REVIEW ESSAY

REDEEMING THE RULE OF LAW

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Constitutional Justice: A Liberal Theory of the Rule of Law, T.R.S. Allan (Oxford: Oxford University Press, 2001)

> For he is called *rex* not from reigning but from ruling well, since he is a king as long as he rules well but a tyrant when he oppresses by violent domination the people entrusted to his care. Let him, therefore, temper his power by law, which is the bridle of power, that he may live according to the laws....
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> Henry de Bracton
> *Bracton de legibus et consuetudinibus Angliae* (c. 1230)

I. INTRODUCTION

Until recently, what might be termed 'rule formalism' was the prevailing interpretation of the rule of law. According to this view, the rule of law is rule by and through rules; and its minimalist normative content resides exclusively in the formal characteristics of rules as such, which is to say, their generality, clarity, prior declaration and prospective application, stability, and so on.[1] The rule formalist view reached its apotheosis, in my view, with Joseph Raz's widely influential article "The Rule of Law and Its Virtue" which appeared in 1977.[2] There Raz declared the rule of law to be politically migratory:

> A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened western democracies.[3]

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1 Lon Fuller's remains the best account of these virtues. See L.L. Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969) c. 2. According to Fuller, law as such requires certain procedural practices and commitments associated with rule governance, and these procedural requirements together constitute a morality of rule governance which we term the rule of law.

2 J. Raz, "The Rule of Law and Its Virtue" (1977), 93 L.Q. Rev. 195. This piece also appears as chapter 11 of his *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) 210. In his more recent work, Raz offers a much more nuanced view of the matter. See "The Politics of the Rule of Law" in J. Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1994) 354. About which, see *infra* note 145 and accompanying text.

3 "The Rule of Law and Its Virtue," *ibid.* at 196.

And he went on to attenuate the relationship between the rule of law and arbitrary power which, traditionally,[4] was considered the grist of the matter:

> Arbitrary power is broader than the rule of law. Many forms of arbitrary rule are compatible with the rule of law. A ruler can promote general rules based upon whim or self-interest, etc., without offending against the rule of law.[5]

These views, of course, fairly incapacitate the rule of law as a measure of the legitimacy of government. Nor only that. They make the rule of law a particularly unsuitable idiom for the expression of our political and legal commitments, and, to the extent that we have accorded that vocabulary pride of place in our political and legal imaginations, reveal our commitments to be delusory. Indeed, if these views be true — if the rule of law is a largely empty vessel into which can be poured any norm on any excuse — then the rule of law is rightly dismissed as "just another of those self-congratulatory rhetorical devices that grace the utterances of Anglo-American politicians" and any "intellectual effort" expended on the matter would indeed be "wasted."[6]

Yet, our intellectual history and the history of the legal community particularly recommend against such despair. "[W]orship — that is not too strong a word — of the rule of law is one of the most constant themes in the history of political theory."[7] And the rule of law has always been "central to the self-esteem of the legal profession," of judges and practising and academic lawyers alike.[8] But history is not the sole warrant for continued commitment and reflection, since the conceptual credentials of rule formalism turn out to be much less compelling than might have first appeared.

The virtue of rule formalism is supposed to reside in conceptual modesty, not only of its reach but, just as importantly, of its resources. Indeed, Raz recommends his austere view of matters on just these grounds: unlike other versions, which are "promiscuous" because pregnant with suppositions,[9] his version, because it conceives of the rule of law as an "essentially ... negative value" or "virtue,"[10] avoids such "exaggerated expectations"[11] and "sacrificing too many social goals on the altar of the rule of law."[12]

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4 In my view, the best rendition of this tradition, which places the rule of law in opposition to the arbitrary rule characteristic of tyranny, is Hayek's. See "The Origins of the Rule of Law" in F.A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960) c. 11 at 162-75. Of course, Dicey's portrayal of the ideal of rule of law as "the absence of arbitrary power" remains central in the English tradition. See A.V. Dicey, *Introduction to the Study of Law of the Constitution*, 8th ed. (London: Macmillan & Co., 1924) Part II (The Rule of Law).

5 "The Rule of Law and Its Virtue," *supra* note 2 at 202-203.

6 J.N. Shklar, "Political Theory and the Rule of Law" in A.C. Hutchinson & P. Monahan, eds., *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987) 1.

7 G. Kateb, *Political Theory: Its Nature and Uses* (New York: St. Martin's Press, 1968) at 66.

8 A.W.B. Simpson, *Leading Cases in the Common Law* (Oxford: Clarendon Press, 1995) at 228.

9 "The Rule of Law and Its Virtue," *supra* note 2 at 196.

10 *Ibid.* at 206.

11 *Ibid.* at 209.

12 *Ibid.* at 211.

On closer inspection, however, rule formalism, Raz's especially but not only included,[13] reveals itself as neither conceptually unmediated nor politically neutral, but instead as dependent upon a particular understanding of the rule of law and as productive of a full-blown, and controversial, proposal about law, politics, and state.

According to Raz, the "basic idea" of the rule of law is that "the law should be capable of providing effective guidance" to its subjects.[14] This guidance concept — which will be of further and central concern further on in this essay — makes his conception of the rule of law a strikingly instrumental one. "Conformity" of law to the requirements of rule formalism, he tells us, "makes the law a good instrument" for enabling those who are its subjects to "be ruled by the law and obey it" and "to be guided by it."[15] But, in that event, the rule of law is first and foremost an instruction to the ruler concerning how best to rule so that its subjects will obey and guide their lives by its legislative acts. So viewed, the rule of law is not so much about *lex* as it is about *rex*: it becomes a technique of effective social ordering by the rule-maker and, in that sense, "an apology for state power,"[16] which has little if anything to say about the principles of good governance. On the one hand, then, rule formalism of the sort offered by Raz implicates a rather straightlaced legal positivism which would make of the rule of law a prescription for what is, without more, a meagre and not very attractive *nomos*.

On the other hand, formalist views also always seek to implicate, as "auxiliary precautions,"[17] a number of features of liberal governance. Raz, for instance, includes among "the principles which can be derived from the basic idea of the rule of law"[18] judicial independence, supervision, and accessibility and observance of the rules of natural justice.[19] Now, though he views these requirements as "designed to ensure that the legal machinery of enforcing the law should not deprive it of its ability to guide,"[20] there is no mistaking their liberal credentials. Nor is there any avoiding the suspicion that the positivist commitments that underlie the formalist conception are obscuring a drive yet to make that conception comport with our standing expectations for the rule of law.[21]

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13 Much of the analysis that follows would, for instance, apply with equal force to Robert Summers' formal theory, though his view is, I think, much richer than Raz's. See R.S. Summers, "A Formal Theory of the Rule of Law" (1993), 6 *Ratio Juris* 127.

14 "The Rule of Law and Its Virtue," *supra* note 2 at 202.

15 *Ibid.* at 198.

16 B. Fine, *Democracy and the Rule of Law* (London: Pluto P., 1984) at 174.

17 N.B. Reynolds, "Grounding the Rule of Law" (1989) 2 *Ratio Juris* 1 at 8.

18 "The Rule of Law and Its Virtue," *supra* note 2 at 198.

19 *Ibid.* at 200-201. Summers, *supra* note 13, is even more robust and liberal (and in my view successful) in his articulation of implications of the formalist view.

20 "The Rule of Law and Its Virtue," *ibid.* at 202.

21 This association, through implication, of an austere core with familiar features of liberal polity has prompted the point made by John Finnis and others that "a tyranny devoted to pernicious ends has no self-sufficient *reason* to submit itself to the discipline of operating consistently through the demanding processes of law" given that the point of such discipline is, as put by Raz (*ibid.* at 205) to "provide ... the foundation for the legal respect of human dignity." See J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at 273. Robert Summers' formalism (*supra* note 13 at 139-140) is more convincing than Raz's in this respect as well since, unlike Raz, he directly posits that "the institutional requisites of a formal theory of the rule of law and of substantive arbitrariness ... are in practice to a considerable degree incompatible." The points made by Summers and Finnis are supported by the actual practice of pernicious regimes. See D. Fraser, *The Jews of the Channel*

In any event, deconstruction of rule formalism along these lines, coupled with the continued force of the rule of law in our law and politics generally and in our political imaginations especially, perhaps accounts for the "striking revival of the rule of law debate ... in the last ten or so years."[22] Yet, this emerging debate remains very much bedevilled by the formalist past. In an important essay published in 1997, Paul Craig, a British public law scholar, deftly captured the contours of the present situation.[23] According to Craig, rule of law theorizing is caught in the middle of the ford, between the necessarily shallow waters of formalism and the deeper and more satisfying, yet forbidden, waters of substantive political theory. He thinks, that is, that the "dichotomy" between "formal and substantive meanings of the rule of law" is unrepairable[24]: there is, as he puts it, no "middle way"[25] between the positivist neutrality of the formal view as regards "the actual content of the law"[26] and substantive views which seek to derive "substantive rights" from the formal requirements of law as a foundation for distinguishing between "'good' laws ... and 'bad' laws."[27] It is Craig's submission that this is a true impasse because to the extent that we stretch the meaning of the rule of law to include substantive rights, we diminish the utility and integrity of the ideal of rule of law: "[T]he adoption of a fully substantive conception of the rule of law has the consequence of robbing the concept of any function which is independent of the theory

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Islands and the Rule of Law, 1940-1945 (Brighton: Sussex Academic Press, 2000); I. Muller, *Hitler's Justice: The Courts of the Third Reich*, trans. D.L. Schneider (Cambridge, Mass.: Harvard University Press, 1991); M. Stolleis, *The Law Under the Swastika: Studies on Legal History in Nazi Germany*, trans. T. Dunlap (Chicago: University of Chicago Press, 1998); and R. Weisberg, *Vichy Law and the Holocaust in France* (New York: New York University Press, 1996).

22 D. Dyzenhaus, "Form and Substance in the Rule of Law: A Democratic Justification for Judicial Review?" in C. Forsyth, ed., *Judicial Review and the Constitution* (Oxford: Hart, 2000) 141. Though this revival has been particularly evident (and, in my view, productive) in the United Kingdom, academic lawyers in America, Australia, and Canada have also contributed to the debate. See, for example, G. de Q. Walker, *The Rule of Law: The Foundation of Constitutional Democracy* (Melbourne: Melbourne University Press, 1988); J. Waldron, "The Rule of Law in Contemporary Liberal Theory" (1989) 2 *Ratio Juris* 79; M.J. Radin, "Reconsidering the Rule of Law" (1989) 69 Boston U. L. Rev. 781; F. Schauer, "Rules and the Rule of Law" (1991) 14 Harv. J. L. & Pub. Pol'y 645; J. Jowell, "The Rule of Law Today" in J. Jowell & D. Oliver, eds., *The Changing Constitution*, 3d ed. (Oxford: Clarendon Press, 1994) 57; I. Shapiro, ed., *The Rule of Law: NOMOS XXXVI* (New York: New York University Press, 1994); R.H. Fallon, "'The Rule of Law' as a Concept in Constitutional Discourse" (1997) 97 Colum. L. Rev. 1; L.B. Tremblay, *The Rule of Law, Justice, and Interpretation* (Montreal & Kingston: McGill-Queen's University Press, 1997); D. Dyzenhaus, ed., *Recrafting The Rule of Law: The Limits of Legal Order* (Oxford: Hart, 1999); W.C. Whitford, "The Rule of Law" [2000] Wis. L. Rev. 723; & J.W. Torke, "What Is This Thing Called The Rule of Law?" (2001) 34 Ind. L. Rev. 1445. According to William Scheuerman — himself a player in the Anglo-American revival — this "renaissance of the rule of law theorizing" is also in evidence among "the West European left over the course of the last twenty years." See W.E. Scheuerman, "The Rule of Law at Century's End" (1997) 25 *Political Theory* 740 at 742.

23 P. Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework," [1997] Pub. L. 466.

24 *Ibid.* [emphasis omitted].

25 *Ibid.* at 468, 484-86.

26 *Ibid.* at 467.

27 *Ibid.*

of justice which imbues such an account of law."[28] But, "the phrase the 'rule of law' has a power or force of its own,"[29] and to preserve that force, which resides alone in formalism, the rule of law must be kept "separate from broader issues of political theory."[30] So, as did Raz earlier,[31] Craig would have us wield Ockham's razor to save safe the formalist force of the 'rule of law' which is "a result of its use across time."[32]

Now, this is not the place to join issue with Craig.[33] What is important is his rendition of present circumstances. For it is indeed the case that the central task facing rule of law theory is somehow to transcend the apparent opposition between form and substance. Failing such an accomplishment, we are simply stuck with admitting that the rule of law, in its proper formalist formulation, though important, is marginal to the justification of our institutions and jurisprudence. And with that admission comes another: that, where it is used for the grander purpose of grounding our institutions and jurisprudence, it serves merely as a slogan which "cloak[s]"[34] whatever independent theory of justice is doing the real work of foundation building.

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28 *Ibid.* 487. See also 468 ("the concept ceases too have any useful independent function"), 478 (Dworkin's substantive theory preserves "no place for a *separate* concept of the rule of law as such at all"), 480 ("the consequence of adopting a substantive conception of the rule of law" is "that [the] phrase ceases to have a function independent of the rights based theory of law and adjudication"), and 482.

29 *Ibid.*

30 *Ibid.* at 477.

31 "The Rule of Law and Its Virtue," *supra* note 2.

32 *Supra* note 23 at 480.

33 This is not to infer that joinder is not possible. Just the contrary. Firstly, Craig never conclusively indicates what he considers properly to be the concept of rule of law of which the formalist and substantive versions of the matter which he canvasses are conceptions. He does refer to the chief rivals — the 'guidance to subjects' (*ibid.* at 469, 471) and the 'constraint of arbitrary power' (*ibid.* at 470-472) concepts — but he never chooses between them and instead tends to confuse them as part of the different conceptions. This is perhaps best revealed in his discussion of Dworkin, whom he criticizes for having no "separate concept of the rule of law" (*ibid.* at 478). But, of course, Dworkin does articulate a concept of rule of law of which his work more generally is a conception. And, *contra* Craig (*ibid.*), it is found early along in *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986) at 93: according to Dworkin, "the most abstract and fundamental point of legal practice is to guide and constrain the power of government." With this, of course, Dworkin is enlisting the 'constraint of arbitrary power' concept which I earlier (*supra* note 4) characterized as the longstanding traditional view of the matter. What is important here, however, is the consequence of Craig's failure to articulate fully and consciously to choose between the concepts. And the consequence is, of course, confusion. Disciplined reflection requires clarity as regards the contours of the subject matter of reflection. In order to articulate a conception of the rule of law, one has first to articulate, clearly and consciously, the concept of the rule of law about which one is reflecting. Craig's thesis is also frail in another way. He expressly connects the formal conception of the rule of law with legal positivism (*ibid.* at 477). But unless he thinks positivism an empirical proposition, he is then guilty of the sin he alleges against substantive versions, namely, "cloaking ... [his] conclusion in the mantle of the rule of law" (*ibid.* at 469). Otherwise put, if the rule of law cannot properly embrace "broader issues of political theory" (*ibid.* at 477), it cannot be construed as synonymous with positivism since positivism is itself a normative theory concerning politics and law.

34 *Ibid.* at 469.

II. ALLAN'S CONTRIBUTION

Trevor Allan is Reader in Legal and Constitutional Theory at Cambridge University, and he has been a leading player in the revival of rule of law theorizing.[35] It is his purpose in *Constitutional Justice: A Liberal Theory of the Rule of Law* to solve the form/substance conundrum.[36] It is my purpose in the remainder of this review to come to what I hope will be a proper judgment as regards both the methodology he deployed in this endeavour and the product of his labour. But let me indicate straightaway that, though his is a rich and in a great many respects a very rewarding book, in the final analysis it fails as a path forward in our understanding of the rule of law. In the course of making this case, I shall attempt to sketch what I take to be the proper path to redemption.

Given this overall intention, Allan's aims are appropriately robust. He intends to form and to defend a conception of "the rule of law as an organizing principle of political thought"[37] and as, indeed, "the basic charter of a free society."[38] The details then follow. He will

> offer an account of the rule of law that, though primarily an ideal of procedural fairness, governing the manner in which laws and policies should be applied to persons, also has important *implications* for the permissible content of such laws and policies.[39]

And that account, which posits a "necessary connection between law and justice,"[40] will, he claims, disclose the rule of law to be "a set of closely interrelated principles, that together make up the core of the doctrine or theory of constitutionalism and hence a necessary component of any genuine liberal or constitutional democratic polity."[41]

Allan's rule of law is, in sum, "an ideal of constitutionalism,"[42] and it offers "an integrated theory of constitutional government."[43] He pursues this ambition in two ways. The more general part of his methodology concerns conception formation, involves him in "uncover[ing] and clarify[ing]"[44] the aforementioned "implications," and occupies him in some measure throughout, though in the first, third, eighth, and last chapters especially. Elsewhere in the book, he is concerned to illustrate, and through that to defend, "the ability" of his conception "to give a coherent, unified, and attractive account of the

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35 His previous works of note in this respect include *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford: Clarendon Press, 1993); "The Rule of Law as the Rule of Reason: Consent and Constitutionalism" (1999) 115 L.Q. Rev. 221; and "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" (1985) 44 Cambridge L.J. 111.

36 *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001) (hereinafter *Constitutional Justice*).

37 *Ibid.* at 1.

38 *Ibid.* at 207.

39 *Ibid.* at 1 [emphasis added].

40 *Ibid.* at 283.

41 *Ibid.*

42 *Ibid.* at 6.

43 *Ibid.* at 4.

44 *Ibid.*

principal questions of legal authority and personal freedom."[45] In the course of this second strategy, Allan explores the separation of powers (Chapter 2), freedom of speech and civil disobedience (Chapter 4), fundamental freedoms (again including speech), equality and due process (Chapter 5), judicial review and the relations between the judicial, the legislative, and executive powers (Chapter 6), parliamentary sovereignty (Chapter 7), constitutional law, common law rights, and written constitutions (Chapter 8) — and all of this through engagement with parcels of the relevant scholarly canon and a mélange of case law, English, American, Australian, New Zealand and, in several instances, Canadian. I shan't pursue these illustrations except to the extent that they impact on the general methodology of conception formation, which, together with the conception thus delivered, will guide the inquiry that follows. I should note, however, that the chapters devoted to issues and illustration suffer, in my view, from much repetition and from the absence, anywhere in the work, of a non-argumentative summation of either the substance or structure of argument.

A. FORMATION

Allan argues that "the procedural ideal of 'natural justice' or due process, if it is to provide real protection against arbitrary power, must be accompanied by the equally fundamental ideal of equality" and that equality, so understood, "imposes substantive constraints on governmental power."[46] The 'must' here signals the implications out of which he constructs his conception of the rule of law. But we must ask: whence this "must"? and whence too the caveat regarding "protection against arbitrary power"? The second question raises the issue of the concept of rule of law from which he is proceeding, and the first, the issue of the theoretical venue for his implications. Allan's answer to the second question places his undertaking in the position from which any at all adequate conception of the rule of law must, in my view, depart. That happy beginning is, however, immediately fudged and in a fashion that leads to Allan's entirely unsatisfying solution to the second question.

Allan departs from the very Dworkinian notion that conceptions or interpretations of practices depend upon, and must proceed from, some coherent view of their overall point,[47] what Dworkin, following Rawls, calls their "concept."[48] In language somewhat delinquent from this Dworkinian standard, Allan tells us that "our conception of the chief point or value of the rule of law will rightly govern our interpretation of what is claimed to be its central notion."[49] That said, he contrasts the "traditional" notion of the rule of law — according to which its point is to "afford ... the citizen protection from the abuse of power"[50] — with the 'guidance' concept endorsed by Raz and others. "The core of the rule of law," he then tells us, "is not the idea, as Raz suggests, that the law should be

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45 *Ibid.* at vii (Preface).
46 *Ibid.* at 2.
47 *Law's Empire*, *supra* note 33 at 46-53, 62-73.
48 *Ibid.* at 71-72.
49 *Constitutional Justice*, *supra* note 36 at 54.
50 *Ibid.* at 55.

capable of guiding people's behaviour."[51] Its point, rather, is the constraint of arbitrary power.

This enlistment of tradition, however, does not exhaust Allan's response. In an admirable turn, he associates the concept of constraint of power with "the abstract ideal of equal citizenship,"[52] or moral equality, which resides at the heart of the rule of law and, as Finnis appears to have thought,[53] provides its political motivation. "[E]quality, in its central meaning," is "freedom from *arbitrary power - power exercised* on indefensible or irrational grounds, distinguishing unfairly between different (or different groups of) citizens."[54] Put positively, "the principle of equal citizenship," in service to which the rule of law constrains power, requires that "distinctions between persons ... should be capable of adequate justification, according to permissible (non-arbitrary) criteria."[55]

According to Allan, then, the very concept of the rule of law is wedded to, and expresses, liberal values and intentions. But there remains the rub of the fudge mentioned previously. Remarkably, Allan elsewhere reasserts Raz's view that rule of law is migratory politically because, in Allan's view, in the final analysis, its wedding with liberal polity is "contingent."[56] What distinguishes the rule of law in liberal states is the "moral status" it there alone obtains.[57] That is, while in other regimes, the rule of law will serve merely as an instrument of prudence for the ends, wicked or otherwise, of the ruler, in liberal polity it necessarily acquires "intrinsic moral value" because it is there attached to the equality, dignity, and autonomy of individuals.[58] Now, Allan is driven to this confession and avoidance because he associates the constraint of power initially with procedural fairness flowing from rule governance rather than, as does Dworkin,[59] with rights. Whereas, for Dworkin, rule governance is a consequence of our commitment to constraining power through rights, for Allan, rights are attached to rules, and are required by them, only in liberal polity. This is a crucial difference, notwithstanding that Allan elsewhere seems to indicate that his liberal rule of law state is a Dworkinian state.[60] For it expresses the fundamental character of Allan's enterprise as distinct from Dworkin's: where Dworkin thinks the rule of law, properly conceived as the constraint of power through rights, is the *political morality* of liberal states alone, because he thinks the rule of law first a matter of procedure rather than of rights,[61] Allan is committed to deriving its liberal credentials from that procedural core. He chooses Lon Fuller's account as the basis for his implicated, and at once vaguely Dworkinian and republican,[62] liberalism.

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51 *Ibid.* at 38.

52 *Ibid.* at 122.

53 *Natural Law and Natural Rights*, *supra* note 21.

54 *Constitutional Justice*, *supra* note 36 at 38, 21-22, 123.

55 *Ibid.* at 129.

56 *Ibid.* at 62.

57 *Ibid.* at 67.

58 *Ibid.*

59 "Political Judges and the Rule of Law" in R. Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985) 9.

60 *Constitutional Justice*, *supra* note 36 at 24-26, 40-41, 72-73.

61 "The rule of law remains a largely procedural ideal": *ibid.* at 75.

62 About the latter, see *ibid.* at 90, 283, 288, and section III of this essay.

According to Allan, Fuller's account of "the inner morality of law"[63] is "the basic model" from which "the full potential of the rule of law, as a principle of legitimate governance" is properly to be implied.[64] Fuller's account is "the core," in just this sense, "of a more elaborate conception of law as a bulwark or barrier against the exercise of arbitrary state power" because "the various formal requirements of [his] essentially procedural version of the rule of law derive their point and fundamental value from the broader ideal of constitutionalism to which, ideally, they belong."[65] This view commits Allan to recuperating the liberal intentions of Fuller's project. Fuller, we are told, "brought into clearer focus principles and values implicit in all liberal-democratic states founded on the political ideal of the rule of law, properly understood"; and his "true purpose was to provide a philosophical foundation for the process of law in a Western democratic state."[66] Fuller, however, resists this exegesis. His "true purpose" turns out to be "partly disguised";[67] and "an important ambiguity" as regards the very concept of rule of law underlies his account.[68] Allan overcomes this resistance through straightforward reappropriation of Fuller — "the compass of Fuller's ideal of internal morality," he tells us, "must not be drawn too narrowly"[69] and "should be reinterpreted as a demanding ideal of due process of law"[70] — and by declaring Fuller's "commitment to the values of liberal democracy" to be "overly self-restrained" and "his account of law" to be "ultimately too spartan."[71]

Allan's Fuller exegesis is, in consequence, strained. More importantly, the derivation of liberal principles from procedural core, which that exegesis intends to support, is in the result confusing, needlessly complex and, in my view, entirely unconvincing. More importantly still, none of this was at all necessary. Allan's fine appreciation of the relationship between equality and the rule of law[72] provided him the wherewithal to proceed directly to the important task of normative construction. That he instead took this unhappy, and I believe unproductive, detour through Fuller is a consequence of his conceding much too much force to positivist arguments of the sort marshalled by Craig.[73] Lingering positivism of Craig's variety suffers not only from a lack of candour about its own value-laden suppositions and implications, but also from a pronounced lack of explanatory compensation. Which is to say, the maintenance of the dichotomy between form and substance is not only indefensible on its own terms, but it also provides us nothing beyond the ersatz ability to declare decidedly illiberal regimes to be rule of law regimes. But, in that event, the distinctive force of the rule of law, which the dichotomy intends to preserve, turns out to be a force dedicated to no more dignified a purpose than elevating the moral status of oppressive regimes. Had Allan chosen instead to be led by his own good sense and principles, he would have realized that the distinction that counts

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63 *Supra* note 1 at 42.
64 *Constitutional Justice*, *supra* note 36 at 31-32.
65 *Ibid.* at 61.
66 *Ibid.* at 66.
67 *Ibid.* at 62.
68 *Ibid.* at 54.
69 *Ibid.* at 204.
70 *Ibid.* at 75.
71 *Ibid.* at 73.
72 *Supra* notes 45-53 and accompanying text.
73 *Supra* note 23.

in rule of law theorizing is not the tired positivist distinction between form and substance, but the more intriguing and productive distinction between the guidance and constraint concepts. I will propose in the next section that the path of redemption flows from just this distinction and, in so doing, will argue that Allan failed to take this course because his project fundamentally misconceives the meaning of political morality and the critical role it plays in our reflection about law. But first there is the matter of liberal conception of the rule of law which Allan proposes.

B. CONCEPTION

Allan is committed to the view that the form of law leads, though as we saw not inevitably,[74] to a substance which makes of the rule of law the foundation of liberal constitutionalism. He is also of the view that this substance does not itself depend upon or express either a full-blown theory of justice or the controversial precepts of some political theory.[75] Rather, according to Allan, the formal equality and procedural fairness that characterize rule governance as such and that together ensure that "all are governed in practice, as well as in principle, by the same standards,"[76] "generate" a deeper and "more demanding" equality which he designates "equal citizenship."[77] Equal citizenship resides in the public acknowledgement of "the equal dignity of citizens" that commits regimes to "fair treatment and respect for individual autonomy."[78] Equality in this sense provides a non-instrumental rationale for rule governance which transforms the procedural core of rule of law into an "intrinsic moral value."[79] It is liberal regimes whose motivations work this transformation and, in such regimes, equal citizenship is the "basic premise" of government and consequently "the ultimate meaning of the rule of law."[80]

Allan's first contribution resides in his articulation of this correspondence between the rule of law and liberal constitutionalism. "[T]he principle of equal citizenship" requires, he claims, that "distinctions between persons that departures from settled practice or adopted rules entail should be capable of adequate justification, according to permissible (non-arbitrary) criteria."[81] Justification so conceived, of course, serves directly the cause of constraint. But, according to Allan, its ambitions and effects are larger still: it makes the rule of law "a rule of reason"[82] and "an ideal of consent"[83] and a practice of "deliberative democracy."[84] The "basic requirement of justification" establishes a "condition of legitimacy, whereby the legality of a person's treatment, at the hands of the state, depends upon its being *shown* to serve a defensible view of the common good."[85]

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74 See *supra* note 54 and accompanying text and *Constitutional Justice*, *supra* note 36 at 23-24.

75 *Constitutional Justice*, *ibid.* at 26 (his "account of the rule of law ... remains distinct from any fully elaborated theory of *political* or *social* justice") [emphasis in original].

76 *Ibid.* at 17.

77 *Ibid.* at 12 and passim.

78 *Ibid.* at 2.

79 *Ibid.* at 67.

80 *Ibid.* at 2.

81 *Ibid.* at 129 and 284.

82 *Ibid.* at 2.

83 *Ibid.* at 6.

84 *Ibid.* at 288.

85 *Ibid.* at 2 [emphasis added].

Allan defines the 'common good' as "the good of a community whose members are accorded equal respect and dignity, according to some rational account of their collective well-being,"[86] and submits that "the constraints of public reason are honoured as long as ... the abstract values of individual dignity and equality" are not denied.[87]

That rules and policies must be 'shown' to be justified in turn entails government by consent for it is the citizen that is the addressee of this demonstration. "[T]he law seeks the citizen's acceptance of its demands as morally justified: he is invited to acknowledge that obedience is the appropriate response in light of his obligation to further the legitimate needs of the common good."[88] In consequence, "the rule of law is ultimately an ideal of government by consent of the governed, in which the law invokes the assent of the individual by appeal to a morally accepted view of the common good."[89]

The justification requirement, then, entails standards of legitimacy and conditions of consent, and these together, Allan argues, make "the ideal of deliberative democracy ... the central aspiration of the rule of law."[90] The rule of law "requires a mode of governance designed to elicit voluntary compliance on the basis of conscientious moral judgment" of the justification proffered for public rules and policies.[91] The rule of law demands, that is "that governmental action should be capable of justification in terms of an explicit conception of the common good ... reflecting the status of each citizen as an independent moral agent."[92] With this final calculation, Allan has wrought very much indeed from the procedural core of rule of law.

The second contribution of Allan's conception lies in the identification of "the institutional implications"[93] or requirements of this "mode of governance."[94] These requirements track, and make good, the standard of legitimacy and the conditions of consent. Central to the former is the separation of powers, and to the latter background rights of speech, conscience, and association.[95] I shall pause on each.

Allan believes that government by rule of law requires judicial supremacy. He frames this requirement first on an assumption[96] and then on a distinction between what he terms the "political" and judicial "branches of government."[97] The judicial branch must

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86 *Ibid.*

87 *Ibid.* at 285 and 284 ("Neither legislation nor government policies may be defended by recourse to arguments that conflict with constitutional fundamentals").

88 *Ibid.* at 6.

89 *Ibid.* at 24.

90 *Ibid.* at 288.

91 *Ibid.*

92 *Ibid.*

93 *Ibid.* at 47.

94 *Ibid.* at 288.

95 *Ibid.* at 2-3 and generally c. 5.

96 *Ibid.* at 2 ("The principles of procedural fairness and equality assume the existence of a separation of powers between the principal organs of government"). Incidentally, this calculation might commit Allan to the view that the separation of powers is an institutional feature of rule governance as such and not just of liberal regimes. If this is the case, then his assumption is controversial for the reasons already noted: see *supra* notes 17-21 and accompanying text.

97 *Ibid.* at 9, 41, 122, 162, 279.

be separate from the executive and legislative branches because it alone is vested with authority to adjudicate "questions of legal right."[98] And it must be independent of those branches because, in adjudicating right, the judicial branch acts as the "servant ... of the constitutional order as a whole rather than merely as [an] instrument ... of a majority of elected members of the legislative assembly."[99] The point of "the separation and independence of judicial power" is, therefore, that the judiciary might act "as an essential safeguard against arbitrary power."[100] And "it is ultimately for the courts to determine the validity of statutes in accordance with the principle of equality and with due regard for the other essentials of the rule of law."[101] It is important to note that Allan's claim for judicial supremacy does *not* depend upon the happenstance of some constitutional instrument which vests in the courts the authority of judicial review. His claim, rather, is a general one about liberal governance *tout court*. Indeed, not only does he argue against constitutional bills or charters of rights as a liberal requirement,[102] where they do exist, their interpretation is, he claims, properly subject to the "general law," a concept to which we will now turn.[103]

Government by consent requires basic rights of association, speech, and conscience, and those general rights are therefore "intrinsic to the rule of law."[104] Now, Allan appears here to be proceeding from the well-worn distinction between background rights and specific rights, according to which liberal regimes are characterized both by "a back-up general right to equality" and a "schedule of specific rights," with the latter expressive of the former.[105] Allan contrasts the aforementioned basic rights, which, because they inhere in the rule of law as such, will govern in every liberal regime, with "the concrete content of equality," which "will depend on whatever [presumably other] fundamental rights and general principles the polity in question recognizes."[106] This view leads him to draw a distinction between what he calls "the general law" and "the ordinary law."[107] This distinction is critical, not only because it produces the second arm of his institutional prescription, but also because it ties his view of fundamental rights to the first arm of judicial supremacy.

The 'ordinary law' consists of "those rules and measures whose purpose is the attainment of specific social and governmental goals" and, inasmuch as it too "must be integrated into the general law," any "codified constitution" that may obtain.[108] The general law consists of "those basic freedoms, such as speech and conscience, and procedural fairness, that lie at the heart of the rule of law."[109] It is Allan's view, as it

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98 *Ibid.* at 133.
99 *Ibid.* at 3.
100 *Ibid.* at 133.
101 *Ibid.* at 3.
102 *Ibid.* at 152, 201, 207, 224.
103 *Ibid.* at 243ff.
104 *Ibid.* at 122.
105 W. Kymlicka, *Liberalism, Community, and Culture* (Oxford: Clarendon Press, 1989) at 110.
106 *Constitutional Justice*, *supra* note 36 at 159 and 12 ("The idea of equal citizenship" is "abstract and therefore dependent on the elaboration of specific rights").
107 *Ibid.* at 259.
108 *Ibid.*
109 *Ibid.* at 250.

was Dicey's before him,[110] that the common law is the home and the factory of these rights and principles of rule of law.[111] Allan puts the matter thus (and I will cite at length):

> The common law inevitably reflects the society and polity in which it is embedded; but its susceptibility to enlightened change, in conjunction with altered perceptions of justice in society at large, is a product of its intrinsic dependence on the moral judgment and vision of all who participate in legal analysis and constitutional debate. The development of the common law does not occur in isolation from the evolution of ideas about justice that take place in the community at large. Dependent on the dictates of reason, it is inherently responsive to the moral understanding of all who contribute to the decision of particular cases, whether by formulating legal argument or giving judgment on questions of constitutional importance; and lawyers and judges are also citizens who may be expected to engage, outside the court-room, in the arguments about justice that political debate is supposed to nurture and inspire. The ideal of equality, implicit in the common law method of argument from precedent, illuminated by appeal to legal principle, means that each person's treatment must be capable of justification in terms of general rules and principles that express a coherent conception of justice, open to public scrutiny and rational criticism.[112]

But not only then do "common law values," in this way, "inform the ideal of the rule of law"[113] and constitute the "public reason" of liberal governance,[114] the entire matter of liberal governance is thereby remitted in the final resort to the judicial branch.

Allan is not at all shy about the implications of his having come, in this fashion, full circle to his first institutional prescription. "The common law," he declares, "is prior to the legislative supremacy, which it defines and regulates."[115] Nor just that: "the common law becomes the measure of the limits of legislative power in the sense that it is through the process of adjudication that fundamental ideas and principles are tested and refined."[116] And this august "judicial authority," he argues, "ultimately rests on the capacity of judges to represent the nation they serve by articulating," case by case, "the implications of its basic political values."[117] In all of this, he echoes Dicey: "Our

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110 *Introduction to the Study of the Law of the Constitution, supra* note 4 at 191: "We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty or the right of public meeting) are the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts.") See also 199: "[T]hus the constitution is the result of the ordinary law of the law."

111 *Constitutional Justice, supra* note 36, especially c. 8 ("Fundamental Common Law Rights and Equality"). Though, it must be noted that even here in the common law homeland of liberal governance, there is a core and penumbra. "We should," Allan tells us, "distinguish between those liberties and principles intrinsic to the rule of law and those contestable or less firmly rooted arrangements more susceptible to deliberate constitutional change" (*ibid.* at 260).

112 *Ibid.* at 249.

113 *Ibid.* at 243.

114 *Ibid.* at 290-94.

115 *Ibid.* at 271 and 251.

116 *Ibid.* at 269.

117 *Ibid.* at 271 and 220 ("the final judge of legality or constitutionality is the conscience of the ... official, whose personal integrity is ultimately what preserves the rule of law from degenerating into the exercise of arbitrary power").

constitution, in short, is a judge-made constitution, and it bears on its face all the features, good and bad, of judge-made law."[118]

I do not want to delay at any great length over the particulars of Allan's conception of the rule of law, since the gravamen of my dissent, as indicated previously,[119] concerns more general matters which I will raise in the next section. I shall, however, briefly consider certain difficulties with his views because I take them to be related to those more general concerns.

There is the matter first of Allan's view of the proper relationship between the legislative and judicial branches of the liberal state. Now, Allan quite properly accords fundamental importance to the separation of powers:

> Unless the separation of powers between legislature and judiciary is maintained, the rule of law is displaced by arbitrary power: the system of government is stripped of its character as a constitutional state in which citizens are made subject to the law, and replaced by an autocracy in which the will of a ruler or a hostile parliamentary majority has free rein.[120]

This, of course, must be so, since otherwise "the protection of individual freedom and security"[121] that the liberal state exits to serve would be an unenforceable, and forever revocable, promise. However, placing the separation of powers and judicial independence at the heart of matters raises the requirement of "an appropriate reconciliation between the legislative sovereignty of Parliament, as the supreme lawmaker, and the legal sovereignty of the courts, as the final arbiters of the law in particular cases."[122] Allan thinks, again quite properly, that any such rapprochement between the powers must not "subvert ... other essential features of the constitutional design, including representative democracy."[123] In my view, the reconciliation Allan offers fails to meet this test and, instead, merely restates, unresolved, the apparent contradiction between the legal and legislative.

The quandary is clear. On the one hand, the courts cannot be "reduc[ed] ... to an instrument of whatever injustices the legislature purport[s] to inflict."[124] On the other hand, the rule of law cannot "permit unbridled judicial power."[125] Allan appears conflicted about how properly to respond to this riddle. At one point he declares "the essence of constitutional justice" to be "the insulation of the citizen from both popular prejudice and governmental hostility";[126] yet, at another, its "essence" becomes "the effort to secure a fair balance between public and private interests."[127] Now, these sentiments, in my view, inform two very different attitudes towards the proper place of

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118 *Introduction to the Study of the Law of the Constitution, supra* note 4 at 192.
119 See text accompanying note 73 above.
120 *Constitutional Justice, supra* note 36 at 202.
121 *Ibid.* at 151.
122 *Ibid.* at 2.
123 *Ibid.* at 263.
124 *Ibid.* at 247.
125 *Ibid.* at 159.
126 *Ibid.* at 146.
127 *Ibid.* at 157.

the judicial branch in liberal democratic politics. The first emphasizes protecting the citizen against arbitrary power and compels an oppositional judiciary; the emphasis of the second is democratic governance and produces a collaborationist judiciary. Allan's book is rife with evidence of both,[128] but he never adequately reconciles them because he does not here construct a theory of adjudication which alone can provide the answer.[129] Because courts indeed enjoy "interpretative freedom,"[130] the absence of such a theory simply remits the legislative branch to the mercy of the judicial branch and its views concerning "the general 'law,' whose supremacy the separation of powers is intended to preserve."[131]

Allan's collaborationist views raise another difficulty. The citizen looms large in his conception of liberal democratic governance. "The rule of law," he claims, "is ultimately premised on the 'sovereignty autonomy' of the individual citizen"[132] to whom it "transfers ultimate legal authority."[133] Citizens have, therefore, "the right to participate in the *identification* and *interpretation* of the law."[134] Indeed, their participation, in that

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[128] Evidence of the oppositional moment is everywhere apparent, but especially in chapters 2, 5, 7, and 8. See, for example, *ibid.* at 14 ("the courts ... fulfil the protective role that the rule of law accords them"), 133 (the "point" of judicial separation and independence is the judiciary's acting "as an essential safeguard against arbitrary power"), 251 ("the judges' central function of applying the law, as a defense against arbitrary ... power), and 273 ("the courts' duty" is "to defend the rule of law"). For details on the collaborationist moment, see particularly *ibid.* at 122 and 140. For Allan's 'test' for the propriety of opposition and collaboration, see *ibid.* at 202 ("[T]he means of reconciling parliamentary sovereignty with the rule of law are clear. The principles of equality and due process, and those civil and political rights fundamental to constitutional democracy, find adequate protection in the exercise of judicial sovereignty, as regards the application of law to particular cases"), 250 ("Beyond those freedoms, such as speech and conscience, and procedural fairness, that lie at the heart of the rule of law, there is wide scope for legislative judgment about the needs of the common good, to which courts should ordinarily defer. The degree of constraint imposed by equality will properly vary in accordance with the impact of legislation (as of administrative action) on rights and liberties of acknowledged constitutional importance"), 152 ("Courts should not be over-eager to discover an illegitimate intention to penalize a group of persons when it is possible to find a reasonable basis for statutory restrictions, attributable to proper concern for the general welfare"), 198 (where Allan adopts Dworkin's distinction between 'policy' and 'principle'), and 309 ("Since ... elected officials may be assumed to accept the constraints of the rule of law, courts should allow their judgments to stand ... when they fall within a broad range of acceptable conclusions"). These views of the function and limits of judicial authority appear in some respects similar to John Hart Ely's and, like Ely's, Allan's understanding suffers from a lack of precision concerning how courts are to determine when those principles and rights "fundamental to constitutional democracy" are, and are not, at play. See J.H. Ely, "Toward a Representation-Reinforcing Mode of Judicial Review" (1978) 37 Md. L. Rev. 451 and *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980).

[129] Allan's view of adjudication, as expressed in the present volume, appears to me Hartian. For instance, at one point, he opines that "legal reasoning permits resort to personal moral and metaphysical commitments only when settled principles and or established principles prove indeterminate" (*ibid.* at 288); and this seems to accord with Hart's view that the law runs out when the rules run out. See H.L.A. Hart, *The Concept of Law*, 2d ed. (Oxford: Clarendon Press, 1994) at 200-12 and c. 7.

[130] *Constitutional Justice*, *ibid.* at 227.

[131] *Ibid.* at 125.

[132] *Ibid.* at 281 and 220 ("the final judge of legality or constitutionality is the conscience of the individual citizen").

[133] *Ibid.* at 221.

[134] *Ibid.* at 94 [emphasis in original].

sense, is "internal to the concept of law" proper to liberal democracy.[135] Yet this vision of government by consent appears frustrated by his inclination sometimes to view the workings of the liberal democratic state as a collaborative enterprize between officials. Allan recommends that we envisage "government officials, elected representatives, and judges .... as collaborating in the pursuit of a coherent conception of justice."[136] In that event, however, the citizen is not only a bystander to government, but also the object of an ongoing state discourse.[137] That he elsewhere includes citizens in this "joint political endeavour"[138] and secures a place for them in litigation and in civil disobedience[139] does not, in my view, salvage his normative intentions. Official discourse remains a discourse *about* the citizen and never becomes a discourse of which the citizen is *author*. And, in this respect, despite his republican impulses, Allan orients the rule of law to the ruling elite in a fashion that recalls, though in a much milder form, the orientation of crude formalism described previously.[140] This is important for present purposes because the rule of law, properly conceived, has seamlessly to secure the place of the individual citizen at the heart of law and politics. Or so at least I will argue in the next section.

However, before taking up that enterprise, there remain two further difficulties with Allan's conception on which I wish briefly to dwell. At several points, Allan deals with the matter of the standards that properly apply to legal theories. For instance, early along in the piece, he approves of Lon Fuller's view that the best legal theory is one which serves the "'professional lives' of the legal philosopher's 'fellow lawyers.'"[141] Later on, he comments that "legal theory and analysis are empty, in practice, until applied to existing political structures and traditions."[142] Now, one cannot reasonably quibble with either dictum. One can, however, hold Allan to account before them. In this regard, two difficulties emerge: his failure to secure the place of either the legal community or the private law in his conception of the rule of law.

A free and independent legal community is a fundamental institutional feature of liberal rule of law states. Fully conceived, the legal community consists of practising and academic lawyers *and* the judges drawn from their numbers. And though what may be termed the judicial, practising, and academic branches of this community have different and distinct obligations, the branches are united in being "the *special* clientele of the rule

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135 *Ibid.* at 25.

136 *Ibid.* at 122, 201 ("separate, but interdependent, sovereignties") and 294 ("The task of reconciling competing principles of political morality is inevitably shared between courts and legislature"). With this, Allan appears to be endorsing, inadvertently of course, the Supreme Court of Canada's 'dialogue' theory of the proper relationship between the judiciary and the executive and legislative branches. I have criticized this understanding elsewhere. See F.C. DeCoste, "The Separation of Powers in Liberal Polity: *Vriend v. Alberta*" (1999) 44 McGill L.J. 231.

137 Discourses of the sort described by Allan have been aptly described as "pastoral." See Z. Bauman, *Legislators and Interpreters* (Ithaca: Cornell University Press, 1987) at 19-20 (defining "pastoral" as "for 'the benefit of' the dominated, in their interest, for the sake of the proper and complete conduct of their life business").

138 *Constitutional Justice*, *supra* note 36 at 140.

139 Concerning the former, see *ibid.* c. 3 and at 289-90; and for the latter, *ibid.* c. 4.

140 Fine, *supra* note 16 and accompanying text.

141 *Constitutional Justice*, *supra* note 36 at 69.

142 *Ibid.* at 187.

of law" with respect to which they have corporately "a special role."[143] Now, this view is not novel. In his formal theory of the rule of law, Summers identifies the legal community — in which he includes "students of law, professional academics, legal practitioners and judges" — as essential to governance by the rule of law.[144] In his most recent work, Raz too names "a strong and independent legal professional" as a critical "presupposition" of the rule of law.[145] Both Raz and Summers associate an independent legal community with the separation of powers required by the rule of law.

As we have seen, Allan places lawyers along with judges in the foundry of the common law.[146] And though lawyers are thereby made co-responsible with judges for forging the general law of equality and due process that characterizes governance by rule of law,[147] Allan nowhere deals with the institutional place of lawyers in our law nor associates the legal community more generally with the separation of powers. Had he contrasted the "'political' branches of government" with the 'legal branches,' instead of merely with the judicial branch, he would have found an institutional home and justification for the legal community[148] and, with that, made available to his "fellow lawyers"[149] the "political ideals that underlie" their practices.[150] As it stands, however, his conception of the rule of law fails to account for a cardinal feature of liberal governance or to inform us about the motivations of those who, along with judges, commit themselves to it.

According to Allan, the rule of law has as its primary concern the legality of the treatment of people "at the hands of the state."[151] This view leads him to define "the ideal of the rule of law as a bulwark insulating the individual from the unmediated exercise of state power."[152] This orientation and definition, without more, problematizes the place of private law, since private law concerns not the relations between citizens and the state, but the relations between persons in civil society. Now, Allan of course realizes that "the danger of arbitrary power is not confined to institutions that can be properly regarded as part of the state,"[153] and he wishes his liberal theory of the rule of law to comprise "a barrier against arbitrary power, from whatever source."[154] However, he does not adequately theorize this ambition. Such a theory would have first to de-emphasize the constraint of state power and then expand the point of rule of law to include the constraint of power of, and through, the state. So conceived, the concept of the rule of law would easily contemplate a conception that could capture the constraint of both political and

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143 Summers, *supra* note 13 at 128.

144 *Ibid.*

145 "The Politics of the Rule of Law," *supra* note 2 at 361 ("We often emphasize the importance of an independent judiciary. But it is crucial to remember that it can be independent only if it is supported by a strong and independent legal profession. A politically manipulable legal profession can subvert the rule of law just as much as weak and politically manipulable courts").

146 *Supra* notes 111-13 and accompanying text.

147 *Supra* notes 104-10 and accompanying text.

148 *Supra* note 96 and accompanying text.

149 *Constitutional Justice*, *supra* note 36 at 69.

150 *Ibid.* at 218.

151 *Ibid.* at 2.

152 *Ibid.* at 15 and 61 ("a bulwark or barrier against the exercise of arbitrary state power").

153 *Ibid.* at 11.

154 *Ibid.* at 12.

social power. Allan takes another course. He attempts to incorporate private law through his view of the rule of law as governance by consent:

> The rule of law is ultimately an ideal of government by the consent of the governed, in which the law invokes the assent of the individual conscience by an appeal to a morally acceptable view of the common good. It is the aspiration for general moral assent that underlies and unites both private and public law.[155]

But, he does not, in my view, make good this proposal, and in consequence the private law remains very much an orphan in the institutional regime he proposes.

His view of rights confirms this unhappy result. According to Allan, "rights provide the substance of the rule of law."[156] And about that there can be no contest. However, when, late in the book, he considers the question of rights directly, he again compromises the place of the private law in the overall architecture of his theory. For, it turns out, that the rule of law, "as the guardian of individual autonomy, ... is primarily the guarantor of negative rights, ... negative rights against state interference."[157] This complicates matters, not only because a great many private law rights do not appear to concern the state at all, but also because they often operate in what Hart termed a "power conferring," rather than in a power constraining, capacity.[158] Now, I do not mean to support the view that private law rights do not concern the constraint of power. Indeed, it is very much my view that public and private law are united through the rule of law as practices which constrain power in service to equality and liberty.[159] What I mean to claim is that this unity has to be theorized and that Allan, in this work, fails to do so.

III. CONCEPT, LOCATION, & THEORY

I have so far made two claims concerning the path to productive theorizing about the rule of law. I have claimed firstly that the necessary point of departure is the concept, or point, of the rule of law and that *liberal* conceptions, or theories, of the rule of law must proceed from the 'constraint' concept and dismiss the 'guidance' concept.[160] Secondly, I have proposed that, properly conceived, the rule of law accords political and legal primacy to the individual.[161] I want now to defend, and to expand, these prescriptions and, in so doing, to argue that Allan's conception of the rule of law, despite his intentions, offers us an impoverished and deformed version of liberal politics and law. As indicated earlier,[162] this argument arises from what I take to be his misunderstanding of political morality as a concept, and his misappraisal of its explanatory place and force in legal and political theory.

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155 *Ibid.* at 24-25.

156 *Ibid.* at 250.

157 *Ibid.* at 280.

158 *The Concept of Law*, *supra* note 129 at 26-49, 80-81, 283-86.

159 Dawn Oliver's work comes to mind in this regard. See D. Oliver, "Common Values in Public and Private Law and the Public/Private Divide" [1997] Pub. L. 630 and *Common Values and the Public-Private Divide* (London: Butterworths, 1999).

160 See text accompanying notes 72-73.

161 See text accompanying note 139.

162 See text accompanying note 73.

I argued earlier[163] that, despite its neutralist intentions, the guidance concept is every bit as much a normative proposal as is the constraint concept. On this view, the concepts differ in the nature of the prescriptions each compels and in the place each accords the rule of law in our political and legal discourse and practices. Now, theorists, like Raz, who depart from the guidance concept, and adopt the rule formalism to which that concept is permanently and necessarily wedded, claim that the rule of law may, as a matter of theory and of fact, be a feature of any sort of regime, just because the nature of any regime is in the final analysis a consequence, not of the rule of law, but of independent political predicates supplied by some free-standing political theory. But this is wrong. The guidance concept places the ruler at the centre of law and politics, proclaims the content of law properly to be a decision, on whatever grounds, of the ruler, makes of the legal subject an addressee and consumer of rules, and takes the courts to be an instrument of the sovereign's purpose. And, in all of these respects, and quite independently from whatever other prescriptions may in any case, in fact, inform political and legal practice, the guidance concept, by itself, constitutes a political morality, and a significant one at that. But so too, of course, does the constraint concept. It makes the subject and not the ruler the centre of law and politics, conceives of law and politics as powerful threats that have to be contained and not as instruments of power, and imagines the judiciary as pledged to the law's subject rather than to the sovereign.

This is to say that, however we might conceive of it, law *is* political morality. And this declaration raises two requirements: we must be precise both as regards the meaning of political morality *and* about the law's place in, and contribution to, political morality. I shall confine my inquiry concerning the second matter to the place of law in liberal political morality; and with respect to both matters, I shall converse with Allan's views.

A. DEFINITION

The distinction between personal and political morality is fundamental to legal and political theory, not only because, on the view taken here, law and politics express political morality, but also, and more mundanely, because otherwise the project of reflecting about law and politics becomes lost in a tide of indistinguishable opinion. So let's be clear. Personal morality has as its object what it means to lead a good life. Political morality, on the other hand, concerns itself, not with individual good in that sense, but with the good of political community, and its objects are "the fundamental bases of political life," and not the ends of a human life well lived.[164] Institutions are of course fundamental to a community's political life. And, in consequence, it falls to political morality to tell us what those institutions should be, "how [they] should be designed, [and] how people in them should act."[165] Concerning the first two matters, conceptions of political morality have minimally: (a) to identify the institutions required for a community's political life; (b) to structure the relations between those institutions;

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163 See text accompanying notes 9-16.

164 S.M. Shumer, "Machiavelli: Republican Politics and Its Corruption" (1979) 7 *Political Theory* 5 at 8.

165 T. Nagel, "Ruthlessness in Public Life" in S. Hampshire, ed., *Public and Private Morality* (Cambridge: Cambridge University Press, 1978) 75 at 90. Also published in T. Nagel, *Mortal Questions* (Cambridge: Cambridge University Press, 1979) 75.

(c) to set standards for the treatment of members of political community by those institutions; and (d) to identify when those institutions may regulate the relations between members of political community and in what fashion. The third matter concerns the institutional moralities which those institutions define for, and impose upon, their officers.

In order to satisfy these requirements, a political morality must identify, and expound, some value which, in its view, is the proper foundation for the terms and conditions of human association in political community. Contemporary conceptions of political morality invariably associate themselves "with protecting and promoting the well-being of people."[166] The guidance and constraint concepts, as parcels of political morality, are instances of this: guidance theorists claim that the rule of law serves autonomy, and constraint theorists that it serves equality.

Allan uses the term 'political morality' throughout *Constitutional Justice*,[167] but his usage is undisciplined and, as we shall see, leads him to articulate a conception of the matter which, in its details, is decidedly illiberal. Matters start out well enough. Indeed, straightaway, he concedes his theory's fate to the demands of political morality: "the strength of a theory's appeal," he tells us, is properly calculated "on grounds of political morality."[168] Moreover, he justifies his strategy of argument by implication in terms of political morality: the implications he draws from "the principle of equality implicit in the rule of law ... depend on arguments of political morality."[169] Yet, these impulses are not as proper as might first appear. For, it turns out that Allan means by political morality nothing else but personal morality writ large.

There is abundant textual evidence. At one point, he comments that "legal interpretation is inextricably conjoined with political morality — *the morality of the interpreter*."[170] Elsewhere he contrasts the core of "procedural legality" with "the wider sphere of political morality"[171] and defines legal principle in a way which unmistakingly associates principle with popular morality: "a legal principle is only a moral principle whose basis in the values of the general community gives it a legitimate role in legal argument."[172] And, near the end of the book, he makes the following candid declaration: "In neither legal reasoning nor political argument is there a sharp division between public reason and personal conviction."[173]

Allan, in short, collapses the distinction between personal and political morality. The signs of this collapse are apparent early along in his discourse. For instance, when discussing Dworkin's theory of integrity, he comments that "the ideal of integrity requires

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166 Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, *supra* note 2 at v. Dworkin also puts this matter nicely: "concern for [their] subjects ... is the most basic requirement which political morality imposes on those who rule." See *A Matter of Principle*, *supra* note 59 at 370.

167 *Supra* note 36.

168 *Ibid.* at 5.

169 *Ibid.* at 265.

170 *Ibid.* at 71 [emphasis added].

171 *Ibid.* at 74 and 250.

172 *Ibid.* at 292.

173 *Ibid.* at 290.

government to conform to *a* coherent conception of political morality."[174] But Dworkin's point, surely, is that liberal governments must conform to *the* liberal conception of political morality. When he comes to set a standard for legal theory and analysis, he explicitly concedes political morality to a pre-existing moral and political datum: "Legal theory and analysis are empty, in practice, until applied to existing political structure and tradition."[175] However, this concession reaches its high point in his discussion, and rejection, of John Rawls' theory of public reason.[176]

Though his "very general account of the idea of public reason is intended to match [his] fairly abstract account of equality," his view of public reason must not, he tells us, be identified "with the more stringent view offered by John Rawls."[177] Now, Rawls' public reason is intended to preserve the distinction between the conventional morality in fact in place in a community and the specifically political morality on which its credentials and legitimacy as a liberal political community depend. Allan thinks Rawls' division too strong and his conception too "narrow."[178] "Recourse to controversial moral and metaphysical convictions" is, he claims, "more often necessary, and more generally legitimate, than Rawls seems willing to concede."[179] Consequently, though "in seeking to challenge or justify legal restraints or government policies, both citizens and officials should appeal, so far as possible, to shared principles and values..., it is not necessary for debate to cease as soon as there is a clash of moral commitments."[180] But this curtsy to political morality and the extension of public reason to include substantive personal convictions comes at considerable cost.

Remember that the point of the rule of law, as a rule of public reason, is to render judgments concerning which "distinctions between persons [are] capable of adequate justification, according to permissible (non-arbitrary) criteria."[181] But, under Allan's "elastic and generous" public reason,[182] this permit does not necessarily fall to the requirements of liberal political morality to which the state must conform, but may instead, on undisclosed occasion, fall to a public reason constituted in some undefined part by "traditional morality."[183] It is for this reason that Allan must side with Devlin against Hart in their historic debate concerning the place of conventional morality in the law.[184] And it is for this reason that he must equivocate on the legal propriety of regulating, through the law of crimes no less, consensual sexual behaviour deemed deviant by the dictates of conventional morality.[185] He must side with Devlin, and state-prescribed sexuality must be for him a see-saw issue because public reason is for him, in some

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174 *Ibid.* at 40 [emphasis added].

175 *Ibid.* at 187.

176 *Ibid.* at 284-92, 296-97. Allan is here responding to Rawls' views in *Political Liberalism* (New York: Columbia University Press, 1993), especially Lecture VI and at 226, 241, 243.

177 *Ibid.* at 284.

178 *Ibid.* at 296.

179 *Ibid.* at 286.

180 *Ibid.* at 287.

181 *Ibid.* at 129.

182 *Ibid.* at 313.

183 *Ibid.* at 303.

184 *Ibid.* at 295-300.

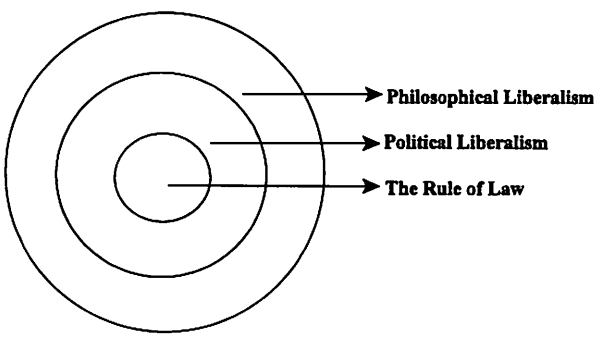
185 *Ibid.* at 158-59, 296-98, 302-304, 313-15.

significant measure, conventional morality which the public reason of law expresses and not a standard of political morality to which conventional morality is made subordinate. The effect of all of this cannot be overstated. To the extent that Allan concedes public reason to conventional morality, he permits political equality to become its hostage. Nor only that. His smudging of the critical difference between public reason and conventional morality leads him to mislocate the place of our law in the overall edifice of political liberalism and, with that, to compromise the place of the individual at the heart of liberal politics and law.

B. LOCATION

According to most views, the rule of law sits somehow at the core of liberal political morality. This understanding means, first of all, that the rule of law is the minimal moral content of states devoted to the moral equality of their members as individuals. Secondly, it means that liberal states may be guided by principles which exceed the requirements of the rule of law: the rule of law, that is, does not exhaust the political morality, nor the institutional practices, of liberal political communities. It is this second meaning which raises the issue of the location of those other principles and practices, and of the rule of law with respect to them, about which theories of the rule of law must be clear and convincing.

The following diagram attempts to illustrate the theoretical typography in which the liberal state resides:



At the most abstract level, liberal political theory may be situated in contrast to inegalitarian theories, which, whatever their specific ends, propose and produce inegalitarian political practices and arrangements.[186] The rule of law is the defining element of liberal political theory. It holds this pride of place because, absent an institutional practice to constrain power, political practice becomes inegalitarian and government becomes tyrannic or despotic. But, while it sits at the centre, the rule of law must be understood as part of — and, indeed, as a consequence of — a larger conception of the right ordering of human affairs. Understanding law requires, that is, an informed

[186] About which, see S. Holmes, *The Anatomy of Antiliberalism* (Cambridge, Mass.: Harvard University Press, 1993).

view of the law's relationship to the terms and conditions of human association. Since such a view must take the form of a theory of the state, it is proper to say that liberalism is the theory of state in which the rule of law resides and takes shape.[187]

Liberalism of this sort is properly called political or institutional liberalism because it aims to establish that "certain institutions that are generally associated with liberal societies ... are essential to any good society."[188] The bare bones of political liberalism are easily recounted: a rightly ordered political community (a) is predicated on the moral equality of the individuals who comprise it; (b) requires that individuals be treated equally despite differences of power, affiliation, and attribution; and (c) authorizes the state, minimally, to guarantee equality by enforcing negative tolerance through a regime of rights which, among other things, institutionalize the distinction between the public and the private and subjects the state itself to law. The key word here is of course 'minimally.' I have already mentioned that liberal politics might be guided by principles which exceed the minimal requirements of the rule of law. And clearly there are other institutions, besides the rule of law, which are generally associated with liberal societies — for instance, free markets for the exchange of goods, universities for the cultivation of free inquiry and expression, and representative democracy.[189] Both the liberal state and liberal society have then, in theory and in practice, a configuration which exceeds the institutional form we call the rule of law.

An adequate conception of the rule of law must articulate, first, the normative source of liberal political institutions as such and, then, the proper relationship between the rule of law and those other institutions which characterize liberal politics and society. Political liberalism, the rule of law included, depends upon what might be termed philosophical liberalism. Liberal societies embrace the principles that only individuals count, that all individuals count equally, and that all individuals count just because they are persons. These principles, which form the foundation of liberal law and politics, are supplied by philosophical liberalism whose burden it is to describe the fundamental features of the human condition.[190] Now, though the details of the relationship between philosophical, or comprehensive, liberalism and political liberalism may be contested, the institutions and principles of liberal politics are all of them a consequence of our philosophical commitment to the moral equality of individuals. And this is to say that the source of our political arrangements, including the rule of law, is to be found, not in the arrangements themselves, but in some wider view of what it means to be a human person.

The liberal state pursues ends, and liberal society is characterized by institutions that exceed the institutional requirements, practices, and principles of the rule of law. Now, as indicated previously, it is a founding feature of liberal society that the requirements of political morality trump the requirements of personal morality in any instance where the

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187 On liberalism as "a particular conception of the state, in which the state is conceived as having limited powers and functions," see N. Bobbio, *Liberalism and Democracy*, trans. M. Ryle & K. Soper (London: Verso, 1990).

188 D. Johnston, *The Idea of a Liberal Theory: A Critique and Reconstruction* (Princeton: Princeton University Press, 1990) at 24-25.

189 R. Dworkin, "Liberal Community" (1989) 77 Cal. L. Rev. 479.

190 Johnston, *supra* note 188 at 24-25.

two may conflict. But matters do not end there. The requirements of the rule of law trump other principles and ends that the liberal state may pursue and the practices of other institutions that characterize liberal society. More specifically, the liberal state and other liberal institutions are subordinate to the principles of governance by rule of law; and where the conduct of liberal politics or of liberal institutions violates legal principle, and the principle of equality especially, it is the rule of law, and not political or institutional practice, that governs. Indeed, this is precisely what it means to say that the rule of law is the fundament of liberal law and politics.

It is difficult to know what to make of Allan's various statements with respect to the location of his conception of the rule of law in the larger swath of liberal political theory. On the one hand, he thinks his liberal conception "an integrated theory of constitutional government"[191] that "unites legal and political discourse,"[192] declares the rule of law to be both "a legal doctrine and a political ideal,"[193] warns that "law cannot stand aloof from political theory,"[194] and requires rule of law theory "to defend a particular position on the 'political theory continuum.'"[195] On the other hand, he wants to claim that the criterion of constraint that his theory provides relies "not [on] conformity with any particular conception of justice, derived from abstract political philosophy, but [on] compatibility with those principles accepted as constitutionally fundamental, within a particular regime or polity, and the underlying values of human dignity and freedom that these principles characteristically assume."[196] Now, this is very different from the claim that his "account of the rule of law remains distinct from any fully elaborated theory of *political* or *social* justice."[197] Despite its place at the core of political liberalism, the rule of law is indeed properly distinguished from political liberalism more widely conceived, and is properly described, as Allan describes it, as "modest."[198] Even though it predicates and constrains the whole of liberal life and politics, its limited ambition leaves much to the other institutions, state and otherwise, that characterize liberal society. No, this claim seems instead to concede the rule of law to the *de facto* practices and commitments of particular regimes, with the singular (and as it turns out very defeasible) caveat that "underlying values of human dignity and freedom" be somehow observed.[199]

Because it is for this reason let loose from its liberal moorings, the position that Allan finally stakes out on the "political theory continuum," though it intends to "strike ... a reasonable balance between modest guarantees of 'negative' individual freedom and scope for collective political action,"[200] in fact forfeits the liberal credentials of the rule of law

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191 *Constitutional Justice*, *supra* note 36 at 4.

192 *Ibid.* at 290.

193 *Ibid.* at 26.

194 *Ibid.* at 231.

195 *Ibid.* at 27.

196 *Ibid.* at 22.

197 *Ibid.* at 26.

198 *Ibid.* at 27 and 29 ("The rule of law is a modest theory of *constitutional* justice, whose requirements any acceptable version of liberal democracy should be expected to satisfy") [emphasis in original].

199 *Ibid.* at 22.

200 *Ibid.* at 27.

to collective discretion. The medium of this exchange, remarkably in my view, is John Stuart Mill.[201]

In his classic essay "On Liberty"[202] Mill, of course, identified harm to others as the singular threshold of principle for collective interferences with individual lives. Accordingly, the notion of harm marks the boundary between public and private and establishes the threshold of equal concern and respect. Unless they harm another, an individual's actions are private. They cannot, therefore, be a proper matter for collective deliberation and control and must, instead, be left entirely to the individual's discretion. Moreover, to interfere for any other reason would be to treat that life — with its choices, preferences, and plans — as less deserving of equal concern and respect and, in the result, as less than equal. To restrict liberty to prevent harm serves both values by saving the lives of all from unwanted direction by others. To restrict liberty in the absence of harm, however, diminishes equality because, in that event, the course and content of our lives would depend on whatever calculus of worth happens to be favoured by those who happen to have the power to impose their preferences on us. Our lives would not be equal, as a cause of concern and respect, to their lives; and, in consequence, our lives, unlike theirs, would not be ours to live and to construct as we see fit.

According to Mill, a harm exists where other-regarding conduct causes real damage to some identifiable legal person. This simple definition is pregnant with meaning. That self-regarding conduct is excluded as harm at law prohibits legal paternalism;[203] that the damage caused by other-regarding conduct must be sustained by legal persons excludes constructive harms from law;[204] and that damage must be real, and not a matter of mere offence, prohibits legal moralism.[205] Legal paternalism is the view that prevention of physical, psychological, or economic harm to an actor him/herself is a good reason to interfere with that individual's choices and conduct. Constructive injuries are those that are thought to be sustained, not by "assignable" individuals,[206] but by abstractions, such as society generally or some class or category of individuals within society. Legal moralism is the view that, even where it causes neither harm nor offence to the actor or others, individual conduct might yet be a legitimate object of interference and control, if the conduct in question can be shown to be inherently immoral.

Allan dissents from both Millian prescriptions. "The law," he says, "need not be confined to the protection of individuals from 'harm,' narrowly conceived, but may properly seek to secure and enforce a wide range of human and social values."[207] This must be so, he thinks, because "whether or not conduct constitutes 'harm' (either to the actor or to someone else) and may, therefore, be prohibited is inevitably a moral judgment that reflects a conception of the 'good.'"[208] "For morality to be the ground of legislative

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201 *Ibid.* at 295-304.

202 In J. Gray, ed., *On Liberty and Other Essays* (Oxford: Oxford University Press, 1991) 5.

203 *Ibid.* at 14.

204 *Ibid.* at 90-91.

205 *Ibid.* at 93.

206 *Ibid.* at 91.

207 *Constitutional Justice*, *supra* note 36 at 304.

208 *Ibid.* at 297.

prohibitions," it is only necessary then that the conception of the good which it expresses "be susceptible of reasoned defence."[209] A "vision of the common good,"[210] if it is "an integrated conception,"[211] will qualify in this respect, as will in consequence endangerment of "the community's valued traditions and culture."[212] "We cannot," then, "always allow people freedom to act in accordance with their own convictions," even if their conduct harms no one.[213] For "there are interests of the community as a whole, as well as those of specific individuals, that must be protected from injury."[214]

Now, these views do not merely eviscerate Mill. Nor is their effect only to equate, to a fateful degree, the values and traditions of the sociological community with the values and traditions to which any community must be committed in order to qualify itself as a liberal political community. More grandly still, they undercut Allan's founding definition of equality in terms of arbitrary power, subordinate individual liberty to collective good and, with that, compromise the primacy of the individual in our politics and law.

IV. CONCLUSION

I have devoted an essay of this length to Allan's book, simply because, in my view, it is an important contribution to the project of redeeming the rule of law from the positivism that remains still potent among lawyers and judges. And though I would for this reason urge the book upon legal scholars, practising lawyers, and judges, who take seriously the moral call and foundations of their office, my recommendation would not be without qualification. For, as I have sought to persuade throughout, Allan's project does not fully comport with what I take to be the three basic requirements of theorizing a liberal view of the rule of law, namely: that it depart from the view that the point of rule of law is constraint of power, political power and social power; that it understand that this concept commits theory to an elaboration of the law's place in, and contribution to, the political morality of liberal societies; and that it, therefore, accord primacy to individual persons to whom the entire edifice of political liberalism is pledged. I shan't rehearse my dissent from Allan's conception as regards the these requirements. I will here add but two comments.

Paul Kahn offers the following vision of the rule of law:

> The rule of law is a social practice: it is a way of being in the world. To live under the rule of law is to maintain a set of beliefs about self and community, time and space, authority and representation. It is to understand the actions of others and the possible actions of the self as expressions of those beliefs. Without those beliefs, the rule of law appears as just another form of coercive governmental authority.[215]

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209 *Ibid.* at 299.

210 *Ibid.* at 300.

211 *Ibid.* at 304.

212 *Ibid.* at 302.

213 *Ibid.* at 311.

214 *Ibid.*

215 P. Kahn, *The Cultural Study of Law* (Chicago: University of Chicago Press, 1999) at 36.

In my view, these beliefs, and the cultural practices that they sustain and nourish, become lost in Allan's project under the quilt of the dichotomies which his illiberal impulses and inclinations destine him to adopt.[216] In consequence, were we to live under his rule of law regime, our experience, to the extent that we happened to dissent from the community's "valued traditions and culture,"[217] would indeed be of coercion.

Secondly, to the extent that his conception incorporates conventional morality and tradition into the project of liberal law and politics, it misses the point, and effect, of liberal morality. That morality delivers freedom so that each of us, as moral equals, might make our lives our own. And to the extent liberal morality flourishes in any society, its effect is to subvert the force of tradition on our lives. In that resides the alchemy of liberty: "All that is solid melts into air" because liberty once made real against the force of history corrodes all.[218]

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216 *Constitutional Justice*, *supra* note 36 at 290 ("public reason and personal conviction"), 301 ("the demands of both justice and community" and "the requirements of morality and justice"), 304 ("reason and tradition"), and 315 ("personal autonomy and moral rectitude").

217 *Ibid.* at 302.

218 K. Marx & F. Engels, "Manifesto of the Communist Party" in E. Kamenka, *The Portable Marx* (New York: Penguin, 1983) 203 at 207.