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Harry Arthurs

Osgoode Hall Law School of York University, harthurs@osgoode.yorku.ca

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MY “VERY IDEA” OF ROD — AND YOURS

**Remarks to the Symposium on the Legal Imagination of Rod Macdonald
McGill University
February 7, 2014**

**Harry Arthurs
York University**

Introducing a symposium on the legal imagination of Rod Macdonald would be a daunting task under any circumstances. It is made even more so by the constraints under which I labour. I can't hope to match the comprehensive overview that Andrée Lajoie provides in the book she will launch this afternoon. Nor can I compete with the focused exploration of specific aspects of Rod's work which will be offered by the six panels scheduled for today and tomorrow. Nor, because he has forbidden us to be maudlin, can I do what I would like most to do — to spend the next half hour expressing my admiration and affection for Rod. I have therefore taken my clue from something Rod says frequently and in various formulations: “The very idea of law [he says] must be autobiographical”.¹ If that's true, then the “very idea” of Rod himself must be “autobiographical”. I'm therefore going to begin our symposium by sharing my autobiographical — and consequently idiosyncratic — idea of Rod and his work. This idea has been shaped by our many encounters over some four decades. It may not accord with your idea of Rod's scholarship or, for that matter, with his. However, as Rod himself strongly advocates “pluralizing the legal subject”, it will be interesting to see what happens when we put his theory into practice.

For convenience's sake, I'm going to engage with four aspects of his work that have variously impressed, persuaded, puzzled and exasperated me — sometimes all at once. Specifically, I'm going to say something about Rod's antipathy to borders and boundaries; about his relentless search for virtue; about his style of argumentation; and finally about his inclination to magic realism.

Savant sans frontières

We live in a world where in many respects borders seem to be hardening — borders between nations, classes, religions, cultures, ethnicities, epistemologies, ideologies, professional specialisms, academic disciplines and legal regimes, to name a few. They are hardening despite the Enlightenment, despite technology, despite globalization and, alas, despite the best efforts of Roderick A. Macdonald. Rod rejects borders. “Personal” or “political” or “professional”: for Rod these are just labels that obscure more than they reveal. Teacher or student: for Rod both are equal partners in the search for understanding. Mathematics or music, genetics or jurisprudence, it’s all the same to him: just another useful way of looking at life. High law or low law, common law or civil law: all way stations along Rod’s trans-systemic, trans-disciplinary road to better understanding. Building docks in Ontario’s cottage country or creating a legal framework for secured transactions in the Ukraine: for Rod these are just occasions for shaping appropriate responses to people’s particular circumstances and varied needs.

In short, Rod is the quintessential *savant sans frontières*. He constantly demonstrates how and why we must deconstruct concepts and break down categories that impede the search for understanding, justice and virtue. He does this by insisting, not only on the possibility of integrating all forms of knowledge, but on the inevitability of people’s interconnectedness, on the inescapable *mixité* of communities, on the hybridity of institutions and the contingency of rules and, above all, on the role of the individual as the ultimate source and destination of legal and moral knowledge, agency and responsibility.

Rod’s open borders policy makes huge intellectual demands on him and, frankly, on his readers. In one recent article, for example, Rod discusses musicology, biology and virology as metaphors for norm migration.² However, after ensuring that readers have mastered these difficult subjects, he rejects them all and takes refuge on the moral high ground of Aristotelian philosophy. Why, I am tempted to ask, did he not start where he was ultimately going to end up? The answer surely is that for Rod, the journey — the border-crossing — is at least as important as the destination.

In search of virtue

But the destination is important too. Rod is always searching for virtue, for the moral high ground. This will become clear in the panel discussions, especially those concerned with fairness and with distributive justice. However, it is the moral dimension of his search that I want to comment on. In the article I've just referred to, Rod relies on the concept of *phronesis*, which is central to his own thinking. Rod explains *phronesis*:

... [T]he capacity to be sensitive to the particularities of a given situation is a necessary condition for moral agency. Even if universal moral principles were to exist, they would not be self-applying. The moral agent ... is never relieved of the responsibility for making decisions. As moral agents we must therefore constantly reassess what it is we think we know. This, in turn, means cultivating openness to and reciprocity with others.³

So far so good. However, the article dealt with attempts to standardize certain rules of international trade law. As far as I have been able to observe, "cultivating openness to and reciprocity with others" has not been a prominent feature of the so-called Washington Consensus, nor of regimes of trade law, nor of actual-existing international business relationships. "Openness" and "reciprocity", I contend, are likely to become more widespread (if at all) only with a change in power relations, which is to say only after the current model of U.S.-led neo-liberal globalization enters its declining stages.

In his work, if only occasionally, Rod acknowledges the existence of power:

Human beings are social animals who find meaning in the relationships they build with others [he says somewhere] but ...[s]adly, these relationships are not always bilateral or equitable, for human beings in the Western cultural tradition also appear to have an insatiable appetite to project their views about life, community, social organization, spirituality and justice onto others through ... episodic violence; ... through psychological manipulation; ... through religious crusades, ... and sometimes by economic coercion⁴

If our appetite for power and domination is indeed insatiable, if the means we are prepared to use are so despicable, how does this square with our innate responsibility and capacity as moral agents? In Rod's view this contradiction is attributable in part to our reliance on the state. He characterizes the state as "the primary vehicle for self-assertion and domination of the other" and he insists that "whether exercised for malignant or benign purposes, political power ... tends toward authoritarian subjugation".⁵

How, then, does he propose to reverse the tendency towards subjugation? Rod genuinely favours giving priority to distributive rather than restorative justice which makes him a small-s, small-d social democrat. However, because he is uneasy about the state, Rod can also be called a diffident social democrat. He musters much more enthusiasm for ideas and initiatives that empower individuals: acknowledgement that they constitute the state rather than vice-versa for example; affirmation of their status as legal agents rather than legal subjects; the provision to citizens of opportunities and resources that will translate these concepts into practical reality; the "unbundling" of state functions to make them more responsive to the needs and desires of citizens. Don't misunderstand me. Rod is no egoist, let alone a closet libertarian; he is not now nor has he ever been a market fundamentalist. It is just that he has laid out his own unique route to the moral high ground of social democracy, of distributive justice, by way of individual capacity and responsibility.

Methodology

My "very idea" of Rod — perhaps mistaken — is that he has chosen that route partly because of his preferred methodologies, partly because of his temperament. I'll explore those two notions in that order — methodology first. Though he dazzles in almost any intellectual vernacular, Rod's preferred methodologies seem to be philosophy and poetry. I've already mentioned that Aristotle's concept of *phronesis* captures a central aspect of his approach to life and therefore to law. That's just one of many instances when he uses philosophical methods to work towards his conclusions, and

philosophical concepts to encapsulate those conclusions in his memorable prose. Indeed, I would argue that *Lessons from Everyday Law* is lodged firmly in the philosophic tradition of inductive argument from the observed experience of everyday life. But Rod is not just a philosopher. He is also a poet, a skilled practitioner of metaphor, allusion, allegory. “Allegory” he explains “... is a vehicle for *phronesis*, a form of expression that does not allow for a final propositional message that is separate from the story itself, easily transmissible, formulaic and universalized...”⁶ — a form of expression, in other words, that ensures that each reader, each listener, will have to pursue virtue by trying to understand themselves and others.

A philosopher and a poet, then, but apparently not an empirical social scientist. For example, in a recent piece Rod and David Sandomiersky write

...While we locate ourselves as legal pluralists, we nonetheless take our distance from empirical, social scientific conceptions of legal pluralism.⁷

Indeed, Rod takes his distance from empirical social science in many similar statements. However, such disclaimers must be taken with a grain of salt. Rod — the *savant sans frontières* — is constitutionally incapable of taking his distance from any form of knowledge, any mode of analysis, that provides enlightenment. For example, his wonderful essay, *Office Politics*,⁸ reveals him to be an anthropologist, an ethnomethodologist of the first order; so does *Lessons of Everyday Law*.⁹ Moreover, his understanding of institutions like federalism, of relationships like families, and of processes like law-making is thoroughly grounded in empirical evidence including (as his footnotes often reveal) evidence amassed by the very social scientists from whom he distances himself. But I will concede that the social sciences are not Rod's preferred mode of analysis. This, as he himself has acknowledged,¹⁰ constitutes something of a “paradox” for someone as deeply involved in society and social relations as Rod is. That paradox can be resolved, I think, by considering Rod's relationship with reality.

Magic realism

Here is how the Macdonald-Sandomierski article I've just mentioned describes legal reality:

Legal norms, in whatever site of law, are imagined by human beings, given expression by human beings, lived by human beings, followed by human beings, modified by human beings, rejected by human beings — in a word, constituted by human beings not primarily as passive legal subjects, but above all as active legal agents.¹¹

I have no problem with this formulation, so far as it goes, but there does seem to be something missing. That missing element is power¹² — power that permeates many sites of law, that warps human imaginations, that stunts freedom of expression, that prevents people from adhering to certain legal norms or forces them to do so against their will. All too often, indeed, power trumps *phronesis* and determines whether human beings become passive legal subjects or active legal agents, or neither — but simply disenfranchised, debilitated or even dead. I've made this point to Rod over the years:

... I have the sense [I wrote to him once] that you continue to overestimate the power of the individual, to underestimate the power of the state, class, culture and corporation I sense that a more tragic view of life, a recognition of its large and little brutalities has to be introduced into your picture of identity-negotiating citizens.¹³

Rod responded by calling me a “tragic realist”. I retaliated by calling him a “magic realist”. On reflection, I think my flippant rejoinder was not far off the mark.

Rod — in his work as in his life — engages with reality as a thoroughgoing optimist or, as I call him, a magic realist. By contrast, I'm at best a Gramscian optimist — an optimist of the will, but a pessimist of the intellect. I believe — like Gramsci and unlike Rod — that “man is ... a product of history, not of nature.” Seeing Rod as a magic realist helps to explain a lot — especially his always-imaginative and well-conceived projects to levitate justice: to mobilize ordinary Canadians in a bottom-up process of

law reform; to unbundle government programs to allow citizens to shape their own identity; to introduce a new “Swiss army knife of governance” that will ensure social justice while preventing the growth of an overbearing state; to invent a trans-systemic legal education that will not only be able to resist the intense parochialism of the bar but ultimately transform our understanding of law. Truly, truly I admire the noble ambitions and imaginative design of each of these projects. But they do represent a magical view of reality, a determined optimism that isn’t quite quixotic, but nonetheless fails to factor power into the equation. Rod, I conclude, takes his distance from empirical social science because it is foreign to his nature and (as he perceives it) at odds with the concept of *phronesis* that informs so much of his thinking.

Let me illustrate this point by referring to *Office Politics*. You’ll recall that that article concerns the allocation of newly-vacated offices in a law faculty. It is epistolary in form: it reproduces an imagined exchange of memos between the dean and faculty members asserting their claims to the office they think they deserve, as well as challenging the claims of others and in some cases impugning the dean’s fairness and good faith. The narrative demonstrates, says Rod, “the value of constitutive practice for reaffirming the subtle and informal normative orders that make associational life possible”.¹⁴ It’s his article, and he is entitled to draw his own conclusions. However, stated as it is, Rod’s conclusion confirms to me that he is indeed a magic realist. Everyone in the story — save “the dean”, save Rod himself — seems utterly unconcerned about “associational life”. On the contrary, each faculty member seems to be driven not to improve the quality of collegial relations, not to secure justice or virtue, but to expend precious intellectual and moral capital in an effort to enhance their personal comfort, convenience or prestige.

One final example. In the mid-1990s, Rod and I were members of the law program of the Canadian Institute for Advanced Research. Fraser Mustard, the founder and director of the Institute, was incapable of conducting a conversation that did not include mention of “the gradient”. The gradient in question was the product of a sophisticated epidemiological study, the Whitehall Study, that closely linked health outcomes to socio-economic status. Very crudely put, the gradient showed that the higher your

status, the better your prospects of living a long, healthy, productive and satisfying life.¹⁵ As a tragic realist, I thought this was what Bora Laskin used to call “a penetrating glimpse into the obvious”. Indeed, the same gradient seemed to me to determine a whole host of outcomes from people’s political influence to their access to social and cultural goods to their enjoyment of legal rights. However, mere mention of “the gradient” drove Rod to distraction. There were other reasons no doubt, but at some level, I think, Rod’s optimism, his magic realism, would not allow him to accept the determinism implicit in the very notion of a “gradient”.¹⁶ He just could not acknowledge that their socio-economic status is what makes some people into active legal agents and others into passive legal subjects.

A new research agenda

We’ve all been challenged to identify the implications of Rod’s work for future research. I think I’ve now identified a key item on that agenda. On the one hand, we are all attracted by Rod’s commitment to *phronesis*, his vision of individuals as moral and legal agents: it’s a vision that not only promises a better society for all of us but a better life for each of us — a life exemplified by the one Rod has made for himself. But on the other hand, I’m surely not the only tragic realist in the room. Many of us — Rod included — are deeply concerned about the powerful and destructive forces at loose in the world. Many of us are convinced that power can seldom be challenged effectively by individuals — even exceptional individuals, even steadfast practitioners of *phronesis*. And many of us are convinced that new and better forms of political, economic and social relations are essentially projects that require collective action and, in many cases, state action. So here is my nomination for a future, Rod-inflected research question: how can we push back the forces of injustice and selfishness, how can we mobilize for positive collective action, how can we create effective institutions and governments, how can we build a just society — without at the same time impairing our individual capacity, and denying our individual responsibility, for moral and legal action?

Conclusion

I said at the outset that my “very idea” of Rod is necessarily autobiographical and therefore likely different from yours. Now I want to shift my ground. At any academic gathering, the only person wearing a bow tie he has tied with his own two hands is likely to be Rod. In that sense, the “very idea” of Rod begins for all of us with the man himself, with his unique human qualities, with the breadth of his interests and the depths of his understanding, with his unrelenting search for meaning and for justice. All of these function as a bow tie. They give his work remarkable intellectual coherence and imprint it with a unique moral DNA. If there were such a thing as a blind tasting of legal scholarship, Rod’s work would be instantly recognizable. That’s why I think I can conclude in a very matter-of-fact, non-maudlin way by saying that Rod is *sui generis*. He is one of Canada’s most conscientious and constructive citizens, one of its most imaginative and influential scholars, and one of its most decent human beings. That is my “very idea” of Rod; and I’m sure it’s yours as well.

¹ Roderick A. Macdonald & Martha-Marie Kleinhans, "What is a Critical Legal Pluralism?" (1997) 12 Canadian Journal of Law and Society 25 at 46.

² Roderick A. Macdonald, "Three Metaphors of Norm Migration in International Context" (2008-2009) 34 Brooklyn Journal of International Law 603.

³ Id. at 652.

⁴ Roderick A. Macdonald, "The Political Economy of the Federal Spending Power" (2008) 34 Queen's L.J. 249 at 251.

⁵ Id. at 252.

⁶ Supra note 2 at 652.

⁷ Roderick A. Macdonald & David Sandomierski, "Against Nomopolies" (2006) 57 Northern Ireland Legal Quarterly 610 at 616.

⁸ Roderick A. Macdonald, "Office Politics" (1990) 40 University of Toronto Law Journal 419.

⁹ Roderick A. Macdonald, *Lessons of Everyday Law* (Kingston: Law Commission of Canada / School of Policy Studies, Queens University, 2002).

¹⁰ E-mail Rod Macdonald to Harry Arthurs 29/11/2013.

¹¹ Supra note 7 at 614-15.

¹² In that same piece, Macdonald and Sandomierski maintain that "... whether law is a closed normative system, or whether its rules, practices and institutions are permeated by other social, economic and political norms is, for present purposes, immaterial...." (at 612)

¹³ E-mail Harry Arthurs to Rod Macdonald 28/01/2004.

¹⁴ Supra note 8 at 419.

¹⁵ For a very brief summary of the argument see Fraser Mustard, "Free market capitalism, social accountability and equity in early human (child) development" (2008) 13 *Pediatrics and Child Health* 839 online at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2603502/>

¹⁶ He provides his own account of this experience in Roderick A. Macdonald, "Transdisciplinarity and Trust" in M. Summerville and D Rapport eds, *Transdisciplinarity: Recreating Integrated Knowledge* 61 at 74-75 (Oxford UP 2000).