

## The Governance of Human Communities

Remarks to the Symposium February 8, 2014

*The Unbounded Level of the Mind: Rod Macdonald's Legal Imagination*

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The governance of any human community – and perhaps that of non-human communities as well – can be contextualized in its propensity for abuse of power, corruption, and endless tragedies of the commons. When we encounter these phenomena, crying out as they do for justice, we begin to find it astonishingly naïve to contextualize the governance of any human community in its propensity for giving, self-sacrifice and interdependent collective action. To put this in biblical terms, the knowledge of evil occludes the perception of good. There is consequently an almost irresistible intellectual temptation to acknowledge what is dysfunctional and pathological in us and to seek to channel and control it toward the production of some lesser evil. Thus, why not acknowledge self-interest and greed, and orient it toward stable markets and competitive consumption? Why not invent separations and distributions of power that can keep our own need for authority in check? Why not give each of us the shield of personal rights to fend off the havoc that might otherwise be wreaked upon us and by us? I call this the posture of fatalistic narcissism, and Rod Macdonald has taught me to resist it with every juridical fibre available to me.

It is no mean feat to construct an entire body of thought around an indefatigable, practically-minded and demonstrably successful appeal to our better selves even as we confront the worst abuses of which we are capable. A crucial aspect of Rod's thought that serves to defeat fatalistic narcissism is its disciplined insistence that every human encounter is a setting for open-ended justice claims. For many jurists, but not for Rod, the formalism of treating like cases alike serves to give shape and orientation to legal inquiry. Indeed, it is a core and deeply unsettling insight in Rod's work that formalism, which in small doses seems to protect us from our worst selves, in fact through its acceptance of fatalistic narcissism, ultimately releases them. Of course, as Rod has insisted almost *ad nauseam*, this formalism begs the question as to what is truly alike, since nothing ever is, except in one respect. Every human encounter carries the possibility of a higher aspiration.

However, when we ask ourselves what prospects for future research are held out by a writer, we are really asking: how truly radical is their thought? Conventional wisdom can hold out no prospect for future research because it can only produce the confirmation of what is already known. To borrow a metaphor that arose yesterday, it is true that small departures from conventional wisdom can shine light into hitherto unseen corners of our collective experience by applying the tried and

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<sup>1</sup> To Annalise Acorn, with deep thanks and affection.

true with some slight variant. But as Rod might put it, what exactly is the point of doing the umpteenth study of how to apply the Charter of Rights and Freedoms?

If, perhaps precisely because you detect in Rod a certain diffident social democrat and are therefore unpersuaded that he is a radical thinker, consider the encounter between Rod and two perennial latin maxims. One is up above us on the wall: *honeste vivere, alterum non laedere, suum cuique tribuere*. Even now, when I read those words, I feel a certain dignity descend upon me and can be persuaded that if I just cleave to them, I cannot go astray. I do not want to go so far as to say that for Rod these words are an affront. But if I go through the exercise of reading them immediately after re-reading Rod's work, they come to seem dull and unambitious. To live honestly is only to begin to live as a fully engaged citizen. To do no harm is not yet to have taken on the burden of discovering the good one can do for others. To render to each her due – that talisman of justice – only begins to open up the vista of what can fully be enabled for her.

Consider a second maxim that has come to be embedded in the unconscious of generations of students of the common law: *stare decisis et non quieta movere*. When I repeat the exercise of contemplating those words after re-reading Rod's work, I feel the rise in me of a certain impatience and frustration. How can I possibly allow myself to stand on my decision? At most, I should give it honest continuing appraisal, account for the harm I might do in departing from it, and ensure that I am not about to deprive someone of what is due if I abandon it. This is perhaps what is meant by giving it the status of a default rule. But governance, as Rod conceives it, is all about a continuous fluid appraisal of our needs, latent capabilities and transformative potential. *Stare decisis* is a waxworks that purports to leave things in undisturbed calm when we know it can melt in the presence of a little heat.

Rod's thought may indeed cast asunder words that have been engraved on stones for many a year, but for it to have prospects would also mean that something could be built on it in place of those ancient words. The pose of critique, fashionable at times even in law schools, does not hold out prospects for future research if the deconstruction it accomplishes leaves only rubble in its wake. After all, what's really to choose between endlessly reproduced conventional wisdom and unrelenting critique. They are simply obverse forms of monomania that have been on display at least ever since Parmenides proclaimed the persistence of the One only to be countered by Heraclitus's dictum that one cannot step into the same river twice.

So let's be frank, here together. Who among us has not smirked a bit thinking that Rod's endless fascination with cottage docks and packages of smarties lacks gravitas in the face of the holocaust and climate change? Who among us has not given way to the temptation to see in Rod's work a custom made cabinet of curiosities filled up with vim and vigour but destined ultimately to be cupboarded away like some discarded Law Commission? I dare say that Rod himself has on occasion given way to that temptation, wondering if all of his efforts are not mere ephemera in the face

of our overwhelming capacity for amnesia, indifference, indolence and greed. These forces eat away at us, like a cancer.

Therefore let me take you on a brief trip to the dark side of Rod Macdonald's thought. The articles we have under consideration for this panel are in fact quite open about its existence. "Call Centre Government" channels intense frustration with the mind-numbing quality of the collective idiocy that over here is called bureaucratic rationality and over there is called customer service. "Rabbits, Ravens Snakes and Turtles", under the guise of yet another Rod paean of praise to the richness of human experience, peers into an abyss that has been created by the persistent afterlife of colonialism in aboriginal communities. "The Swiss Army Knife of Governance", with all the gleam of the smooth and shiny tools on display, begins by invoking the Tower of Babel – a recurrent image for Rod – that monument to failed communication; one huge, toppled Habermas. Into the "Acoustics of Accountability" erupts what deeply troubles and dramatically unsettles Rod: agency capture, partisan politics, subverted independence, rent-seeking and bribe-taking. And what is "Regulation by Regulations", a piece that has had transformative significance for me, if not a *cri de cœur* against what Harry called yesterday the Washington Consensus and John decried as market fundamentalism. Rod is not a happy camper here.

Virtually all of us, when we look at the Gorgon's head, turn into stone. To be petrified is to be utterly immobilized with fright. Rod has long had a rare, unusual form of double vision with which he can behold a terror at the same time as turning entirely away from it. Who has not felt that Rod has eyes in the back of his head?<sup>2</sup>

I cannot help but invoke a Rod story to illustrate my point. This is not hagiography – it is my effort at rigorous application of Rod's scholarly methodology. Every experience is material for writing.

A number of years ago I arranged a meeting for me and Rod with the Dean of Music to pursue the possibility of intersecting our two Faculties, building on Rod's longstanding efforts to weave legal inquiry into the entire fabric of the university. It had taken a bit of doing to convince that Dean that such a meeting made sense, and finally the day arrived when the efforts were about to pay off. I remember that day vividly. It was in 2001, September 11 to be exact.

A phone call from my wife got me glued to the radio in my office. I was petrified. I couldn't stop listening. I needed to find a television. Then I remembered our meeting, almost too late. I phoned Rod, who was expecting me in his office, and I said:

Rod, have you heard?

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<sup>2</sup> As my friend Daniel Boyer points out, for many of us Rod's work functions like Perseus' shield.

Yes, where are you?  
I can't believe it.  
When are you going to be here?  
Rod, I don't think I can do this meeting.  
*Long pause*  
Janda – can you do anything for New York?  
No  
Does your fixation on the news change anything?  
No  
Get over here now, we have a meeting.

I followed his order. That was Rod, on the battlefield.

I have revisited that exchange periodically over time. It was one of my vivid Rod moments. I never quite fathomed its meaning, even to this day. At the time, it unpetrified me. It braced me back to life. But I was left with unease about it as a lesson in governance. I felt like I had been brought to play my instrument, cued by the conductor's baton, there in the middle of Teresienstadt. What sense could this make?

It was only when I was given by Daniel Jutras the gift of organizing this symposium that I came to understand the nature of the meeting Rod had cajoled me into attending. It was the meeting to do something about what was petrifying me. So permit me to express some intemperate anger at Harry and John, and maybe even at Les and Denise, which in fact, as you will see, is really anger directly at myself, rebounded from the anger Rod had expressed on September 11.

That lightweight, magic realism, with all its elaborate incantations of procedural fairness, accountability and virtue, is deathly serious and represents the only thing we can fortify to confront the evils that petrify us. If you want to give way to power, if you want to bemoan an evil you can do nothing about, stand aside because you have nothing to offer. If you believe that these incantations are but baubles and trinkets about to be swept aside by the surge of history while Gaia, the goddess earth, finally takes its revenge on the ravages we have done against her, just go, take a front row seat, and wait for the apocalypse.

I have not learned all the magic that lies in Rod's incantations. But I think I know one of the spells. It's in the piece that changed my scholarship many years ago, and I suppose, since it was written under the editorial direction of Andrée Lajoie, it was destined to bring me into a kind of magic circle with her, Rod, Guy Rocher and Pierre Noreau: "Understanding Regulation by Regulations." There is much to the piece, but the spell in question is there in plain view, though it bursts upon the reader so suddenly and with so little elaboration, that its deep significance seems to have been missed. We all know the Coase Theorem and Arrow's Theorem, but how many of us recall let alone teach Macdonald's constant. It is simple and elegant: the sum of

regulation in any given economy is a constant; what vary are the degree of centralization of regulation and its instrumentalities.

As I look back upon it, I think one way of describing my own work and its future trajectory is that it is an effort to elaborate Macdonald's constant.

From what is Macdonald's constant derived? Everything we have spoken about at this symposium. The regulation of any given economy is the sum of all human endeavour to steer it. It is the alignment and misalignment of our agency.

Our economy is ubiquitously capitalist with the gift economy that runs in counter-cycle to it more often than not misaligned and drowned out by the price signal. However, the sum of regulation is a constant. To the degree that the economy can be decentralized toward constitutive human agency and if human agency can be instrumentalized toward gift, the sum of regulation will remain a constant and capitalism will be transformed. Yes Rod acknowledges instrumentalism – he speaks at length of choice of instrument. The instrumentalism he rejects is one that fails to acknowledge the means-ends complex. The end in view is to overcome the power that petrifies us.

Think therefore on Macdonald's constant.