The Rule of Law: Ideal or Ideology, edited by Allan C. Hutchinson and Patrick Monahan (Toronto: Carswell, 1987) pp. xiv + 167.

The rule of law has received a mixed press recently. One historian of a particular episode in English law, E.P. Thompson, perhaps unexpectedly, given his well-known ideological bent, has described the "regulation and reconciliation of conflicts through the rule of law" as a "cultural achievement of universal significance".[1] The rule of law in one aspect appears to him as an "unqualified human good".[2] Thompson has been excoriated in the following terms:

> It [the rule of law] creates formal equality — a not 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.[3]
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> [emphasis in the original]

Surely the framers of the Canadian Charter of Rights and Freedoms could not have had the latter view in mind when they wrote into the preamble that "Canada is founded upon principles that recognize the supremacy of God and the rule of law". Before we can agree whether the rule of law is a good or bad thing or a thing that is good and bad by turns we must first reach common ground on what we are being asked to judge.[4] That problem has proved intractable.

Is the rule of law a concept or a principle or a congeries of principles or a mere practical concern? Is it a political constraint primarily associated with liberalism? Or is it an evaluative standard by which to judge the failures of modern legal liberalism? Is it possibly an essential underpinning of any legal system, liberal, socialist, or totalitarian? This collection of essays, arising out of a conference in April, 1984 at Osgoode Hall Law School, exhibits seven possible and quite diverse approaches to such issues. All of the papers are valuable for their attempt to rethink philosophically what we mean by invoking the rule of law. The discussion in each instance goes far beyond the ethnocentric treatment offered by Dicey that is still introduced as canonical in many classrooms.[5] Nor do we find among these essays any panegyrics that might be worth lifting for quotation on occasions of lawyerly self-congratulation. The authors contributing to this volume differ so fundamentally in their characterization of the nature and purpose of the rule of law that its versatility as a term in our legal and political discourse is amply demonstrated.

Two limitations of this book should be noted at the outset. The essays do not necessarily take up the topic on the same plane of abstraction. Some of

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1. E.P. Thompson, *Whigs and Hunters* (1975) at 265.
2. *Id.* at 266.
3. Morton J. Horwitz, "The Rule of Law: An Unqualified Human Good?" (1977) 86 *Yale L.J.* 561 at 566. *See also*, for a critique of Thompson on this issue, Bob Fine, *Democracy and the Rule of Law* (1984) at 169-89.
4. Raz notes how the rule of law, though an ideal, often conflicts with other values and that this is "just what is to be expected": see Joseph Raz, *The Authority of Law* (1979) at 228.
5. Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed. 1985) at 187-203.

the essays make careful distinctions about the various conceptions of the rule of law that have predominated at different times. Other essays are oblivious to anything but a programmatic meaning assigned by that particular author to the rule of law. It is therefore difficult to compare the different treatments without a host of accompanying qualifications. The second limitation is that, although these essays were all delivered as lectures at the 1984 conference, they do not contain cross-references to each other. In consequence we are left to imagine what kind of dialectical exchange the authors might participate in with one another. The introduction to the volume summarizes the gist of each essay, but there is no serious attempt by the editors to put the various approaches into a single coherent perspective. Perhaps the message of that omission is that the search for such a perspective is illusory.

Judith Shklar offers in "Political Theory and the Rule of Law" an essay in retrieval. In her customary lucid fashion she distinguishes between two "original" meanings of the rule of law. The first, attributable to Aristotle, sees the rule of law as the rule of reason. In the Athenian *polis*, judgments in courts of law were ideally constrained by intellectual and ethical dispositions on the part of the judges that would enable them to decide rationally through the construction of practical syllogisms. The second meaning of the rule of law is, according to Shklar, best exemplified in the work of Montesquieu. For him, the rule of law is integral to a theory of limited government. The rule of law is necessary to protect the governed against oppression by government. The purpose of the rule is to guarantee a balanced political system in which power is to some degree dispersed and used by different branches of government to check countervailing forces within the state. The most interesting feature of Shklar's essay arises out of her attempt to clarify how contemporary conceptions of the rule of law reflect or, in some cases, distort these two original meanings. Thus, she describes Hayek's and Unger's models of the rule of law as "mirror images" of each other that both take Montesquieu's version as their background.[6] Hayek and Unger share a belief in a spontaneous social order than can emerge in the absence of attempts to impose a legal order. The assimilation of Unger to Hayek on this point seems to be right and it reveals a set of assumptions that deserves more extended treatment.

The Aristotelian conception of the rule of law also has its modern interpreters (or corrupters, in Shklar's account). The court-centered jurisprudence of Fuller and Dworkin alike may be criticized for divorcing the judge from "the normative and political context within which his ratiocinations take place". In Fuller's case, his notion of the "internal morality" of law is open to Shklar's accusation that as an interpretation of the ideal of the rule of law, the theory is undermined by its purely formal rationality.[7] Shklar qualifies her similar criticism of Dworkin by noting that his "more recent essays" tend to "absolve him from similar charges of political and historical fantasizing". This is fair enough, especially in view

6. *See* Friedrich Hayek, *The Road to Serfdom* (1976) and Roberto Mangabeira Unger, *Law in Modern Society* (1976).

7. Lon L. Fuller, *The Morality of Law* (rev. ed. 1969).

of his 1978 British Academy lecture.[8] His rights-based conception of the rule of law will, however, continue to cause problems for critics who dispute the source and the content of the background political morality that Dworkin still maintains helps judges decide hard cases.[9] Shklar concludes by offering hope that the rule of law is not simply a verbal weapon for use in ideological combat. She suggests that a serious political theory must deal with such enduring issues as "the fear of violence, the insecurity of arbitrary government and the discriminations of injustice".[10] That theory will have to include a defensible conception of the rule of law. It ought not to be conceived so abstractly that its meaning for such issues becomes ambiguous or impractical.

At first glance, the succeeding paper in the collection appears to engage in just the sort of combat the Shklar deplores. Theodore Lowi's essay, "The Welfare State, The New Regulation, and the Rule of Law", seeks to document the decline of the rule of law in the face of an unprecedented increase of federal regulation in the U.S. during the 1970's. This regulatory "binge" was bipartisan and perhaps as a matter of policy choice unrelated to party programme at all. By authorizing the delegation of a vast range of powers to governmental agencies, which then operate under broad and vague guidelines, federal administrations have in effect eroded the significance of the rule of law. That principle is understood by Lowi to embrace the libertarian values of the individual's freedom to choose which way of life is best for him or her and the right not to have one's judgment on this account overridden by considerations of the collective good. Lowi does not deny that the growth of welfare administration is in some ways positive. Rather, he questions whether the negative side of those events is not a further amble down the road to serfdom. He understands that metaphor quite vividly, as a matter of citizens becoming mere feudal subjects of a proliferating bureaucracy. The solution imagined by Lowi would be to make the rule of law once again robust by carefully examining the political consequences of each proposed governmental delegation. Citizens must be "watchful and competitive".[11]

The title of Ernest Weinrib's essay, "The Intelligibility of the Rule of Law", hints at a notion of intelligence, inspired by Aristotle, that suggests to Weinrib a non-instrumental conception of law. By this he means that the purpose of law is not necessarily determined by the political or economic interests of those who hold power in a society. In delineating the non-instrumental view, Weinrib lays out a complex argument about understanding law as the interpenetration of form and content. His account thus rises above, as he calls them, positivist or reformist legal theories. A non-instrumental understanding represents a point of view "internal" to law; there is no outside criterion that is available to judge the adequacy of the

8. Ronald Dworkin, "Political Judges and the Rule of Law" reprinted in his *A Matter of Principle* (1985) at 9-32.

9. See Ronald Dworkin, *Law's Empire* (1986) at 256-58; James Boyle, "The Politics of Reason: Critical Legal Theory and Local Social Thought" (1985) 133 *U. Pa. L. Rev.* 685; and Andrew Altman, "Legal Realism, Critical Legal Studies, and Dworkin" (1986) 15 *Phil. & Public Aff.* 205.

10. *The Rule of Law* at 16.

11. *Id.* at 58.

form of justice derivable from the non-instrumental conception. The pattern of justice that Weinrib thinks is exemplary in this regard is what he calls, again borrowing from Aristotle, "corrective" justice that governs private transactions. This pattern or form is characterized by its ignorance of the particular attributes of parties to a dispute and by its attempt to restore the parties to an initial notional equality. These two features are analogized by Weinrib to the formal requirements of Kantian morality. The pattern he explicates underlies or represents the "deep structure" that is realized in legal content. This conceptual argument, posed in terms that show Weinrib's impressive technical familiarity with both ancient and modern philosophy, is intended to vindicate the possibility of the rule of law. That notion is coherent because Weinrib has demonstrated that a theory of justice can be formulated that is "self-sufficiently intelligible": it is not to be judged by external criteria, for example, by a utilitarian conception of moral ends. Weinrib admits that his account is highly abstract and that its implications for legal doctrine have yet to be worked out fully. This essay is a valuable statement of the philosophical principles that underlie his continuing jurisprudential project. His work offers great promise as a serious analysis of legal phenomena.

Michael Sandel's contribution to this volume, "The Political Theory of the Procedural Republic", supplements his continuing project to refute the ethical foundations of liberalism.[12] His essay tries initially to show how the two standard versions of liberal political morality are both wrong. The first, the utilitarian account, suffers from not being ultimately compatible with liberal theories of individual rights. The second version, essentially an adaptation of Kantian ethics, shows the failures of utilitarianism on this score. But it, in turn, fails to secure the foundations of liberal theory. Rawls distinguishes, for instance, between the right and the good. Liberalism offers arguments that justify a scheme of basic rights and liberties without any particular values or ends being imposed. The framework is purportedly neutral as it does not favour any particular view of how our lives should go. Sandel's most notable addition to the debate is a theory of the self. In contrast to either version of liberalism, whether utilitarian or rights-based, Sandel's model of the self is radically situated in communities. Where liberals conceive of the self for the purposes of political analysis as "unencumbered", communitarians treat each individual's identity is derived from such membership, whether in a "family or city, people or nation, party or cause". This difference between liberal and communitarian conceptions, according to Sandel, cashes out in opposed conceptions of politics and social policies. Communitarians, for example, are distressed at the displacement of meaningful political debate from more local forms of association (the workplace, the neighbourhood, the family) to more regional or national forms (the provincial legislatures or the federal Parliament). Sandel sees what he calls the procedural republic as the ultimate successor to the civic republican ethos that formerly had gripped the Western political imagination. In his estimation, democracy has been impoverished as a practical result.

12. *See* Michael J. Sandel, *Liberalism and the Limits of Justice* (1982).

Although Sandel writes as a political theorist, many of the communitarian ideas he espouses have been adapted by legal writers aligned with the Critical Legal Studies movement. His invocation of republican ideals and the virtues of civic participation that once seemed lively possibilities, but then were submerged by notions of liberal, representative democracy, has its counterpart in recent leftist assaults on legal theory and legal doctrine. In formulating an alternative prescription for the practice of politics, contemporary radicals have attempted to revive ideas formerly dominant, particularly at the time of the creation of the U.S. republic. My own critique of the relevance and impact of communitarian theories of the relationship betwen political arrangements and the law is to be found elsewhere.[13]

The essay following Sandel's, "Democracy and the Rule of Law" by Hutchinson and Monahan, is a useful adjunct to the kind of criticism levelled by Sandel. It attempts to identify and decenter what are perceived to be the constitutive principles of a liberal theory of politics. Institutions and practices we take for granted are condemned by Hutchinson and Monahan in their polemic as devices that serve to mediate and suppress popular disaffection and conflict. Consequently, representative, constitutional democracy, the use of courts to decide important social issues, and the rule of law itself are all ironically anti-democratic. The rule of law, as Hutchinson and Monahan understand it, is "premised on the ideal of limited government" and is related to liberal claims about the political significance of individual autonomy. These critics chart the development of differing conceptions of the rule of law through English and U.S. constitutional history and arrive at the current reigning theory exemplified in the work of Ronald Dworkin. He becomes their main stalking horse. For him in common with other liberal theorists, "all roads begin with atomic, pre-political individuals maximizing their self-interest".[14] By adhering to this assumption, liberals are unable to capture any of the senses in which individuals are not just holders of rights against their communities and should not be supposed to be generally uninterested in participating in the political debates of their communities. Politics has become, especially through the use of fundamental rights protected under a constitutional charter, problematically elitist. Citizens notoriously decline to participate widely in even the limited role offered by voting for representatives drawn from political parties. The judicialization of politics, through the use of constitutional challenges to government action, further works to turn citizens, few of whom are legally trained or able to fund litigation to an ultimate resolution, into "distant spectators". This is the thrust of the radical critique advanced by Hutchinson and Monahan, both of whom are prolific exponents of a non-liberal conception of law.

The main problem with their critique arises from the generalizations they attempt to draw from contemporary legal theory. Their statements of the presuppositions of so-called liberal writers are often overblown. For instance, the claim that all liberal theory must start with an assumption of

13. *See* my forthcoming "The Communitarian Vision of Critical Legal Studies" (1988) 33 *McGill L.J.*

14. *The Rule of law* at 108.

radical individualism, whether in a metaphysical, methodological, or sociological sense, is a difficult construction that, to be proved, will require more than a blanket reference to Unger's *Knowledge and Politics* [15] or Macpherson's work on seventeenth-century theories of possessive individualism.[16] One of the striking features of both Rawls's work that follows up on his comprehensive argument in *A Theory of Justice* [17] and also Dworkin's recent *Law's Empire* [18] is that those authors' assumptions about the role of communities in explaining political and legal obligation cannot be reduced to a simple aggregative conception of the role of the social group in human flourishing. For Dworkin in particular, the notion of community has become a central part of the political background to his theory of adjudication in a way that Hutchinson and Monahan in their essay seem reluctant to acknowledge.[19]

Philippe Nonet, in an inventive essay, "Is That The Rule That Was?", frames his thoughts on the conference topic by means of an exercise in pedagogy in which he focuses on the question whether the rule of law still exists. His discussion of the question, including why and how it is posed, as well as how it might be answered or avoided, is acutely self-reflective. He examines closely his own possible responses to the question as an experienced teacher who also happens to "profess" law. The question calls upon him to distinguish his role as an observer or theorist from his equally valid role as a full participant in the practices of his community (and for this purpose the law school itself also counts as a community). Making use of the distinctions in French between *le droit* and *la loi* and in German between *Recht* and *Gesetz* (terminological discriminations without English parallels), Nonet tries to illustrate the difference between stating the law and describing what the law is. He relies, that is, on the more general distinction between saying what norms govern us in our particular social context and conducting our metanormative inquiries. This distinction has powerful implications for a theory of legal education, particularly insofar as we might contrast education as grounding or training in practical knowledge with education as intellectual understanding. In the end, Nonet doubts whether it is worthwhile to strive for an answer to the question, asked from an external standpoint, whether the rule of law exists. His pedagogical lesson ends with a peroration, aimed at moving his students to action, rather than with an intellectual resolution. The point seems to be, on Nonet's account, that we ought to act as if the rule of law exists and can be applied to our lived circumstances.

The final essay contained in the collection is Duncan Kennedy's "Toward a Critical Phenomenology of Judging". Kennedy fixes intently on the process of judging in a particular hypothetical case. He is interested

15. Roberto Mangabeira Unger, *Knowledge and Politics* (1975).

16. C.B. Macpherson, *The Political Theory of Possessive Individualism* (1962).

17. *See* John Rawls, *A Theory of Justice* (1971) and his remarks rejecting any interpretation that tries to foist on him a thesis of radical individualism in his "Justice to Fairness: Political Not Metaphysical" (1985) 14 *Phil. & Public Aff.* 223 at 230-31.

18. *See supra* n. 9 at 194-216.

19. *But see* Allan C. Hutchinson, Book Review (1987) 96 *Yale L.J.* 637 at 653-56 for caustic criticism of Dworkin's notion of political association and how it fails to reflect contemporary social facts.

in exposing the variables that come into play when a judge has an initial impression that "the law" requires a different result from the way in which the judge would like, for political or other reasons, to see the case come out. In tracing the process of judicial thinking, beginning with what a judge might perceive as given by authority, then turning down both useful and blind alleys, across precedential hurdles, and following potential analogies, Kennedy illuminates how radically contingent the resulting holding is. Kennedy's approach resembles what a particularly candid practising judge might describe if he or she could employ the vocabulary of unconstrained reflection. The crucial lesson in Kennedy's little experiment is that legal solutions to problems posed in daily life are all highly susceptible to analysis along structural criteria. But this does not mean that such solutions can ever be known in advance of the process of actually thinking through the potential arguments that shift the balance one way or the other. The uncertainty of how the case will come out is preserved throughout the process, during which "the situation seems to open toward a multiplicity of possible outcomes, none of which would violate any strongly held theoretical tenets".[20] In this respect, Kennedy's essay appears to be a natural continuation of his earlier work, in which his discussion received its initial impetus from the recognition of a basic duality.[21] The charm of Kennedy's argumentation then arises out of how he criticizes the force and meaning of each pole in the pair, finally arriving at an understanding that transcends the opposed concepts without denying their normative attractiveness. In this essay, Kennedy is particularly dependent on the metaphor of a "field", composed of legal authorities and policy arguments that push the judge different ways. In a hard case or possibly in any case (the latter is probably closer to Kennedy's meaning), the field is always to some degree "impacted". At this level the judge is operating inside the practices of legal analysis where the outcome is always "radically indeterminate". In part, this is because, as Kennedy recognizes, the "message" contained in the normative field is still subject to an interpretive construction — so the "pull" of the field is not always the same for two different judges or, by extension, for the same judge in two apparently similar cases.

Kennedy summarizes the meaning of his phenomenological experiment by noting that: "Rule application is something that does happen, but it is *never* something that *has* to happen. It is an outcome as contingent, as arbitrary, from the point of view of jurisprudence, as that in which the field is gloriously manipulable".[22] It is at this point that Kennedy sees the Critical Legal point of view diverging most noticeably from contemporary mainstream legal theory. The difference is over how the process of judging is described. In Kennedy's depiction, there is nothing privileged about being able to descry a controlling rule that would plausibly fit a set of factual circumstances. By contrast, the jurisprudence of such writers as Dworkin invests heavily in the notion that a judge, such as Hercules, can

20. *The Rule of Law* at 156.

21. *See*, for instance, Duncan Kennedy, "The Structure of Blackstone's Commentaries" (1979) 28 *Buff. L. Rev.* 205.

22. *The Rule of Law* at 166.

always produce a rule (in the form of a principle) that will provide the best fit with established legal authority and will be consonant with shared notions of substantive justice or fairness. The Dworkinian result is ideally principled, not arbitrary, and determinable, not contingent. One way to realize the differences in these accounts is to ask what possibilities of failure are applicable to each. In Kennedy's terms, a judge can be criticized for invoking a rule as if in every case that could be the only possible ground on which a decision might be reached. Dworkin's theory imagines a judge going astray by failing to find an abstract principle that reflects the composition of the set of values that provides the background to a community's legal system.[23] It is important to note that Dworkin's account is not simplistically rule-dependent. There is also within that account significant scope accorded to the problem of how interpretation of the apparently established authorities and other historical factors is more than just a threshold inquiry that must necessarily be achieved in adjudicating every hard case. In light of such considerations, it is difficult to agree with Kennedy that nearly every modern legal theorist has somehow misconceived the judicial task. Kennedy's reliance upon the image of a normative field is in this sense both illuminating and puzzling. It does help us see the variety of forces that a candid judge might confront in a controversial case, especially a judge who is, to use a particularly unilluminating expression, "result-oriented". To this extent, Kennedy's phenomenological description is enlightening and helpful. Nonetheless, his conclusion that every case, looked at from a vantage point inside the system of legal reasoning, is susceptible to radical contingency, seems to beg the question about the peculiarity and isolation of legal ratiocination. His skeptical thesis is so strong that no inferences are permitted from one episode of legal argument to the next. His mistake seems to lie in two possible causes. First, he appears to assume that if legal reasoning cannot be characterized as entirely a rule-governed activity, then rules can never be determinative of any issue. Second, from the claim that a rule cannot include directions for its own application it does not follow that no sense at all can be made of the practice of "following a rule". Debate over the possibility or explanation of rule-governed activity is one of the cardinal modern philosophical questions. Readers of the American legal realists or of Critical Legal literature would find helpful some sophisticated, though differing, philosophical treatments of this problem.[24]

There are at least two themes that cut across the essays in this volume. The first is the emphasis on the political participation of all citizens. If the rule of law is to have any relevance, those subject to laws forged in a community must be vigilant and assume responsibility for the content and application of the legal system. This theme is especially evident in the

23. *See*, for an example of a judge failing to realize the scope of a constitutional principle, Dworkin's discussion of Robert Bork's views on adjudication in Ronald Dworkin, "The Bork Nomination" (Aug. 13, 1987) *N.Y. Rev. of Books* at 3-10, substantially reprinted in (1987) 9 *Cardozo L. Rev.* 101.

24. *See* Ludwig Wittgenstein, *Philosophical Investigations*, (3rd ed. trans. G.E.M. Anscombe 1967) ss. 143-242. For conflicting discussions of the import of Wittgenstein's argument, see Saul A. Kripke, *Wittgenstein on Rules and Private Language* (1982) and G.P. Baker and P.M.S. Hacker, *Scepticism, Rules and Language* (1984).

contributions of Shklar, Lowi, Sandel, Hutchinson and Monahan, and Nonet. It thus is common to a wide range of ideological positions. Secondly, in another aspect, the rule of law can be identified most clearly as something that works like a gravitational force when we are practising within our legal system (as distinct from looking at our legal system from outside, as an anthropologist from another culture might do). The discussions by Weinrib, Nonet, and Kennedy illuminate in quite contrasting styles the sense in which the rule of law constrains our legal thinking in ways we might find difficult to resist without a highly developed consciousness of our own institutional role. The internal point of view thus offers crucial insights into our legal culture in a way that positivism, for instance, cannot.

As to the alternatives posed by the title to the collection, the rule of law conceived as ideal or ideology, these have not proved to be mutually exclusive. How they interpenetrate is epitomized in the following sentence referring to the rule of law from the editors' essay: "Like any ideal, it only exists in the political consciousness and conscience".[25] That comes as close as any statement in the volume to disclosing the overriding lesson of these lectures.

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25. *The Rule of Law* at 99.