule of law: Lorne Sossin, "The Unfinished Project of *Roncarelli v. Duplessis*: Justiciability, Discretion, and the Limits of the Rule of Law" (2010) 55 McGill L.J. 661. In this regard, compare Dicey's discussion of Habeas Corpus Suspension Acts, which, when properly used, only temporarily suspend recourse to the courts for the determination of the legality of a detention (Dicey, *supra* note 30 at 224-28).

³⁹ *Roncarelli*, *supra* note 1 at 141-42.

those postulates are unrealizable outside of a system that is both democratic and legal.

The liberty we have in a modern society is liberty made possible by law, but it will be liberty if and only if particular laws are by provenance and form laws that have a claim to serve the postulates of free men. And for such law to have a hold on plausibility, any legal subject whose interests are affected by the decision of a public official must have access to an independent forum where she can ask not only by what legal warrant the official has acted, but also for a determination of the content of the warrant in light of the postulates that undergird the system.

Conclusion

I have claimed above that in order for the liberal tradition to make an important shift, it must be the case, first, that the tradition is composed of strands that in fact provide the normative resources for it to make the shift, and second, that there must be practical considerations that make it normatively imperative that such a shift take place. There are indeed practical considerations that make it urgent for us to focus on the idea of freedom as non-domination. After all, we are living with the consequences today of thirty or so years of dominance of the negative liberty strand of liberalism in public life—a dominance that is characterized by suspicion of regulation, a taboo on progressive taxation, rising inequality, and political apathy except on the part of those who wish the state to retreat even further from a role in public life. At the same time, there has been a trend, exacerbated by the reaction to the events of September 11, 2001, for the executive to arrogate ever more power to itself, as well as troubling signs within Western democracies of a resurgent social conservatism that seeks an “other” to demonize in order to shore up a sense of collective identity.

The idea of freedom as non-domination, with its closely associated ideal of equality, its alertness to the potentially dominating interferences of private and social power as well as of public power, its welcoming of state interference as long as it is non-dominating, and its aversion to the arbitrariness of public officials who are not properly accountable to law, is thus of particular political salience at this time. But what makes it so salient is precisely the hegemony of the negative liberty strand within public life, which, with the other trends sketched above, manifests a disrespect for moral principles associated with the liberal commitment to respect for the individual.

The importance of non-domination, the ideal of equality, and so on, are all firmly part of the liberal tradition of which the adherence to negative liberty is but one strand. Moreover, it is likely that one can make sense of the claim that these ideas are normatively important only within that tradition, with its insistence on respect for persons. As Charles Larmore,

at the end of an illuminating essay on republican political thought, puts it,

[t]he freedom we prize ... is always a freedom shaped by other moral principles, principles whose authority must therefore be understood as binding on us independently of our own will, individual or collective. Political freedom, if it is to have a shape that we today would welcome, must take its bearings from the obligation to respect one another as persons.⁴⁰

Rand's thoughts within his 1960 essay, when understood in light of his judgment in *Roncarelli*, thus set out an account of the rule of law that gives clear expression to the idea of non-domination, founded and shaped by an ideal of respect for persons. Roncarelli was a member of a disliked minority, who was singled out for persecution when he had done nothing more than exercise his rights as a free and equal subject of the law. Those who singled him out for persecution sought to achieve their ends through law. But since government under law is valuable because it helps to secure non-domination—the rule of law rather than the arbitrary rule of men—to use law to single out an individual for domination is, as Duplessis discovered, rather a complex business. No matter one's grip on power, one might find that one's ends simply do not count as public ends within a system of public law because such a system is predicated on respect for the persons who are subject to its authority.

In sum, the reason we gathered to celebrate the fiftieth anniversary of *Roncarelli* is that Justice Rand took the trouble to set out in his judgment the main elements of a republican legal theory.

⁴⁰ Charles Larmore, *The Autonomy of Morality* (Cambridge: Cambridge University Press, 2008) c. 7 ("The Meanings of Political Freedom") at 195.