

## Witnessing Arbitrariness: *Roncarelli v. Duplessis* Fifty Years On

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The Legacy of *Roncarelli v. Duplessis*, 1959-2009  
L'héritage de l'affaire *Roncarelli c. Duplessis*, 1959-2009

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Résumé de l'article

L'affaire *Roncarelli c. Duplessis* symbolise l'idée selon laquelle l'arbitraire et la primauté du droit sont des valeurs antithétiques sur le plan conceptuel. Dans cet article, l'auteure examine plusieurs formes d'exercice arbitraire du pouvoir dans *Roncarelli*, allant au-delà de l'accent qui est généralement mis sur le pouvoir discrétionnaire exercé de façon arbitraire par la branche exécutive du gouvernement.

Une lecture attentive de l'arrêt fait ressortir d'autres formes méconnues d'exercice arbitraire du pouvoir, notamment par l'appareil judiciaire. En replaçant l'arrêt dans son contexte social et politique, cette question peut s'aborder sous un nouvel angle à partir duquel le cœur conceptuel de l'affaire peut être élargi et l'importance normative de l'arrêt mieux saisie. L'auteure soutient qu'un tel repositionnement contextuel expose la façon dont les acteurs juridiques tentent de freiner l'arbitraire dans l'exercice de la fonction judiciaire. Le fait de justifier son raisonnement constitue une pratique importante au sein de la primauté du droit. Cette pratique permet de contrer l'arbitraire institutionnalisé en cherchant à s'assurer que les décideurs étatiques soient sensibles aux exigences de la légalité, qu'ils soient imputables et qu'ils s'engagent à maintenir une bonne gouvernance.

WITNESSING ARBITRARINESS:  
*RONCARELLI V. DUPLESSIS* FIFTY YEARS ON

*Mary Liston\**

In Canadian public law, *Roncarelli v. Duplessis* stands for the proposition that arbitrariness and the rule of law are conceptually antithetical values. This article examines multiple forms of arbitrariness in *Roncarelli*, going beyond the usual focus on discretionary power arbitrarily exercised by the executive branch of government.

A close reading of the case brings to the surface other forms of arbitrariness, notably under-acknowledged forms of judicial arbitrariness. Repositioning the case in its social and political context provides an alternative vantage point from which the core conceptual content can be enlarged and the case's normative import better gleaned. The article argues that such a repositioning illuminates how legal actors attempt to constrain arbitrariness within the activity of judging. Reason-giving appears as one significant rule of law practice that can counter institutionalized arbitrariness by seeking to ensure that decision makers throughout the state are attuned to the demands of legality, can be held to account, and are committed to upholding good government.

L'affaire *Roncarelli c. Duplessis* symbolise l'idée selon laquelle l'arbitraire et la primauté du droit sont des valeurs antithétiques sur le plan conceptuel. Dans cet article, l'auteure examine plusieurs formes d'exercice arbitraire du pouvoir dans *Roncarelli*, allant au-delà de l'accent qui est généralement mis sur le pouvoir discrétionnaire exercé de façon arbitraire par la branche exécutive du gouvernement.

Une lecture attentive de l'arrêt fait ressortir d'autres formes méconnues d'exercice arbitraire du pouvoir, notamment par l'appareil judiciaire. En replaçant l'arrêt dans son contexte social et politique, cette question peut s'aborder sous un nouvel angle à partir duquel le cœur conceptuel de l'affaire peut être élargi et l'importance normative de l'arrêt mieux saisie. L'auteure soutient qu'un tel repositionnement contextuel expose la façon dont les acteurs juridiques tentent de freiner l'arbitraire dans l'exercice de la fonction judiciaire. Le fait de justifier son raisonnement constitue une pratique importante au sein de la primauté du droit. Cette pratique permet de contrer l'arbitraire institutionnalisé en cherchant à s'assurer que les décideurs étatiques soient sensibles aux exigences de la légalité, qu'ils soient imputables et qu'ils s'engagent à maintenir une bonne gouvernance.

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In public regulation of this sort there is no such thing as absolute and untrammelled “discretion”, that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, *without express language*, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute.

Justice Rand<sup>1</sup>

## Introduction

In Canadian public law, *Roncarelli v. Duplessis* stands for the proposition that arbitrariness and the rule of law are conceptually antithetical values. Arbitrariness constitutes the central idea around which other concepts in the case revolve, such as authority, discretion, legitimacy, and reason. But what exactly are the attributes of arbitrariness in *Roncarelli*? Does the judgment disclose all possible forms of arbitrariness? Moreover, can *Roncarelli* still assist in understanding contemporary exercises of arbitrary power?

As part of the larger reflective and retrospective exercise that this Special Issue represents, this article first examines multiple forms of arbitrariness in *Roncarelli* (Part I). A close reading of the case demonstrates that arbitrariness as a normative concept possesses a robustness that, when used in legal discourse, draws on a profound historical legacy concerning political and legal forms of constitutionalism (Part II). This paper also suggests that a more comprehensive discourse of arbitrariness profitably provides alternative insights into the case’s iconic status in Canadian public law (Part III). Here, the argument brings to the surface implicit models of judging contained within the case in order to examine judicial arbitrariness. Repositioning the case in this manner provides an alternative vantage point to understand the differences between legal and political forms of arbitrariness and their possible remedies. Finally, this paper suggests that *Roncarelli* provides much assistance in building a stronger theoretical structure from which to understand and articulate not just the rule of law, as is the conventional reading, but also an updated conception of arbitrariness suitable for a modern state (Part IV). Indeed, *Roncarelli* particularly invites us to revisit, revise, and reconcile the relationship between the principle of the rule of law and that of parliamentary sovereignty.

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

## I. *Roncarelli's* Arbitrariness in a Nutshell

Before moving to a more detailed analysis, I will first very briefly retell the *Roncarelli* narrative in a manner that highlights the multiple manifestations of arbitrariness that are present in the case. This retelling aims to show in Part II how the combined effects of these multiple manifestations of arbitrariness make the case exemplary. My second objective relies on the first in order to make a modest counter-reading from a perspective fifty years on in Part III.

Frank Roncarelli was a Jehovah's Witness who ran a restaurant in Montreal and was denied renewal of his liquor licence formally by Edouard Archambault, the Chairman of the Quebec Liquor Commission, but effectively by Maurice Duplessis, then Attorney General and prime minister of Quebec. The denial of the liquor licence ended Roncarelli's economic activities as a restaurateur, threatened his livelihood, and publicly tarnished his name. This denial appeared to be authorized by the Chair of the Liquor Commission who possessed broad discretionary authority by statute to issue or cancel licences on what appeared to be any grounds under the statute. Due to public statements made by Duplessis during a press conference held the day after the cancellation, as well as legal testimony from Chairman Archambault and Duplessis, the real grounds for the licence cancellation were disclosed. It became clear that Duplessis was displeased about Roncarelli's bail support for his fellow Jehovah's Witnesses who were jailed under municipal laws for unauthorized distribution of their religious tracts, and that this was both the real motive and the real reason for the licence cancellation. Though Roncarelli himself was not an active pamphleteer, he was singled out by Duplessis to bear the collective burden of religious discrimination against his group. The real motive seemed to border on vengeance, malice, and the desire for punishment, given Duplessis's insistence that Roncarelli's liquor licence should be cancelled forever. One evidentiary focal point in the case was the question of whether or not Duplessis had actually "ordered" Archambault to cancel the licence during a telephone conversation that occurred the night before the cancellation and subsequent police raid on the restaurant.

Duplessis further channelled the disapproval of powerful Catholic authorities who wished the province to resist the possible expansion of this alternative faith and who characterized the activities of the Jehovah's Witnesses as near sedition. Duplessis's defence was that he was acting for the larger public good by protecting Quebec society from disloyal agitators, preserving public order, and ensuring that the justice system was no longer clogged up by their unruly activities.<sup>2</sup>

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<sup>2</sup> For an exposition of the background world view partly shared by the Catholic authorities and Duplessis, see the influential writings of Canon Lionel Groulx. See e.g. Canon

## II. Witnessing Arbitrariness

With this brief narrative in mind, this section will further contextualize *Roncarelli* in order to tease out the multiple manifestations of legal arbitrariness in relation to legal subjects, arbitrariness in the legal system, and the constitutive values of a larger political morality.

### A. *The Subject and the Subjective Core of Arbitrariness*

Justice Rand's judgment, featured in part as the epigraph to this article, most famously captures the normative core of arbitrariness.<sup>3</sup> Justice Rand characterized the liquor licence as an economic near-right, and a vested interest, contributing to Roncarelli's dignity, signifying his autonomy, and communicating his formal status as an equal Canadian citizen.<sup>4</sup> Archambault's apparent complicity in being the legal conduit for arbitrariness bordered on wholesale indifference to the effects of the licence cancellation on Roncarelli's life and dignity, and contributed to Roncarelli's belief that due process had gone awry.

Duplessis's individualized legal order, on the other hand, manifested the subjective core of arbitrariness traditionally characterized as ill will and the substitution of private for public purposes by individuals in positions of power.<sup>5</sup> Justice Rand argued that Duplessis interfered with the

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Lionel Groulx, "Tomorrow's Tasks" in H.D. Forbes, ed., *Canadian Political Thought* (Toronto: Oxford University Press, 1985) 255 (a 1936 address to the patriotic youth of Quebec made at the height of his influence). Groulx argued that Quebecers needed to resist the domination of the Anglo-American economic minority by becoming masters in their own house. A duty also lay on Francophone officials to use the state to realize the political character of the province:

But if it is granted that a Catholic people and country represent a value of a higher order; and if, despite our shortcomings and troubles, as a result of historic causes it happens that we embody, here in our land, Catholic spirituality and vitality as no other people does, then to work towards the creation of a French State, towards a climate of liberty for the flowering of human personality and Christian civilization—what is this, in short, but to give our labour and our life an incomparable end: the survival of one of the highest spiritual realities on this continent? (*ibid.* at 269).

Though ideologically congruent, Groulx and Duplessis were, in fact, political opponents.

<sup>3</sup> For the best elaboration of the normative core in Rand J.'s judgment and what this means for common law constitutionalism, see David Dyzenhaus, "The Deep Structure of *Roncarelli v. Duplessis*" (2004) 53 U.N.B.L.J. 111 [Dyzenhaus, "Deep Structure"].

<sup>4</sup> For further discussion of the import of citizenship in Rand J.'s thinking, see Matthew Lewans, "*Roncarelli's* Green Card: The Role of Citizenship in Randian Constitutionalism" (2010) 55 McGill 537.

<sup>5</sup> The psychological dimension should be distinguished from the legal core of arbitrariness in administrative law, where an improper motive, rather than ill will or spite, is required in order to obtain a legal remedy. By contrast, and as discussed below, malice is considered an essential element of the tort of abuse of power. See *Suing Government*

implicit statutory purposes of the *Alcoholic Liquor Act*<sup>6</sup> because Duplessis knew that these purposes did not further his preferred outcome. Perhaps Duplessis's actions stopped short of outright vengeance or vindictiveness, but Roncarelli's restaurant and livelihood were nevertheless dealt a "mortal blow".<sup>7</sup> In legal terms, the effect of Duplessis's actions therefore amounted to an abusive act that violated an interest essential to Roncarelli's autonomy and sense of dignity.<sup>8</sup> In political terms, it amounted to a form of domination from the perspective of liberal-republican theories of governance: Quebec's French-Canadian Catholic community was exercising its power as a national majority through public institutions in order to marginalize and silence a disruptive and sometimes aggressive minority religious group.

We might also label Duplessis's actions as subjectively capricious if we understood caprice to include truly pernicious actions rather than those that are simply aberrant, quirky, or whimsical in a quaintly humorous way.<sup>9</sup> Ordering the lunchtime public raid on Roncarelli's restaurant con-

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*for Abuse of Power* (Vancouver: Continuing Legal Education Society of British Columbia, 1987). See also Mark Aronson, "Some Australian Reflections on *Roncarelli v. Duplessis*" (2010) 55 McGill L.J. 615; David Mullan, "*Roncarelli v. Duplessis* and Damages for Abuse of Power: For What Did It Stand in 1959 and For What Does It Stand in 2009?" (2010) 55 McGill L.J. 587. Aronson and Mullan offer rewarding insights into the potential role of the tort of misfeasance in contemporary public law.

<sup>6</sup> R.S.Q. 1941.

<sup>7</sup> Claude-Armand Sheppard, "*Roncarelli v. Duplessis*: Art. 1053 C.C. Revolutionized" (1960) 6 McGill L.J. 75 at 75, reprinted in (2010) 55 McGill L.J. v.

<sup>8</sup> Joseph Raz argues that only some types of interference will count as an offence to the dignity of a person: insults, enslavement, and manipulation. See Joseph Raz, "The Rule of Law and Its Virtue" in *Liberty and the Rule of Law*, ed. by Robert L. Cunningham (College Station, Tex.: Texas A&M University Press, 1979) 3 at 14 [Raz, "Rule of Law"]. Duplessis's treatment of Roncarelli does not easily fit here unless we accept Raz's understanding of *implicit* insult: "An insult offends a person's dignity if it consists of or implies a denial that he is an autonomous person and deserves to be treated as one" (*ibid.*). Implicit insult necessarily relies on a theory of adjudication authorizing judges to do a lot of interpretive work with background understandings. If correct, this conclusion is at odds with the positivist desire for determinate and predictable judgments.

<sup>9</sup> But aesthetic inferences may also be relevant. Arbitrariness, for example, is completely permissible in aesthetic judgment. Aesthetics also leads us to the concept of the sublime, a related concept that played a political role in the Romantic period. Following the republican American and French Revolutions against monarchical forms of arbitrary power, the Romantic Movement embraced the necessity of revolutionary violence. Though mindful of the destruction wrought by Jacobinism and the Terror in the French Revolution, such costs were deemed necessary in the democratic struggle for political liberty. For a conservative proponent of limited power like Edmund Burke, this view illustrated the simultaneous irresistibility and danger of the sublime as a mode of unconstrained power. Aesthetically, it might be terrifically pleasurable to be thunderstruck by the beauty of natural wonders, to be bowled over by powerful beasts, to be thrilled by spectacles, and to enjoy many other delicious fears. Some forms help us realize our smallness and might then lead us to grasp the infinite or the power of God. But the po-



notes this kind of arbitrariness and Duplessis presumably felt fairly chuffed about the powerful public symbolism of his commands—a satisfaction he later revealed that same day at the press conference. Nevertheless, Duplessis denied that he or Archambault had anything “personal” against Roncarelli and so he did not consider his actions reprehensible on this more subjective level.<sup>10</sup> It is not possible to establish with any certainty whether or not Duplessis took great pleasure in causing such pain to Roncarelli. Moreover, Duplessis honestly believed he was acting for the greater good and his certainty about this belief lured him into thinking that the law would find for his side. He publicly stated several times, “I have no family. My only responsibility is the welfare of Quebec. I belong to the province.”<sup>11</sup> His subsequent testimony confirms his conviction that the harm done to the Jehovah’s Witnesses was clearly outweighed by the good for the larger society and was not an example of arbitrary interference—a defence that captures the battle between right and good that was so prominent in debates between liberals and communitarians.<sup>12</sup> Duplessis also characterized his approval of Archambault’s suggestion to cancel the permit as a necessary and noble duty, and so was not arbitrarily motivated either.<sup>13</sup> The former defence tapped into public law justifications to limit individual rights in order to further the public good, while the latter shielded Duplessis from a finding of fault in tort.

Hubris also brings into play one of Dicey’s three features of the rule of law—that no public official is above the law. Duplessis’s attitude brought him to that threshold—a disturbing result from a man trained as a law-

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litical forms of the sublime—either an overawing government grounded in fear or an infatuation with uncontrollable political violence—could not be positively valued by Burke. See William Keach, *Arbitrary Power: Romanticism, Language, Politics* (Princeton: Princeton University Press, 2004) c. 6 (“The Language of Revolutionary Violence”). See also Louis I. Bredvold & Ralph G. Ross, eds., *The Philosophy of Edmund Burke* (Ann Arbor: University of Michigan Press, 1960) (selections from Edmund Burke’s writings on the sublime).

<sup>10</sup> See *Roncarelli v. Duplessis* (1951), [1952] 1 D.L.R. 680 at 693 (Qc. Sup. Ct.) [*Roncarelli (Sup. Ct.)*].

<sup>11</sup> Pierre Laporte, *The True Face of Duplessis* (Montreal: Harvest House, 1961) at 33, cited in George Steven Swan, “A Preliminary Comparison of Long’s Louisiana and Duplessis’ Quebec” (1984) 25 *Louisiana History* 289 at 294, n. 42.

<sup>12</sup> From a liberal perspective, individual differences are arbitrary and cannot be endorsed as the unproblematic result of a pre-existing natural order. Institutions are therefore just when “no arbitrary distinctions are made between persons in the assigning of basic rights and duties and when the rules determine a proper balance between competing claims to the advantages of social life”: John Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1972) at 5. Rights reconstitute the natural person so that legal and political attributes, not natural attributes, possess moral significance and all possess formal equality as a result. Systemic discrimination occurs when patterned asymmetries occur widely along one attribute (e.g., gender or race).

<sup>13</sup> *Roncarelli (Sup. Ct.)*, *supra* note 10 at 692.



yer—and the effects of his arbitrary actions were further exacerbated by the overlapping sources of power stemming from his two executive functions: the political role of prime minister and the advisory legal role of Attorney General. This blending of functions recalls Montesquieu’s most famous institutional remedy for the risks of arbitrariness: to separate and distribute power among several institutions and corresponding persons so that no institution or official possesses an effective monopoly or stranglehold.

The connection between the subjective attitude of the man and the concentration of power is isomorphically suggestive. In this case, the closed mind of a powerful man confronted by the problem of pluralism ultimately resulted in the unilateral projection of power from the top down without regard for those subject to it. Duplessis’s normative and functional unilateralism resulted in antilegality and a resounding denial of the broader principles of *audi alteram partem*. It also approached political absolutism. Unlike the world of mathematics, however, under the rule of law, individuals and citizens are not to be considered arbitrary elements or interchangeable units in a vast and neutral system that may be put to any use by their master. On the contrary, a shared political belief in the equal moral worth of and respect for individuals requires that institutional practices attend to this status and that public power-wielders manifest their commitment to a constitutional bond of shared law.

### ***B. Functional Unilateralism***

The blending of functions discussed above leads us from the subjective—individualized with respect to the relationship between the two main actors that provides the overall drama and emotional resonance—to the functional dimensions of arbitrariness. Instead of Duplessis’s deliberate and wilful disregard for the rule of law, the law or its institutional failings constitute, whether overtly or inadvertently, another type of legal harm.<sup>14</sup> In this section, identifiable weaknesses take four forms: the overly broad delegation of discretion; the lack of institutional independence; the failure to give reasons; and the denial of access to justice.

A chief source of mischief was the statute<sup>15</sup>—an act of “legislative thoughtlessness”.<sup>16</sup> The statute contained an overly broad delegation of

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<sup>14</sup> For a treatment of arbitrariness in the context of technical deficiencies in criminal law, see Marc Ribeiro, *Limiting Arbitrary Power: The Vagueness Doctrine in Canadian Constitutional Law* (Vancouver: UBC Press, 2004).

<sup>15</sup> *Alcoholic Liquor Act*, *supra* note 6.

<sup>16</sup> Henry Richardson, *Democratic Autonomy: Public Reasoning about the Ends of Policy* (New York: Oxford University Press, 2002) at 7. Joseph Vining sums up this common judicial view of legislation. “What then is legislation? The implication, strongly hinted but never fully stated, is that legislation is action that need have no reason and need

discretionary power unconstrained by any overt signalling of purposes regarding the overall liquor licence scheme or any guidance through suggested decision-making criteria.<sup>17</sup> A literal reading of this seemingly open-ended statutory provision leads to the conclusion that the decision maker could base his decision to grant, cancel, or refuse a liquor licence on any ground without losing his legal authority. While the language of the provision was itself clear, the intended scope was extremely vague. It caused confusion and uncertainty not only to those who were subject to it, but also to those who applied it—borne out by Archambault’s need to consult Duplessis—because it neither channelled nor guided the exercise of power. This power therefore appeared absolute and untrammelled.

Application of the law represents the second failing, for Archambault did not apply his discretionary judgment at all. Indeed, his decision appeared to be dictated by Duplessis who therefore substituted his own judgment for that of the authorized decision-maker. Alternatively, if we accept that Archambault did make the decision prior to his phone conversation with Duplessis, then his decision was not fully determined by Duplessis. But, his decision still lacks independence and, with the public record as evidence, appears primarily politically motivated and biased.

Archambault also admitted that he had had Agent Y-3 secretly investigate Roncarelli before cancelling the permit in order to determine conclusively that Roncarelli was both restaurant owner and bail furnisher.<sup>18</sup> Surveillance was indirectly authorized by Duplessis in his capacity as Attorney General.<sup>19</sup> Political motivation, while not outright denied by the statute, violates an underlying set of expectations regarding good-faith decision-making and fair treatment in this statutory licensing regime. Political interference brings into play the principles of natural justice with respect to independence, impartiality, and bias. The fact that Archambault held an “at pleasure” appointment buttressed these concerns since

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meet no standards of consistency”: Joseph Vining, *From Newton’s Sleep* (Princeton: Princeton University Press, 1995) at 256. One potential danger of this view is the concomitant arrogation of institutional reason to the courts alone.

<sup>17</sup> See *Alcoholic Liquor Act*, *supra* note 6, s. 35: “The Commission may cancel any permit at its discretion.”

<sup>18</sup> Sheppard, *supra* note 7 at 79.

<sup>19</sup> Claude-Armand Sheppard reports this incident as follows:

Archambault, after verifying the facts, telephoned the prime minister in Quebec. He relayed to Duplessis the information he had received and mentioned his intention to cancel Roncarelli’s licence. Duplessis told him to be careful and to make sure that it was the same Roncarelli who gave bonds. Secret agent Y-3 confirmed Roncarelli’s identity. Archambault then called Duplessis and it was decided to cancel the permit (*ibid.*).

The passive voice in the last sentence signals the legal uncertainty about whether Duplessis was the actual determining cause of the cancellation.

he could hardly reject Duplessis's "advice", else risk losing his statutory office.

As a third weakness, Roncarelli received neither a hearing nor legal reasons for the decision; instead, he received public shaming and self-serving public statements from the prime minister of Quebec. Roncarelli therefore lacked any institutional reasons for the decision and possessed no concrete legal grounds from which he could dispute the decision.

On a positivist model of adjudication, a formally valid decision would not be legally suspect because it was issued without reasons or reasonable reasons. Justice Cartwright's dissenting judgment at the Supreme Court of Canada reflects this approach to the judicial review of discretionary decisions. According to Justice Cartwright, an administrative decision made within jurisdiction requires full deference from a court when its enabling statute grants absolute and unfettered discretion to the decision maker.<sup>20</sup> For Justice Cartwright, the expressly worded legal materials, literally read, determined the legal answer: an administrative tribunal, when exercising broad discretion, is a "law unto itself."<sup>21</sup> According to Justice Cartwright, the proper remedy for this situation lay with the legislature, not the courts.<sup>22</sup> The absence or presence of reasons as a component of legality becomes a neutral or even insignificant factor in this model of judging. Indeed, Justice Cartwright's approach to statutory interpretation goes beyond broad deference to appear as a judgment without judging: the supposedly unambiguous materials themselves dictate the correct answer.

For judges of a less positivist persuasion, on the other hand, the irrelevant reason for cancelling the licence—Roncarelli's unquestionably legal actions as bondsman—was certainly unreasonable from a rule of law perspective and clearly took Duplessis outside of his ministerial immunity under article 88 of Quebec's *Code of Civil Procedure*, despite the fact that he was not served notice of the suit as stipulated by the provision.<sup>23</sup> On

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<sup>20</sup> Moreover, this conclusion entailed that Duplessis could not be found liable in tort law for approving or dictating the decision if the statutory language permitted such an exercise of discretion. In administrative law, by contrast, an unreasonable or irrational exercise of discretion would be found invalid as an abuse of power.

<sup>21</sup> *Re Ashby*, [1934] O.R. 421 at 428, 3 D.L.R. 565 (C.A.), Masten J.A., cited in *Roncarelli*, *supra* note 1 at 167.

<sup>22</sup> *Ibid.* at 168.

<sup>23</sup> Article 88 of Quebec's *Code of Civil Procedure* stated:

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, nor can any verdict or judgment be rendered against him, unless notice of such action has been given him at least one month before the issue of the writ of summons.

this account, Duplessis furthered arbitrariness by severely damaging the integrity of the legal order.

Finally, we come to the fourth main functional failing concerning the citizen's legal ability to challenge a potentially arbitrary exercise of public power. Section 12 of the *Alcoholic Liquor Act* barred Roncarelli from suing Archambault for damages except by express permission of the Chief Justice of Quebec or a senior judge of the Quebec Court of Appeal.<sup>24</sup> This route was denied by Chief Justice Létourneau. The statute, under section 12, also permitted Roncarelli to sue the Liquor Commission but only with the consent of the Attorney General, who was then Duplessis. At this point, the case takes on distinctly Kafka-esque tones since under the circumstances, Duplessis's consent seemed remote at best. Given the facts of the case, the rule of law *fides* of this institutional arrangement are rendered suspect because the statute appeared to bar, in some cases, the ability to recover damages for arbitrary executive action. From the safety of the outside perspective where one can indulge in black humour, these obstacles might appear to be a kind of system whimsy or loop of illogic with Duplessis as a perverse gatekeeper.

But Roncarelli, frustrated every step of the way, finally took action to sue Duplessis personally for abuse of power in a paradigmatically Diceyan use of tort law in the ordinary courts of the land. David Mullan terms this "the operation of Diceyan principles in the best sense."<sup>25</sup> The tactical shift to the private law also provided surer grounds for judicial review of the decision at issue. Given the state of administrative law at the time—a situation best exemplified by Justice Cartwright's judgment—it remains doubtful that he was legally entitled to natural justice and in this statutory context. The inability of law to recognize procedural fairness in these early cases in terms of access to justice and grounds for review of the substance of the decision illustrates the institutional forms of arbitrariness and the frustration of one important function of a legal system committed to the rule of law.

Combined, these four functional failures illustrate the lack of systemic rigour or integrity where law as a system is motivated by the desire to limit arbitrariness according to a "fundamental postulate of our constitu-

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<sup>24</sup> *Alcoholic Liquor Act*, *supra* note 6, s. 12. The provision read:

No one appointed under this act as manager of the Quebec Liquor Commission may be sued, for acts done or omitted to be done by him in the exercise of the duties vested in him under this act, except by the Government of this Province, or with the authorization of the Chief Justice of the Province, or if he be prevented from granting such authorization, by the senior judge of the Court of Appeal.

<sup>25</sup> Mullan, *supra* note 5 at 589.

tional structure,” namely, the rule of law.<sup>26</sup> The rule of law’s dynamic standards are contextually grounded in the very examples that we use to understand the abstract concept of arbitrariness. Arbitrariness, then, appears to be a permanent property of a legal order, much like bad grammar is of the structure of language systems.<sup>27</sup>

### C. *Arbitrary Horizons*

Expectations bring us to the third dimension of arbitrariness, the sociological.<sup>28</sup> This dimension bears on not only the jurisprudential path of the case, but also the several judgments in the Supreme Court of Canada as they bring to the surface differing views regarding the judge’s adjudicative role. The importance of the sociological view will be further elaborated on in the counter-reading in Part III below. Here, I will simply highlight the set of competing societal expectations, all of which appear to merit varying degrees of legitimacy in Canadian political culture and are recognized in the case as strands of a generally shared world view. Roncarelli, for example, expected procedural fairness and predictability from the administrative body, the courts, and the executive branch of government—none of which he received and to which any Quebecer would have felt entitled. The Jehovah’s Witnesses expected to enjoy religious freedom and association as well as widespread nonfearful interactions with other individuals as a fundamental basis for civil relations within Quebec. Quebecers, in turn, expected their provincial government to protect and pro-

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<sup>26</sup> *Roncarelli*, *supra* note 1 at 142, Rand J.

<sup>27</sup> Arbitrariness *neutrally* describes the relationship between the word and the signified in linguistic analysis. Language is completely arbitrary and conventional because there is no necessary connection between words and what they signify. Ferdinand de Saussure, the originator of the concept of the arbitrary sign, did not claim that language was an absolutely arbitrary system or that the signs were always wholly arbitrary. Though the signified is not naturally connected to the signifier, a language system generates over time a gravitational pull and stability that resists the arbitrary substitution of one signifier for another. On naturalist accounts, language is determined by or grounded in something outside of itself such as a biological structure, a universal grammar, the force of society, neural networks, etc. In a structurally analogous way, the early positivist tradition saw law as completely conventional and only accidentally or contingently related to justice. Deconstruction has run furthest with both of these insights suggesting that law, as a discursive system, is arbitrary all the way down and through. The dichotomy between nature and convention in law is important because it generates systemicity with respect to a complex, seemingly chaotic, and sprawling activity. Lastly, according to natural law theory, external justice inevitably determines human laws and the legal order cannot eliminate the judicial duty to determine what justice requires. See John E. Joseph, *Limiting the Arbitrary: Linguistic Naturalism and Its Opposite in Plato’s Cratylus and Modern Theories of Language* (Amsterdam: John Benjamins, 2000).

<sup>28</sup> For a discussion of the sociological dimensions of the concept of the rule of law using literature, see Mary Liston, “The Rule of Law Through the Looking Glass” (2009) 21 *Law & Lit.* 42.

mote their distinctive culture, which, at that time, included freedom of religion as a constitutive feature. And lastly, the general public—including both adherents and nonadherents of the Jehovah’s Witness faith—expected a political community committed to safety, stability, and order, and ruled by a government that was responsive to their interests.

Despite potentially broad overlap, a sociological perspective suggests that Roncarelli and Duplessis possessed significantly different understandings of the concept of law, the efficacy of the rules of law, and the satisfactory legal balancing of competing expectations represented in the decision to cancel the licence. Jurisprudence and historical hindsight appear to endorse the Roncarellian version as normatively better and permissibly prioritizing individual rights over a competing conception of the public good.<sup>29</sup> Roncarelli and Duplessis possessed two different mindsets regarding the scope of public power, its directionality, and how such scope and directionality should be made manifest in law. On Duplessis’s account, law was primarily a system of rules, such that the legislative drafters and enactors simply and unthinkingly omitted several important rules, thereby appearing to authorize untrammelled discretion. But Duplessis argued that his actions were also not arbitrary because he was motivated by a political conception of the public good and constrained by an ethical duty to realize that good. According to Roncarelli, on the other hand, law was better conceived as a purposive and principled system where discretion is never untrammelled despite legislative lacunae, and the state of mind of the statutory decision-maker is never left without some form of legal guidance. Moreover, if the statute had explicit grounds of decision making, Archambault would have faced effective constraints on his discretion or else would have risked vocational outlawry if his subjective mind considered abdication of his statutory responsibility.

But what if, in the words of Justice Rand in the epigraph, the statute had expressly authorized religious discrimination? How then might we understand the nexus between individual responsibility and institutional responsibility for valid exercises of public power? This prospect raises the disconcerting conclusion that we need our public-law decision-makers to adopt both a strong professional morality recognizing legal constraints, and an inevitable endorsement of more controversial normative commitments made at the communal level, even with an express bill of rights

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<sup>29</sup> But see Roderick A. Macdonald, “Was Duplessis Right?” (2010) 55 McGill L.J. 401. Macdonald provides a provocative and insightful argument supporting aspects of Duplessis’s position using internormative social theory, communitarian political theory, and pragmatic instrumentalism in legal theory in order to “hear” the world view represented by Duplessis.



such as the *Canadian Charter of Rights and Freedoms*,<sup>30</sup> to further channel executive discretion and democratic judgment.

### III. Modelling Judicial Arbitrariness

Up to this point, we have encountered legislative arbitrariness in the statute. We have also seen administrative arbitrariness in Commissioner Archambault's abdication of responsibility and concomitant loss of institutional independence. And we have seen executive arbitrariness manifested in Duplessis's interference in the institutional integrity of an independent administrative body. But what forms of judicial arbitrariness, if any, might be disclosed?

#### A. *Judging Between Politics and the Law*

As discussed in Part II.B above, access to justice proved difficult because of the influence of politics and bias. When Roncarelli decided to complain about the treatment he received at the hands of the Liquor Commission, provincial Chief Justice Létourneau, the first of fifteen judges to consider this case, refused to permit Roncarelli to sue Commissioner Archambault under section 12 of the *Alcoholic Liquor Act*.<sup>31</sup> Roncarelli then appealed to Attorney General Duplessis who also unsurprisingly refused to permit a suit for damages.<sup>32</sup> After Duplessis's press conference where he publicly announced the permanent cancellation of Roncarelli's licence, Roncarelli petitioned the Chief Justice of Quebec to sue the Commissioner, but again to no avail. Chief Justice Létourneau's decision went unreported, a perhaps innocuous result but one that, when situated in the discourse of arbitrariness, raises accountability concerns about the integrity of judicial institutions and practices due to the violation of the principle of publicity within the rule of law and democracy.<sup>33</sup>

In a defeat for public law, Roncarelli was therefore forced to sue Duplessis in private law for an abuse of public power. He resoundingly won in the Quebec Superior Court.<sup>34</sup> Claude-Armand Sheppard notes that none of Quebec's official or private reporters published this favourable judgment and hints that politics may have been a motivating factor in the

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<sup>30</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Canadian Charter*].

<sup>31</sup> *Roncarelli v. Archambault*, [1947] B.R. 105 (K.B.) [*Roncarelli v. Archambault*]. Claude-Armand Sheppard, without any detail, asserts that Létourneau C.J.'s decision rested on "rather flimsy grounds" (Sheppard, *supra* note 7 at 76).

<sup>32</sup> The second paragraph of s. 12 read, "The Commission itself may be sued only with the consent of the Attorney-General" (*Alcoholic Liquor Act*, *supra* note 6, s. 12).

<sup>33</sup> *Roncarelli v. Archambault*, *supra* note 31, cited in Sheppard, *supra* note 7 at 76, n. 5.

<sup>34</sup> *Roncarelli (Sup. Ct.)*, *supra* note 10.



reporting branch of the judicial system.<sup>35</sup> The Quebec Superior Court judgment also confirmed that English authorities governed Quebec's public law and ruled that Duplessis lost both his entitlement to procedural fairness and his claim to ministerial immunity because he had stepped outside of his proper functions in ordering the cancellation—a key but disputed factual finding.

Duplessis successfully appealed this decision at the Quebec Court of Appeal, which rejected the lower court's finding of fact regarding the order—the next stage of this bumpy institutional ride. The Quebec Court of Appeal emphatically reversed the Quebec Superior Court decision, except on the issue of the immunity of Crown officers. In a unanimous lapse in judicial reasoning, the five Quebec Court of Appeal judges felt no need to demonstrate jurisprudential support regarding the denial of Crown immunity, instead writing that the English authorities were too numerous to be cited.<sup>36</sup> At the Supreme Court of Canada, only Justice Abbott considered this issue and he too did not find it necessary to “cite from the wealth of authority supporting the principle that a public officer is responsible for acts done by him without legal justification.”<sup>37</sup> For such an important conclusion, one would have hoped that the courts might have found one or two precedents despite the obviousness of the proposition.

Roncarelli appealed to the Supreme Court of Canada, winning the support of six of the nine judges.<sup>38</sup> The dissents written by the two French-Canadian judges regarding article 88 of the *Code of Civil Procedure* provide two further models of judging. Recall that article 88 set out the necessity of acting “in the exercise of his functions” in order to secure Duplessis's immunity as well as his right to notice. The legal treatment of this provision raises intriguing questions about the differing approaches between those trained in the common law and those trained in the civil law.<sup>39</sup> The majority held that Duplessis was clearly outside of his executive functions, regardless of Duplessis's own perception of good faith, and was therefore neither legally immune nor entitled to receive notice as a form of procedural protection. In his judgment, Justice Rand went so far as to characterize Duplessis's actions as exclusively private in nature such that Duplessis had completely stepped outside of legal authority.<sup>40</sup>

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<sup>35</sup> Sheppard, *supra* note 7 at 79, n. 17.

<sup>36</sup> *Duplessis v. Roncarelli*, [1956] B.R. 447 at 460-62 (C.A.).

<sup>37</sup> *Roncarelli*, *supra* note 1 at 184, Abbott J.

<sup>38</sup> Cartwright J.'s dissenting opinion is discussed in Part II.B above.

<sup>39</sup> See Macdonald's ideological profile of the judges on this point: Macdonald, *supra* note 29 at 411.

<sup>40</sup> *Roncarelli*, *supra* note 1 at 144.

Justice Taschereau, on the other hand, argued on formalist grounds that Duplessis never ceased being a public officer despite his misapprehension about the nature and scope of his functions—a position that is as at odds with the concept of the rule of law as Justice Cartwright’s judgment now appears to be. Justice Taschereau concluded that Duplessis’s error, if any, did not disentitle him to notice.

Justice Fauteux, in contrast, duly examined all of the relevant legal materials as well as the interpretive and statutory history of article 88—predicates of careful judging and a more structured approach to the statutory interpretation of legislative intent. Archambault’s abdication of authority invalidated his cancellation of the licence and, therefore, Roncarelli was entitled to sue for damages under article 1053 of the *Civil Code of Lower Canada*. While Roncarelli had a right, he was however denied a remedy. Based on the analysis of legislative history, Justice Fauteux determined that the right to notice in article 88 was preemptory even if the public official was acting in bad faith in the exercise of her functions.<sup>41</sup> But for the express and clear legal materials and statutory history to which he felt he was bound, Justice Fauteux wrote that he would have ruled in Roncarelli’s favour on the merits. Even if one disagrees with Justice Fauteux’s interpretation and conclusion, his methodological approach to the legal materials contains at least as much judicial integrity as Justice Rand’s looser style, and certainly more than the bare formalism exhibited in Justice Cartwright or Justice Taschereau’s judging.

The existence of these different models within one case, however, underscores the types of constraints judges perceive themselves bound by when indeterminacy requires them to elaborate on what the law requires. Minimalist judges like Justice Cartwright and Justice Taschereau look to what the legislature explicitly says in the statute and no more. Others, like Justice Fauteux, seek to complete the legislative process through interpretive strategies that are simultaneously discretionary, contextual, and purposively constrained by the legal materials at hand. Still others, such as Justice Rand, take a more aspirational stance, seeking to “thicken” what appears to be a thin veneer of legality through recourse to principles and content found in a larger political morality. While Justice Rand’s approach is laudable in its goal to impose genuine constraints on political power, its greater discretionary scope raises the problem of judicial arbitrariness, thereby risking the legitimacy of the exercise of legal authority as expressed in judicial institutions.

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<sup>41</sup> *Ibid.* at 181.

### *B. The Sounds of Silence*

Tribunals like the Liquor Commission ought to act in a judicial manner. But the judicial manner, given the history outlined above, is far from perfect. With respect to legal determinations in the Supreme Court of Canada decision, several are conclusive. Duplessis did not have the authority to interfere in the Liquor Commission's operations. In Canadian jurisprudence, Crown officers are in no way entitled to special immunity from civil prosecution. And lastly, administrative discretion is never absolute, subject to one caveat regarding legislative intent that stands as a possible point of inconsistency in Justice Rand's judgment. This is important because it is this third determination that has proved to be of profound import for the development in Canadian administrative and constitutional law, and the judicial treatment of privative clauses.<sup>42</sup>

Other matters appear less certain. Did Duplessis actually dictate the decision resulting in Archambault's silence? Duplessis's *factum* to the Supreme Court of Canada argued, "It is further suggested that an order to an administrative officer to do a thing which he has already decided to do, cannot give rise to an action in damages."<sup>43</sup> It would, however, be an error in administrative law on procedural fairness grounds, if one could discover it. Nevertheless, the indeterminacy regarding the significance of the central fact remains legally perturbing.

A second point of uncertainty originates from several judicial silences in the three judgments. Three of the Quebec Court of Appeal judges were conspicuously silent on the scope of Duplessis's authority. Two of the dissenting Supreme Court of Canada justices were silent on this point as well. While it was clear that the *Alcoholic Liquor Act* gave Duplessis no authority whatsoever, and that relevant statutes might not give him any authority either, depending on the approach to statutory interpretation chosen,<sup>44</sup> several judges remained reticent about stating the legal limits on the authority of the chief officer of the Executive and Minister of the Crown. Did their silence mean they agreed with the majority that Duplessis had decisively stepped outside of his proper functions? Were they warily sitting on the jurisprudential fence? Or does it mean they implicitly accepted Duplessis's argument that he did not exceed his powers as Attorney General in his attempt to maintain peace and public order in

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<sup>42</sup> On this point, see generally Colleen M. Flood & Lorne Sossin, eds., *Administrative Law in Context: A New Casebook* (Toronto: Emond Montgomery, 2008).

<sup>43</sup> *Roncarelli v. Duplessis*, [1959] S.C.R. 121, 16 D.L.R. (2d) 689 (Factum of the Respondent) at 40 [*Roncarelli* FOR].

<sup>44</sup> Arguably, s. 4(2) of the *Attorney-General's Department Act* (R.S.Q. 1941, c. 46) might provide an authorized source if one were to interpret his general superintending function over all matters relating to the administration of justice quite broadly. The majority rejected this interpretation.

what he characterized as crisis conditions? If yes, does this further mean that, though they may have disagreed with Duplessis's course of action, they viewed the proper remedy as political and not legal? As Duplessis argued, "[t]he Attorney-General is not exceeding his authority because the proceedings he has instituted are found unfounded by the Courts, or because the wisdom of the other means adopted may be questionable."<sup>45</sup> Accordingly, the ultimate remedy would be the ballot box.

The third silence, a focus of several other papers,<sup>46</sup> concerns the place of Quebec's legal order. Civil law takes a back seat in *Roncarelli*. Despite dissenting opinions from the two French-Canadian judges on the Supreme Court of Canada, only the English-Canadian judgments are remembered in Canadian legal consciousness. As Robert Leckey argues, all three courts trumpeted the conclusion that English authorities govern Quebec's public law, and acknowledged that liability for damages is governed by civil law, but did so without careful attention to the civilian statutory materials.<sup>47</sup> It is tempting to conclude that English authorities dominated Quebec's mixed legal order such that *Roncarelli* should be considered a prime legal example of the archetypal two solitudes in the Canadian political community.

### C. Court (Dys)functions

In exasperated tones, lawyer Claude-Armand Sheppard bemoaned both the overreliance on Diceyan constitutionalism, which championed the courts as the defenders of the constitutional order, and the failure of the Supreme Court of Canada (indeed all three courts) to demarcate relevant grounds from *obiter* in *Roncarelli*. Sheppard contended that the entire issue of discretion was legally irrelevant because all of the judges agreed that Duplessis did not have any discretion to exercise at all, and that the Liquor Commission had abdicated its duty to exercise discretion.<sup>48</sup> His article concludes in a tone of disbelief: "In effect, the courts first decided that Duplessis had no discretion to cancel a liquor license, and then proceeded to decide how he should have exercised such discretion. A psychologist rather than a lawyer is needed to explain the astonishing

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<sup>45</sup> *Roncarelli* FOR, *supra* note 43 at 39.

<sup>46</sup> See generally Eric M. Adams, "Building a Law of Human Rights: *Roncarelli v. Duplessis* in Canadian Constitutional Culture" (2010) 55 McGill L.J. 437; Macdonald, *supra* note 29; Robert Leckey, "Complexifying *Roncarelli's* Rule of Law" (2010) 55 McGill L.J. 721; Derek McKee, "The Public/Private Distinction in *Roncarelli v. Duplessis*" (2010) 55 McGill L.J. 461.

<sup>47</sup> Leckey, *supra* note 46. Leckey provides an incisive analysis of the judicial treatment of Quebec's codified procedural law.

<sup>48</sup> On this view, the lecture was directed to the wrong audience, Duplessis. If it was directed to public officials such as Archambault, then the message did little to counter the Diceyan vision of the inherent arbitrariness of administrative discretion.

mental mechanism which produced such confusion.”<sup>49</sup> If we agree with Sheppard, then it is indeed more than ironic that the substantive discussion of the nature of administrative discretion—what Sheppard characterizes as “highly *obiter*”<sup>50</sup>—has since crystallized to become the jurisprudential heart of the case. And not only is this substance a part of the Roncarellian legacy, but the very question that Sheppard poses has since found a permanent home in contemporary debates about post-Charter constitutionalism:

It is not for us to decide *whether it is within a court's functions to lecture the country in cases of this type*. But opinions on matters which strictly speaking are extraneous should be clearly isolated. The importance of realizing the irrelevancy of the holdings on discretion lies in the probability that they will be frequently cited in the future. Their highly *obiter* nature must be understood and the real *ratio decidendi* be found, if we are to avoid erroneous derivations from this decision.<sup>51</sup>

Whether or not one thinks Sheppard is right depends on one's model of adjudication as well as one's appreciation of the deep context of the case. The so-called *obiter* on how administrative discretion ought to be exercised has since come to express a Canadian ideal of the rule of law.<sup>52</sup> *Roncarelli* itself represents one important milestone in the development of a distinctively Canadian public law, ultimately culminating in the *Canadian Charter*. In my view, Justice Rand was most clearly engaging in an adjudicative exercise that made clear how legal principles fit within a larger political morality, though I agree that his legal analysis could benefit from greater care. His judgment accords with Lon Fuller's understanding of the judge as “not merely laying down a system of minimum restraints designed to keep the bad man in check, but [who] is in fact help[s] to create a body of common morality which will define the good man.”<sup>53</sup> A Fullerian perspective would suggest that this judicial lecture was meant to communicate both the normative content and the normative force of law to all types of executive actors as a constitutional baseline. My analysis therefore puts Justice Rand's judgment on the jurisgenerative rather than jurispathic side of this expansion of judicial power because its principled reasoning exhibits legal integrity.

Lastly, with respect to the original context, given the turmoil that had occurred in Quebec around the Jehovah's Witnesses, one might reasona-

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<sup>49</sup> Sheppard, *supra* note 7 at 90.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.* [emphasis added].

<sup>52</sup> See Dyzenhaus, “Deep Structure”, *supra* note 3 (outlining the increased frequency of *Roncarelli*'s citation post-Charter).

<sup>53</sup> Lon L. Fuller, *The Law In Quest of Itself* (Chicago: Foundation Press, 1940) at 137.

bly conclude that the Supreme Court of Canada was entitled to remind the executive branch of government about its legal duties, limits, and sources of authority, absent explicit public authorization from the legislative branch. As David Dyzenhaus, following Robert Cover, suggests in another context, *Roncarelli* evokes a “paideic community” that is primarily bound by strong internal commitments to norms rather than being bound by fear and force.<sup>54</sup> A judiciary that is bound in such a manner can justifiably take on a dialogic and educative role, without monopolizing the interpretive field at the expense of other branches of government or challenges to its interpretations from affected legal subjects.

#### *D. Remediating Arbitrariness*

Sheppard is right to argue that Duplessis was not accused of abusing, but rather of *usurping* authority.<sup>55</sup> This criticism unsettles happy complacency about the form of legal action. *Roncarelli* should have been a public law case but, because the proper route was denied, it was argued as a private law case. It had to bridge administrative law concerns about bad faith and the absence of jurisdiction with tort law findings of fault. Was Duplessis’s fault a public harm, a private harm, or both? Should the remedy engage with public or private law principles of justice or both? These questions point to the insufficiency of the legal form—the tort of abuse of power—to articulate the nature of the legal harm and to provide an appropriate remedy.<sup>56</sup> Usurpation of authority is a public law harm requiring a public law remedy: satisfaction of the citizen’s demand for government legality. What *Roncarelli* represents is an individualized harm with a private law remedy of damages. Not only is this a second-rate result from a public law perspective, but also, as Sheppard is surely right to suggest, the decision is less than helpful in the matter of sorting out private law responsibility for public wrongs committed by public persons.<sup>57</sup>

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<sup>54</sup> David Dyzenhaus, “The Puzzle of Martial Law” (2009) 59 U.T.L.J. 1 at 58. Dyzenhaus explores the problems that martial law poses for certain conceptions of the rule of law such as that espoused by A.V. Dicey. His analysis probes law’s modes of operation, focusing on the interplay between the imperial and the paideic or educative roles identified by Robert Cover in his seminal article, “Nomos and Narrative”. See Robert Cover, “Nomos and Narrative” in Martha Minow, Michael Ryan & Austin Sarat, eds., *Narrative, Violence, and the Law* (Ann Arbor: University of Michigan Press, 1995) 95. Dyzenhaus considers how imperial modes of control, if committed to law as a means of legitimating government, will inevitably be constrained by demands for legality and political efforts to realize that ideal. Imperial modes will therefore be less able to respond with violence to these demands, else risk losing legitimacy and widespread compliance.

<sup>55</sup> Sheppard, *supra* note 7 at 92.

<sup>56</sup> See McKee, *supra* note 46. McKee examines public and private distinctions and the implications of their mingling for the purposes of finding fault in tort.

<sup>57</sup> Sheppard, *supra* note 7 at 95-96.



Even the damages award raises the spectre of arbitrariness. Regarding the amount, Justices Locke and Martland wrote for the majority: “However, in all the circumstances, the amount of these damages must be determined in a somewhat arbitrary fashion. I consider that \$25,000 should be allowed as damages for the diminution of the value of the good will and for the loss of future profits.”<sup>58</sup> Roncarelli could not be faulted if, despite his legal victory, he remained dissatisfied, for the damages remedy seems inadequate on two counts. First, the amount seems disproportionately small to the amount of suffering he experienced. Roncarelli initially claimed \$118,741.00 in damages, but he received \$33,123.53, a mere fraction of the total. Second, damages provide little legal or political assistance in the larger fight against the systemic problem of the religious discrimination faced by his fellow Jehovah’s Witnesses. This result points to the weaknesses of Diceyan constitutionalism, since ordinary law in the ordinary courts proved ineffective in remedying the systemic harms wrought by religious discrimination. Indeed, after his eleven-year legal battle, Frank Roncarelli moved to the United States to run a restaurant, living there until his death.

Nevertheless, twenty years after *Roncarelli* and Duplessis’s death, the enactment of Quebec’s *Charter of Human Rights and Freedoms (Charte des droits et libertés de la personne)*<sup>59</sup> in 1975 represented the coming of age of Quebec’s own public law and symbolized one important legal correction for the public wrongs committed in the Duplessis era.<sup>60</sup> As other papers suggest,<sup>61</sup> despite the bijural weaknesses within *Roncarelli*, it may provide us with a broader lens through which we can see how a legal decision contributed, even if indirectly, to the creation of a distinctive rights-culture within a modern, secular Quebec.<sup>62</sup> Even more significant is the fact that a rule of law perspective must admit that such systemic problems concerning the exercise of legal authority from all branches of government were simply beyond the remedial powers of the courts. In order to satisfy the demands for a legitimate legal order, the solution—precipitated by judicial decisions like *Roncarelli*—was ultimately achieved politically through institutional reform, which was stimulated by a widespread commitment to make all political authorities legally accountable

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<sup>58</sup> *Roncarelli*, *supra* note 1 at 160.

<sup>59</sup> R.S.Q. c. C-12.

<sup>60</sup> For an overview of the constitutional history of Quebec, including the affirmation of Quebec’s commitment to individual rights in the province’s *Charter of human rights and freedoms* (R.S.Q., c. C-12), see Alain-G. Gagnon, “Quebec’s Constitutional Odyssey” in James Bickerton & Alain-G. Gagnon, eds., *Canadian Politics*, 3d ed. (Peterborough, Ont.: Broadview Press, 1999) 279.

<sup>61</sup> See *supra* note 46.

<sup>62</sup> See Adams, *supra* note 46 (discussion of how *Roncarelli* influenced the development of a rights culture at the national level).



and, to the furthest extent possible, nonarbitrary in their decision making.

#### IV. Reviewing Arbitrariness in Theory

In retrospect, what is most surprising about *Roncarelli* is how well it tracks the meanings and attributes of arbitrariness found in modern legal and political philosophy. The narrative I have constructed underscores the subjective, the functional, and the sociological dimensions of the normative discourse of arbitrariness; each respectively has a theoretical home in analytic positivism, instrumental pragmatism, and liberal republicanism.

As an analytic positivist, Joseph Raz considers arbitrariness a necessary property of the conceptual structure of law:

“Arbitrary power” is a difficult notion, and a detailed analysis of it is not required here. It seems however, that an act which is the exercise of power is arbitrary only if it was done either with indifference to serving the purposes that alone justify use of such power, or with belief that it will not serve them. ... This condition represents arbitrary power as a subjective concept. It all depends on the state of mind of the men in power. As such the rule of law does not bear directly on the extent of arbitrary power. But around its subjective core the notion of arbitrary power has grown a hard objective edge.<sup>63</sup>

*Roncarelli*'s arbitrariness is very similar to what Raz has described as the subjective core rooted in the minds of men like Roncarelli who wield legal and political power.

But, while agreeing with Raz, I have sought to de-emphasize the notion of the subjective as presenting too bright a line between subjective and objective attributes and modes. I considered arbitrariness a normative discourse resulting in a legal determination about how law may properly affect individual subjects. This legal determination therefore communicates substantive content informing the evaluation of accountability relations among principals and agents in the state. The normative import of human power at the core of arbitrariness serves not only to demarcate this concept from related terms such as randomness<sup>64</sup> and luck,<sup>65</sup> but also

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<sup>63</sup> Raz, “Rule of Law”, *supra* note 8 at 12-13.

<sup>64</sup> Randomness as a principle of decision making differs from arbitrariness in several important ways. Lotteries as a random selection-mode place all participants on an equal footing regarding outcomes, though we would rarely use randomness as a general or overarching principle of governance. Lotteries are neutral with respect to the influence of both good and bad reasons, thereby potentially opening up debate and consideration of plural views. Indeterminacy, then, plays a potentially positive role in this form of decision making, but also ensures that it should be used for sub-task governance. This is also why lottery-type random decision-making is antithetical to legal institutions under the rule of law because procedural justice demands the exclusion of bad and irrelevant

to connect with the concept of domination, which plays such a fundamental role in republican theories of government.<sup>66</sup> In the type of republican theory upon which I draw (civic republicanism), a paramount value is political liberty where it is understood as nondomination or independence from arbitrary exercises of power.<sup>67</sup> Arbitrariness as domination means the power of the state to interfere discursively and physically in the lives of agents with few restraints or costs. Domination entails modes of state interference that do not track the interests of the person or persons affected—a condition I termed functional unilateralism. Both the power that is exercised as well as the very possibility that such power might be exercised—such as in the defective statute at issue in the *Roncarelli* case—are arbitrary in this way.

Though not anachronistic, Raz's description of arbitrariness remains rooted in much older notions of will-to-power despotism and subjective whim rather than more modern forms of government.<sup>68</sup> On the interactive

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reasons and cannot permit irrelevant reasons to determine a legal decision. See Peter Stone, "The Logic of Random Selection" (2009) 37 *Pol. Theory* 375. For a provocative exploration of the potential for the use of lotteries in social and legal decision-making, see Neil Duxbury, *Random Justice: On Lotteries and Legal Decision-Making* (Oxford: Oxford University Press, 1999).

- <sup>65</sup> Jeremy Waldron argues that luck is ineliminable from a system of positive law and it poses important moral problems concerning unpredictability, arbitrariness, and unfairness. But luck has no bearing on arbitrariness in law unless either a judge makes an unexpected decision that morally harms the affected individual or when she decides a case differently from past "like" cases and her choice is not morally defensible. In these cases, bad luck overlaps with arbitrariness. See the following debate concerning the role of luck in law: Jeremy Waldron, "Lucky in Your Judge" (2008) 9 *Theor. Inq. L.* 185; Chaim Gans, "A Comment on Jeremy Waldron's 'Lucky in Your Judge'" (2008) 9 *Theor. Inq. L.* 33.
- <sup>66</sup> Other papers in this Special Issue explore these theories. See David Dyzenhaus, "Rand's Legal Republicanism" (2010) 55 *McGill L.J.* 491; Evan Fox-Decent, "Democratizing Common Law Constitutionalism" (2010) 55 *McGill L.J.* 511.
- <sup>67</sup> The most prominent contemporary proponent of this branch of republican theory is Philip Pettit. See Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon Press, 1997); Philip Pettit, *A Theory of Freedom: From the Psychology to the Politics of Agency* (New York: Oxford University Press, 2001); Miguel Vatter, "Pettit and Modern Republican Political Thought" in Melissa S. Williams & Stephen Macedo, eds., *Political Exclusion and Domination* (New York: New York University Press, 2005) 118. I have also drawn upon the republican theory of Henry Richardson (*supra* note 16).
- <sup>68</sup> Older notions consider the political source of sovereignty as constitutive of an arbitrary regime. Consider the following examples: oligarchic, democratic, and tyrannical regimes in Aristotelian thought; modern authoritarian, dictatorial, and totalitarian regimes; imperial and colonial powers; and absolutist historical forms of monarchy including tsarist and orientalist despotisms. Such forms of absolute sovereign power are no longer considered normatively desirable or politically legitimate. For further discussion of this "family" of bad regime types, see Andreas Kalyvas, "The Tyranny of Dictatorship: When the Greek Tyrant Met the Roman Dictator" (2007) 35 *Pol. Theory* 412.

plane between ruler(s) and the ruled, arbitrariness participates in a centuries-old discourse about legal authority and its relation to the subjects of law.<sup>69</sup> Aspects of this discourse still need to be updated and refined in Canadian public law with respect to the pervasive interaction among the principles of the rule of law, democracy, and parliamentary sovereignty, and their modern content. Indeed, public law theory clings to the conclusion that discretion is an always unconstrained state of decision making and is therefore a perfect synonym for arbitrariness in law.<sup>70</sup> As Martin Krygier suggests, it is precisely because a sufficiently complex and textured conceptual analysis of arbitrariness eludes us, that we still primarily make use of (perhaps outmoded) historical examples in order to convey its meaning.<sup>71</sup>

Raz, however, does not specify who these “men in power” are, except in a general discussion about discretion exercised by administrative and police officials.<sup>72</sup> The “state of mind of the men in power,”<sup>73</sup> however, must also include the judiciary and their powers of discretion and interpretation. This ambiguity illustrates how much of the connotative work arbi-

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<sup>69</sup> James Daly traces the conceptual shift in and decline of the positive valuation of the concept of “absolute” in the seventeenth century. In Shakespeare’s time, “absolute” possessed three sets of meanings: 1) resolved, positive, uncompromising, and complete; 2) precise, certain, and determinate; and 3) faultless, perfect, and highly accomplished (e.g., God). The sacred was paradigmatically the domain of the non-arbitrary. An absolute monarch possessed perfect sovereignty. A unified nation was also absolute because it was perfectly coherent and undivided. During the English Civil War, “absolute” lost any of its favourable connotations and became a synonym for tyranny. Indeed, “absolute” came to be permanently linked with the arbitrary. Here the nexus takes a familiar Lockean form as an axiomatic evil with predictable consequences: when sovereign power exceeds the limits of its grant, public trust is forfeited, and subjects can reclaim their natural right of self-preservation to justifiably resist by ridding themselves of this arbitrary power and installing a new form of government. Political power conceptually becomes conditional and fiduciary in nature as a result. The political effect of this shift was to exclude a form of government that arguably had been thought both valid and legitimate—that is, the monarchical form. Indeed, medieval theories thought it the best form so long as the king was truly bound by law. See James Daly, “The Idea of Absolute Monarchy in Seventeenth-Century England” (1978) 21 *The Historical Journal* 227 at 229-37.

<sup>70</sup> Kenneth Culp Davis offers neither a discussion of arbitrariness nor an explanation of how it might be conceptually distinct from (though clearly related to) discretion. See Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969). See also Denis J. Galligan, “Public Administration and the Tendency to Authoritarianism” in András Sajó, ed., *Out of and Into Authoritarian Law* (The Hague: Kluwer Law International, 2003) 187. For an early exception to this tendency, see this key article: Steve Wexler, “Discretion: The Unacknowledged Side of Law” (1975) 25 *U.T.L.J.* 120.

<sup>71</sup> Martin Krygier, “The Rule of Law: Legality, Teleology, Sociology” in Gianluigi Palombella & Neil Walker, eds., *Relocating the Rule of Law* (Oxford: Hart, 2009) 45 at 57.

<sup>72</sup> See *supra* note 63 and accompanying text.

<sup>73</sup> *Ibid.*

rariness does in legal discourse. The concept significantly depends on shared historical or common-sense understandings within a political culture—an “imaginary” or a “horizon”—requiring further elaboration.<sup>74</sup> Such elaboration can be the task of the judiciary when interpreting and applying legal principles, though this conclusion is highly contested in legal and political theory.<sup>75</sup>

In this respect, I have used *Roncarelli* as a prism to refract the legal process and to reveal several models of judging. In many theories of adjudication, a judgment in law represents an authoritative settlement requiring reasoned elaboration.<sup>76</sup> Judicial discretion features positively as a permanent element, for example, as equity in the sense of correcting deficiencies or strictness in the law. It more often features negatively as institutional activism, subjective preference, or pure ideology in judging. Legal indeterminacy, uncertainty, gaps, and vagueness exacerbate the risks of

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<sup>74</sup> I used the terms “imaginary” and “horizon” earlier in Part II.C, having borrowed them from Charles Taylor. Taylor argues that the significance of key philosophical concepts like arbitrariness can best be understood as a historically shared project of generating socially constructed meaning. This historically shared project is what Taylor, following Gadamer, calls a horizon of significance that gives meaning to individual and collective lives. Individuals therefore do not freely choose horizons but, rather, do so through evaluative processes of dialogue with and in contestation against others over the content and worth of inherited frameworks. A social imaginary is comprised of a constellation of public, inherited frameworks of meaning. Unlike Taylor, and in accord with Daniel Weinstock, I maintain the view that liberal institutions generated by concepts like the rule of law provide the best possible political conditions under which such strong evaluations can take place. For further discussion of strong evaluation and horizons of meaning, see the collected essays in James Tully & Daniel M. Weinstock, eds., *Philosophy in an Age of Pluralism: The Philosophy of Charles Taylor in Question* (Cambridge: Cambridge University Press, 1994). See especially Daniel Weinstock, “The Political Theory of Strong Evaluation” in *ibid.*, 171. Influential theories of the social imaginary that attempt to understand how imagination, and not just reason, constructs institutions, representations, and practices include: Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London and New York: Verso, 1991); Cornelius Castoriadis, *The Imaginary Institution of Society*, trans. by Kathleen Blamey (Cambridge, Mass.: MIT Press, 1987); Charles Taylor, *Modern Social Imaginaries* (Durham: Duke University Press, 2004).

<sup>75</sup> As discussed below, Ronald Dworkin’s theory of adjudication supports such elaboration through judicial use of the principles of political morality in the adjudication of hard cases. Recent theories of common law constitutionalism also endorse this kind of elaboration. Legal positivists and many democratic theories, on the other hand, reject this role as institutionally inappropriate and politically unwise. A prominent and long-time critic of this form of judging would be Jeremy Waldron (see *infra* note 78).

<sup>76</sup> The idea of judgments as reasoned elaborations that are legally authoritative because of their justificatory potential finds support in many schools of thought including legal process, textualism, purposivism, principled adjudication, and reason-giving in the common law. For an overview of some of these debates, see Neil Duxbury, *Patterns of American Jurisprudence* (Oxford: Oxford University Press, 1995) c. 4 (“Finding Faith in Reason”); Anthony J. Sebok, *Legal Positivism in American Jurisprudence* (Cambridge and New York: Cambridge University Press, 1998) c. 4 (“Legal Process and the Shadow of Positivism”).

judicial discretion and competing models of judging propose different remedies to mitigate, control, or even eliminate these risks. This article has attempted to unpack one of Raz's key claims in this regard, as well as the considered qualification that appears in parentheses:

The one area where the rule of law excludes all forms of arbitrary power is in the law-applying function of the judiciary: the courts are required to be subject only to the law and to conform to fairly strict procedures. (The rule of law itself does not exclude all possibilities of arbitrary law-making by the courts).<sup>77</sup>

Legal positivism and legal realism have long recognized this state of affairs and have traditionally concluded by saying that this is when law runs out and judgment becomes subjective preference, thereby raising the spectre of arbitrariness. Democratic positivists, like Jeremy Waldron, reject this as a desirable outcome and instead prioritize expectation, certainty, and expertise via legislation in order to mitigate judicially arbitrary decisions.<sup>78</sup> Viewed in the best light, *Roncarelli* explains Justice Cartwright's (but not, perhaps, Justice Taschereau's) judgment on this theoretical basis. Other theorists, such as Steven J. Burton, counter fears of legal indeterminacy by developing a model of ethical judging in good faith and permissible discretion.<sup>79</sup> Justice Fauteux's approach seems to exemplify this model. Finally, Ronald Dworkin argues that discretion properly understood entails a choice among alternatives according to the needs of the situation and within a framework of rules, principles, or standards. It is a kind of freedom in decision making, but one that is legally channelled so as to become a model of judicial discretion that ranges from weak to strong, depending on the circumstances of the case, but is never unconstrained.<sup>80</sup> Justice Rand clearly fits the Dworkinian approach.

In order to conceptually capture the full significance of arbitrariness in law, then, analytic philosophy requires the assistance of other disciplinary approaches. One example serves to illustrate the need to combine a variety of approaches. Of the many virtues of the rule of law, one that Raz does not directly consider is arbitrariness as a modality of irrationality or unreasonableness.<sup>81</sup> The corresponding rule of law virtue would be rea-

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<sup>77</sup> Raz, "Rule of Law", *supra* note 8 at 12.

<sup>78</sup> See Jeremy Waldron, "The Irrelevance of Moral Objectivity" in Robert P. George, ed., *Natural Law Theory: Contemporary Essays* (Oxford: Oxford University Press, 1994) 158 at 163 [Waldron, "Irrelevance of Moral Objectivity"].

<sup>79</sup> See Steven J. Burton, *Judging in Good Faith* (Cambridge: Cambridge University Press, 1992).

<sup>80</sup> See Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978) at 31-39.

<sup>81</sup> The nexus that exists among arbitrariness, the rule of law, and law as a justificatory system was not in Raz's mind at the time and remains underspecified. He confines subjective arbitrariness to the minds of the men in power but does not discuss whether he

son-giving or justification as a necessary legal requirement within a chain of authorization, thereby constituting an essential ingredient regarding the legitimacy of outcomes.<sup>82</sup> While law's Razian purpose is to guide those who apply and obey the law, and it is presupposed that a rule of law order recognizes the subject as a rational and autonomous creature who desires life options and the ability to plan, law need only meet minimum conditions of rationality and not necessarily reasonableness. Such a conclusion is in keeping with Raz's approach to legitimacy, which makes claims to legal authority a necessary component of the logical structure of law and considers them not constitutive of moral and political debates about what makes law legitimate to legal subjects. In other words, Raz treats legitimacy analytically as an institutional fact and not as a contested normative claim or social construct.

Contrary to the valid but minimalist model put forward by Justice Cartwright, both liberal and republican philosophies take reason-giving to be an essential legitimating factor, communicating legal and political equality, and creating a permanent public law duty on government that assists in mitigating actual and potential public acts of domination. In the democratic republican theory of Henry Richardson, for example,

[g]overnment action without any reasons in support of it is arbitrary in an elemental sense, epitomized by the arbitrariness of K.'s judge in *The Trial*. ... Since both the liberal and republican aspects of freedom that are impinged on are individualistic—pertaining, respectively, to the rights and the duties of individuals—an appropriate set of legitimating reasons must be addressed to, or must pertain to, the individuals impinged on.<sup>83</sup>

Judicial invalidation of Duplessis's arbitrary actions comports with the republican view that nonarbitrary power tracks not just the powerholder's world view and welfare—a form of unilateralism—but also the

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means mentalities, ideologies, or responsible minds. Indeed, his main line of argument is that the rule of law is essentially a "negative value" rather than a theory with substantive positive content. See Raz, "Rule of Law", *supra* note 8 at 21. But, if reason-giving is seen as a good in itself as well as a good that serves other values, then we might reflect further on the importance of this dimension of arbitrariness, discussion of which prevails in natural law theory and common law constitutionalism. See Mark D. Walters, "Legality as Reason: Dicey, Rand, and the Rule of Law" (2010) 55 McGill L.J. 563.

<sup>82</sup> On the importance of reason-giving in Canadian public law, see the collection of essays in David Dyzenhaus, ed., *The Unity of Public Law* (Oxford: Hart, 2004). Reasons also act in a negative fashion according to Raz. Legal authority places duties on judges to exclude some kinds of reasons. In Raz's schema, authority also protects certain reasons that require action and provides reasons that exclude other kinds of reasons. See Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1975) at 18-23.

<sup>83</sup> Richardson, *supra* note 16 at 27. Unlike Pettit, Richardson combines republicanism and liberalism to recommend effective and fair processes within a modern state.



world view and welfare of the public. Liberalism, in turn, concentrates this view on the individual who may be the subject of the particular exercise of political or legal power and who is ideally shielded from it by rights.<sup>84</sup>

Jeremy Waldron's democratic positivism considers reason-giving a mechanism that checks the subjective and "arbitrary moral reflex" of public decision-makers (including judges), thereby ensuring that the democratic process remains the proper site for deciding questions of social value.<sup>85</sup> Waldron suggests that in modern jurisprudence, arbitrariness possesses at least three negative connotations. To be arbitrary is to be unpredictable, unreasoned, and illegitimate. These connotations are distinct from one another because a judgment can be reasoned and not predictable, or predictable but not legitimate. On a democratic account, judges are no better moral deliberators than either legislators or the general populace. Democratic positivism recommends that legal decisions be made as much as possible without the exercise of moral judgment because, under the separation of powers doctrine, the legislature is the proper locus for generalized moral judgment. According to Waldron, "[t]hose who want to eliminate arbitrariness from law, therefore, have good reason to be normative positivists," especially if we accept the realist view that moral judgments do not amount to absolute truth claims.<sup>86</sup> Deliberate arbitrariness can therefore be checked by the disclosure of thought, potentially demonstrating justification and consistency, and frustrating the ability of arbitrary actors to create relations based on unilateral assertions of superiority over subordinates. Furthermore, reason-giving is of prime importance to the judiciary because reasons constitute both the main source of legal authority and a key ground of institutional legitimacy.

Reason-giving implicates reciprocal power-sharing, responsiveness, and justificatory structures (as well as justified state structures) by virtue of a commitment to both the rule of law and democracy.<sup>87</sup> It is therefore a form of authority that distinguishes itself from unconstrained power be-

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<sup>84</sup> *Ibid.* at 38.

<sup>85</sup> Waldron, "Irrelevance of Moral Objectivity", *supra* note 78 at 180.

<sup>86</sup> *Ibid.* at 163. From an epistemological perspective, the choice between legislators and judges will be arbitrary until objective truths are determined. So a certain degree of arbitrariness regarding institutional preferences for or against democratic positivism and judicial review will prevail.

<sup>87</sup> In addition to Richardson on this point, see David Dyzenhaus & Evan Fox-Decent, "Rethinking the Process/Substance Distinction: *Baker v. Canada*" (2001) 51 U.T.L.J. 193; Carl J. Friedrich, *Tradition and Authority* (New York: Praeger, 1972) at 51-53, 62; Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969); Ernest J. Weinrib, "Why Legal Formalism" in Robert P. George, ed., *Natural Law Theory: Contemporary Essays* (Oxford: Oxford University Press, 1994) 341 at 355.



cause it rejects, among other things, unilateralism. In the face of reasonable disagreement, instead of unilateral directives, a political community must resort to authoritative forms of persuasion about the right course of action or outcome to gain consent of the ruled and of those affected by authorized decisions.<sup>88</sup> A statute, for example, is more likely to acquire efficacy, validity, and normative worth through processes of democratic legitimation channelled by rule of law constraints. Common law constitutional theorists such as Trevor Allan, David Dyzenhaus, and Mark Walters also affirm the Waldronian conclusion that the legitimacy of the legal order has its basis in political morality. They nevertheless take issue with his claim that the judiciary ought not to play a role in the articulation of the content of motivating reasons through common law interpretative practices because such a role ultimately undermines legitimacy.<sup>89</sup> Moreover, they recognize the expressive function of legal institutions and how these institutions, if committed to the rule of law, beneficially contribute to the development of a shared normative language.

A normatively explicit functionalist account approves forms of authority that are distinguishable from exercises of power like Duplessis's efforts to "discipline",<sup>90</sup> via Roncarelli, the Jehovah's Witnesses as a group. Arbitrariness can therefore be used to identify and diagnose false or harmful forms of authority. Conversely, a robust conception of the rule of law will appeal to reason-giving as a constitutive practice throughout the state. It will also view authority, especially legal authority, as the general capacity for reasoned decisions, thereby representing the main non-Razian institutional virtue entailed by the rule of law. I have also tried to highlight the risks of accepting the more objective features in Raz's understanding of arbitrariness—features that appear as mere technical deficiencies in the application of law, and that can be resolved primarily through legal renovation rather than a more thorough or transformative political overhaul. Functional understandings of arbitrariness also describe and evaluate instrumental uses, institutional arrangements, and technical problems. This approach will be familiar from the more formal and legalistic approaches to determining the content of arbitrariness, and will connect the subjective to the "hard objective edge" that surrounds the concept of arbitrariness according to Raz. These formal and legalistic approaches also provide the lawyer's content to the concept of the rule of law. The functional modality affiliates arbitrariness with associated concepts of judicial

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<sup>88</sup> The concept of the rule of law, on this account, is irreconcilable with early forms of positivism that recognize systems of law built upon sovereign force, will or power alone. It is reconcilable with some varieties of deliberative democracy that recognize the legitimate role of the courts.

<sup>89</sup> On this point, see David Dyzenhaus, "The Rule of (Administrative) Law in International Law" (2005) 68:3-4 *Law & Contemp. Probs.* 127 at 160.

<sup>90</sup> *Roncarelli (Sup. Ct.)*, *supra* note 10 at 682, Mackinnon J.

independence and the separation of powers, both of which animate accountability concerns regarding judicial forms of discretion in new institutionalism. Functional approaches need not be explicitly normative, though they must ultimately lead to normative concerns about the proper purposes and ends for which power is used. I have suggested that the import of this extension lies in understanding when remedies other than those of courts are required or are more effective to correct for arbitrariness.

The sociological or “wide-angle lens” further contextualizes arbitrariness and comports with Raz’s initial claim that arbitrary power is broader than the rule of law to include other normative structures.<sup>91</sup> The broadest normative scope invites consideration of the social conditions that amplify or counter arbitrary power. It is, for example, now a commonplace view that the Supreme Court of Canada serves an educative function in Canadian society and, more controversially, embraces a dialogic relationship with other branches of government.<sup>92</sup> The sociological angle stimulates reflection on what forms of arbitrariness Canada’s particular history produces and what remedies—legal and political—might or might not be implicated. Indeed, this broader perspective highlights the salience of our moral choices regarding reform or redress and how they are ethically justified.

## Conclusion: Twenty-first Century Arbitrariness

*Roncarelli* is iconic. It seems to contain the whole of arbitrariness and that may be a primary reason why this case continues to resonate. But this retrospective has disclosed the danger of iconic status: the subsequent reduction of what a case fully represents. Duplessis’s autocratic political regime resembled a classical regime constituted by arbitrariness. We might therefore be tempted to run a happy story suggesting that such regimes belong to the past history of “once upon a time” in Canada, that we will not see the likes of Duplessis again, or that such persons and governments exist in countries far away from our shores. Such a conclusion

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<sup>91</sup> Raz does not provide any examples for this claim, but one can think of the family, the workplace, the school, or the church as other key societal sites where arbitrary power exists and is exercised.

<sup>92</sup> Exemplary works include: T.R.S. Allan, “Constitutional Dialogue and the Justification of Judicial Review” (2003) 23 *Oxford J. Legal Stud.* 563; Stephen Gardbaum, “The New Commonwealth Model of Constitutionalism” (2001) 49 *Am. J. Comp. L.* 707; Peter W. Hogg & Allison A. Bushell, “The *Charter* Dialogue Between Courts and Legislatures: (Or Perhaps the *Charter of Rights* Isn’t Such a Bad Thing After All)” (1997) 35 *Osgoode Hall L.J.* 75; Christopher P. Manfredi, “The Life of a Metaphor: Dialogue in the Supreme Court, 1998–2003” (2004) 23 *Sup. Ct. L. Rev.* (2d) 105; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001); Jeremy Waldron, “Some Models of Dialogue Between Judges and Legislatures” (2004) 23 *Sup. Ct. L. Rev.* (2d) 7.

would be a misreading of *Roncarelli*, for arbitrariness takes new forms and its old forms appear in new guises.

I have reread *Roncarelli* to draw out underacknowledged aspects of judicial arbitrariness. Current models of judging cannot unquestioningly work with older articulations of the principles of the rule of law and parliamentary sovereignty, and the understandings of arbitrariness they evoke. Post-Charter interanimation of these two principles entails a rejection of absolutism on either side and a blending of their content: we are working toward a rule of law-oriented democracy and a democratically informed rule of law. To paraphrase Justice Rand, this is now the larger perspective within which our institutions are intended to operate. As the epigraph to this article suggests, the modern content of the principle of the rule of law and the principle of parliamentary sovereignty as democracy require practices of justification that aim, through *express language*, to make visible various forms of arbitrariness, and to justify the actions of public officials no matter where they are located in the state. From a longer time slice, *Roncarelli* discloses that the rule of law principles inherent in the procedural protections offered by common law constitutionalism are not always in tension with, and indeed are often in the service of, a larger democratic accountability. A theoretical approach attuned to the sociological therefore confirms what Benedict Kingsbury calls “a nested set of theories of governance, institutions, and community” and provides a stronger structural and conceptual foundation.<sup>93</sup>

I have argued that arbitrariness is a normatively attractive language to describe legal harms and to diagnose institutional remedies. Radiating out from cases like *Roncarelli*, this discourse continues to provide a motivating force in Canadian public law jurisprudence and animates the larger legal imaginary. It can be expressed politically in terms of sovereignty, authority, and legitimacy, as well as juridically in the recognition of legal harm, allocation of institutional responsibility, and evaluation of different models of adjudication. This article drew on common law constitutionalism and liberal republicanism to argue that the free decision, which seems the essence of arbitrariness, must be channelled by reason when it involves discretionary powers in public law. Politics and aesthetics may unreservedly participate in the liberating aspects of discretion, but the principles of the rule of law and democracy demand that all discretionary decisions take a deliberate and deliberated form. Reason-giving as one practice instantiates this principle and exemplifies the subjective state of mind of decision makers attuned to the demands of legality. The

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<sup>93</sup> Benedict Kingsbury, “The International Legal Order” in Peter Cane & Mark Tushnet, eds., *The Oxford Handbook of Legal Studies* (Oxford: Oxford University Press, 2003) 271 at 295.

legacy of *Roncarelli* is therefore profound, but it is not yet fully realized throughout the Canadian legal order.

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