

# Book Review: Lessons of Everyday Law/Le Droit du Quotidien, by Roderick A. Macdonald

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Book Review

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*LESSONS OF EVERYDAY LAW/LE DROIT DU QUOTIDIEN* BY  
RODERICK A. MACDONALD (MONTREAL & KINGSTON:  
MCGILL-QUEEN'S UNIVERSITY PRESS, 2002) 139 pages.

BY ROSANNA LANGER<sup>1</sup>

Rod Macdonald's interpretative anecdotes were originally posted as individual "President's Messages" on the Law Commission of Canada website during Macdonald's tenure there between May 1998 and February 2000. The compilation of these anecdotes is a wonderfully accessible introduction to the consideration of law's social aspects and potential. The author states several central jurisprudential premises with disarming simplicity, including that rules may determine how we conceive of an issue, that justice is as much process as outcome, and that forms of inquiry determine the structure of legal decision making.

Each story is prefaced by a brief discussion of the legal issues raised by the anecdote and their relevance to the project of law reform. Each section is concluded with partially annotated and engagingly opinionated suggestions, both academic and non-academic, for further contemplation, including reflections of popular culture such as movies, television programs, and children's literature. The collection will be of interest to legal educators, law and society scholars, and a popular audience of lay students of the law. It is also an entirely Canadian text: published by Queen's University School of Policy Studies, it is a double-headed volume, one side English, one side *français*.

The relationship between law and society is the central problematic of much scholarship, often with the underlying desire to use empirical knowledge for state and institutional ends, policy development, and legal reform. These short essays place Macdonald, alongside his intellectual mentor Lon Fuller, firmly in the camp of those who assert that law emerges from social relationships. To correct the dominant view that law is primarily prohibitive, we must also assert law's facilitative dimension. Our interactions with others, he contends, give us the opportunity to form expectations and develop self-constraint, and provide the context for our individual and collective aspirations. Law is not only a set of imposed rules, but it is also the outcome of social interactions. In this view, law arises *out of* social relations; it is not imposed *on* them. The implicit assumption is that law is embedded in social relations.

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As a lawyer, I often worry about nomocentricity—the inclination to see law everywhere. Is all interaction legal? This would be an impoverishment of ordinary existence if it were so. Macdonald addresses this concern. To characterize social interactions through a legal lens is a choice made when we choose to evaluate social encounters in terms of rules, fairness, interpretation, and authority.<sup>2</sup> But Macdonald does make distinctions between informal everyday law and official law. Everyday law is implicit, not consciously generated. Precisely because it is not codified, everyday law requires us to generate explicit substantive reasons in individual instances. And finally, everyday law claims its authority from “experience, wisdom and good judgement”<sup>3</sup> rather than from power and expertise. Macdonald cautions that formalizing these everyday laws governing ordinary social relations such as those among neighbours, friends, and relatives may undermine rather than facilitate these relations. Sometimes it is better to leave them inchoate. Furthermore, despite all good intentions, we cannot predict how laws will be used, and in being applied, how they will be shaped by the establishment of precedent and the development of a body of interpretation.

Macdonald questions the premises underpinning legal burdens of proof: he asks how we can rely on legal concepts designed to draw inferences from that which we observe directly when these inferences may be wrong. In addition, when does legal decision making succeed in incorporating the unfamiliar into a pre-existing category and when do we reach the limits of the applicability of old concepts? I have posed similar questions myself, both in undergraduate law and society courses and legal theory seminars. They arise from the foundations underlying legal systems. Macdonald usefully introduces them here. Their resolution is important not only for the nature of legal reasoning generally, but also for law reform.

Themes concerning identity are also highly topical: only recently did legal theory focus on the question of which aspect of our own identities we might choose to highlight in legal representation (for example, with respect to equality considerations) and on the extent of that choice. In light of the enormous recent global incursions into privacy and identity, the newer question, no less relevant, has shifted to which aspects of identity the state can legitimately identify us by. Macdonald frames the paradox of multiple identities differently than I have done through his focus on community associations and informalism in institutions. Nonetheless, his focus raises equally interesting questions about the potential and limits of formal

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<sup>2</sup> Macdonald, *supra* note 1 at 5-8.

<sup>3</sup> *Ibid.* at 7.

recognition of group identities.

Although we must acknowledge the distinctions between informal regulation of everyday interpersonal practices and formal regulatory structures and legal regimes, Macdonald's stories are really allegories about intimate connections between them. The tales are grouped under four themes. In the first grouping are stories that highlight the values and functions of rules and rule making in creating a social order. What rules will achieve distributive justice? What are the consequences of overreaching rules or rules that are implemented without sufficient consultation? Must laws command or should they merely provide us with guidelines elaborating on the duties we know we have?

The second group examines the limits of rules and the problem of reforming rules that are outdated, inefficient, or apply to circumstances that no longer exist. How far can we stretch old rules to accommodate new realities? What considerations affect when to reform and when to begin anew? What happens when the fit between law and social issue has become awkward, but is not yet ripe for law reform?

Decision making is the subject matter of the third group, unifying inquiries into what type of argument is a sound one, what principles govern the balance between the letter and the spirit of the rule, and the choice between differing types of inquiry. What is the relationship between rules and rationales for rules? What happens when the rules are out of step with our expectations of them? How may we distinguish when we need new rules for unusual circumstances or when it is sufficient to refer to underlying principles? How do we distinguish between situations that require interrogative or adjudicative processes?

The final group loosely investigates the role of identity in law: the choices we must make about categorizing events from a certain perspective, accounting for multiple identities and multiple group associations in law. How does the categorization of issues affect how we think about them and what we want to do about them? What should the relationship be between informal and community institutions and state policies? How do we reconcile informal and formal bases of institutional power?

It is worth mentioning that Macdonald frames these questions as open-ended. As befits his recent role as President of the Law Commission of Canada, he is intensely interested in the choice among competing alternatives, reasons for making the choices that we do, and both the underlying values and the consequences flowing from these choices. Law is both an embodiment of social relations and an instrumental device for achieving social order. Thus, while Macdonald's stories tell us about how social facts are organized for legal purposes, they also raise issues about how social relations are influenced and characterized by administrative and

institutional imperatives. We must also consider the manner in which legal discourse imposes its imprimatur on meaning, thereby ensuring that the influences of legalism and dominant interests on meaning are often decisive. While intersubjectivity may lie at the heart of legal practices, the exercise of power, primarily economic, regulatory, and political, often determines outcomes. Macdonald's story "Street Hockey, Skateboarding and Responsive Law" raises this theme for consideration. It notes that teenagers and their families are not only a legitimate neighbourhood constituency, but that failure to accommodate their need for harmless local pursuits may displace them to less desirable locales, potentially creating the problem of delinquency.

Although Macdonald's text has much to say about rules, under their colourful and sometimes folksy exteriors, several of the stories explore repetitively similar considerations. This risks redundancy on the themes of legislative intention, scope, and method. Although the essays are engaging because of their storytelling tone, the discussion does not always proceed into the considerations one might expect at the outset. For example, the discussion about the unique nature of legal inquiry and decision making in "I Was Rolling on the Floor and It Fell In" hints at decision-making frameworks other than criminal prosecution but does not identify or explain those frameworks as promised. Instead, the discussion focuses on the role of victim witnesses and how difficult it may be for them to revisit their experience, especially in a cross-examination. A lay reader would be left with an impression that these other forms, such as inquiries, inquests, or administrative tribunals, are less common or less important than a criminal trial. The last part of the story neutralizes the potential of the first part. Furthermore, given the distorted privileging of criminal prosecution in the media, a public legal agency with the educational mandate of the Law Commission of Canada would be an obvious forum to correct this view.

In some cases, legal developments are squeezed into the mould of Macdonald's preoccupation with law reform at the expense of an accurate representation of the events. For example, in an essay titled, "Sometimes It's Better Just to Fix the Dock," he refers to the ultimate defeat of criminal regulation of therapeutic abortions as a kind of organic atrophy rather than the protracted activist struggle that it was, and remains, against repeated attempts to prosecute and even to reintroduce both federal and provincial legislation.

Is all law merely rules? Macdonald's commitment to law as a constitutive dimension of social relations surely includes acceptance of law as a social phenomenon. Yet these essays say too little about legal consciousness; law and other forms of social ordering; law and culture; legal actors; and law in its ideological aspects, such as the problem of legitimacy.

The few tantalizing references left me wishing for more extensive discussions on informal dispute resolution, the problems of discretionary decision making, and the function of law in mediating between individuals and institutions. Macdonald is a master at articulating the underlying structure and issues at stake in legal policy discussions.<sup>4</sup> It is a fine thing that he turned his expertise to making these discussions more broadly accessible, but I find his tales too modest indeed as they stop short of telling us what is at stake.

However, it is too easy a critique to point at what is missing from a well-intentioned effort. The genius of this collection is in its simple illustration of how legal meaning may be accomplished from social facts. Macdonald's anecdotes provide not only precious springboards to illustrate legal concepts, but also illustrate, with authoritative ease, the relative seamlessness between law and ordinary life.

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