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Book Review

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**Book Review: Law's Rule - The Rule of Law: Ideal or Ideology, by A. C. Hutchinson and P. Monahan (eds)**

# BOOK REVIEWS

## LAW'S RULE

*The Rule of Law: Ideal or Ideology.* By A.C. Hutchinson & P. Monahan, Eds., Toronto: Carswell, 1987.

*Reviewed by Leslie Green.\**

In the *Discourse on Political Economy* Rousseau trumpeted law's virtues in these terms: "It is to law alone that men owe justice and liberty. . . . It is this celestial voice which dictates to each citizen the precepts of public reason. . . . It is with this voice alone that political rulers should speak when they command. . . ."<sup>1</sup> The implicit claims that law has a positive function in promoting cherished values and a negative one in restraining rulers are common to many conceptions of the rule of law. But Rousseau also knew well that law does not always live up to these ideals. Law is morally fallible: it may be an instrument of tyranny, inequality, or injustice.

This being the case, should we think of the rule of law as an ideal or an ideology? This question is posed in the title of an attractive and useful collection of essays edited by Allan Hutchinson and Patrick Monahan.<sup>2</sup> Most of the contributors incline to one side or the other. But to put the question in disjunctive terms is potentially misleading, for the rule of law may be both. In addition to its common pejorative use, 'ideology' also has a legitimate neutral, or descriptive, sense roughly equivalent to 'world-view.' More rarely, it may even have a positive sense.<sup>3</sup> Thus, inasmuch as the rule of law is a political *ideal*, it simply *is* an ideology. So the question to be addressed amounts to this: Is the ideal of the rule of law worth prizing or not? Note that this is not the same question as whether it is politically neutral or whether, as the editors ask, it is capable of "transcending partisan concerns."<sup>4</sup> All political ideals are partisan because they are embedded in controversial and competing

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<sup>1</sup> J.J. Rousseau, *The Social Contract*, trans. G.D.H. Cole (London: Dent, 1941) at 256.

<sup>2</sup> A.C. Hutchinson & P. Monahan, eds, *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987).

<sup>3</sup> R. Geuss, *The Idea of a Critical Theory* (Cambridge: Cambridge University Press, 1981).

<sup>4</sup> Hutchinson & Monahan, *supra*, note 2 at ix.

political theories. A non-partisan ideal is a contradiction in terms. The important issue is whether we should enlist as partisans of an ideal that has a blemished record even in those societies that proclaim an institutional attachment to it. There are two main positions:

(1) We might say that the rule of law is indeed a good worth pursuing, but one inherently subject to the distortions of human interest. The failures are those of imperfect compliance: we need to try harder. In general terms, this answer is favoured by Judith Shklar, Theodore Lowi, Ernest Weinrib and, I think, Philippe Nonet.

(2) On the other hand, we might conclude that the defect is not in us, but in the ideal itself. It presents a juridical model of society that is inherently individualistic, class biased, and undemocratic. According to this view, the rule of law is an impossible sham that requires, not fulfilment, but abolition. The sceptics of the volume are Michael Sandel, Duncan Kennedy, and the editors.

Any thematic collection of essays, including those based on conference proceedings, should aspire to three virtues: breadth of coverage, evenness of quality, and distinctness of focus. Collectively the contributions should cover the field; individually they should be competent and to the point. Judged by these standards, the present collection does quite well. First, sceptics and enthusiasts are both represented although the important Marxist debate on the issue is unfortunately absent.<sup>5</sup> Second, on the point of quality, the present volume also succeeds. Each of these essays is worth reading and is fully up to its author's usual standards of argument. Only on the third criterion of focus must a reservation be entered. Of the seven pieces here, it is fair to say that only those by Judith Shklar and the editors are directly on topic. Of course, it is not easy to get invited participants to stop what they are actually working on and give sustained thought to a related, but probably different, problem. And this is not always a bad thing. Sometimes, as in Ernest Weinrib's sideways glance at the subject, it reveals new and interesting angles. But this is less true of Michael Sandel's summary of his well-known criticisms of individualistic liberalism, or of Theodore Lowi's thoughtful discussion of regulation in the USA in the 1970s. These pieces express attitudes towards the rule of law and provide food for theoretical and empirical reflection, but they offer no direct arguments on one side or the other. Like several other contributions here, they will be more useful to those already familiar with the central issues about the rule of law than they will to those in search of an introduction.

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<sup>5</sup> See E.P. Thompson, *Whigs and Hunters* (London: Allen Lane, 1975) at 258-66; H. Collins, *Marxism and Law* (Oxford: Clarendon Press, 1982).

I should like to single out for detailed attention three pieces that will, I think, be of more general interest, beginning with an important (though only implicit) disagreement between Judith Shklar and Ernest Weinrib, one which raises questions of substance and method in legal theory. In brief, Shklar contends that the failing vitality of the rule of law results from excessive abstraction and a failure to connect that doctrine with a broader social and political context. Weinrib offers precisely the opposite diagnosis: Contemporary conceptions of the rule of law are insufficiently abstract and have not succeeded in purifying the notion of law of all politics.

## I. THE NEED FOR CONTEXT

The rule of law, Shklar claims in her historical overview, is an intelligible ideal only within the context of a complete political theory. She argues that most modern conceptions are rooted in one of two classical views. According to Aristotle, the rule of law is a comprehensive ideal of the rule of reason in politics. Its indicia are the rational and impartial judgment of the wise; its value rests in its contribution to the health of the polis and, through it, the good life for man (though not, of course, for women or slaves). Montesquieu, in contrast, saw the rule of law more narrowly as a set of institutional restraints on power designed to protect people against tyranny and thus to serve, not the good life in general, but security and liberty.

These are, to be sure, ideal types. Many writers are influenced by both traditions. Even Montesquieu was capable of sounding very Aristotelian at times. "Law in general," he wrote, "is human reason, to the extent that it governs all the peoples of the earth. The political and civil laws of each nation ought to be only particular cases of the application of human reason."<sup>6</sup> Still, in spite of such natural law rhetoric, Shklar is right that Montesquieu's conception of the relation between law and liberty is a thin one. Indeed, at points it is almost Hobbesian: "For a citizen, political liberty is that tranquillity of mind which derives from his sense of security. Liberty of this kind presupposes a government so ordered that no citizen need fear another."<sup>7</sup> Such views provoked Rousseau's observation that tranquillity is found also in dungeons. Nonetheless, security may be a necessary condition for political liberty.

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<sup>6</sup> M. Richter, ed., *The Political Theory of Montesquieu* (Cambridge: Cambridge University Press, 1977) at 177.

<sup>7</sup> *Ibid.* at 245.

If the rule of law could offer at least that much, then that would provide one reason for favouring it.

Modern writers tend to offer variations — or, as Shklar thinks, corruptions — of these two archetypes but without the political and historical consciousness of their forebears: “[T]hey have tended to ignore every political reality outside the courtroom or hurled the notion of ruling into such abstraction that it appears to occur in no recognizable context.”<sup>8</sup> In the writings of L.L. Fuller or R.M. Dworkin, for example, we find the Aristotelian model of the empire of reason trivialized and perverted. Although Shklar concedes that Dworkin has correctly read the egalitarian impulse of America, she thinks him wrong to hold that the judiciary is the unique or paramount forum of principled, rational decision making. In Dicey, Hayek, and even Unger, we see the degeneration of Montesquieu-inspired themes. Shklar denounces Hayek’s faith in general and prospective rules as hanging on an unverifiable claim about the necessary consequences of human ignorance. She castigates Unger for offering warmed-over Max Weber as substitute for serious history and for being dangerously utopian. His thought that one might build a truly fraternal polity by destabilizing the existing rhetoric of civil liberties is an undefended leap of faith that “shows little grasp of the fragilities of personal freedom which is the true and only province of the Rule of Law.”<sup>9</sup> Shklar is, after all, a follower of Montesquieu, for whom the fear of violence and the threat of arbitrary government provide an essential context in which the rule of law takes its meaning. Its function in political argument cannot be understood apart from such interests or outwith the institutions of representative and constitutional democracy.

Shklar has the historian’s faith that ideals must be tried in the court of world history. Certainly it is true that a general evaluation of the benefits of legal order presupposes a knowledge of comparative politics which is often lacking among dogmatists. But empirical impoverishment is not the only cause of bad judgment; one also requires plausible and consistent principles. To insist that these principles be rooted in a political context need not be an invitation to commit the naturalistic fallacy of deducing evaluative conclusions from factual premises. Social history itself cannot proceed without some general, even if only implicit, social theory and that theory will import certain value judgments. But with

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<sup>8</sup> Hutchinson & Monahan, *supra*, note 2 at 3.

<sup>9</sup> *Ibid.* at 12. She notes, in a wry deconstruction of the radical pretensions of some academics: “[C]ritical legal student-teacher ventures have served to sustain the existing legal profession by helping radical new college graduates to adjust to the alien and disliked culture of the law school and eventual professional world slowly and without too great a psychological cost. They have thus been eased into integration rather than hurled into it, which might have been far more disruptive for them and other people around them.” *Ibid.* at 11.

that reservation in mind, there does seem to be an initial plausibility in the claim that a notion like 'the rule of law' has a distinctive function only within a certain political context and thus that explicating that notion is at least in part a matter of political theory.

## II. PURE LAW

Ernest Weinrib argues energetically for the opposing view. He regards the rule of law as intelligible only to the extent that it can be grasped as an end in itself independent of wider political values. Shklar's recommendation that we try to identify the way it serves the ambitions of a general political theory is in Weinrib's scheme of things a recipe for disaster. To understand the rule of law, he argues, we need to develop a non-instrumental conception of law, one purified of all history, politics, and sociology.

Weinrib explicitly attacks positivists and implicitly attacks critical legal scholars and all those (realists, marxists, economists) who think that law can be understood in terms of its social or political functions. In an interesting reversal of the usual natural lawyer's complaint, Weinrib holds that positivists do not have enough respect for the rule of law. They tend to regard legality merely as an instrumental value, to be prized when it serves deeper political ideals such as justice, liberty, or welfare, but to be compromised or abandoned when it does not. Joseph Raz puts it most clearly when he says that, although the rule of law is the specific virtue of legality, it is nonetheless only a negative virtue which protects us from the harm that law itself can cause. To show that a legal system lives up to the rule of law does not therefore show that it has any positive moral worth.<sup>10</sup> All of this Weinrib denies. The rule of law is not merely a "watery ideal."<sup>11</sup> It is an ultimate value which does not need to be — indeed, cannot be — defended in terms of other values but only exhibited as consistent and self-intelligible. And, because it possesses this inner coherence, it rises above the level of ideology.

Before examining his arguments, we should pause to consider the overall strategy here. At first blush, it seems odd to try to defend the rule of law from the charge of ideology by appealing to its inner coherence, for it is not a necessary feature of ideological beliefs that they are incoherent. Indeed, some have identified ideological thinking with a high degree of cognitive consistency. So what work is the search for coherence doing? Perhaps Weinrib's polemical purposes can be gleaned from these

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<sup>10</sup> J. Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979) c. 11.

<sup>11</sup> Hutchinson & Monahan, *supra*, note 2 at 67.

passages: "The central issue in the modern debate is whether law is to be understood in instrumental or non-instrumental terms. Only in so far as law is conceived as non-instrumental can law be insulated from the purposes which might be projected on it by political and economic interest."<sup>12</sup> "Law is not subservient to external ideals because it constitutes, as it were, its own ideal, intelligible from within and capable of serving as a constraint upon the radical idealisms which postulate its depreciation."<sup>13</sup> Law is not to be 'subservient'; law is to be 'insulated' from political purposes; and legal theory — standing Kelsen on his head — is to be kept pure by revealing the morality immanent in law. The search for law's inner coherence, then, is part of an attempt to show that it has internal ideals that render it closed to certain ends.

To appreciate how striking this claim is, one must contrast it with a rare point of consensus among modern legal theorists. Most of them see the *openness* of law as among its distinguishing features. Legal positivists, for example, take the view that law is wholly a social creation; its existence and content are matters of social fact, and it can in principle be used to regulate any behaviour whatever. Law constrains judicial decision by binding judges to decide cases in particular ways, or by narrowing the scope of their discretion; but the positivist denies that the concept of law limits the content of those rules. Legal realists and critical legal scholars emphasise the openness of law in a contrasting way: they deny that law determines legal decisions. As Duncan Kennedy puts it in this volume:

[w]e experience law as a medium in which one pursues a project, rather than as something that tells us what we have to do. . . . How my argument will look in the end will depend in a fundamental way on the legal materials — rules, cases, policies, social stereotypes, historical images, but this dependence is a far cry from the determination of the outcome by a process of legal argument that could only be done correctly in one way.<sup>14</sup>

Underlying each of these different views, however, is a common vision of law as an open-ended social instrument of which we are the complete masters.

Weinrib, in contrast, holds legal systems to be conceptually closed: "[T]he Rule of Law claims that law can be its own end, and that certain content can be rejected as incompatible with law's inner nature."<sup>15</sup> Some aims just cannot be pursued through legal regulation; to attempt to do

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<sup>12</sup> *Ibid.* at 61.

<sup>13</sup> *Ibid.* at 63.

<sup>14</sup> *Ibid.* at 150.

<sup>15</sup> *Ibid.* at 68.



so is to lapse into conceptual incoherence. While he would admit that it is of course an open question whether or not we should have law at all, he wants to insist that once we have opted in, we must have that union of form and content that emanates from the very idea of law.

This is a very strong claim indeed. To establish it, Weinrib relies heavily on the techniques of conceptual analysis and on what philosophers would call 'transcendental arguments'. A transcendental argument is one that takes as its premise some immediately obvious feature of our shared experience and seeks the unique possibility conditions of that feature. Very crudely, it asks, "How is it possible that . . ." where what follows is some fact about which we seem to be agreed. For example, we might ask, "How is it possible that infants can learn any human language whatever?" hoping thereby to reveal something important about the nature of language and mind. Weinrib pursues the transcendental tack when he asks: How is it possible that law can be understood 'in terms of itself'? or again, how is it possible that the rule of law is not just a *prima facie* ideal?

Now, there is controversy among philosophers over how transcendental arguments should be understood and whether they are ever sound. The root difficulty is that they may seem to beg the question at issue. Such arguments must choose the data to be explained with great care: the feature of common experience must be something we really *are* agreed about, something which so structures our whole outlook that it is as close to undeniable as we can come. In the philosophy of language and perhaps in epistemology this technique may be fruitful. There is, however, a notorious difficulty in carrying it over to the realm of social theory. Everything we know about the structure of conceptual controversy in the social studies suggests that there are no undeniabes of any interest and that evaluative argument is pervasive. Weinrib's starting point, therefore, is not neutral ground — for there is none — but is in fact among the most controversial of his own claims. When asked, "How is it possible that law is insulated from social and political purposes?" or, "How can it be that the rule of law is more than a *prima facie* ideal?" opponents may well reject the questions entirely. Their position is that law *cannot* be so insulated, that the rule of law *is* only a *prima facie* ideal, that their claims are part of a defensible legal theory and that because these claims are at issue, they cannot in any case be used to bootstrap a transcendental deduction. When the premises lack epistemic priority, when they are too closely bound up with the rest of the dispute to give independent footing, the technique will fail.

### III. TORT AND SCHMORT

Let me illustrate the difficulty by discussing the real subject of Weinrib's stimulating essay: tort law. Common-lawyers typically view the set of rules and principles roped together by textbook writers under the rubric of 'tort' as a camel. It has the not fully compatible aims of compensating victims for wrongful injury and deterring injurious behaviour. In this view, tort is an institution whose character can be fully understood only by attending to its historical development and its social functions. We would therefore expect to find a 'theory of tort' in about the same sense as we would find 'theory of carburetors': a descriptive account of their constitution and functions. This theory would not itself be a normative one. We could indeed evaluate whether or not a carburetor performs its function, but whether that assessment is of any importance turns on whether or not the function is one worth performing. There could be better ways to fire an engine. Many people have felt the same way about tort law: whatever its legal function, we are entitled to ask whether it performs that function fairly, efficiently and so forth, and even whether the function is one which should be performed at all. On their view, the theory of tort does not itself provide a sound standard of appraisal and tort law remains inherently open to criticism of the usual sorts.

Weinrib wants to neutralize all such criticisms by showing that they import to tort law standards not its own. Tort cannot be judged without first being identified, and it can be identified only by its indigenous standards. Whether tort serves fairness or utility is irrelevant; we may ask only whether it succeeds *at being tort law*. What it is trying to be is a form of 'corrective justice': the restoration of free and independent parties to an initial baseline of equality which has been disturbed by a non-consensual 'transaction'. "It is a conceptual point about corrective justice that it is intelligible solely in non-instrumental terms, that to understand it by reference to something beyond itself is to transform it into what it is not and thus to fail to grasp it as it is."<sup>16</sup> Corrective justice is said to embody the form of rationality inherent in such transactions.

Now, I do not want to discuss the plausibility of the 'corrective justice' model of tort,<sup>17</sup> or the claim that corrective justice is a distinct

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<sup>16</sup> *Ibid.* at 76-77.

<sup>17</sup> Interested readers should consult E.J. Weinrib, "Toward a Moral Theory of Negligence Law" (1983) 2 J. Law & Phil. 37, and J. Coleman, "Corrective Justice and Wrongful Gain" (1982) 11 J. Leg. Stud. 421.

category of justice,<sup>18</sup> or the supposition that it is possible to make sense of torts as a kind of 'transaction', or that transactions have a character 'as such'.<sup>19</sup> Instead, let me grant all this and ask what the normative force of the conclusions, if sound, would be. Remember that we are investigating the rule of law as an *ideal*: something worth prizing, pursuing, and supporting; something whose loss is to be regretted. This investigation cannot be ruled out of court. We are not seeking to explain this form of justice — of 'right', as the continental jargon has it — in terms of 'the good' and therefore are not open to the charge of making a category mistake. Our request is a far more general one: nothing can be a form of justice unless there is something that can be said in its favour. We must be able to explain its just character in a way that reveals its virtue but does not simply appeal to the institutional rules of tort and insist that they are the *criterion* of justice.

The first and large obstacle is the possibility that tort law does not have any essence at all, that it is a cluster of competing principles individuated as a group only for reasons of expository convenience. Set that aside however. Assume that, as a kind of 'transaction', tort does have an essential unity. But the plain lawyer will not have failed to notice that this is a very fancy and theoretically charged way of speaking. In what sense is a tort a 'transaction'? Are all torts equally 'transactions'? Even supposing that satisfactory answers can be given to these questions, there are other legitimate ways of describing tort as well. Indeed, *any* event is liable to various correct descriptions. The act of pouring some liquid can be a poisoning, an avenging, and a murder. Likewise, one event can be both a 'transaction' and the infliction of an 'injury'. Now the very idea of an injury is something which attracts our moral attention, at least out of sympathy for the injured. Suppose that such sympathy is channeled and regulated through a set of principles which provide for compensation of the injured and deterrence of the injurers. Could someone argue that these principles are not the essence of tort because tort is a kind of transaction? That objection is irrelevant when we describe the event as an injury. Perhaps it will be said that in eschewing the category of 'transaction' we lose our entitlement to *call* it a tort. As Bishop Butler says, "Everything is what it is and not another thing." No matter, language is flexible, and to get on with the discussion we might adopt another term; so let us call this set of injury-based principles 'schmort'.

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<sup>18</sup> For an argument to the contrary, in the context of contract, see A.T. Kronman, "Contract Law and Distributive Justice" (1979-80) 89 Yale L.J. 472.

<sup>19</sup> See W.J. Waluchow, "Professor Weinrib on Corrective Justice" in S. Panagiotu, ed., *Law, Justice and Philosophy in Classical Athens*, forthcoming.

Now, since one event may be both a transaction and injury it can, under the appropriate description, attract either tort or schmort as its regulative principles. Each is self-consistent and internally intelligible. But schmort is appropriately guided by principles that are external to tort: we can certainly ask of schmort whether it fairly or efficiently distributes the burden of injuries among members of a society. Of course, if Weinrib's argument is correct then schmort is incompatible, that way of speaking is not compulsory, so we cannot insulate appraisal of the event from competing principles by retreating behind one set of categories. What one regards as the essence of tort will depend on one's choice of descriptive categories, and that choice can itself be motivated only by more general considerations of social theory.

Perhaps the point can be clarified if we consider an analogous argument about criminal justice. "One cannot punish the innocent," someone might say, "Because the very idea of punishment includes the essential supposition that the punished party is guilty. One who is judicially harmed when thought to be innocent cannot therefore properly be said to be 'punished'; he has been victimized. Strictly speaking, then, it is impossible to punish the innocent because that would reduce the very idea of punishment to incoherence." Obviously, something has gone deeply wrong here. (It is no consolation to the innocent to be told that, in his case, a prison sentence is not really 'punishment', properly so called.) Although these premises might, if true, establish something about the grammar of 'punish', they cannot settle the moral question of how the innocent should be treated. We cannot ascend from a verbal or even conceptual dispute to one of moral substance. If 'punishment' is a guilt-attributing term, then one can avoid that notion altogether and still be left with a vocabulary rich enough to pose the moral question.

What then is the normative bite of Weinrib's conceptualism?

The very point of the forms of justice, and what gives them their critical bite, is that they are forms; inasmuch as they set out the implicit patterns of interaction which illuminate law from within, they also provide a standpoint of criticism which is internal to legal relationships and is thus decisive because it cannot be deflected or escaped by a change of standpoint.<sup>20</sup>

This is a difficult thought. Why should *a* standard of criticism be peremptory simply because it is an internal one? Schmort also has its own standards which compete with tort whenever a transaction is also an injury. And there is a further difficulty, for to show that a standard is internal is not to show that it is a moral one. Even if a form of action (for example, murder, or suttee) has internal standards of appraisal ('the

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<sup>20</sup> Hutchinson & Monahan, *supra*, note 2 at 75.

perfect murder', 'the ideal immolation') that is no reason to regard them as standards of justice at all, let alone decisive or unchallengeable ones.

Weinrib's strategy, I conclude, cannot therefore provide for the intelligibility of the rule of law *as an ideal*. If his arguments are sound they reveal something about the essence of (private) law<sup>21</sup> under one description, but they reveal nothing about its value. Arguments for the coherence of corrective remedies do not show that these are a form of justice for the reason that they may be coherent and unjust. In view of this, high conceptualism seems not value-neutral but politically charged. So far from saving law from ideology, it can easily become the vehicle for an ideology of deference to law.

Weinrib wants to be tough-minded about law, to preserve it as an object of cognition from the external purposes of reformers, to show that it is closed to certain ends, and thus that some kinds of criticism of it are ruled out. How far might this strategy be carried? Suppose our present system of punishment turned out to be immensely productive of human misery with no commensurate gains in security or justice. Could we nonetheless absolve it by arguing that we must not project onto the inner logic of criminal 'transactions' such external goals as the promotion of justice or welfare? Could we say, with a straight face, that the point of criminal law is simply to *be* a system of criminal law, at which it succeeds admirably? Would the inner coherence of such a system show that it is a form of justice — maybe not so good, but at least very right? The political theory behind this is well expressed by W.H. Auden:

Law, says the judge as he looks down his nose,  
Speaking clearly and most severely,  
Law is as I've told you before,  
Law is as you know I suppose,  
Law is but let me explain it once more,  
Law is the Law.<sup>22</sup>

Weinrib does not wish to promote such an ideology; but his theory provides few resources to combat it. This is not to deny that there is a core of sound principle underlying his project. He is rightly contemptuous of those theorists who argue, "X is desirable, and therefore the law ought to promote X."<sup>23</sup> This is indeed shoddy thinking, but we do not need

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<sup>21</sup> Weinrib's view of public law is complicated. He sometimes writes as if those standards external to tort might be internal to public law, since it is a form of 'distributive' justice and as such cannot exhibit a complete separation of law and politics. At one point, he hints that this may not be the case. This would limit the relevance of his argument to the present debate, for the rule of law depends on the state of public law in the society in question. *Ibid.* at 76.

<sup>22</sup> W.H. Auden, "Law, say the gardeners, is the sun" (1939) in E. Mendelson, ed., *W.H. Auden: Selected Poems* (London: Faber and Faber, 1979) at 89-90.

<sup>23</sup> Hutchinson & Monahan, *supra*, note 2 at 65.

to adopt a non-instrumental conception of law to show that it is. Promoting X by law involves invoking law's characteristic means to do so and this has consequences beyond merely promoting X. People should be friends, but that doesn't mean that friendship should be legally enjoined. Many attitudes are transparent to motivation, so we cannot produce them through authoritative directives reinforced by sanctions. (That was among Locke's arguments for toleration: religious belief is valueless unless honestly held, so it is irrational to punish the heterodox.) Moreover, considerations of efficiency and liberty establish that some desirable states of affairs ought not to be promoted by law: all promises should be kept, but only some of them should be enforced. None of this, however, requires anything other than an instrumental conception of law and a little sophistication about the nature and limitations of that instrument.

#### IV. LAW AND ITS RULE

Although his title advertises a discussion of the rule of law, Weinrib describes his essay as making "a conceptual point about the nature of law."<sup>24</sup> In this conflation he is joined by several other contributors who also appear to identify the concept of law, or the existence of law, with the rule of law. Sometimes this results in peculiar expressions and distortions of ideas. Kennedy, for example, in exploring the way rules constrain legal decisions, contemplates a judge thinking, "The *Rule of Law* is going to be that workers cannot prevent the employer from making the use of the buses during the strike."<sup>25</sup> This sounds very odd. A judge might say, "The *rule* is going to be . . ." or "The *law* is going to be . . .", but not "The *Rule of Law* is going to be . . ." And Philippe Nonet, in his defense of *Recht* against *Gesetz*, amends H.L.A. Hart in the following terms: "[T]he assertion that [*the Rule of Law*] exists can only be an external statement of fact as an observer who did not accept the [*R*]ule might make and verify."<sup>26</sup> But what Hart actually wrote was, "[T]he assertion that [*the rule*] existed could only be an external statement of fact both as an observer who did not accept [*the rule*] might make and verify."<sup>27</sup> And Hart's passage refers, not to a legal system, but to a pre-legal society which obviously cannot live up to the rule of law.

The confusions may signal a misunderstanding about the place of the rule of law in legal and political argument. The following issues raise distinct questions for legal theory:

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<sup>24</sup> *Ibid.* at 61.

<sup>25</sup> *Ibid.* at 143.

<sup>26</sup> *Ibid.* at 140.

<sup>27</sup> H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) at 106.

(1) The concept of law: What distinguishes law from other things? When can we say that a society has a legal system in force?

(2) A rule of law: when can we say that there is, in a given system, a rule that provides such and such?

(3) The rule of law: What are the specific virtues of regulating human behaviour by the sort of system referred to in (1)?

In the technical jargon, (1) raises the question of the identity and existence of legal systems, (2) a problem about the individuation of laws, and (3) the question of law's value. These are connected, but a satisfactory legal theory must delineate them in a way that makes it possible to say, for example, that while Chile has a legal system in force, and that one of its rules is such and such, it nonetheless fails to live up to the virtues of legality. *Prima facie*, the first seems to be a matter of social fact, the second a question of legal analysis, and the third a statement of political morality. It is true, however, that (3) does bear a certain logical relation to (1). For it asks whether the legal system lives up to certain ideals which are specific to law. There are many virtues of legal systems which are not specific in this way. Other things being equal, law is better when it operates so as to promote economic efficiency. But efficiency is not part of law's 'internal' morality, to use Fuller's term; it is part of the morality of the market. (This does not mean, *pace* Weinrib, that efficiency is an inappropriate standard for judging law.) The relations among these issues include these: For a legal system to satisfy the requirements of (3), its rules, (2), must meet certain standards of appraisal that depend on the specific nature of law, (1).

This is to take an instrumental view of law, to see it as a particular mode of social control or way of organizing cooperation — what Kelsen called a "specific social technique". But although law performs such social functions, it does not follow that we can understand the nature of law by appeal to them.<sup>28</sup> Suppose that law serves to coordinate action and secure peace. So do many other social institutions including custom and social morality, and such functions cannot therefore suffice to identify law. The same holds of every other plausible social function of law: stabilizing the mode of production, legitimating class rule, securing male power, or serving the common good. Apart from useless abstractions such as 'maintaining order', there are no social functions which are common to all legal systems and unique to them. Law cannot, therefore, be identified by its functions, but only by what might be called considerations of form. Classical positivists supposed this to be a matter

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<sup>28</sup> I discuss this issue in greater detail in "The Political Content of Legal Theory" (1987) 17 *Phil. Soc. Sci.* 1.

of normative type and source: Bentham and Austin thought that law is a general command issued by a sovereign. Modern positivists think it is a system of rules identified and applied by authoritative institutions. Either way, the heuristic for legal theory is not in fact the hoary question "What is law?" but rather, "What is it to regulate behaviour legally?"

Focusing on law's means rather than its ends will not, of course, resolve all theoretical disagreement. Some, like Austin, Weber, and Kelsen, see law as essentially coercive, as offering standing threats. Others, like Hobbes or Hart, see it as authoritative, giving peremptory guidance and resorting to force only as secondary motivation. Dworkin differs again in viewing law as primarily adjudicative, settling disputes among parties. What these theories all have in common is that they represent law as a normative or action-guiding institution. Thus, as Raz argues, law's specific virtues are those features it must have if people are to be guided by it: It must be clear, stable, prospective, subject to general and open rules, *et cetera*. But in ascending to the more abstract level, one perhaps loses the right to claim that these flow from the *specific* nature of law. Any social order (such as custom, or conventional morality) must also exhibit these virtues if it is to guide behaviour. To make a persuasive case that the familiar procedural values mentioned above are indeed specific to law, one would need to enter the debate about the nature of legal regulation, and that cannot be done here.

Along such lines an instrumental conception of the rule of law might be developed and legality evaluated, not as an end, but as a means. One might wonder whether one can appraise a means *as such*, without reference to its end. It is certainly true that whether or not a means has any value depends on whether it promotes a valuable end. But there may, nonetheless, be an interaction between means and end such that the value of the end is changed when pursued in a different way. It is, for example, desirable to have a reliable supply of blood for transfusions. Suppose this can be achieved through a system of voluntary donation sustained only by exhortation or through a free market in which blood donors are paid. Now, setting aside the question of whether these would be equally safe and efficient, it is possible to prefer one to the other on independent normative grounds. One might, for example, feel that the gift relationship expresses a valuable feeling of solidarity, or that the market system rewards enterprise. Hence, even if the two scored identically well on supply criteria, one might still have a preference for one means over another.

Legality may be subject to evaluation in similar ways. When we understand how law characteristically works, we may have normative attitudes towards that form of order. Criticisms of the litigious society



or the juridical model of human nature express critical attitudes; the doctrine of the rule of law expresses favourable ones. And it may be the case that legal regulation brings costs and benefits that are not commensurate. Consider Morton Horwitz's remarks made in response to E.P. Thompson's affirmation of the rule of law:

I do not see how a Man of the Left can describe the rule of law as 'an unqualified human good'! It undoubtedly restrains power, but it also prevents power's benevolent exercise. It creates formal equality — not an inconsiderable virtue — but it *promotes* substantive inequality by creating a consciousness that radically separates law from politics, means from ends, processes from outcomes. By promoting procedural justice it enables the shrewd, the calculating, and the wealthy to manipulate its forms to their own advantage. And it ratifies and legitimates an adversarial, competitive, and atomistic conception of human relations.<sup>29</sup>

Even if one does not agree with Horwitz's assessment of the balance, these are clearly the sort of considerations that should figure in a comprehensive assessment of law's value as a means of social control.

If we enter upon such an assessment must we regard law as an empty form which may be filled with anything whatever? Kelsen, it is true, seems to take that view. He writes: "A legal norm is not valid because it has a certain content . . . but because it is created in a certain way. . . . Therefore any kind of content might be law. There is no human behavior which, as such, is excluded from being the content of a legal norm."<sup>30</sup> But one must tread carefully here. From the premise that the validity of law does not depend on its content it does not follow that law may have any content whatever. It only follows that *so far as validity goes* law may have any content, that is, restrictions on its possible contents cannot be explained by appeal to the validity conditions for legal norms. This seems right, and it is compatible with the view that law may have some necessary minimum content, in Hart's sense.<sup>31</sup> Law has not only a characteristic form but also a characteristic subject matter: it regulates those vital interests that are constitutive of the human condition. So long as we are mutually dependent, able to injure each other, not fully altruistic, and imperfectly informed, we can expect the legal system to establish and regulate offenses against persons and property. Although law is capable of regulating anything, in societies remotely like ours there is a class of concerns so central that they may be fairly counted as essential content, not because they are mandated by the nature of law, but by

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<sup>29</sup> M.J. Horwitz, "The Rule of Law: An Unqualified Human Good?" (1976) 86 Yale L.J. 561 at 566.

<sup>30</sup> H. Kelsen, *Pure Theory of Law*, trans. M. Knight (Berkeley: University of California Press, 1967) at 198.

<sup>31</sup> Hart, *supra*, note 27 at 189-95.

*our* nature. So even on the instrumental view, the rule of law may be seen as having a set of concerns that are characteristically its own.

## V. ENEMY OF DEMOCRACY?

I have suggested, against Weinrib, that we may understand the rule of law in an instrumental framework and have accepted Shklar's claim that this framework must be located in a comprehensive political theory. To show how the problem of the rule of law might be approached is not, however, to approach it. I have not attempted to draw up the balance sheet that Horwitz proposes. But I would like to consider one element that might be thought important in that calculation. In a characteristically wide-ranging and provocative piece, Allan Hutchinson and Patrick Monahan argue that, whatever its other benefits, the rule of law is inimical to the development of a radically democratic society. In particular, they charge that judicial review of legislative action promotes individualism and elite politics at the expense of communal, citizen-oriented participation and control.

Once again, I find the strategy here a bit puzzling. To argue that the rule of law is an ideal worth pursuing does not show that we should have a legal system at all. It only shows that *if* we should have one then it should conform to certain procedural values. Still less does it commit us to specific institutional features of such a system, such as American-style judicial review. Dicey was perfectly consistent (though he may have been wrong) in favouring the rule of law and limited government while opposing written constitutions, bills of rights, and specialized constitutional courts. Judicial review is neither a necessary nor sufficient condition for the rule of law; and its justifiability is a more complex issue than many commentators realize. To begin with, its problems arise only within a scheme of responsible government and separation of powers. Any serious evaluation of its merits must therefore be contextual in the way Shklar recommends. For how could one come to a reasoned view of the political role of the judiciary without examining the state of responsible government in the country in question? The power of the American Supreme Court cannot be understood or evaluated without considering the weakness of political parties, the atomization of the electorate, and the homogeneity of political ideology in America. In European countries with stronger systems of party government, socially organized electorates, and wider range of political views, the possibilities of judicial politics are quite different. Whether America needs its Supreme Court cannot therefore be answered by musing about the nature of courts as such.

At the theoretical level, the specific problem of judicial review is this: What is uniquely undesirable about courts exercising review powers? Many of the standard arguments are far too general. If judges are a socially conservative elite, if they lack relevant expertise to decide matters of policy, if they are accessible only to the wealthy, then there is reason to abandon an independent judiciary *altogether*. These criticisms are powerful enough to cast doubt on whether judges should even be given the power to adjudicate private disputes and criminal prosecutions. (The notion that criminal and private law are areas in which judges are inherently more competent to deal with the issues of social and economic policy involved is too absurd to contemplate.) Anti-review writers who are not also anarchists therefore need to target their criticisms more narrowly. They must identify what is wrong with judicial review that is *not* wrong with ordinary adjudication. It will not do to say that this can always be improved or replaced by democratically elected legislators because, unless one also replaces the courts, judges retain the power to interpret the improvements.

The editors' main charge is that judicial review pre-empts the process of democratic policy formation. Their argument parallels in many ways political scientists' criticism of the theorists of 'elite democracy', such as Mosca, Michels, and Schumpeter, who argued that modern democracies are characterized, not by popular rule, but by popular choice of elite rulers.<sup>32</sup> In its most extreme form, their thesis held that the stability and survival of democracy in fact depends on limiting popular input in these ways. Their critics argued, plausibly enough, that democratic values mandate more, not less, popular participation and that the instability is illusory. Paradoxically, in view of the use to which Hutchinson and Monahan now wish to put these ideas, the elites whom both sides of that argument had in mind were not lawyers and judges, but legislators and members of political parties and interest groups. Indeed, every sociological analysis of party politics tends to confirm the elite and marginal character of that activity. The causes of this are well known. The extension of the franchise in the nineteenth century had the unintended consequence of putting a premium on the ability to mobilize a mass electorate and this in turn led to the domination of electoral politics by those with the time and money to indulge in it. We should not forget that for Rousseau, whose democratic credentials can scarcely be doubted, the most serious threat to popular rule came from representative government and political parties.

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<sup>32</sup> See, for example, P. Bachrach, *The Theory of Democratic Elitism: a Critique* (Boston: Little, Brown, and Co., 1967).

It is, of course, possible to reject Rousseau's vision of direct, participatory democracy. (Though to do so might prove a bit difficult if one has already defined democracy as "the greatest possible engagement by people in the greatest possible range of communal tasks and public action."<sup>33</sup>) But those who remain comfortable with representative government and party politics need some way to explain why the élitism that this spawns is less dangerous than that alleged to inhere in the rule of law. In crude quantitative terms, most policy-making is either legislative or executive, and one would therefore have thought that undemocratic practices in these realms are more significant than the occasional happenings in the rarified atmosphere of appellate courts.

This criticism does not, however, go to the heart of things. The central difficulty with most anti-review arguments is that they try to prove too much with too little. Obviously, the people can vote legislators out of office whereas judges remain comparatively immune. If that claim is decisive, it argues not against judicial review, but against an independent judiciary. Hutchinson and Monahan quote with approval John Hart Ely's observation that "we may rant until we're blue in the face that legislatures aren't wholly democratic, but that isn't going to make courts more democratic than legislatures."<sup>34</sup> Ranting is, of course, not the most subtle approach to legal theory. But Ely's own claim rests on a mere fallacy. It does not matter that courts are, of their nature, less democratic than legislatures are, of their nature. One must show that the *combination* of legislative action plus judicial review is less democratic than legislative action without it. Ely's mistake is in failing to notice the interaction between institutions; it is like saying that because straight tonic tastes better than straight gin, it also tastes better than gin-and-tonic. Likewise, it is not paradoxical, though it may turn out to be false, to think that a democratic institution checked by an undemocratic one better serves democratic values than would unrestricted popular power.

This judgment will turn on one's concrete assessment of the functioning of a system of judicial review and on one's assessment of the risks of unrestrained legislatures. Academic lawyers, so cynical about the rationality and neutrality of judges, are sometimes strikingly credulous of the self-image of legislators in the modern state. No doubt this is in some measure a consequence of specialization. It is in the nature of the academic enterprise to think critically, and it seems reasonable to suppose that one becomes most critical of those institutions which one studies most carefully. Perhaps for that reason, legal realism and

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<sup>33</sup> Hutchinson & Monahan, *supra*, note 2 at 119.

<sup>34</sup> *Ibid.* at 107.

legislative romanticism often go hand in hand. The surest evidence of this syndrome is the urge to retreat from a recognizable political context to the high ground of True Democracy. Some temptation in this direction is evident in the present piece. When Hutchinson and Monahan search for a non-utopian example of participatory self-government they turn to the jury. Then, aware that radicals have criticized the jury as "a rubber stamp for state values," they urge that "whatever the failings of individual juries, the jury system as a whole embodies to a remarkable degree the values of self-government."<sup>35</sup> We are to assess the political role of juries by their ideal-type: the "lamp of liberty which might illuminate the potential and power of ordinary people."<sup>36</sup> Courts, on the other hand, are to be assessed by their real-world performance. Those who set True Law against Real Democracy are thus countered by those who set True Democracy against Real Law. But surely the only contest whose outcome matters is the one between Real Law and Real Democracy.

"The people in a democracy," wrote Montesquieu, "is in some respects the monarch; in others, the subject."<sup>37</sup> Some democrats will not concede that the people is every subject. They demand unlimited popular power to decide any question of public concern. If this is an alarming thought, the populist assures us that, when citizens' minds are attuned to the General Will, majority tyranny is only a theoretical problem. But this reply misses a second and independent argument for legally limited government. The primary subjection of a democratic people is to those constitutive rules which define their actions. Again, we might learn from Montesquieu: "[The people] can be the monarch only by casting those votes that are the will of its members. . . . In a democracy it is crucial to have rules determining how the right to vote is to be given, who is to exercise this power, who is to receive it, and what matters are to be decided by vote."<sup>38</sup> Put simply, an essential part of democratic government is the constitutional provision for the forms and limits of democratic rule.

Hutchinson and Monahan are not, I think, much in favour of such limits. In offering a practical application of their view, they say that tragic choices about the allocation of medical resources should not be the preserve of medical and legal elites, but "the subject of a more thoroughgoing democratic debate." And so they should. But what will we do after we have had our full and frank discussion of abortion and

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<sup>35</sup> *Ibid.* at 120.

<sup>36</sup> *Ibid.*

<sup>37</sup> Richter, *supra*, note 6 at 178.

<sup>38</sup> *Ibid.* at 178-79.

surrogacy? Who will *make* the ineluctable choices? What will count as the democratic choice? How will we enforce it? On what grounds will we require compliance of those who object? These questions cannot be silenced merely by invoking the will of the people. As Montesquieu saw, part of what it is to be a democracy is to enforce rules that determine which matters are to be decided by popular will and which are not. It is not only morally repugnant, but logically impossible, that everything should be decided by majority vote. (For how could we decide on *that*?)

In the end, the editors seem prepared to concede this point, provided we recognize "a distinction between constitutional safeguards which constrain democratic activity in the name of democracy and those which constrain democratic activity in the name of 'right answers'."<sup>39</sup> In plainer terms, John Hart Ely is right and Ronald Dworkin is wrong: judicial review is permissible when purely procedural, not with substantive. But this old distinction is in tatters<sup>40</sup> and to appeal to it is in any case simply to concede the importance of legally limited government in supporting democratic rule. If this is all the radical criticism of the rule of law comes to, then Montesquieu and his party have nothing to fear.

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<sup>39</sup> Hutchinson & Monahan, *supra*, note 2 at 122.

<sup>40</sup> See for example M. Tushnet, "Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory" (1979-80) 89 Yale L.J. 1037; L.H. Tribe, "The Puzzling Persistence of Process-Based Constitutional Theories" (1979-80) 89 Yale L.J. 1063; R. Dworkin, *A Matter of Principles* (Cambridge, MA: Harvard University Press, 1985) c. 2.

I also do not see how Ely's position escapes the authors' own claim that "[a]lthough a travesty of the democratic ideal, the judiciary's elevation to the status of moral prophet is defended and extolled by many in the name of democracy itself" — a gambit which inevitably fails. Hutchinson & Monahan, *supra*, note 2 at 98-99.