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Lessons of Everyday Law

Roderick Alexander Macdonald

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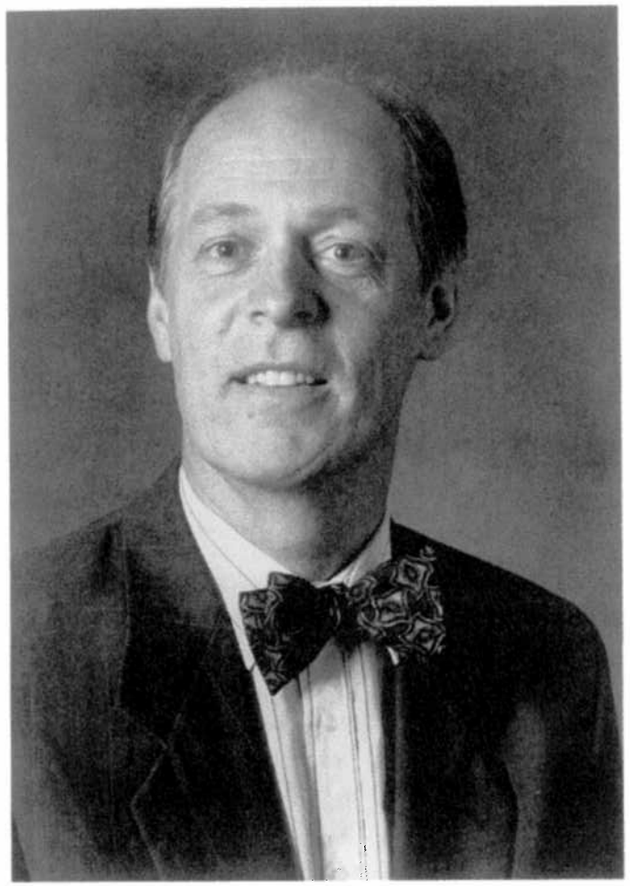
DEDICATION

To my parents Colin Macdonald and Fern Kennedy, my wife Shelley Freeman, and my children Madeleine and Aidan



RODERICK A. MACDONALD

Roderick Macdonald is the F.R. Scott Professor of Constitutional and Public Law at McGill University. He has long been interested in the intersection of law and everyday life, having served as Co-Director of the Community Law Programme at the University of Windsor (1976–79), President of the Groupe de travail sur l'accessibilité à la justice of the Quebec Department of Justice (1989–91), adviser to the Ontario Civil Justice Review (1994–95), and founding President of the Law Commission of Canada (1997–2000).

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FOREWORD

The School of Policy Studies is delighted to be able to publish these stories by Professor Roderick Macdonald, the first President of the Law Commission of Canada. We hope that they will find an audience that includes everyone interested in the norms and principles of living in a pluralist society.

One of the greatest virtues of this short book is the way in which Professor Macdonald is able to use apparently simple tales about everyday life to express sophisticated ideas about law and public policy. The essays were originally written to illustrate the full extent of the ambitious research program of the Law Commission. But they go much further. In these stories we can see fresh ways of thinking about ethical dilemmas we all face in our daily activities as members of families, sports teams or university faculties. The book does not advance any explicit theory, but it is pluralist in its approach and its outlook. The author invites us to consider how we arrange our lives together, and how the rules we live by at home are inseparable from the rules we expect Parliament to enshrine in law.

The view of law that Professor Macdonald expresses exemplifies a broad perspective on public policy. It starts from the belief that not all "policy" is state policy, and government sometimes does best by facilitating the work of others. Policy analysis is the study of the sometimes implicit choices a community makes about what it collectively will do about problems it understands to be public, whether it does so itself through collective actions, or through the state and its agencies, or through forms of voluntary association in the third sector.

In the School of Policy Studies we are interested in how issues come to be framed as public problems; and how we know that some sorts of policy

interventions are feasible or appropriate. We hope that when our students are asked to advise on fixing a dock, a subject directly addressed by one of the stories in this book, they will be able to ask: What is a dock? Why is fixing it a public problem? Can we solve the problem another way? What do we need to know about ice, the environment, or engineering, to provide good advice?

Our students will provide as many different answers to the questions as would the members of our multidisciplinary faculty. And many of them will recognize the question, because I ask them to read that essay in my course on "approaches to policy analysis."

It is our hope in publishing these stories with the Law Commission of Canada that in this form they will be more accessible to students in the many domains where policy, like law, emerges from collective life.

Robert Wolfe
December 2001

PREFACE

For law to be a living, changing thing, it must tell a story. A story found not only in legal texts, which are often dry, or in lengthy judicial decisions, but in stories and anecdotes that show how important legal questions are rooted in our daily lives.

The genius of Professor Roderick Macdonald lies in his ability to bring the most pressing law reform issues down to a series of fascinating articles that amuse, intrigue and are full of wisdom. Who can resist such titles as, "I was rolling on the floor and it fell in!" or "It's not fair, he hit me first!"?

This collection of stories is part of the intellectual legacy that Roderick Macdonald leaves to law reform. His articles in learned journals are widely read (such as "Recommissioning Law Reform" (1997), 35 *Alberta Law Review* 831; and "Access to Justice and Law Reform" (1990), 10 *Windsor Yearbook of Access to Justice* 289.) His outstanding leadership in the creation of the Law Commission of Canada and the development of an innovative research methodology and program is recognized in Canada and abroad. This collection adds a third element to law reform: the right of citizens to understand the law.

This publication is the product of a profound commitment to ensuring that people have access to justice – a type of access that goes beyond the more traditional notions of financial or logistical accessibility. The issue here is intellectual access to the law – a type of law that is no longer hard to understand, boring, and removed from reality. For it is real life that is the catalyst for raising legal issues, and creating and questioning the law.

This appeal to the public and the public's involvement in creating and renewing the law are at the heart of the reform process developed by Profes-

sor Macdonald. He made it the mission of the Law Commission of Canada to "engage Canadians in the renewal of the law to ensure that it is relevant, responsive, effective, just, and equally accessible to all." We should not downplay the revolutionary side of democratizing law reform: citizens participate in the reform process. It concerns them and belongs to them. It is no longer the domain of specialists and experts. The message is clear: we all have an interest in law reform and we must all get involved.

Roderick Macdonald has succeeded in creating and implementing a vision of law reform that is committed, dynamic, and stimulating; and we are all grateful to him.

Nathalie Des Rosiers
December 2001

ACKNOWLEDGEMENTS

The origins of this book lie in a happenstance conversation between Bruno Bonneville, Executive Director of the Law Commission of Canada and Professor Robert D. Wolfe of the School of Policy Studies, Queen's University. They concluded that the series of "President's Messages" appearing between May 1998 and February 2000 on the Web site of the Law Commission should, accompanied by light annotations, be published as a collection.

The idea for the President's Messages in their initial form came from Cathy Hallessey, the Manager of Communications of the Law Commission. Early in 1998 she asked me to write a monthly Feature Story about law and law reform intended for a non-professional audience. Over time, and with the encouragement of Hans Mohr and Jennifer Stoddart, members of the Advisory Council of the Law Commission, I began to make these stories more personal and more rooted in everyday experience.

I am, obviously, grateful to my family, and especially to my children Madeleine and Aidan, who allowed me to share many of their early life experiences with a wider public. I trust that these stories faithfully reflect at least a part of the meaning they would attach to their inchoate legal encounters.

Susan Alter, Bruno Bonneville, Dennis Cooley, Cathy Hallessey, and Susan Zimmerman at the Law Commission of Canada, and Bob Wolfe at Queen's University all read and commented on early drafts of most of these stories. In preparing this collection for publication I have slightly revised a number of the earlier essays. The basic idea of each, nonetheless, remains unchanged. The last two essays in the collection were written as President's Messages in the spring of 2000, but for various reasons were never posted on the Web site of the Law Commission.

Several of my McGill colleagues -- Blaine Baker, Jean-Guy Belley, Daniel Boyer, Richard Janda, Daniel Jutras, Nicholas Kasirer, David Lametti, Geneviève Saumier, Stephen Toope and Shauna Van Praagh -- reviewed the final manuscript, offering numerous suggestions for improvement and additional material to be included after each story under the rubric "Suggestions for Further Reading." My summer research student, Hoi Kong, was especially insightful in locating sources appropriate to this latter endeavour. To him and to my colleagues at the Faculty of Law, to Professors Pierre Noreau of the University of Montreal and David Howes of Concordia University, to Nathalie Des Rosiers, current President of the Law Commission of Canada, and to all those who helped me sharpen the focus of these stories in their various iterations, I am most indebted.

Finally, a word about intellectual debts. Throughout this collection the reader will discern the powerful influences of Lon Fuller and, to a somewhat lesser degree, Jean Carbonnier. I never met either. Yet much of what I think I know about law I have learned from their writings, and from the writings of others about them. I would be honoured if knowledgable readers were to judge me to have been a good student.

Roderick A. Macdonald
December 2001

INTRODUCTION

EVERYDAY LIFE AND EVERYDAY LAW

The urge to recognize and make law is felt almost from our first moments as human beings. Some measure of consistency and predictability in everyday human interaction is at the foundation of social life. Being able to acknowledge, interpret and find meaning in the words and actions of others, and being confident that our own words and actions will be acknowledged, interpreted and understood more or less as we intend them allows us to dream, to make plans, and to act in public in relative security.

Throughout our lives, in many different contexts and at many levels of commitment we reach out to others. Often we communicate directly with words, but not always. We also use gestures, or sounds, or pictures, or even silence to engage with those around us. Over time, many of these engagements mature into more stable patterns of interaction that give rise to constraints on our own behaviour; they also permit us to form settled expectations of others. The nexus of these constraints and expectations we call relationships. Relationships are the bedrock of law.

Human relationships emerge and evolve through the interplay of personal, social, cultural, religious, and economic forces. Together these forces generate the informal law that allows us to recognize and negotiate our interactions with others. They also shape how the official law enacted by Parliament and developed by courts comes to acknowledge and regulate relationships. In combination, the law of everyday interactions and this official law provide instruments and symbols through which we can realize the hopes and aspirations that we have for ourselves, for our families and kin, for our communities, and for society more generally.

RELATIONSHIPS

Everyday life is a complex web of relationships. These relationships may be merely occasional and not particularly intimate. They may also be affectionate, ongoing and involve deeply felt attachments. Sometimes we seek out or chance upon relationships within formal institutions like schools, the workplace, social clubs, and religious organizations. More frequently, our closest relationships are forged less formally – in families, neighbourhoods, or our ever-changing circles of friends. Neither the places nor the manner of human interaction through which we build relationships are fixed. Contexts change. So do the relationships themselves.

In a vibrant society relationships are formed and flourish for a variety of reasons. We often find in them comfort, security, mutual support, love, and fulfilment. Normally, the tasks and responsibilities of daily life are more easily managed when shared. But relationships can occasionally be a source of sorrow, pain, exploitation, and even violence. However much a society might try to pattern various types of relationships that nurture mutuality and trust, pathologies and dysfunction are inevitable in some. For better or for worse, relationships structure our sense of belonging to a community, channel our interactions with others, and help to define our identity.

Ponder the following early life examples of relationships under construction within families.

- A baby quickly comes to recognize how a cry or a gurgle can produce predictable responses from parents and caregivers. At the same time, parents and caregivers quickly learn the difference between a cry that says "I'm hungry," a cry that says "I'm wet," and a cry that says "I hurt myself."
- A two-year-old soon discovers his or her own will, and how to test the limits of that will in a family setting by showing off, by throwing temper tantrums, biting and otherwise engaging in disruptive behaviour. Parents and caregivers also soon appreciate that tantrums and biting are seldom simply about a child's frustrated will, but are often about a toddler trying to establish more subtle patterns of communication than a limited vocabulary permits.
- A five-year-old finds out, through the sharing of toys, sand-boxes, and television time with siblings and friends, how to develop informal habits and practices that make play in common possible. Likewise siblings and friends learn to move from separate, parallel play in the same physical space to genuine shared activity.
- A ten-year-old gradually absorbs how fixed ground-rules that are predictable can helpfully structure activity – at school, at home, in the playground. So too, teachers, parents and playmates figure out ways to interpret and adjust these fixed ground-rules to meet the developing capacities and expectations of late childhood.
- A young teenager challenging parents and others in authority learns about argument, about what can constitute good reasons for action, and about how to evaluate justifications offered by decisionmakers. In turn, parents and others in authority are challenged to respect the emerging self-awareness and desire to make sense of constraining rules that young teenagers exhibit.
- An adolescent confronts the fact that emotions are deeper than actions, and experiments with various ways to solve what first look like intractable disagreements with peers and parents. Similarly, peers and parents themselves are pressed to find their own resources to understand, discuss, and work through alternative ways to conceive and to resolve apparently insoluble adolescent conflicts.

There is, of course, nothing magic in these early moments of close human interaction. Many others could also be given. But whatever the chosen moments, all provide glimpses of the reflexes and expectations through which relationships are nurtured. These same reflexes and expectations are also the ground upon which a society governed by rules and fair decision-making procedures can be conceived. Every moment of interaction can be a moment of relationship building. Every moment of interaction can contribute to the development of our legal consciousness. The lessons we learn about the complexity of human experience as children and adolescents enrich the quality of the law we are able to create throughout our entire lives.

IMAGES OF LAW

In musing as adults upon these events of everyday family life, we come to see that human understanding of and commitment to law arises much earlier than we might first have imagined. It appears that there may be a legal instinct in human beings just as powerful as the language instinct. The legal discoveries of the young teenager and the adolescent are already emergent in the legal life of the two-year-old, the five-year-old, and the ten-year-old.

And yet, these musings are sobering. They confront us with our limitations as human beings. Why are we unable to apply routinely and meaningfully the lessons of law understood in our childhood and adolescence to our day-to-day practices as adults? Continually we are reminded, often by our offspring, of our failings. Not only is law itself an ongoing enterprise, located and developed in the myriad interactions we have with others, so too it would appear, is the acquisition and effective deployment of legal insight.

The urge to discover or invent law in our dealings with others is, in this view, not just a monopoly of children and teenagers. In our everyday adult activities at home, at work, and at play we also encounter and puzzle about basic issues of law and legal ordering. We interpret the conduct of others and we frame our own conduct in ways that generate relatively stabilized expectations. Through the various relationships that emerge from and are built upon our day-to-day interactions, we find the legal vehicles to communicate our feelings, commitments, and dreams.

Most adults are, nonetheless, inclined to discount this legal behaviour. We are wont to see in the actions of legislatures, courts, and governmental agencies the sharpest, if not the only, image of the law we believe regulates our lives. This law is, after all, quite visible, being regularly reported on in newspapers and television programs. It is worth attending to because it is perceived to constrain our freedom. And it is backed by coercive power as personified by police, bailiffs, and prisons. The counter-image of everyday law is less visible. Lived as less constraining and less coercive because consonant with settled patterns of interaction, this unofficial law allows us to confront and resolve opportunely most of society's central legal conundrums.

The law governing ordinary encounters reveals how we make sense of our relationships with others. Only afterwards do we translate our lived insights and understandings into the realm of official law. To the extent we imagine social life as continuous, so too we imagine legal life. The mainly informal and implicit artefacts of everyday law are reflected even in the formal and explicit artefacts of official law. This does not mean, however, that everyday law and official law are just mirror images. Here are three reasons why.

Everyday law is largely implicit law. Implicit law is law that is not consciously made as law – even if consciously made – by anyone. It can be just as rich and subtle as the explicit law that flows from formal legislative processes, where human beings expressly direct their energies to trying to make "good" or "just" law. Of course, some everyday law is also explicit. Just as much official law is implicit. Everyday law brings to light the vast body of tacit legal regulation that makes official law, whether formal and explicit or informal and implicit, possible.

Everyday law also reveals something important about our efforts to do justice. It is not only official law that can occasionally be unjust. We constantly confront problems of justice in implicit law. Sometimes implicit law is unjust because it reinforces or reproduces patterns of domination and hierarchy. Often we substitute the rote solutions of explicit law, thinking we have overcome an injustice by naming it and formalizing a response.

Yet the more we deploy explicit rules as a means to achieve justice, the less we actually engage thereafter in debate about what justice requires in

individual cases. In confronting injustice, everyday law denies us the comfort of pointing to a rule that seems to cover the case. Without an officially "just" rule to fall back on in explaining injustice, we are compelled to offer substantive reasons for our actions. These reasons often expose the injustice we would otherwise not perceive.

Finally, everyday law puts into question our reverence for claims of authority based on expertise or on formal status. Because we have allowed ourselves to become over-awed with the technical achievements of science, we are much inclined to dismiss legal knowledge and insight that does not come from a professional. The official pedigree of power and authority is believed to be a sufficient justification for its exercise.

Everyday law, by contrast, is law grounded neither in technique, nor in expertise, nor in official pedigree. Authority resides in claims of experience, wisdom, and good judgement. In this, everyday law reminds us that no claims of legal authority can be self-justifying.

LIVING EVERYDAY LAW

The stories in this book are meant to reveal something of the richness of everyday law. How might attending to everyday law improve contemporary practices of law, law reform, and public policy? The stories do not aim to prove that the wisdom and understanding of children and adolescents are superior to that of adults. The historical abuses of lessons thought to be drawn from "children and noble savages" counsel caution in making any such assertions.

Neither are these stories intended to show that all human interaction is legal, or rather, is best conceived of as legal. Consider the following. To an economist, all problems of allocation and distribution can be understood as economic problems. This does not mean, however, that they are only economic problems. Similarly, to a jurist, all problems of justice in human interaction can be understood as problems of everyday law. This does not mean that they are only legal problems. To see any particular incidence of human interaction through the lens of law is a choice – a choice we make to put issues of justice and the quest for the good front and centre in thinking about the quality and character of that interaction.

Nor are these stories designed to prove that everyday law is, in some sense, better than official law. "Better" in evaluating law and legal practices is not always easy to discern or judge. First we need to ask about who is included in, and who is excluded from, the legal regime in question. Legal regimes should not draw unjustifiable distinctions between those who can partake of their benefits and those who cannot. Then we need to assess how power

is allocated, legitimated, and exercised. Fair procedures for making rules and deciding cases and a commitment to justice in regulation are key standards against which any kind of law has to be evaluated. On such scales of assessment, neither everyday law nor official law is always, or even presumptively, better.

The overriding theme of this collection can be stated modestly. Everyday law is a separate site, or a separate collection of sites, of human interaction, notwithstanding that various forms of official law are often imported into it. Everyday law is also an allegory for perennial problems of official law. The way we handle the events and circumstances of everyday life contains much insight into how we might think about handling analogous issues in the domain of official law.

The notion of law reflected here is quite broad. Among other things, law is seen to embrace the vast array of rules that govern human conduct, whether they are found in an explicit enactment, or flow from an agreement, or arise in a practice. It embraces as well the panoply of rulings to decide arguments, whether imposed by adjudicators, suggested by mediators, or derived from an electoral process. But formal rules and rulings are only law's markers. We enter on to law's terrain as soon as we orient our behaviour through tacit rules and informal decisions. Of course, law is much more than a set of recognizable concepts, institutions, and instruments. It is also an aspiration present in all human interaction.

In these stories law is found even where there are no actions of government. Many people think that because our constitution requires everything done by officials to be authorized by law, nothing anyone else does can be law. Whenever we find ourselves puzzling through issues of access to justice, fair procedures, problems with authority, and questions of interpretation in their interactions with others we find law.

Most importantly, law arises from, belongs to, and responds to everyone. It is understood here less as a set of constraining prohibitions imposed by those with social power, than as a framework of rules that facilitate human interaction by stabilizing our expectations of others, and theirs of us. In these stories, the key contribution of law is its capacity to reflect and to state the values around which we seek to organize debate about the kinds of societies in which we want to live.

LESSONS OF EVERYDAY LAW

The 18 stories in this collection have been grouped under four themes. Within these thematic groupings, each story is intended to raise a number of specific ideas.

The first part considers several dimensions and aspirations of law: What do we mean by law? What are its ambitions? What are its processes? What are its techniques?

Law Day and Chocolate Bunnies is meant to suggest how frequently we confront the basic issues of allocating benefits and burdens through rules and procedures. What are the relative strengths and most suitable uses of the different processes of social ordering in cases where the decision-maker may also be a beneficiary?

Street-hockey, Skateboarding, and Responsive Law addresses the channelling and regulatory functions of legislation. What approaches to making rules meant to govern apparently delinquent behaviour will ensure the greatest degree of voluntary compliance and the least likelihood of litigation?

Is Law about Issuing Orders or Making Rules? poses what looks just like another question of legal technique. How detailed and directive should laws be? The deeper issue is, however, whether one wants a highly regulated society, or a society where rules provide guidelines for self-directed activity.

If it Goes without Saying, Does it Go Better when You Say it? reminds us that one of the principal characteristics of official law is its formalism. But formalism, even in everyday law, is not an unmitigated good. Under what circumstances should relationships not be formalized in a written agreement or an enacted rule?

Heads I Win ... concerns the different ways in which we come to organize social relationships. Establishing rules in advance and running off to a judge or an arbitrator are only two possibilities. Keeping the others in view can often lead to outcomes that solve existing problems and actually prevent them from recurring.

Part two of the collection groups stories relating to the forms and limits of rules: How do we discover rules? How do we make them? How do they work? How do we keep them current?

Sometimes It's Better just to Fix the Dock examines a key dilemma faced by lawmakers today. What should be done with rules, concepts, and institutions that are outdated or inefficient? There seems to be no easy way of knowing when to just tinker with a rule that needs fixing, and when to recast an entire legal regime because the assumptions on which it is built no longer hold.

50th Anniversaries and Families carries the dilemma of outdated rules onto the terrain of legal method. In what kinds of cases should the law be organized by reference to concepts that are largely defined by social convention and religious practices? And in what kinds of cases should concepts be defined by reference to the purposes the law is trying to achieve?

Measure for Measure addresses the balance between experience and rationality in the design of legal rules. Do we want our legal concepts always to be rationally coherent even at the price of their usefulness? When can we tolerate concepts that draw apparently illogical distinctions based on experience?

Legal Fictions – the Law's "Little White Lies" poses a challenge for those who believe that the hardest, if not the only difficult legal task is to enact the "perfect" rule. When times change, ideas change and beliefs change. Is it always necessary to enact a new rule? What are the different ways that the law can cope with a "perfect" rule that no longer seems to work?

Decision-making is the focus of part three: Is there anything distinctive about legal decision-making? How do decisionmakers reconcile conflicts between the letter and the spirit of a rule? How should they deal with the exceptional case?

... But Everyone Else Is Allowed to comes back to the question of interpretation. Are there limits on the kinds of arguments that can properly be raised in a dispute about the meaning of a rule? How does a decisionmaker know what types of arguments are appropriate and what types are not?

It's just a Legal Technicality explores two of the oldest puzzles of legal regulation when words are used to express rules. How far should the spirit of a rule prevail over its letter? And in the criminal law especially, what legal "technicalities" are actually a reflection of fundamental values and principles that merit protection even if they lead to an acquittal?

Let's just Stick to the Rules asks us to consider the purposes that rules serve. Should rules be drafted so that their underlying logic and purpose is easy to see? How do we know when to apply this logic and purpose in circumstances where the factual assumptions underlying the rule no longer hold? Should the logic of a rule always be applied to new, but similar situations?

It's not Fair, He Hit Me First! is a meditation on why it is that human conflicts are always more complex than they initially appear. Problem-solvers cannot always take everything into account when deciding. How do they know just how much of a story being told they should consider relevant to their decision-making task?

I Was Rolling on the Floor and it Fell in! opens up the issue of what constitutes the truth in law. What kinds of truth do different legal processes seek, and at what cost to witnesses who are victims? How much can any process be redesigned without losing its basic character? When is it better to seek one kind of legal truth rather than another?

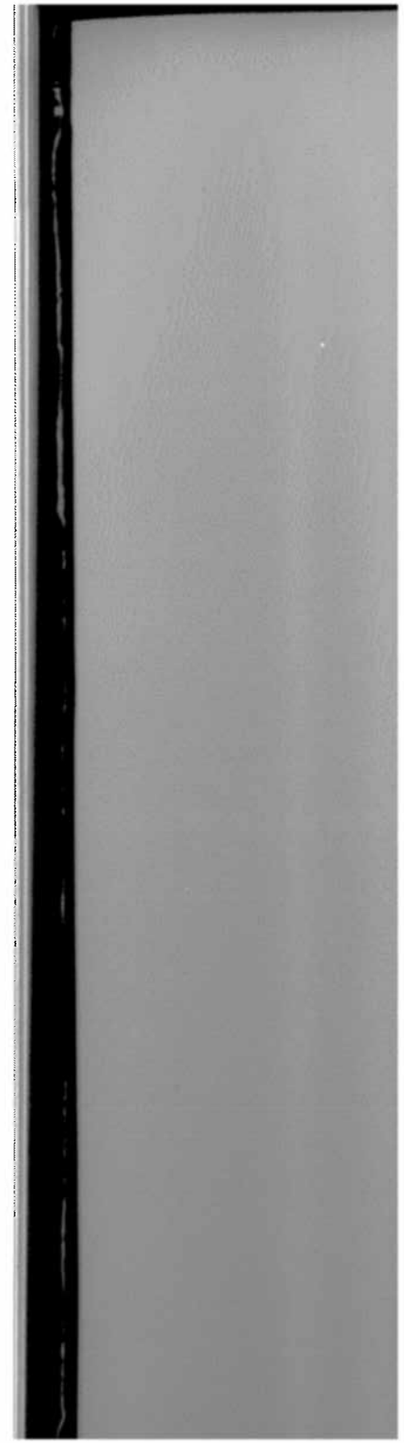
The book's last part explores some of the concepts and institutions through which law does its work: How does law categorize? What is identity and how many identities should law recognize? What is the relationship between official and unofficial legal organizations, and between state agencies and other human associations? What is the role of informal groups within legal institutions?

What You See Depends on Where You Stand confronts us with a constant in human affairs. Not everybody sees things the same way. Does law always make the right choice about how to categorize actions and events? How do we know when behaviour should be treated as a crime, as an economic transaction, as a public health issue, or as a psychological problem?

Who Do You Think You Are Anyway? puts squarely one of the fundamental conundrums of constitutional law today. This is the question of identity. Is it possible for law to account for the multiple identities that we all carry? If so, how ought it to distinguish between those identities that matter and those that do not?

Can We Go to a Garage Sale this Weekend? examines the different roles of the state and the churches, voluntary associations and local self-help agencies in providing social services through which people express a sense of commitment to each other. In responding to calls for privatization and deregulation, how can lawmakers ensure that values of democratic accountability and public participation are not displaced?

Old Guards recalls that many relationships are nurtured within complex and subtle formalized institutions. But without practices and tacit understandings, and without informal associations and groups, most complex institutions could not function. Understanding the interplay between formal and informal associations is a prerequisite for the design of effective legal institutions.



These 18 stories draw upon, and attempt to situate, a number of the practices that comprise both everyday and official law in modern society. They provide analogies, allegories, and anecdotes raising perennial issues in legal theory. In this sense, they might be seen as an attempt to "demystify" official law by relocating its concerns on the more familiar terrain of everyday human interaction.

These stories are also meant to invite reflection on the responsibility each one of us assumes as we go about coordinating our activities within a regime of rules and relationships. They remind us of our ethical obligations toward others in all our actions. In so doing, they are intended to hold us to account for our everyday behaviour. Law is a precious resource. A failure to ask what we expect of our law is a failure to ask what we expect of ourselves.

In the end, this collection of stories seeks to validate the urge we all have to find meaning through law -- to organize our interactions with others by means of relationships discovered and nurtured under a just framework of rules. We learn about law by living law. We vindicate law by claiming it as our own.

The suggestions for further reading set out below, and those that follow each part, are not meant to be exhaustive. No more than the text of the stories themselves should these suggestions be seen as authoritative or constraining. At best, they are an idiosyncratic assemblage -- much like the collection of messages, notes, and magnets on a fridge door -- of scholarly writing and popular literature meant to open additional lines of inquiry and reflection. Occasional references to well-known movies and stage plays have also been included.

The form and content of these bibliographies are consistent with the general ambition of this book. Like the stories, the entries are invitations to readers to find resonances in the cultural artefacts that shape everyday law in their own lives. Since the stories remind us that social life is continuous, I have not systematically sorted scholarly and non-scholarly sources into separate categories. Nonetheless, those who wish to pursue the themes addressed in each of the stories will find no shortage of additional readings listed in the footnotes and bibliographies of the scholarly articles and monographs cited here.

SUGGESTIONS FOR FURTHER READING

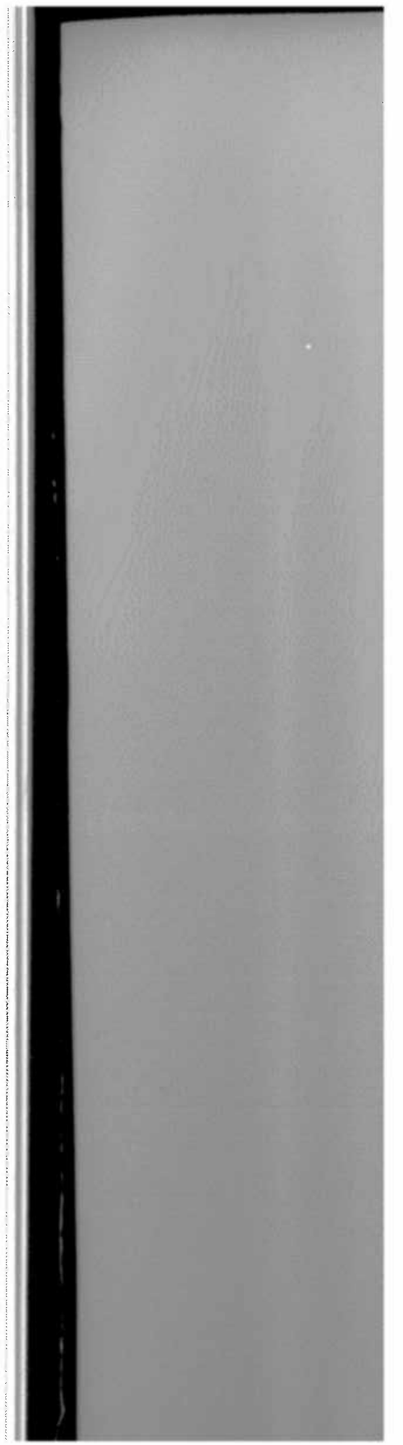
Everyday life has long been a fertile ground for legal analysis. Numerous monographs seek to test the interaction of official and unofficial law in social practices. See, for evocative examples, S.E. Merry, GETTING JUSTICE AND GETTING EVEN (Chicago: University of Chicago Press, 1991); M.L. Baumgartner, THE MORAL ORDER OF A NEIGHBOURHOOD (New York: Oxford University Press, 1988); R. C. Ellickson, ORDER WITHOUT LAW (Cambridge: Harvard University Press, 1991); E.P. Thompson, CUSTOMS IN COMMON (New York: The New Press, 1993).

The normative significance of everyday life is assessed in P. Ewick and S. Silbey, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE (Chicago: University of Chicago Press, 1998). In "Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life" in A. Sarat and T. Kearns, LAW IN EVERYDAY LIFE (Ann Arbor: University of Michigan, 1993) Sarat and Kearns seek to locate the concept of everyday life in the context of traditional legal theory.

Recently, the literature of comparative law has taken a much broader view of what constitutes law and, consequently, is beginning to explore local, customary and everyday law as reflections of distinctive legal systems. The richest study in this genre is H.P. Glenn, LEGAL TRADITIONS OF THE WORLD (Oxford: Oxford University Press, 2000).

Many contemporary studies of everyday law can be located within the larger tradition of narrative legal anthropology. Classical studies include K.N. Llewellyn and E. Hoebel, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE (Norman: University of Oklahoma Press, 1941); S.F. Moore, LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH (Boston: Routledge & K. Paul, 1978); and C. Geertz, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY (New York: Basic Books, 1983). Two fascinating particular studies are Lawrence Rosen, THE ANTHROPOLOGY OF JUSTICE: LAW AS CULTURE IN ISLAMIC SOCIETY (Cambridge: Cambridge University Press, 1989); and S. Drummond, INCORPORATING THE FAMILIAR: AN INVESTIGATION INTO LEGAL SENSIBILITIES IN NUNAVUT (Montreal and Kingston: McGill-Queen's University Press, 1997).

The idea of everyday law also evokes classic studies in social psychology such as those of Erving Goffman; THE PRESENTATION OF SELF IN EVERYDAY LIFE (Garden City, NY: Doubleday, 1959); and RELATIONS IN PUBLIC: MICROSTUDIES OF THE PUBLIC ORDER (New York: Harper & Row, 1972). More recently, Michel de Certeau has embarked upon a like terrain: THE PRACTICE OF EVERYDAY LIFE vol. 1 (Berkeley: University of California Press, 1984); and vol. 2 (Minneapolis: University of Minnesota Press, 1998)



A short monograph by Michael Reisman focuses on the momentary encounters of everyday life as evidence of micro-legal systems. See W.M. Reisman, LAW IN BRIEF ENCOUNTERS (New Haven: Yale University Press, 1999). The insights of Reisman's work are developed further in D. Jutras, "The Legal Dimensions of Everyday Life" (2001) 16 CANADIAN JOURNAL OF LAW AND SOCIETY 45.

The intricate inner workings of informal normative orders are most visible when the orders are discrete and insular, and viewed from the outside. In literature and popular culture, sites that are often the objects of observation include: high-schools (see the 1980's movies of John Hughes, especially THE BREAKFAST CLUB), gangs (see e.g., Mario Puzo's THE GODFATHER, and S.E. Hinton's THE OUTSIDERS), the upper classes (see e.g., Edith Wharton's AGE OF INNOCENCE, and P.G. Wodehouse's entire oeuvre), "foreigners" (see travel writing in general, and for an especially keenly observed example, Pico Iyer's, FALLING OFF THE MAP: SOME LONELY PLACES OF THE WORLD (New York: Knopf, 1993)), and minority communities (see e.g., Mordecai Richler's THE APPRENTICESHIP OF DUDDY KRAVITZ (Don Mills: A. Deutsch, 1959)). For a general overview of how cinema tracks everyday law, see J. Denvir, LEGAL REELISM: MOVIES AS LEGAL TEXTS (Urbana: University of Illinois Press, 1996).

Many children's books are also designed to draw lessons from everyday experience. See, notably, AESOP'S FABLES and the "fairy tales" of Hans Christian Andersen and the Grimm Brothers. Other well-known examples include: Hillaire Belloc, CAUTIONARY VERSES (New York: Knopf, 1945); B. Courteau, LES FABLES DE LAFONTAINE (Montreal: Éditions Nelligan, 1986); Roald Dahl, THE COLLECTED SHORT STORIES OF ROALD DAHL (London: M. Joseph, 1991); Sophie Ségur, la Comtesse de Ségur, LES BONS ENFANTS (Paris: Hachette, 1868), LES MALHEURS DE SOPHIE (Paris: Éditions d'art Piazza, 1930), NOUVEAUX CONTES DE FÉES POUR LES PETITS ENFANTS (Paris: Hachette, 1868); and so on. The enormous popularity of J.K. Rowling's Harry Potter series attests to the significance of the genre. Four especially popular offerings are: HARRY POTTER AND THE GOBLET OF FIRE (Vancouver: Raincoast Books, 2000); HARRY POTTER AND THE PRISONER OF AZKABAN (Vancouver: Raincost Books, 1999); HARRY POTTER AND THE CHAMBER OF SECRETS (Vancouver: Raincoast Books, 1999); and HARRY POTTER AND THE PHILOSOPHER'S STONE (London: Bloomsbury, 1997).

Descriptive and prescriptive theories of children's moral development have been articulated throughout history. Some famous (and infamous) examples include: Plato, THE REPUBLIC (Books IV-VI), Rousseau, ÉMILE OU DE L'ÉDUCATION, and Confucius, THE ANALECTS. Obviously, the entire corpus of Jean Piaget's work is instructive on the themes of this collection. See, in particular, J. Piaget, THE CHILD'S CONCEPTION OF THE WORLD (London: Paladin, 1973); THE CONSTRUCTION OF REALITY IN THE CHILD (Neuchatel: Delachaux and Nestlé, 1971); JUDGEMENT AND REASONING IN THE CHILD (Totawa, NJ: Littlefield and Adams, 1972); and THE MORAL JUDGEMENT OF THE CHILD (New York: The Free Press, 1965).

PART ONE

THE ARCHITECTURE OF LAW

INTRODUCTION

Rarely a day passes when we do not use law to solve a problem of social organization. Legal forms and legal processes are everywhere. We encounter them in the actions of Parliament, the courts, public officials, and the police. They are also part of everyday life.

In a meeting we are called upon to vote. A co-worker asks us to have a word with someone who is behaving unreasonably. We announce household rules for our children. We agree to meet someone for lunch at a particular restaurant. At a bus stop we line up to get on. We referee a youth soccer game or call balls and strikes for a softball league. Once a week we get together with friends to play cards or watch football on the television.

Each of these activities -- voting, mediating, making rules, promising, resorting to a rule of thumb, judging, following a practice -- involves us with a form of law. In every case we are using a well-known legal process to structure a relationship, to coordinate plans and projects with others, to make a decision, or to avoid a potential conflict. Often these legal processes allow us to accomplish several goals -- organizing, planning, solving disputes -- at the same time.

Nonetheless, these different processes are not interchangeable. Experience teaches that some work better than others depending on circumstances and depending on the objectives we are trying to achieve. Sometimes problems have to be reshaped in order that they may be handled by a particular process, such as adjudication.

Experience also teaches that most ordering processes work best when those who are affected have real input into their design and operation. Even legislation, which seems to be a one-way projection of authority by a lawmaker,

cannot be used indiscriminately to achieve any purpose. The effectiveness of a statute is sharply constrained by the capacity of the people to whom it is addressed to orient their conduct by reference to its directions.

Not all law needs to be formalized. Sometimes it is better not to write down the features of a relationship or a practice. Over-precision in rules can sometimes destroy relationships rather than facilitate them. It can also bureaucratize a relationship that works best when left inchoate and fluid.

Finally, whatever the process of social ordering in issue, the justice of its outcomes depends on the wisdom and judgement of those who are actually using it in any particular case. Good processes are no guarantee of good outcomes. At best good processes make it difficult to err seriously in any endeavour of social decision-making.

The five stories in this section address several dimensions of law in modern society: its forms, its processes, its institutions. They also hint at the complexity of deciding when and how each of these forms and processes can be deployed to greatest advantage, whether by governments or by citizens in their everyday activities.

LAW DAY AND CHOCOLATE BUNNIES

Allocating benefits and burdens through rules and settled procedures is a commonplace of social life, whether in families, neighbourhoods, schools or workplaces. Sometimes parents, school principals, company presidents, and governments simply announce how a distribution will be made. More often they invite input from children, students, employees, and citizens before deciding. In both cases, however, the decision and the distribution are being made by people who will not personally receive a benefit or suffer a burden. We expect the fact that they are disinterested to enable them to be neutral and impartial. This is the logic that underlies the standard model of adjudication by courts.

Not all distributions can be made this way. Occasionally decisions have to be taken by people who have an interest in the outcome. They stand to gain or lose personally. Still, even in these cases accepted rules (frequently just rules of thumb) and settled procedures (including informal and customary practices) can help to promote impartial decision-making. In fact, if well-designed or well-considered, rules of thumb and informal practices usually do much more than simply promote impartiality. Because they require everyone to take personal responsibility for the outcome reached, they can often help even self-interested decisionmakers achieve a better understanding of what a fair and just distributive result would be.

About 40 years ago, when my grandparents were moving out of their house and into a retirement home, they gave my brother and me several old toys and games that they had collected. But they left it to us to decide who got what. Part of the job was easy. My brother liked the model train, and I preferred the Meccano set. As for dividing the rest we were less certain. Who would get the checkers and the checkerboard? Should the person who received the checkerboard also get the chess pieces?

It did not take us long to see that if we just picked the objects item by item, one after the other, some things that ought to go together were going to be split up. As we puzzled about what to do, we realized that we were actually facing three separate problems. The first was to figure out how to organize everything into two piles of roughly equal value. The second was to do this in a way that kept things that belonged with each other in the same pile. The third was to decide who got what pile.

While we did not know it at the time, in this little exercise we were dealing with a problem that the law faces all the time. It comes up, for example, whenever heirs have to liquidate an estate, or a divorcing couple has to divide the common property of the marriage. In a nutshell, the problem that puzzled my brother and me was one of distributive justice. What decision-making procedure and what principle of distribution could we adopt so as to ensure a fair division of the toys and games between us?

This is the problem the Law Commission of Canada decided to make the focus of its public activities for Law Day in April 1998.

CELEBRATING LAW DAY WITH A CHOCOLATE BUNNY

The Law Commission's first stop on Law Day was a visit to a before-school program at a suburban Ottawa elementary school. We spent almost an hour with a group of 17 children aged four to nine. Even at such a young age, these students displayed a remarkable understanding of issues of law and justice, and great creativity in solving problems of social distribution.

We started the session by unwrapping a big chocolate bunny. How, we asked, would they go about dividing it up fairly between two siblings? At first, the suggestions were that some neutral person like a parent or teacher would be best placed to make a "fair" cut. But then one child observed that parents don't always cut things exactly in the middle. Since the bunny was an odd shape, she added, it would actually be hard to do so. Another chimed in that running off to an adult wouldn't actually solve the whole problem because you would still have to decide who would get the first pick. Still another noticed that the suggestion also wouldn't work whenever a parent or a teacher wasn't around.

DIVIDING THE BUNNY BETWEEN TWO PEOPLE

For awhile the students were stuck. They couldn't come up with a process for dividing the bunny that didn't require a third person to do the cutting. So we asked: "What do you do on your own when you want to even up two objects or two piles of unequal size?" After a short discussion about slicing pieces off two differently sized apples, a solution started to emerge. In the end, the group decided that the idea that "one person cuts and the other picks first" would be a pretty good rule of thumb for most situations. Having to pick second would normally ensure that the person doing the cutting came close to producing equal shares.

Still, there was the problem of deciding who should make the cut. One boy, who must have been a football fan with experience watching kick-off ceremonies, suggested "flipping a coin" to see who cuts. Another proposed that the older sibling be the one to cut. A third said that it did not really matter who went first. As long as the person doing the cutting switched each time there was some more chocolate to divide, things would work out in the long run. Soon the group was full of ideas about procedures for dividing the bunny themselves.

Of course, they also realized that these different procedures would not necessarily produce a more equal cut than a parent might achieve. Most students weren't bothered by that. One put it this way: "We still might get an uneven cut, but we did it ourselves without an argument." Just as everyone was feeling pretty satisfied with the solution they reached, an older (and larger) boy raised another problem. He wondered if equal shares for everybody was a fair division in a group where some students were tiny four-year-olds and some were big nine-year-olds.

This comment led to a lot of murmuring. No one had thought about whether equality based on a head count was actually fairer than equality based on height or weight. It is one thing to distribute pieces of chocolate fairly once you have decided what is a fair share. It is another to know what is the basis for deciding a fair share. The group had trouble coming up with a good argument why a simple head count should be preferred.

Then, another older boy had an idea. He said that it would be a lot more complicated to substitute height or weight as a way of deciding the size of shares. Who would weigh? or measure? How could you slice the bunny into a whole range of different-sized pieces? Through this exchange the group saw that the practical difficulty of deciding fairly will sometimes limit the kinds of procedures that can be used. For dividing up an odd-shaped chocolate bunny, a principle of strict numerical equality might just turn out to be the best that can be done.

FAIR DISTRIBUTIONS AMONG SEVERAL PEOPLE

Right after this discussion, a couple of students – sizing up the bunny and counting the numbers in the group – asked what they should do when there were more than two people to share the chocolate. How could you divide the bunny evenly among a group as big as theirs? Everyone immediately saw that cutting it up with a knife was not likely to produce anything like equal pieces.

Without prompting, a consensus emerged that a big irregularly shaped bunny was a bad choice of candy if the idea was to share it among several

people. How much easier it would have been if the bunny had been pre-cut; or if the chocolate had been self-dividing like Toblerone, Kit-Kat, Jersey Milk, or Caramilk; or even better, if there had been a box of Smarties, Skittles or Glossettes instead. But one girl was not going to be frustrated by the fact that she could not trade in the bunny for a box of Smarties. She came up with an amazingly creative idea for transforming what looked like an insoluble problem. Melt the bunny down to make hot chocolate for everyone.

Later, we gave the students another puzzle: How to organize a fair procedure for distributing a package of smaller more-or-less equally-sized chocolate eggs? The class knew that there would be pushing and shoving if it didn't set up some system to hand out the eggs in an orderly way. Students offered ideas like lining up on a "first-come, first-served" basis, or having the youngest (or eldest) student pass the bag around, or having the choice proceed from shortest to tallest, or lining up in alphabetical order, or letting the girls pick first. In talking about these various techniques, the group was full of insight about the advantages and disadvantages of each solution. It had no trouble seeing how different students would come out ahead depending on which procedure was chosen.

The session ended with a short exchange about why the Law Commission was raising these kinds of problems on Law Day. One child, whose mother was a lawyer, wondered why we didn't talk about the police, judges, and Parliament. Before we could answer, another girl whose parents ran a natural-foods store had a better response than we could have given. She announced: "Well, health means a lot more than nurses, doctors, and hospitals."

With this unexpected cue, the other students saw the connection. Law is not just about legislatures and courts. It is about developing fair rules and procedures so that people interact with each other harmoniously and resolve conflict peacefully. Carefully puzzling through the everyday problems of living together in society is just as important in before-school settings as it is in Parliament or in the Supreme Court of Canada.

STREET-HOCKEY, SKATEBOARDING AND RESPONSIVE LAW

Television shows give the impression that the main goal of law is to state and enforce social values by declaring certain kinds of behaviour illegal. But most legal rules are not like those in the Criminal Code *at all. Their aim is less to prevent inappropriate behaviour than it is to channel and coordinate everyday human activity so as to minimize conflict and confusion. Increasingly, law's channelling function is promoted through regulatory rules. Laws about the environment, housing, consumer protection, and labour relations are good illustrations. So too are traffic regulations and the rules of the road, but with this difference. Their specific content – for example, drive on the left or drive on the right – is less important than the fact that they are known and generally followed.*

Some regulatory rules, however, do not work very well because they have been conceived and enacted without taking account of a sufficiently broad range of legitimate interests. This is often the case with local regulatory law directed at teenagers. When municipal councils fail to canvass adolescents in advance, they typically enact over-reaching and prohibitive bylaws that describe normal teenage behaviour as delinquent. These poorly-considered and unresponsive bylaws are both hard to enforce and a source of continuing conflict in neighbourhoods. They can also undermine peoples' respect for law's channelling and coordinating capacities generally, and provoke lawsuits meant to call rule-makers to account.

Every spring there are lots of stories in newspapers about the efforts of municipal councils to prevent young children and teenagers from playing street-hockey or skateboarding in residential areas – even in streets that are dead-ends. A couple of years ago, my 13-year-old son told me that the municipality where we live had enacted a bylaw to prohibit skateboarding on any public property in the city: streets, sidewalks, parking lots, paved municipal recreation areas, wherever. I was so surprised to hear this that I began to pay closer attention to newspaper and magazine articles about street-hockey and skateboarding.

One story reported that parents of young ball-hockey players went to a local council meeting to voice their concerns. They wanted to have a bylaw changed to permit ball-hockey playing on specially-designated residential

streets. To no avail. The council decided that even quiet residential streets were to be reserved for cars, vans, trucks, motorcycles, and the occasional bicycle. In passing, one councillor noted that the parental concern was overstated. He said that these kinds of bylaw are not strictly enforced anyway, unless a formal complaint is made.

A few months later, a petition put together by teenaged skateboarders in my own neighbourhood met a similar fate. The mayor of the city even refused to have the parks and recreation department look into whether skateboarding might be permitted in an unused parking lot next to a regular children's playground. The city has 27 tennis courts and two large dog-walks, but no skateboard park. One doesn't have to be a rocket scientist to figure out which groups of citizens do, and do not, have the ear of the city council.

Now, my son tells me, the city has gone further. Following a complaint from one homeowner, there has been a crack-down. The local public security unit is giving out $60 tickets for illegal skateboarding. In response, some parents have consulted a lawyer and are threatening to sue the city.

REGULATORY SHORT-SIGHTEDNESS

Why do municipal councils seem to be so short-sighted when it comes to regulating street-hockey and skateboarding? A fear of liability is no doubt at work here, since the arguments in favour of permitting street-hockey or building a skateboarding park would seem to be persuasive – minimal cost, more effective parental supervision, little noise or disruption. It is easy to suspect that something else is also going on, something that has to do with the fact that the petitioners are teenagers, not tennis-playing or dog-owning taxpayers. A comparison of the fine for illegal skateboarding, $60, with the fine for not keeping a dog on a leash in a park for young children, $25, confirms the suspicion.

For people concerned about democratic law-making in Canada today, this continuing street-hockey and skateboarding saga raises two troubling issues. The first is that the law-making process (perhaps especially at the municipal level) can sometimes be unresponsive to reasonable and reasonably-expressed concerns. When lawmakers fail to take reasonable account of a broad range of legitimate interests, they are actually capable of doing great harm by legislating outcomes that have negative long-term consequences. To ensure that rules do not create undesired and unintended consequences, lawmakers have to undertake wide and meaningful consultations that explore a range of possible options long before policy priorities are actually set.

The second is that there is a direct correlation between the lack of political responsiveness among lawmakers and the likelihood of citizens resorting

to litigation. Where public participation is dismissed in the political process, it invariably rebounds in the judicial process. Where discussion, negotiation and political compromise fail, it is easy to see why frustrated parents would try to obtain a favourable court-ordered solution.

RESPONSIVE LAW-MAKING

Law-making in a democracy is based on the idea that Parliament, legislatures, and municipal councils will make some attempt to invite public participation before enacting a statute or bylaw. The competing points of view being presented will then be weighed in deciding what the good of the whole country, the province or the municipality requires.

How well is this ideal actually reflected in the attitude of municipal councils toward parents and teenagers seeking to change street-hockey and skateboarding bylaws?

No doubt these councils cannot let the residents of individual streets inconvenience an entire neighbourhood. One can well understand why a council would want to prevent homeowners from generally adopting a "not in my back yard" attitude. Democratic governance would be impossible if all homeowners had a veto on any decision that might affect them.

But this is not what is at stake in the case of street-hockey playing and skateboarding. The request is not to prohibit something external – heavy truck traffic, a half-way house, or a group home, for example – that homeowners might think undesirable in a residential neighbourhood. It is, rather, to permit people who live on a quiet residential street to help to shape the uses to which that street is put. Who has the closest relationship with the street anyway?

Just because motor vehicles are necessary users of residential streets does not automatically mean that neighbourhood streets should be given over exclusively, or even primarily, to them. If the safety of children playing street-hockey is a concern, let cars slow down; or let stop signs go up at every corner; or let streets become one way; or let commercial and truck traffic be prohibited for a certain period after school is dismissed each day. After all, one of the main reasons people move from the inner city to the suburbs is to avoid being sacrificed to the convenience of traffic.

It is also worth thinking about the likely impact of banning street-hockey and skateboarding. If teenagers cannot play street-hockey or skateboard in front of their own houses in suburban residential areas, they are likely either to go downtown or to a shopping mall to do so. Or, as experience in many cities shows, there is a good chance that they will take up other activities associated with the video-arcade, the pool room or the street-corner gang. These

are hardly desirable outcomes, even if they do appear to make a suburban municipal councillor's life easier by pushing what is seen as a problem elsewhere. Until parents or others who have the attention of municipal councils actually raise the impact of these bylaws upon teenagers, the interests and needs of adolescents are just not part of local political debate.

ENCOURAGING LAWSUITS

The street-hockey and skateboarding saga also shows how failures in the law-making process can lead people to look for answers from the courts. Quite reasonably, the parents of street-hockey-deprived youths thought that the best way to draw the attention of the council to the issue was to make a direct approach. Present a petition asking the council to amend the bylaw. Elementary common sense suggests that it is better to go to the source of a problem and deal with it directly than it is to ask a judge to decide the matter in a lawsuit.

In approaching the local council, the parents most likely assumed that the blanket bylaw prohibition was probably an inadvertent oversight, or resulted from a failure to take changing circumstances and changing teenage activities into account. Once the concerns were presented, the council would be in a position to come up with a new more nuanced bylaw that would accommodate everyone's interests.

But the response of the council was disappointing, if predictable. The councillors no doubt refused to act, at least in part, because of how they saw their own electoral self-interest. Teenagers and teenage activities are always at the bottom of municipal priorities. Promising parks for babies and very young children, tennis courts and dog-runs gets more votes. Parks and tennis-courts are also nice to look at, and they do not attract users who hang out in groups, wear dirty or baggy clothes, seem unruly and keep late hours. Of course, refusing to act also relieved the council of having to work through and weigh all the different interests that would have to be balanced in drafting a new bylaw.

Unfortunately, by not meeting the legitimate concerns of citizens with a reasoned response, these councils now face a group of residents disaffected with the law and the local political process. Newspapers report that many homeowners are sceptical about the integrity and judgement of council members as representatives of all members of the community. There is a reasonable chance that litigation will ensue. Young children and teenagers have learned the lesson that political institutions are either overly beholden to particular interests, or are simply out-of-touch with their citizens. And, finally, the

decision has given ball-hockey players and skateboarders a good inducement to casual law-breaking and disrespect for authority.

These councils did, of course, have an alternative. Inviting street-hockey players and skateboarders to a council meeting to participate in a meaningful policy debate would help teenagers learn to adjust their expectations to the practicalities of the situation, at least as seen by the council. By educating the council as to the recreational needs of teenagers, it would most likely also lead to the enactment of a more responsive and effective bylaw. After all, a general interest in improving the law-making process wherever it occurs, and about whatever subject it concerns – from parliamentary debates about capital punishment to municipal council debates about street-hockey and skateboarding – is a key feature of democratic citizenship.

IS LAW ABOUT ISSUING ORDERS OR MAKING RULES?

The difference between obeying an order and following a rule is something we learn at a very early age. An order is a direct, on-the-spot, command that one expects from a policeman or an angry parent. Orders are normally given face to face. They require an immediate and specific action, leaving little room for choices about what to do. A rule, by contrast, is usually made and publicized in advance, or simply reflects an existing and accepted practice. Rules are not normally first announced in face-to-face encounters. They are more general than orders, and often are meant to do little besides structure practices or guide behaviour.

Today, there is popular belief that law is just a formalized way of issuing written orders. The idea is that because people cannot be trusted to do what is right, society needs to regulate their conduct in detail. On this view, law is like a command. It works best when it is used to tell people exactly what to do, and forces them to do it. But there is another way to think about law. Because most people act responsibly most of the time, society only needs to establish a general framework of rules. Law is most successful when it gives people guidelines about appropriate conduct toward others, as well as a structure within which they can pursue their own goals while still respecting these guidelines. The choice between these two conceptions of law's ambitions has important consequences for the way legislation is designed and implemented.

In the summer of 1998, after a lengthy illness, my father died. Since my mother had passed away many years earlier, it fell to my brother, my sister, and me to wind up my father's affairs. His will was relatively straightforward. He divided most of his personal belongings among his eight grandchildren, made some donations to charities, and left the remainder of his property in equal shares to his three children.

While it was a sad experience to be executor of my father's will, I had no pangs of guilt or reason to feel upset at how he had chosen to dispose of his property. But I wondered what my reaction would have been if my mother were still alive and if the will had directed all my father's property to some charity or to a stranger. Several questions raced through my mind.

The first was whether there should be a legal obligation for a person drafting a will to leave property to support dependants such as spouses and young children. This question has been debated at least since biblical times,

and answers have varied greatly from society to society and from century to century. Now it appears that most Canadians believe people making a will should provide for their dependants.

My second question had to do with more practical matters. Once we accept that the law should require people making wills to look after their spouses and young children, we still have to decide what would be the best way to announce and enforce that obligation. This got me wondering if there were better, and worse, ways of using law to advance social policies. Specifically, I wondered if there were better, and worse, ways of drafting statutes meant to protect dependants.

LAW AS COMMANDS

Some people think that laws should be used to dictate everyday behaviour. They tend to have a rather pessimistic view of human nature. They may think, for example, that most people are not usually inclined to act fairly and responsibly toward each other. The directing hand of law, preferably official law in the form of statutes enforced by the governmental agencies and the police, is needed to organize people's lives. Law's role is to set out precisely not only what must be done, but how it must be done, and when. On this view of things, the law is not there just as a fall-back, to correct injustice when human beings act inappropriately. Official law is a first-line instrument for maintaining social order by strictly controlling all aspects of day-to-day life.

This idea of law leads to a quite specific model for the way in which legislation should be written. It treats laws as if they were the top-down orders of a business manager or the commands of an army general. The only concern of Parliament or other lawmakers should be to draft a statute that is the most effective mechanism for issuing, transmitting, and enforcing orders intended to regulate behaviour. Statutes are not about trying to replicate the kinds of rules people make for themselves. Their purpose is to specify exactly what people can and cannot do, and to empower officials to ensure compliance.

LAW AS GUIDELINES

Other people think that law should be used only to lay down general guidelines to orient behaviour. They usually have a more optimistic view of human nature. They believe that people really do have the capacity to live responsibly and with due regard for the interests of others. For them, fairness and reciprocity generally characterize social interaction. People only need to be reminded of their obligations and of the variety of ways in which to fulfil

them. Official law comes into play directly only at the margins of everyday activity, in those few cases when people behave irresponsibly.

This idea of law, like the previous one, leads to a quite specific model about the way lawmakers should draft statutes. Since most social practices and values reflect the aspirations of a liberal-democratic society, successful law depends on enacting rules that are largely in harmony with these practices and values. The law highlights key values and provides opportunities for people to advance them in cooperation with each other. The role of legislation is mostly to help people to recognize the duties they have to each other, to encourage them to fulfil those duties, and to give them legal techniques and devices for doing so.

DIFFERENT WAYS TO DRAFT STATUTES TO PROTECT DEPENDANTS

Of course, one has to be on guard against oversimplifying things. These two understandings of the role of law and the objectives of statutes are not so sharply distinguished in practice. Even laws that are drafted as detailed commands can facilitate human interaction, depending on how they are understood and enforced. Nonetheless, these two approaches rest on differences in basic assumptions about human conduct. They also reflect differences in beliefs about how law should reflect and promote social and political values.

How, then, should the law announce the obligation not to make a will that leaves a dependent spouse or children destitute? A range of legislative responses can be imagined. Here are four possibilities.

A statute might provide that some percentage (say 50 percent) of a deceased person's property would automatically be reserved for dependants. Or it might provide that certain categories of property – for example, the family home and its contents – must be passed on to dependants. Or it might provide that favourable tax treatment would be given to certain kinds of property – pension rights, life insurance policies, the family residence – if dependants were named as beneficiaries, or if the property were co-owned with dependants. Or a statute might provide that if a deceased person did not make adequate provision for dependants in a will, then these dependants could make a claim against the estate based on criteria set out in the statute.

These are four very different approaches, with very different effects on people's ability to control the precise way they wish to meet their obligation to look after dependents. The first simply denies them any role at all in shaping the distribution of half their property. Regardless of the relative wealth or age of their dependants, a formula is imposed.

The second approach is less constraining, but may well influence the kinds of property that people acquire during their lifetimes. In addition, by stating what property has to be set aside for dependants, it might even lead people to sell off certain kinds of assets prior to their death in order to avoid having them claimed exclusively by dependants.

The third approach, using the tax system to provide incentives for desirable behaviour, is even more flexible. By setting out the kinds of property that will get favourable tax treatment if left to dependants, it provides inducements to certain behaviour, but allows a choice about the specific property that will be set aside for spouses and young children.

The fourth approach is, at least at the outset, most respectful of people's freedom to distribute their property as they judge appropriate. It lists the considerations that should be addressed by people making wills, but leaves it to them to assess, in the first instance, how these principles should be applied, what assets should be affected, and who they consider their dependants. Only if they fail to make adequate provision for dependants will the law intervene. In such cases, as long as the judge is sensitive to the whole context, the reasonable choices of the deceased person will be largely respected.

DESIGNING GOOD LAWS

There are, obviously, many more than four models for enacting the obligation to look after dependants in a will. Each can, however, be located at a point along a spectrum running from "law as commands" through to "law as guidelines." Each rests on beliefs about the role of government in regulating conduct, and about the capacity of people to act reasonably toward others. Each is grounded in an assessment of how best to set out a policy objective in legislation. And each promotes a different view of how conflict should normally be resolved.

The fundamental presumption of a just society is that people are able, and actually wish, to make responsible choices in pursuing their life projects. In principle, therefore, most legislation should be designed and drafted with this presumption in mind. How well do existing statutes accord with the idea that law ought to offer general facilitative rules for everyday human activity? How often do they simply announce detailed managerial commands and orders?

While some laws, like those establishing criminal offenses or regulating workplace safety, or establishing environmental standards, may have to be drafted as detailed managerial commands, in a liberal democracy most legislation should aim to announce general facilitative rules. Redrafting statutes so as to promote the idea of law as guidelines for human interaction is not just about increasing people's responsibility for their own conduct. It is also about

coordinating the official law made by legislative bodies with the basic social values that this official law highlights. And in so doing, it is about allowing the rules and practices of everyday law to assume a more meaningful role in regulating social life.

IF IT GOES WITHOUT SAYING, DOES IT GO BETTER WHEN YOU SAY IT?

Life in society is rooted in everyday routine. Because we have our own comfortable habits and practices, we can plan our schedules, we can predict the problems we will face, and we can even cope effectively with the unexpected. Routines also allow us to frame expectations of others, even those we barely know. We can distinguish a smile from a frown. We can anticipate that a driver is going to jump a red light, or make a rolling stop. We know that we have to pay in advance at the hamburger stand, but can wait for a bill after the meal at a restaurant. Our settled expectations of others, and theirs of us, are the foundations of customary law, practices, and usages.

The bulk of the legal rules governing our day-to-day relationships and dealings with others are like this – informal, unwritten, and grounded in common experience. But not all. Sometimes circumstances change. Sometimes a person does something totally unexpected. Sometimes we have to describe and explain these settled patterns and expectations to a newcomer. In all these cases we feel the need to formalize relationships, to write things down in a rule-book or in a contract. When we do, much changes. We may gain in clarity, stability, and transparency to others. But once a rule is formally written, we run the risk of then finding ourselves arguing more about the words we have used than about the reason for the practice or informal rule itself. There are some circumstances when it is better not to formalize relationships in a written agreement or an enacted rule.

For her sixteenth birthday last year my daughter got a guitar. Soon she was playing casually with a couple of friends and perhaps even dreaming about forming her own band. This ambition brought back warm memories of my own teenage years, and of the variety of musical groups in which I participated during the 1960s.

One in particular I recall fondly. In Grade 13, I was a member of a quartet that loved folk music. We were especially keen about what were then known as protest or topical songs. Partly in deference to our French teacher, who took an interest in our musical pursuits and taught us the classic protest lament *Un canadien errant*, we called ourselves *Les chansonniers*. Mr. Landon was a remarkable mentor and teacher. He loved aphorisms. Among his favourites, always trotted out just before exam time to remind us to take nothing for granted, was: "if it goes without saying, it goes even better when you say it."

I remember being struck, at age 17, by how self-evident this aphorism appeared to be. In the context of exam-writing its counsel seemed unassailable. But my later experience with *Les chansonniers* put into some doubt the wisdom of this maxim as an all-purpose response to uncertainty and disagreement in human relationships.

LET'S DRAFT A CONTRACT

Our foursome originally came together out of a passion for the folk idiom and for the fun of making music together. We each had slightly different tastes and slightly different abilities. Randy, the most poetically creative, liked Bob Dylan and Phil Ochs. Gabriella, with a classical musical training and a superb harmonic sense, idolized Harry Belafonte and Peter, Paul and Mary. Antoinette, who had a wonderful soprano voice, imagined herself a budding Joan Baez. I was the most adept instrumentalist, and my interests ran more to Bob Wills, Woody Guthrie, and Hank Williams.

Every Saturday afternoon we would meet to sing and play: teaching each other new songs, trying out new harmonies, exploring our musical potential. Soon we had a few dozen numbers in our repertoire. Informally, we would take turns picking a song to sing, assigning the lead vocals, designing the harmonies, and choosing the arrangements. About this time Randy and I also began writing songs, which we were keen to try out on the group. Some of my happiest teenage memories are of these Saturday afternoons.

As we became known in the neighbourhood and in the high school, there followed invitations to play at the local YMCA, in community centres and coffee houses, and at school functions. With these invitations also came money; and with money came decisions. Should we just divvy up the modest income among us? Should we upgrade our instruments? Invest in a sound system? Purchase costumes? Buy records and other materials? Who would handle our finances? Quickly we discovered that there is nothing like success to generate differences of opinion.

Our conflicts were also substantive. They touched everything from the choice of songs for our stage repertoire to whether each of us could veto a particular song. The discussions ranged from whether we should sing exclusively in English, to how much original material we would use in our act. After a while, it seemed that we were spending as much time discussing these side issues, and how to solve them, as we were in practising and having fun.

So in the manner of the times, we decided we needed a contract to sort things out. Randy undertook to draw one up. In a few weeks he produced a document about 20 pages long that dealt with everything under the sun. Need

I say that we soon discovered that we were not nearly as much of a singing group as we thought we were. The exercise of trying to capture in a series of written terms and principles the various elements that defined our musical group actually led us down the path of disharmony.

Putting our relationship into the language of a contract seemed to undermine the sense of common purpose that brought us together in the first place. The effort to describe in words our common purpose revealed, first of all, that we did not have just one purpose. Moreover, instead of getting us to focus our attention on what we were doing and what we were trying to accomplish together, the contract did the opposite. It gave us specific clauses setting out rights and entitlements to assert against each other. After a few months of enslavement to our contract, *Les chansonniers* disbanded.

WE OUGHT TO HAVE A CLAUSE ABOUT THAT

A decade later I was making plans to get married. Everyone counselled me about the need to negotiate a marriage contract with my future wife in order to clearly establish the financial ground rules for our life together. As I began to think through the possible content of a marriage contract, all kinds of other issues besides money and property cropped up. Should there be a clause about whether, when, and how many children we would have? About who would choose where we would live? About who cleaned house, made meals, did laundry, shovelled snow, mowed the lawn, tended flower beds, and so on? Before long, I had a queasy feeling that I was about to relive my experience with *Les chansonniers*.

After many conversations, my future wife and I decided to abandon the idea of drafting an all-purpose marriage contract. No doubt, with the assistance of a lawyer or notary we could have come up with an agreement that covered at least the economic essentials, even if it did not detail our whole matrimonial life as a list of rights and obligations. In the end we did not seek professional assistance, or even draft our own agreement. We did, however, find that it was useful to talk about these issues, if only because it led us to conclude that we did not want to make them the subject of a formal contract.

Now, after a quarter-century of marriage, I have also come to see that sometimes it is important to make certain implicit understandings explicit. There is much to be gained in married couples finding occasions to say to each other "I love you," even though after a couple of dozen years, the sentiment usually goes without saying.

Still, the lessons of our first discussions about a marriage contract persist. We both know there is a big difference between spouses saying to each

other "I love you," and them saying "I love you because you have red hair, brown eyes, a nice smile, are kind and compassionate, are a great cook, and so on." Couples normally say "I love you" precisely because they do not want to have to specify in detail either why or how.

As my wife and I now watch relationship after relationship around us disintegrate, there seems to be a pattern. When faced with a changing circumstance – the birth of children, unemployment, ill-health, significant economic success – it is normal for couples to take various formal steps to meet the new challenge. They purchase life insurance; they make a will; they establish a separate fund (like a children's education savings plan) to deal with the uncertainty. If, however, they decide that the only way to handle the change is to write up a detailed agreement specifying their new relationship, that is a good sign that the relationship is really over. Like *Les chansonniers*, couples with a new written agreement soon discover that instead of negotiating and compromising on differences of opinion, their reflex is to look at the agreement in order to prove which one of them is "right."

MAKING LAWS AND MAKING CONTRACTS

Rules and agreements are two important components in a legal system. Both can be reflected in unwritten and written forms. The art of designing and drafting legislation is much like the art of negotiating and drafting written contracts. The common idea is to render a practice into a text. It is not, of course, necessary for a written instrument to supersede all of the informal rules and practices that previously shaped a relationship. These rules and practices will usually continue, albeit in modified form, even in the face of written rules. For this reason, drafters do not always have to specify everything in a statute or an agreement by using the language of duties and entitlements.

Sometimes it is better to let the really important questions remain unstated: all that is required is a general expression of shared commitment or common purpose. Sometimes the exercise of thinking through a contract is as good as drafting the detailed agreement itself: all that is required, if anything, is a general clause, because the parties have worked out their relationship in the implicit understandings that make the general clause possible. Sometimes the effort to write things down is harmful because people actually do not need to be playing the same tune for exactly the same reasons: all that is required is that their reasons for wanting to play in the band, or even to make a commitment like marriage, are not dissonant.

Deciding when it is important to write things down, and what is important to write down when one does, are two central issues of legislative policy.

How does one decide when the goal should be to draft a formal contract or statute where the letter is meant to prevent recourse to prior informal rules? How does one know when the real utility of the drafting exercise is in its compelling one to think through a set of questions, rather than in the framing of detailed answers to those questions? Trying to understand when it goes better when you say what goes without saying, and when it does not, is a challenge legal drafters face every day.

contract = rights ?

HEADS I WIN ...

Legislatures and courts are commonly seen as the key legal institutions in Canada today. Cooperative and peaceful life in society is said by many to result because Parliament writes down all the rules needed to regulate and guide conduct, and because courts can be called upon to settle arguments fairly. While formally making rules (legislating), and formally deciding disputes governed by rules (adjudicating) are important for maintaining the rule of law, they are not the only legal processes for organizing social life. Many rules are never explicitly enacted, but develop as customs, usages, and practices. Many arguments are settled by a mediator or through negotiation and never get to court.

Among other common processes for structuring and coordinating human relationships are voting and deliberately resorting to chance. Like legislating and adjudicating, elections and drawing lots can be effective ordering processes only when problems have already been cast into a form that lends itself to solution by the process being used. Knowing when it is optimal to frame issues so that they can be addressed and solved by enacted rules, by court decisions, or by some other process, requires understanding the forms and limitations of each: What prior structuring choices are inherent in each process? What conceptions of human behaviour does each promote, and reflect? And how can each be deployed fairly in individual cases?

When my son was younger, I served as a Scout leader. Part of every meeting was given over to playing team games. No adult who has ever been involved in children's activities – whether as a coach, referee or a side-line spectator – will doubt for a moment just how seriously children take their games, and just how careful they are in organizing them.

Over the years, I have had many occasions to reflect on my experiences as a Scout leader in supervising games. What now strikes me as obvious, although I did not see it at the time, is the subtlety of the rules and procedures used by members of the Cub pack to organize and regulate the way their games would be played. A few games, dodge-ball, for example, were old standards. Others were practically complete inventions of the local pack.

In both cases the specific rules and procedures followed by the pack were not simply taken from any book of games. Nor were they written down in the pack log. They developed from watching others, from trial and error, from past practices and from experience. The Cubs also had sophisticated rules

for deciding arguments. Only rarely did they have to call in a leader because they could not settle a disagreement.

MAKING RULES AND MAKING DECISIONS

One of the first challenges youngsters face in team sports is figuring out how to choose sides. In a Cub pack, this was often easy because the boys were grouped by sixes. Still, they had to decide how to match sixes when absentees meant that individual groups could vary from four to six members. Many games were also played in teams picked without reference to sixes. Here the choice was not so easy.

Sometimes the process was to line up by height, with each team getting every other person. On other occasions the Cubs had to pick teams. In these cases, the members of the Cub pack would sometimes actually elect the captains by a formal vote. Most often, however, the oldest or best players simply emerged as "captains" and proceeded to select teams by picking alternately. But before choosing, the two captains had to decide who would pick first. At this point other practices would come into play. They might call out "heads or tails" or "odd or even." Or, they might spin the football for "laces or spaces," or toss a baseball bat in the air and do a "hands over hands."

After this the captains would choose their teams. At the end of the process, of course, there will always be someone chosen last. When this happens to be the youngest person in the group, little stigma attaches to being last. Next year, someone else will be youngest. But where the last chosen is an older, uncoordinated or "not very good" player, and that person is always chosen last, embarrassment and humiliation can result.

Most children are aware of this problem, and seek ways to deal with it. I remember, one evening, observing two "sixers" at Cubs deal with it by quietly agreeing that they would pick each other's team. If only for once, the last picked became the first picked. Some months later, I saw two other "sixers" develop the idea further. They agreed that they would pick one way or the other on a six by six basis. In two of the four sixes (black and red) they picked the best players. In the other two sixes (yellow and grey) they started with the least able players. When I asked the two of them at the end of the meeting where they got the idea to pick like that, their off-hand answer was: "it's obvious."

These nine-year-old boys had a very refined understanding of the psychological consequences of choosing sides. Even more impressive were their strategies for picking balanced teams in a way that was sensitive to other Cubs. To keep a game playable, teams have to be reasonably balanced. Not that boys

do not like to win. But if the score becomes lopsided, the other team loses interest, and the game collapses. Even after the teams are picked, there are various ways to keep the teams balanced. Sometimes the person who scored a goal had to change sides. Another technique was to have the goal scorer sit out for a substitute until the next goal was scored. Still another was to require the team that scored to play even strength, but without a goalkeeper.

Of course, the sixers did not simply invent all these procedures without the guidance of an adult at any point. And, they occasionally had trouble applying them to particular games without an argument. But they showed an adaptability and creativity in organizing activities not always found among adults. As adults, we tend to take a relatively formal approach to ensuring social cooperation. Our reflex is to write down the rules that will guide our conduct (a reflex to legislate), and to set up some specialized bodies for settling arguments (a reflex to adjudicate). As the examples of how these Cubs structured their games suggest, however, there are many options for organizing life in society besides getting Parliament to make laws or the courts to decide disputes.

VOTING AND DELIBERATELY RESORTING TO CHANCE AS ORDERING PROCESSES

Enacting rules, developing customs and practices, adjudicating, mediating, and negotiating are processes by which we create and maintain social order. Sometimes they can lead to unfairness, as when one person seems to have all the power, or when some people are totally excluded from the process. But for the most part, in the playground and elsewhere, people are able to recognize and overcome these potential injustices. We just have to know how each process works, so that we can adjust the way we use it to prevent unfairness.

What the playground experience also shows is that we routinely deploy a wide variety of procedures to make rules and reach decisions. Two of the most common of these techniques are voting and deliberately resorting to chance. Here also we need to think about how the processes actually work, if we are going to avoid an injustice.

Voting works well for most types of group decision-making. It can be formalized, as in political elections; or it can be quite informal, as when a group of people decide, for example, what movie they want to see. Usually, everyone has an equal vote. But not always. Sometimes a vote is weighted according to social or economic factors. Sometimes we create unequal voting rights by requiring proposals to be approved by a concurrent majority of two or more groups. Sometimes a special majority is required, and sometimes a simple plurality is sufficient. However we decide, it is obvious that establishing who is entitled to cast a ballot, with what weight, and according to what rules, is a necessary precondition of a voting process.

Fairness in elections has two components. It begins with the fairness of the substantive decisions about allocating voting rights. It continues with the voting process itself. Elections must be carried out fairly. For example, voters cannot be intimidated; and those standing for election must have reasonable access to means for communicating their message. Ballots must be counted as cast. Rules for deciding the outcome cannot be changed after the ballots have been tallied.

Resorting to chance also depends on people agreeing on a number of basic organizational questions in advance. If the choice is only two-sided – odd or even, heads or tails, for example – they still have to decide who chooses first. If the choice is multi-sided, drawing straws for example, the rules of the draw need to be decided in advance. Normally the precise shape of these procedural rules – drawing straws, choosing random numbers, spinning a pointer – are not that important since everyone is given an equal entitlement. But where there is a weighted draw, fairness requires that the order of choosing must itself be agreed upon in advance. In any case, once the rules are set fairly, chance is a truly impartial system of decision-making.

MULTIPLE FORMS OF LAW

Judging by the importance the topic is afforded in the popular press, one would think the most important (if not the only) form of rule-making in Canada today happens in Parliament. This media preoccupation is reflected in the reflex to demand that Parliament pass a law to deal with every new situation that arises. These attitudes betray a narrow view of law in contemporary society. While people should be concerned with the statutes that legislatures enact and the decisions that courts announce, they ought also to be interested in how these statutes and decisions influence all the other ways in which social life may be structured and coordinated. Do enacted rules and judicial decisions undermine or reinforce other processes for planning affairs or deciding questions? Is it even necessary for legislatures and the courts to act at all in certain areas?

These several different ways of regulating human interaction have a significant place in the legal system today. They help us to make our own rules; and they help us to decide things. All exist independently of the state, and are routinely used in everyday affairs; yet all can be affected by the way in which these models are reflected in official law. Just as there is no easy division of these processes into those that are formal (meaning legislation and adjudication) and

those that are informal (meaning customary practice, contract, mediation, voting, chance), there is also no even division of these processes into those that result from official activity and those that arise from everyday human activity. The key is to understand how all these formal and informal processes work together, and when it is most effective and most just to deploy one or the other in regulating a field of social life.

SUGGESTIONS FOR FURTHER READING

Introduction

The general themes of this part were a life-long preoccupation of Lon Fuller. The posthumous volume edited by Kenneth Winston, The Principles of Social Order: Selected Essays of Lon L. Fuller (Durham: Duke University Press, 1983) assembles Fuller's writings relating to the various forms of social order in contemporary society and the limitations of each of these forms. Fuller analyzed the characteristic features of statutes in detail in The Morality of Law, 2d ed. (New Haven: Yale University Press, 1969) and those of the common law in Anatomy of the Law (New York: Praeger, 1968).

While not specifically directed to what Fuller called the architecture of the social order, four collections of essays by Jean Carbonnier can also be read with profit for their insight into the interaction of formal and informal law. See J. Carbonnier, Droit et passion du droit sous le Ve République (Paris: Flammarion, 1996); Flexible Droit 8th. ed. (Paris: L.G.D.J., 1995); Essais sur les lois, 2d ed. (Paris: Répértoire Dufrénois, 1995); Sociologie juridique (Paris: PUF, 1994).

In the domain of political theory, problems of institutional design in law have been a perennial concern – from Plato and Aristotle through to the present. Aquinas, Montesquieu, and Bentham are particularly insightful on the character of legislation. See generally, G. Postema, Bentham and the Common Law Tradition (Oxford: Clarendon, 1983).

Those who debate whether a society should adopt a constitutional Bill of Rights are also puzzling through an issue of institutional design. See, for contrasting views on this question, M. Mandel, The Charter of Rights and the Legalization of Politics, 2d ed. (Toronto: Thompson Educational Publishing, 1994); and W. Bogart, Courts and Country (Toronto: Oxford University Press, 1995).

Michael Walzer's Spheres of Justice (New York: Basic Books, 1983) explores how different conceptions of justice can be attached to different fields of human interaction. A similar thesis is argued, from a sociological perspective, in B. de Sousa Santos, Towards a New Common Sense: Law, Science and Politics in the Paradigmatic Transition (New York: Routledge, 1995). A recurring theme in law reform circles is how to evaluate the relative merits of different forms of social ordering as vehicles for solving civil disputes. For an application of theories of institutional design to the problem of civil justice reform, see Ontario Law Reform Commission, Study Paper on Prospects for Civil Justice (Toronto: OLRC, 1995).

A recent report by the LAW COMMISSION OF CANADA exemplifies the practical importance of the general themes of this part. In 1998, the LAW COMMISSION was asked to prepare a report on the means for addressing the harm caused by past physical and sexual abuse of children in institutions operated, funded or sponsored by government. It began by examining the present needs of survivors of abuse, their families, and their communities. From these needs it derived a list of procedural and substantive criteria that could be used to evaluate different types of approaches to providing redress to survivors. Some of these criteria spoke to universal themes: openness, fairness, impartiality. Others addressed specific needs of survivors: accountability, acknowledgement, compensation, therapy, prevention.

The approaches assessed by the LAW COMMISSION included criminal trials, civil actions, criminal injuries compensation boards, *ex gratia* payment mechanisms, ombudsman processes, children's advocates' offices, commissions of inquiry, truth commissions, administrative redress and compensation programs, and non-governmental local community initiatives. See RESTORING DIGNITY: RESPONDING TO CHILD ABUSE IN CANADIAN INSTITUTIONS (Ottawa: Supply and Services Canada, 2000). This report is also available at <www.lcc.gc.ca>.

LAW DAY AND CHOCOLATE BUNNIES

The issues raised in this story have important resonance in many arenas of human endeavour. Ever since Aristotle's discussion in Book V of the NICHOMACHEAN ETHICS philosophers have considered questions of "distributive justice." In contemporary political theory, one can usefully compare J. Rawls, A THEORY OF JUSTICE (Cambridge: Bellknap, 1971) with R. Nozick, ANARCHY, STATE AND UTOPIA (New York: Basic Books, 1974).

The preoccupation with the criteria for arriving at a just outcome (or ends) has often obscured the importance of finding a workable process (or means) for achieving that outcome. A rich exploration of the different processes by which social order can be achieved, nurtured, and maintained in situations of potential conflict may be found in W. Witteveen and V. van der Burg, eds., REDISCOVERING FULLER: ESSAYS ON IMPLICIT LAW AND INSTITUTIONAL DESIGN (Amsterdam: Amsterdam University Press, 1999).

Three other helpful sources are H. Hart and A. Sacks, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND ADMINISTRATION OF LAW, ed. W. N. Eskridge and P.P. Frickey (Westbury, NY: Foundation Press, 1994); N. Komesar, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY (Chicago: University of Chicago Press, 1994); and J. Elster, LOCAL JUSTICE: HOW INSTITUTIONS ALLOCATE SCARCE GOODS AND NECESSARY BURDENS (New York: Russell Sage Foundation, 1992).

Questions of how to best distribute finite resources amongst the members of a social order have been addressed throughout the centuries. The biblical stories of King Solomon, and Cain and Abel, as well as the Sermon on the Mount are foundational attempts at broaching this topic. The question also arises in literary settings as diverse as Shakespeare's KING LEAR, Dickens' BLEAK HOUSE, and Swift's A MODEST PROPOSAL. The documentary series SEVEN UP, traces the consequences over time of processes of distribution of societal resources.

For a particularly evocative example of strategies for assigning burdens, involving the drawing of lots to determine who should be put to death in a situation of scarcity, see A.W.B. Simpson, CANNIBALISM AND THE COMMON LAW (Chicago: University of Chicago Press, 1984).

STREET-HOCKEY, SKATEBOARDING AND RESPONSIVE LAW

Ensuring that when legislative and policy decisions are taken, the decisionmaker has as broad an understanding of the competing interests in play as possible is a central concern of Lon Fuller in THE MORALITY OF LAW, 2d ed. (New Haven: Yale University Press, 1969). Fuller explores the conditions under which legislation is likely to attract the fidelity and attachment of citizens to whom it is directed. Recently, scholars have considered a variety of techniques to overcome what has been called a "democratic deficit" in the legislative process. See, for example, J. Mashaw, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (New Haven: Yale University Press, 1997); D. Farber and P. Frickey, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (Chicago: University of Chicago Press, 1991).

Much of the literature on access to justice is as concerned with the legislative and policy processes as with access to courts. See R. Abel, ed. THE POLITICS OF INFORMAL JUSTICE, 2 vols. (New York: Academic Press, 1982); and C. Greenhouse, PRAYING FOR JUSTICE: FAITH, ORDER AND COMMUNITY IN AN AMERICAN TOWN (Ithica: Cornell University Press, 1986). For a general discussion of the procedural requirements appropriate to different law-making forms, see R.A. Macdonald, "A Theory of Procedural Fairness" (1981) 1 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 3.

The merits of litigation as a strategy of empowerment have been widely debated in the United States. Writers on the American civil rights movement broach the topic of the relationship between a defective political process and a propensity to litigate when they argue that those excluded from political power often seek to vindicate their interests in court, using the language of rights. See, for example, P. Williams, THE ALCHEMY OF RACE AND RIGHTS (Cambridge, MA: Harvard University Press, 1991); and compare Mary Ann Glendon, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (New York: Maxwell Macmillan, 1991).

On the general problem of lack of political power and the ineffectiveness of legislation and litigation in the face of such a deficit, see L. Lithwack, BEEN IN THE STORM SO LONG

(New York: Knopf, 1979); and G. Rosenberg, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (Chicago: University of Chicago Press, 1991).

Notwithstanding empirical evidence to the contrary, popular culture still invests enormous significance in the trial as a catharsis for those lacking political power. Movie classics such as INHERIT THE WIND, TO KILL A MOCKINGBIRD, ERIN BROCKOVICH, and THE INSIDER reinforce the idea. Two 1960s television dramas – PERRY MASON, starring Raymond Burr; and THE DEFENDERS, starring E.G. Marshall – provide contrasting perspectives on the role of lawyers. The latter, despite its title, focuses more on the workings of the legislative and other non-judicial processes.

IS LAW ABOUT ISSUING ORDERS OR MAKING RULES?

The study of the different forms of legal rules has long fascinated lawyers and philosophers. St. Thomas Aquinas addressed the legislative art in the SUMMA THEOLOGICA, *prima secundae*. Jeremy Bentham wrote several volumes on the topic, of which the most accessible is AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, ed. H.L.A. Hart and J.H. Burns (Oxford: Oxford University Press, 1996). On the general character of rules see H. Hart and A. Sacks, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND ADMINISTRATION OF LAW, ed. W. N. Eskridge and P.P. Frickey (Westbury, NY: Foundation Press, 1994); F. Shauer, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (Oxford: Clarendon Press, 1991).

Much contemporary legal writing examines the differing forms of legal expression, and the assumptions about human agency that these forms reflect. See W. Witteveen, "Semiotics, Symbolic and Symphonic Law: Communication Through Legislation," in SEMIOTICS AND LEGISLATION, ed. H. van Schooten (Liverpool: Deborah Charles, 1999) at 27; W. Witteveen, "Legislation and the Fixation of Belief," in THE EYES OF JUSTICE, ed. R. Kelveson (New York: Peter Lang, 1994) at 319; Winston, "Legislators and Liberty" (1994) 13 LAW AND PHILOSOPHY 389; G. Postema, "Implicit Law," (1994) 13 LAW AND PHILOSOPHY 361. Assumptions about the capacity of human beings to understand and to follow rules also shape debate about whether it is possible to draft statutes in plain language. See, for example, K. Shriver, DYNAMICS IN DOCUMENT DESIGN: CREATING TEXTS FOR READERS (New York: Wiley, 1997).

Attempts to answer the question of whether rules are inherently facilitative or coercive in nature are often present in popular culture. In stories with inspirational teachers at their centre, the teacher typically reveals an understanding of rules as baselines for creative interaction, while an external force, typically a retrograde school administration, conceives of rules as instruments with which to restrict and check the unruly desires of students (See e.g., the DEAD POETS SOCIETY, and the syndicated television program, HEAD OF THE CLASS).

Although the analogy is inexact, the different approaches to rules set out in the piece can also be seen in Chinese Philosophy. The notion of a rule as a command is associated with Han Fei-Tzu and the Legalist school, while the concept of rules (especially rules of propriety and ritual), as opportunities for the development of relationships, is associated with Confucius. See W.T. Chan, comp. and trans., A SOURCE BOOK IN CHINESE PHILOSOPHY (Princeton, NJ: Princeton University Press, 1963).

IF IT GOES WITHOUT SAYING, DOES IT GO BETTER WHEN YOU SAY IT?

The impact of writing on culture generally is explored in J. Goody, THE LOGIC OF WRITING AND THE ORGANIZATION OF SOCIETY (Cambridge: Cambridge University Press, 1986). The effects of rendering a rule into linguistic form have been analyzed by Joseph Church in LANGUAGE AND THE DISCOVERY OF REALITY: A DEVELOPMENTAL PSYCHOLOGY OF COGNITION (New York : Random House, 1961). See also S. Pinker, WORDS AND RULES: THE INGREDIENTS OF LANGUAGE (new York: Basic Books, 1999).

There is a strong connection between words and justification. See J. Vining, THE AUTHORITATIVE AND THE AUTHORITARIAN (Chicago: University of chicago Press, 1986). The character of legal writing is explored in D. Klinck, THE WORD OF THE LAW: APPROACHES TO LEGAL DISCOURSE (Ottawa: Carleton University Press, 1992); J. B. White has also addressed this issue in ACTS OF HOPE: CREATING AUTHORITY IN LITERATURE, LAW AND POLITICS (Chicago: University of Chicago Press, 1994); HERACLES BOW: ESSAYS ON THE RHETORIC AND POLITICS OF LAW (Madison: University of Wisconsin Press, 1985); WHEN WORDS LOSE THEIR MEANING (Chicago: University of Chicago Press, 1984).

Once a decision has been taken to legislate, the question of the "pitch" of legal rules is the subject of D. Jacoby, "Doit-on légiférer par généralités ou doit-on tout dire?" (1982-83) 13 REVUE DE DROIT DE L'UNIVERSITÉ DE SHERBROOKE 255; see also C. Diver, "The Optimal Precision of Administrative Rules" (1983) 93 YALE LAW JOURNAL 65.

The relationship of everyday law to written texts in the domain of contractual practice is discussed in J.G. Belley, LE CONTRAT ENTRE DROIT, ÉCONOMIE ET SOCIÉTÉ (Cowansville: Éditions Blais, 1998). See also, J. Deprez, "Pratique juridique et pratique sociale dans la genèse et le fonctionnement de la norme juridique" (1997) REVUE DE LA RECHERCHE JURIDIQUE 799.

Of course, the words of a statute or a contract can never completely express normativity. The question of when or whether to put a rule into explicit linguistic form is the subject of Maurice Tancelin, "Les silences du Code civil du Québec" (1994) 39 MCGILL L.J. 747. The normative possibilities of silence are the subject of much religious reflection. Robert Bolt's A MAN FOR ALL SEASONS explores the issue in a Christian context. In

Mahayana Buddhism, the *locus classicus* of this reflection is THE VIMALAKIRTI SUTRA (see the translation by R. Thurman, THE HOLY TEACHING OF VIMALAKIRTI: A MAHAYANA SCRIPTURE (University Park: Pennsylvania State University Press, 1983).

A recurring theme in popular culture is the persistence of unwritten practices and understandings in the face of modernity. Movies such as THE REMAINS OF THE DAY and HOWARDS END, and almost all prime-time television comedy – including classics such as ALL IN THE FAMILY – depend on establishing a sense of location that shapes interaction even in the absence of formalized rules.

HEADS I WIN ...

The literature of political science is replete with studies of voting systems and the impact of different voting systems on participation and outcomes. Condorcet's paradox remains as vivid today as two hundred years ago: see J.C. Condorcet, SUR LES ÉLECTIONS ET D'AUTRES TEXTES (Paris: Fayard, 1986). Hannu Nurmi, VOTING PARADOXES AND HOW TO DEAL WITH THEM (Berlin: Springer, 1999) is an excellent recent review. Recently, legal scholars have also become more interested in voting systems, especially in fields like bankruptcy law, corporate reorganizations and class actions. In LAW AND SOCIAL NORMS (Cambridge: Harvard University Press, 2000), Eric Posner reviews how informal norms can sustain formal voting rules.

Deliberate resort to chance is also widely discussed as a principle of social ordering. See, for example, D. Albert, TIME AND CHANCE (Cambridge: Harvard University Press, 2000); M. Orkin, WHAT ARE THE ODDS? CHANCE IN EVERYDAY LIFE (New York: Freeman, 2000); A. Dershowitz, THE GENESIS OF JUSTICE: TEN STORIES OF BIBLICAL INJUSTICE THAT LED TO THE TEN COMMANDMENTS AND MODERN LAW (New York: Warner, 2000).

The relationship between chance and voting, and especially the significance of the former, where the margin of difference in an election is minute, was made evident in the 2000 US presidential election. For a well-respected analysis of the election that completely misses the point, see R.A. Posner, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (Princeton: Princeton University Press, 2001).

The importance of chance as a device for the distribution of benefits and harms also arises in much religious reflection. Perhaps the starkest presentation of chance's religious significance can be found in Calvin's doctrine of election (COMMENTARIES, Book VII).

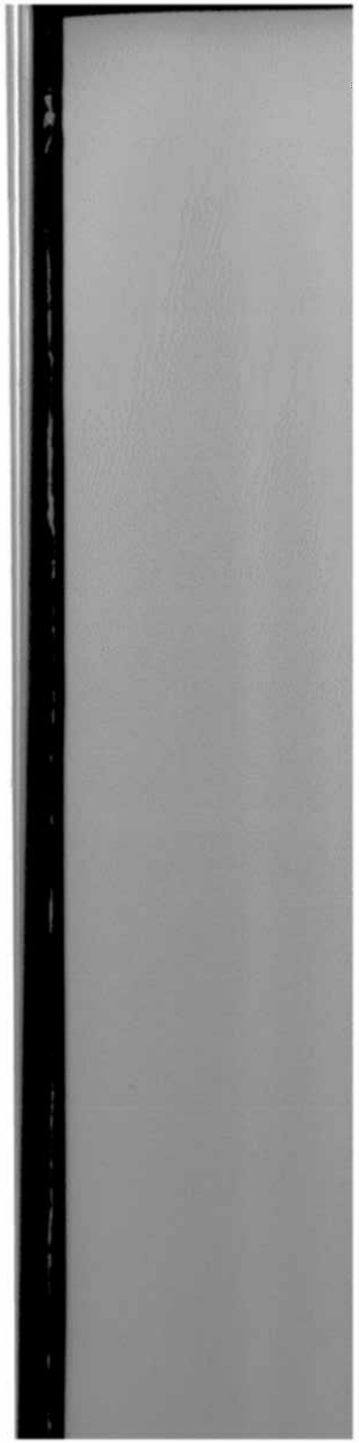
By contrast, much modern law is devoted to attempts to regulate chance. For example, the management of chance is a central concern for both proponents and opponents of new reproductive technologies. Proponents argue that the technologies will permit individuals to minimize risks of harm that flow from genetic diseases that are detectable

before birth, while opponents contend that often what is conceived of as "harmful" (i.e., a physical "disability") is a social construction, rather than an objective fact. For the former, judicious use of technological capacities reduces the negative effects of "chance," while for the latter, extensive recourse to these capacities detracts from the potential positive value that accrues from "chance" allocations of certain genetic traits, and distracts attention from the social imbalances that result in conceiving a "disability" as harmful. For a discussion of these issues, see E. Parens and A. Asch, PRENATAL TESTING AND DISABILITY RIGHTS (Washington, DC: Georgetown University Press, 2000).

A common theme in contemporary literature involves the chance discovery of wealth, and the attempts of families and communities to deal with their good fortune. Michel Tremblay's LES BELLES SOEURS is a classic. In the same genre are the movies WAKING NED DEVINE, SHALLOW GRAVE and A SIMPLE PLAN.

PART TWO

RULES



INTRODUCTION

Rules are a central feature of modern law: rules that command; rules that regulate social life around us; rules that coordinate behaviour; rules that establish institutions through which we can pursue individual and group projects; rules that provide a conceptual framework to organize our various relationships with others.

Today, most of these rules governing human conduct remain unwritten. But many are not. Written rules and official regulations seem now to have a much larger place in the law than in previous centuries. Yet, as in other matters, familiarity breeds contempt. It is easy to take the processes by which rules are discovered or made, for granted, forgetting just how complex the endeavours are.

Explicit rule-making – the deliberate enactment of rules – has become an art form. Whether at home, on the job, in a social club, or in society generally, we are pressed to discover the best ways to state law through written rules. So too is Parliament. Because human beings do not like to "re-invent the wheel" continuously, they look for precedents. These they often find in current practices. Where rules are meant to restate a practice, the practices must first be recognized and described. Only then can a written rule be generated. Where rules are meant to change a practice, or to frame what appears to be a new idea, it is always easier to make modest adjustments that preserve past insights and past understandings than it is to begin completely afresh.

Of course, rules are not physical objects. They are guidelines for human action. Once made, they need to be continually monitored and interpreted. Rule-makers confront three main challenges in the ongoing process of assessing their handiwork. Sometimes, a rule simply does not accomplish in practice

what it has been designed to do. Sometimes, circumstances change so much over time that a rule is no longer effective. And sometimes, rule-makers discover that the narrow issue they thought they could solve by a small legislative change, is actually a reflection of a much larger social problem crying out for attention.

How legal rule-makers come to recognize and deal with these challenges are the subjects of the four stories in this part. Every rule that begins to show its age requires them to ask how much legal change is really necessary in order to modernize it, or bring it up-to-date. Every rule that does not exactly match the policy objective meant to be pursued challenges them to decide whether to prefer formal or functional concepts as a way of realigning policy and text. Whenever the assumptions that shape the way a problem is conceived in law are overtaken by social change rule-makers have to consider whether it may be best to rebuild an entire conceptual structure from the ground up. Finally, since every adjustment to a rule need not be direct, they continually must decide when it is better to change a rule tacitly, by interpretation, rather than explicitly, by enacting a new rule.

SOMETIMES IT'S BETTER JUST TO FIX THE DOCK

Legal rules, especially written legal rules, are meant to have a degree of stability. When a lawmaker takes the trouble to reduce a rule to writing, there is usually a presumption that it will have a longer life than a customary or unwritten rule. If written rules change constantly, they lose their capacity to guide behaviour. People will not be able to keep up with all the changes, let alone be able to adjust their conduct in consequence. But rules also cannot be permanent. New technology can affect practices; so rules about privacy of telephone conversations need to be adapted for Internet communications. Attitudes and values also evolve; we no longer set the voting age at 21.

Social change usually breeds legal change. A key challenge for lawmakers is to decide how much legal change is required when legal rules, legal concepts and legal institutions become outdated or inefficient. Sometimes it may seem that a concept or a rule needs to be abandoned and replaced; other times it appears sufficient just to tinker with it. There is no easy way to decide whether total replacement, major renovations or simple repairs are in order short of asking, in each case, how many of the key social assumptions upon which the rule rests still hold. Even then, the benefit expected may not be sufficient to justify the disruptions caused by replacement or extensive renovation.

Each summer for the past 20 years I have spent a week vacationing at a cottage built by my grandfather and now owned by my sister, my brother, and myself. In the spring we have the pleasure of surveying the latest episode in the long-running and unequal struggle between the forces of nature – the power of ice at break-up – and our capacity to imagine new and better ways of reinforcing and anchoring our docks. Each summer vacation, as I set about repairing the winter's damage, I cannot help thinking about whether to rebuild the docks from the ground up, and if so, how to best do it.

My sister, who lives in the city, usually wants to rip things out and start afresh. My brother, who lives not far from the cottage in a rural setting, typically suggests doing the minimum amount of repair necessary to make the docks serviceable for the summer. I, who wind up actually doing much of the work, alternate perspectives depending on how much energy I have during

my vacation. Sometimes I take the docks apart down to their foundations; sometimes I just level up the deck and replace broken planking.

This year's experience was especially humbling. Last year, my sister carried the day with a plea to rebuild one particular dock from scratch. And so we did, unloading several tons of rock, digging several cubic feet of sand and entirely rebuilding the cribbing from the bottom up. When we finished the job I was convinced that we had finally "solved" the problem. Indeed, the new dock survived the winter magnificently. But a small ramp for putting boats into the water that was attached to it was crushed by the ice flows deflected from the new dock. Worse, another dock, which for 50 years had been anchored behind two huge boulders, was heaved up because ice moved the boulders. A different and completely unanticipated pattern of spring break-up seemed to mock our efforts.

FIXING DOCKS AND FIXING LAW

As I surveyed the damage to the docks my thoughts turned to my work as a law-reformer. When the Law Commission of Canada first developed a strategic agenda and began to elaborate upon how we should select our specific research projects, we undertook a reflective exercise not unlike the annual family discussions about dock-building and dock repair.

Upon examining a statute, or a legal rule reflected in a judicial decision, or a series of contractual and customary practices, law-reformers can often see small problems that need to be adjusted. The rule may be too narrow. It may be overly broad. It may rest on outdated assumptions about social life. It may not be capable of covering modern technological devices. And so on. A first reaction of the law-reformer is, of course, to fix the small problem. Do not enquire about basic principles, about the bigger picture, or even about the forces that are driving the need for change. Just, in other words, "fix the dock."

For a short period, just fixing the dock can be a workable approach. As the ice breaks certain dock planks, you simply replace them. However, after a few years, even if the surface of the dock looks completely new, the underlying foundation will have been weakened. Indeed, the supporting cribbing may be collapsing, so that all of a sudden it falls apart. Then it becomes necessary to rebuild the entire dock.

Rebuilding from the ground up is, however, not always easy, nor even always successful. When one takes a weak structure and rebuilds it more solidly in more or less the same place, the pressures that led to its collapse are usually just transferred elsewhere. If the new dock itself will not budge under the strain of the ice, the boat-ramp attached to it most certainly will.

So, thinking through dock repair also requires thinking through where the ice is going to move next. It also requires worrying about whether the dock is placed in the right position in the first place. And it compels one to ask whether the current design of the dock is appropriate. Is the cost and difficulty of reinforcing the cribbed dock worth the energy when it could be replaced by a lightweight dock that can be lifted out of the water each winter? After all, sometimes even a well-designed and well-grounded dock can crumble when the forces pushing against the bedrock foundation are just too strong. It is usually at moments like these that frustrated cottagers begin to question whether it is even necessary to have a dock at all.

REBUILDING DOCKS AND REFORMING LAW

The analogy between rebuilding docks and reforming law is very close. One may well be able to solve a little problem in one corner of the law with a legislative amendment that has the effect of displacing the problem elsewhere. This is the everyday business of policy development within government. But it is not clear that it requires an independent agency like a law reform commission to undertake this kind of task.

On other occasions it may be necessary to rebuild or even reconsider the foundations of a regulatory regime. Here is where the tough stuff of law reform occurs. For here it is necessary to ask whether an improved statute (a better permanent dock), or a new statute (a replaceable dock), or perhaps no statute (getting rid of the dock) is required. In these cases one seeks to understand the forces of social change (the character of ice flows) and to direct them, where possible, in a manner that dissipates and channels them productively (that preserves the dock and transfers the stress harmlessly).

The business of meaningful law reform is all about this kind of creative inquiry. It is about how we have designed and built the law to date, and about what options we have for meeting the dilemmas and challenges of social change. Sometimes it may be better for a lawmaker to just "fix the dock." More often, however, reconceiving and redesigning the dock, or even getting rid of the dock altogether are likely to be the appropriate response. To know when these different responses are desirable or possible is one of the central challenges of law reform.

RULES, REPAIR AND RENOVATION

Focusing law reform efforts on those places where the pressures of social change can be channelled into legal responses that involve more than just repairing

the docks at first glance seems to be a fruitful use of resources. After all, the instinct of the law-reformer is to act. If there has been social change, necessarily there must be an explicit legal response. Lawmakers face a similar temptation. If the law is not working, it should be fixed.

Sometimes, however, social change does not demand legal change. Life just goes on, and the law becomes increasingly ineffective. In many of these cases courts assume the burden of law reform. At a cottage, there are times when one just gives up the struggle against the ice. Over the years one invests less and less time in resisting the irresistible until finally one arrives in the spring to find the dock washed away. The struggle and eventual failure of the Parliament of Canada to deploy the criminal law to regulate therapeutic abortions is a reflection of this kind of resignation.

There are also times when legislative law reform is not required because a field of legal regulation has become irrelevant. At the cottage, the use of the lake may change. A sailboat dock in addition to a swimming dock may just not be needed anymore. No one much cares if the sailboat dock falls apart, unless it poses a safety hazard. Reforming the law requiring tavern-owners to provide hitching posts for their customers' horses hardly merits legislative attention.

Lawmakers constantly confront choices about how to proceed. They should never lose sight of the choice between renovation, replacement or simple repair when contemplating law reform. They should always assess whether the benefit expected from the chosen strategy justifies the costs incurred. And just as importantly, they should never forget the option of doing nothing.

50TH ANNIVERSARIES AND FAMILIES

Law in modern society fulfils many purposes. Two of its most prominent roles are these: to announce principles for the effective organization of social life that take account of actual patterns of human interaction; and to state the central values and moral principles that are thought to be at the foundation of social life. In a homogeneous society these two roles rarely come into conflict. The more diverse a society, however, the more there will be genuine debate about foundational values and principles. And the more diverse a society, the more there is likely to be a lack of congruence between legal rules drawn from traditional social and religious practices and the emerging legal needs of the general public.

Lawmakers usually try to accommodate incrementally any lack of congruence caused by increased social diversity. The scope of traditional rules and concepts is gradually expanded. Because most rules and concepts are not explicitly framed by reference to the policy goals being pursued, incremental law reform normally does not challenge lawmakers to consider whether purpose-defined concepts might be more appropriate in socially diverse societies. But as the range of incremental extensions widens, what initially may have looked like a narrow issue reveals itself as a reflection of a much broader problem of legal definition. In no field of law is this more apparent than that dealing with personal relationships between adults.

Earlier this year my family and I travelled to British Columbia to celebrate the fiftieth wedding anniversary of my wife's parents. The high point of our visit was a party attended by about 60 friends and relatives, and their various children. As I circulated among the guests I was struck by a couple of things. Most in attendance were then, or had recently been, involved in a stable domestic relationship. But only a small minority was actually married at that moment.

There were an elderly brother and sister (a widower and widow) who had been sharing an apartment for five years. There were two sisters who had never married and who had lived in the same house for over 40 years. There were two air force friends of my father-in-law (one widowed, one divorced) who also were sharing an apartment. There were three unmarried couples in their forties and fifties who had each been living together for more than a decade after their respective divorces. There were single fathers and single mothers trying to re-establish a relationship with a new partner. There were

never-married guests currently living alone who had in the past been involved in a long-term relationship. And there was one same-sex couple. The obvious diversity of these domestic situations caused me to realize just how few long-married, never-divorced couples such as my wife's parents there really were, and just how many other forms of a stable domestic relationship now exist.

This got me thinking about how the law currently addresses issues concerning close "personal relationships" between adults. It also reminded me just how difficult the development and implementation of social policy to deal with these kinds of issues really is. Traditional concepts like marriage and filiation (notably, the relationship between parent and child) just do not seem adequate any more.

CLOSE PERSONAL RELATIONSHIPS BETWEEN ADULTS

Currently, Canadian law does not take a consistent approach to matters of marriage, support obligations, and filiation. We know that human beings are, for the most part, social beings who enjoy the company of, and seek stable relationships with, others. Studies indicate that most human beings live healthier, longer, happier and more productive lives when they are involved in such relationships. Indeed, when these human relationships are not possible, the emotional attachment is often transferred to a beloved pet.

Might this not suggest that, as a matter of public policy, we should be trying to encourage the formation and continuance of stable, adult relationships? And might it not also suggest that we should be enacting legislation that affords to people in such relationships a degree of emotional security, physical security, psychological security, and economic security?

Today, the law actually aims in this direction. But it targets the beneficiaries of these laudable public policies only indirectly. For the most part, we have pursued the goal of promoting stable, mature, nurturing, adult relationships by focusing legislation on those who are married. The bulk of our current social programs are inapplicable to many unmarried couples and to people in most other adult relationships. So the issue now confronting governments is whether policies that currently support the emotional, physical, psychological and economic security of married couples should be redesigned so as to reach as many Canadians as possible.

This means asking whether the goal of these policies is to promote marriage or to support stable relationships of interdependence. Should the two sisters who have always lived with each other be able to designate each other as RRSP beneficiaries? Or should the two elderly air force buddies who move in together be able to share in dental or other contributory plans? Or should

the widowed brother and sister who seek to re-establish a household be entitled to file a joint income-tax return?

Suppose for a moment that we were to conclude that the real goal should be to promote and support stable, adult relationships. How could our statutes be redesigned so as to produce a closer coherence between our desired policy and the legal rules we enact? How might we re-write legislation that has become both under-inclusive and over-inclusive?

TWO MODELS FOR REDRAFTING STATUTES

In law, there are normally two ways of redrafting legislation that in practice is incongruent with the policy objective being pursued. It is possible to extend the existing definition of a concept by analogy or by an overt statutory fiction. Adoption is an example of the former: an adopted child is placed in the same legal position as a biological child. An example of the latter can be seen in the idea of considering corporations to be legal "persons" with the same rights as human beings in most cases.

Both in the case of adoption and in the case of extending the concept of "persons," the legislature is making a policy choice about the scope of a legal concept. It determines that a situation not obviously falling within an historical definition should, nonetheless, be treated from then on as if it did. Notice that in both cases, but especially in the second, the extension of the concept really distorts some of the root ideas associated with the initial concept: how do ideas like freedom of religion, or freedom of willing apply to corporations?

Insofar as implementing a generalized public policy of promoting and nurturing the stable, adult relationships of interdependence is concerned, a legislature could, following these approaches, adopt one of two definitional techniques. It could provide that people in all these other types of relationships -- widowed brother and sister; elderly sisters; old air force buddies; and so on -- should be treated in the same way as a married couple. The new statute would have to read something like: "In this Act, a person who lives in a relationship A or B or C, shall be entitled to do X or Y or Z in the same manner and with the same effect as a person who is lawfully married."

A legislature might also simply redefine "marriage" so that these relationships would fall within the new definition. Rather than drafting a series of legislative amendments to individual statutes, it would take their existing conceptual organization and simply redefine the key concept. The new statute might, for example, state: "The term 'spouse' means persons who live in a relationship A or B or C." Both, in some measure, require the legislature to modify the concept of marriage.

Alternatively, it is possible to redraft a statute in a manner that simply abandons an existing concept as the reference point for a policy and focuses rather on the substance of the desired policy objective. The law would identify criteria of inclusion and exclusion that relate to the facts of a human situation or to the purposes that people are pursuing, rather than to the formal categorization of that situation. In some areas of commercial law, for example, we have given up extending old concepts like mortgages to new situations, and have chosen to invent a brand new concept called "a security interest" that is defined by reference to the substance of the commercial transaction at issue.

Again, in so far as implementing a generalized public policy of promoting and nurturing stable, adult relationships a legislature could, following this approach, rewrite various laws relating to pensions, tax, insurance, or whatever, so that the criterion for eligibility would relate to substantive facts about a relationship – its length and character – rather than to the marital status of the persons in it.

DEFINING LEGAL CONCEPTS

Because legal concepts do not automatically line up with material things in the world, alternative means for fixing their scope have to be found. That is, in order to include and exclude certain social facts or legal relationships from any given concept, new criteria for defining the concept need to be announced. Over a large range of legal fields, concepts originally extracted from everyday experience have been extended through relatively benign fictions. Especially where the initial referent of the concept was a material thing, the policy object being pursued did not usually cause people to question the technique that the legislature chose to pursue it.

Where, however, a legal concept has no material reflection but is defined by its presumed "essential characteristics," these extensions by analogy can sometimes be highly controversial. Where, in addition, a legal concept is grounded in socio-cultural reference points such as custom, tradition, religion, morality or ideology, these extensions can cause significant debate. This is particularly the case when they are fictitiously extended by the law well beyond the definitional limits provided by socio-cultural reference points.

Today, there is probably no better example of a legal and socio-cultural concept under this kind of stress than the concept of marriage. Understanding the reasons why marriage has become such a contested legal concept gives us a good insight into the issues that policymakers and lawmakers have to confront every day in redrafting legislation that makes reference to socio-cultural

concepts. Thinking through what public policies we wish to pursue as a society, given the evident plurality of stable, adult relationships that cry out for some response, and then assessing different means for achieving this desired result by legislation is, obviously, a delicate and difficult task. But the happy occasion of the fiftieth wedding anniversary of my in-laws gave me first-hand exposure to why these questions need to be asked and why they are important in a very concrete way to Canadians.

MEASURE FOR MEASURE

Many of law's rules set out or refer to general concepts that allow us to organize our relationships with others. In one sense, these general legal concepts work like systems of measurement. They provide a grid against which our relationships can be "measured," organized, and compared. In law, as in life, two types of measurement systems are common. In one, everyday experience is used to frame how relationships are characterized and assessed. In the other, experts deduce a framework of abstract principles to organize and characterize relationships. How do lawmakers know when to stick with experience-based concepts, and when it is better to reorient the logic of legal concepts by reference to general abstract criteria?

Since all concepts are a product of their time and place, lawmakers face the competing claims of experience and logic whenever a new social context arises. Part of the challenge is to decide whether adopting new abstract concepts not grounded in everyday experience will distance the law from the very people to whom it is addressed. Another part of the challenge is to evaluate when redesigning a legal structure from the ground up can be effective in overcoming the hidden prejudices and harmful consequences of existing legal rules based on experience. As in all cases where a change in measurement systems is being contemplated, the most important lesson is that neither sticking with experience, nor reinventing the wheel, will always be the right response.

One afternoon last winter I was skiing with my children on a particularly cold and windy day. As we rode the ski lift, I remarked to my son that the temperature was probably near zero. He answered, "Dad, it's got to be at least minus 25." Of course he was right. But so was I. He was calculating in centigrade and I was using the Fahrenheit scale.

This got me to thinking about ways in which we measure things. Sizing up the world must have been a central survival skill for human beings. Most early types of measurement appear to have been based on experience and need. For example, to measure time we know that people used days, moons, years; to measure distance they used thumbs, forearms, paces; later, to measure volume they used teaspoons, cups, bushels, and barrels. None of these three measurement systems – time, space, volume – were linked together.

But 200 years ago in Europe, the French revolutionaries had what they thought was a better idea. They would standardize all measurements, including

temperature and time, using multiples of ten (for example, centimetres, metres, kilometres). Then they would integrate into a common system the various measures of distance, volume, and weight (for example, a cubic centimetre is a millilitre, and a millilitre of water weighs one gram).

The difference between the way my son and I described temperatures led me to reflect upon the consequences of the fact that there is no absolute standard for deciding how best to measure things. Traditionally, systems of measuring have been developed largely on the basis of convenience. Do they serve our purposes? In this sense, measuring is a lot like using a language. It is one way of examining the world around us, of organizing the way we communicate about what we see, and of explaining relationships between things.

This is exactly what law does. Law "measures" human relationships. Every legal concept or idea defines something or someone, and structures relationships between people, and between people and things. For example, when the law says that all human beings are persons, it is also saying at the same time that they cannot be property. This means that human beings may not be slaves.

Does law have anything to learn from the process of standardizing and integrating measurements? Is it possible or desirable to undertake something like a conversion to the "metric system" in law?

EXPERIENCE AND LOGIC IN MEASUREMENT AND LAW

Like most countries today, Canada uses the metric system. Only people over 50 who spent hours in school memorizing units like rods, chains, pecks, gills, grains, and stones, would know or care that four rods make a chain, and that 14 pounds make a stone. Even the most common of these old English measurements – ounces, pounds, quarts, gallons, inches, feet, and miles – are largely unknown to children today. They survive only in expressions like "a miss is as good as a mile," or "that's as heavy as a ton of bricks," or a "ten-gallon hat."

These now-forgotten old English measures were usually developed to meet the needs of certain groups. Whether it was carpenters, brewers of beer, bakers or shipowners, the rationale for each was located in commercial or artisanal activity – in local knowledge serving local needs. Law also has now-forgotten concepts based on local need and experience. Today, few lawyers remember what a "fee-tail" or a "tenancy by the entireties" means in the common law; and few lawyers are familiar with concepts like "civil death" and "proof by solemn oath" in the civil law.

The eighteenth century idea of standardizing units of measurement on a base-ten system came from a core belief of the enlightenment: systematized

rational knowledge was better than experiential knowledge; so "rational, scientific" systems of measurement were better than the pragmatic measurements of everyday life. But, in standardizing and integrating measurements on a base-ten system, many useful intermediate units of measurement disappeared. These intermediate measures, for example, feet, or pounds, or gallons, were often important in practice because of the relationships that they described.

For example, a tavern keeper's primary measuring tasks related to pints and extended downwards to glasses and upwards to quarts and barrels. Smaller or larger measurements did not matter; nor did the fact that these units of volume were not multiples of ten; nor did it matter that liquid measures and weights were not easily transposed. Once the goal became to standardize measurements, however, the practical usefulness of units of measurement had to give way to the "rational elegance" of a logical system. In some ways we might say that the needs of local users were sacrificed to the convenience of larger manufacturers.

A similar desire for rationality exists in law. Local practice and the experience of users are being devalued. Abstract general legal categories and concepts based more on the needs of lawyers and judges are taking hold. A good example can be found in commercial law. Buyers and sellers know that there is a practical difference between borrowing money from a bank to purchase a car, and buying the car on credit from the seller. Today our legal system does not care. Whether the agreement is a "chattel mortgage" from a bank or a "conditional sale" from a seller, in the modern legal world, it is called a "security interest."

RECALCITRANT MEASURES

Rationality in measurement has not, however, been fully achieved. Some exceptions continue. The French revolutionaries were not able to impose their base-ten system on time. We still use a system of 12-month years, 7-day weeks, and 24-hour days of 60 minutes and 60 seconds, rather than a system of 100-minute hours, 10-hour days, 10-day weeks, and 10-month years.

Even within metric systems, needs and experience still matter. Not all metric measurement units are equally popular. Some – like decimetres, hectometres, decalitres, and hectograms – are rarely encountered, while others are used even in their multiples of ten – in the Olympics we talk of a 100-metre race rather than a one-hectometre race.

Here is another example. In some recently converted metric countries, practice has retained traditional units expressed in metric terms. We buy 454 grams rather than 500 grams of butter because 454 grams is one pound. Even

in long-time metric countries certain non-standard measures hold sway over other official units. The French normally bottle wine in 75 *cl* (or 750 *ml*) bottles and not in 1 *l* bottles.

The choice and shape of measurement systems depend on a whole series of factors such as human physiology, theology, economics, inertia in manufacturing processes, and politics. It is easy to see even today that the idea of a base-ten counting system comes from the number of our fingers and thumbs and that seven-day weeks are connected to Judeo-Christian teaching about the time it took God to create the world. It is not as obvious, although just as true, that the development of the metric system was less about measurement than it was about the belief in a perfect human rationality that dominated in revolutionary France.

From the perspective of the non-professional public, experience-based measurement systems will always be preferred as a way of understanding the world. From the perspective of the scientist or the engineer, a metric measurement system will always be preferred because it ties units of measurement and their interconnections to an easy-to-calculate, base-ten scale. In the same way, from the perspective of the non-professional public, legal concepts based on experience will always make more sense than concepts developed and promoted as logical abstractions by lawyers and judges.

EXPERIENCE AND LOGIC IN HOW LAW "MEASURES"

The creation and imposition of the metric system is an example of the triumph of science over experience. Today most people have come to accept and use it. But this has little to do with whether they think it is superior as a measurement system. It just does not matter that much what system is used, once one learns the new system. In the end, as my son and I discovered, minus 25° C and 0° F refer to the same thing: it's darn cold!

What about law? Is the choice of one "measurement" concept over another really as trivial as the choice between centigrade and Fahrenheit scales? We are constantly being told by professionals that their ideas about what counts, and how things work together are the only ones that should be adopted. Yet we know that our own ideas are often just as sensible. The law may tell us that the rules relating to the sale of land and the sale of automobiles should be the same. Our experience tells us otherwise. The law may tell us that a contract between two corporations is the same as a contract between two consumers. Again, our experience contradicts this.

A fundamental challenge for modern lawmakers is to know when we should retain experience-based concepts, and when it is helpful (and safe) to

reorient our concepts by reference to general abstract concepts that do not refer to or rely on everyday experience. This is especially important where we attempt to apply an existing concept to an entirely new situation. But lawmakers also have to know when adopting new concepts is the best way to overcome harmful consequences and hidden prejudices of existing experience-based legal rules. Neither experience nor logic will always give the most appropriate answer to the lawmaker's question.

LEGAL FICTIONS – THE LAW'S "LITTLE WHITE LIES"

Most people live their lives with a relatively close grip on reality. When asked to explain themselves or to describe a particular event or occurrence, they can usually do so in a manner that makes sense to those around them. Their grammar is coherent and the words they use generally fit the facts. A vicious attack is not typically described as a "love tap." In most cases law works like this as well. It describes the events of everyday life in a way that people recognize, and characterizes them using terms that people understand. But not always. Sometimes legal terms and legal concepts seem out of place. On occasion, the law uses a strange vocabulary. And in a few cases it uses a familiar vocabulary in a strange way.

Strange uses tend to result from the law trying to deal with a new or unforeseen situation. This is a common human reaction. People often deal with novel circumstances or with change that is happening too fast by telling themselves "little white lies." These fictions are usually benign, especially where the deception is acknowledged by everyone. Spouses who send each other presents labelled "From Santa Claus" do not aim to deceive each other. Where a legal concept or the words of a statute fall out of step with social life, law also invents fictions to bridge the gap till the legislature can act. These "little white lies" enable the law to maintain current structures of thinking, while nonetheless adapting itself to changed circumstances.

As a young boy of 11, one of my favourite summer camp activities was canoeing. Of course, at five feet tall and one hundred pounds I did not always find it easy to manage a 16-foot-long wooden canoe when the water got choppy. Part of the idea of taking canoeing lessons at camp was to learn different paddle strokes so as to be able to cope with all kinds of conditions. An early lesson was that if you get blown off-course by a head-on gust, you should use what was called a "C-stroke" to pull the bow of the canoe around straight again.

Once, during a blustery day I got blown all the way to the end of the bay. No matter how hard I tried, I could not get the canoe pointed upwind. The C-stroke was not working. I kept getting turned around backwards. Finally, the canoe instructor paddled out to get me. Instead of offering me a tow back to the dock he said this: "Just paddle hard straight forward. When you get off centre, do a 'front sweep' stroke to spin the canoe completely around.

Then, just before you get pointed directly upwind, start over again paddling hard straight forward."

I followed his advice. I took five strong forward strokes, veering left. Then I did a front sweep to make a complete circle. Then another five strokes forward, again veering left. Then another front sweep and another complete circle. Before too long I had looped my way like this back to the dock. With great relief, I put the canoe away. Afterwards I remember telling the instructor that his advice about the front sweep was not bad – it had worked, sort of – but that it was wrong. After all, I pointed out, he had just finished teaching us to use a C-stroke to keep a canoe going straight when paddling into a breeze. He laughed and said: "Oh, don't worry about that. Let's just call this technique the 'windy-weather' C-stroke."

About five years later I came across a similar situation in a story by Mark Twain. Tom Sawyer and Huckleberry Finn had decided to go digging for buried treasure. Tom was using his jack-knife while Huck was leaning on a nearby shovel. Huck asked Tom: "Don't you want this shovel?" Tom replied: "No. The book I read about digging for buried treasure says that you are supposed to use a jack-knife." After about 15 minutes of going nowhere, Tom turned to Huck and said: "Pass me the jack-knife you are leaning on."

Just like me during canoe class, Tom had discovered one of life's key lessons. Things do not always work out the way the books say they should. When this happens, sometimes it is easier just to pretend that they do by means of a fiction than it is to rewrite the book. Such an approach is often true of the law: rather than directly reforming the law by legislation, fictions are sometimes used by courts to informally amend rules that are not working any more.

WHY DO WE USE FICTIONS IN LAW?

Unlike the unwritten law of old, law today is very much about using enacted words to express legal rules. Enacted statutes are like "how to canoe" manuals and "how to dig for buried treasure" books. Our laws, regulations and court judgements provide us a description of how the world should work. They also announce the consequences that will follow from certain of our actions. Words have a magical capacity to make us think that we can control the unpredictable events of our daily lives simply by giving them a name.

The problem legislatures face, however, is that written rules cannot be made to cover every type of case that may come up in the future. Sometimes, they confront an entirely new problem: a law about vehicles and highways passed in the early nineteenth century would not have been intended to cover motorized automobiles. Sometimes, an old situation presents itself in a novel

form: it is not obvious that a nineteenth century law about defaming someone in letter or in print will cover electronic mail. Sometimes, the facts do not change but society comes to a better understanding of what the law should be doing: we now see that nineteenth-century laws that did not give married women the same right to own property as married men are inappropriate.

There are many ways to deal with these different situations. If a legislature has the time and energy, it can enact a new statute. If courts have the chance, they can make a ruling based on "equity and fairness" to cover the new case. Both of these reform options compel legal officials to be relatively explicit about what they are doing.

Legal fictions serve an intermediary step. Sometimes legislatures are not ready to decide an issue that they feel is too divisive. Sometimes, but much less frequently since they have been given the constitutional power to override statutes, courts are reluctant to give a fresh interpretation to legislation that has become controversial. Fictions let both accomplish their goals without disrupting settled patterns of thinking. Of course, a true fiction exists only when everyone who is a party to it knows that it is a fiction.

Here is an example, known in law as a "putative marriage." A couple whose marriage is declared void because they did not know at the time of the ceremony that they were close relatives, are still entitled to claim some of the legal benefits of being married. While legislatures could amend statutes to specifically set out post-marriage entitlements in these cases, usually they have not done so. Rather, they have used the fiction of a putative marriage (an "as if" marriage) to achieve the desired outcome.

Fictions in law create the following paradox. The more rules of law are explicitly written down in legislation – that is, the more we deal with the need to keep law up to date by using statutes rather than fictions – the more we find ourselves, over time, needing to tell other "little white lies" to deal with situations not covered by our "new and better" rules.

WHEN DO FICTIONS STOP BEING USEFUL?

This does not mean that fictions are always benign and that we should not be concerned with them. There comes a time when they outlive their usefulness. When enough canoeists gain experience about paddling into the wind and new techniques for handling rough weather are developed, the "windy weather" C-stroke will no longer be needed. A new stroke with a new name will be invented. And when this happens, it is often difficult to know whether we have actually "invented" a new stroke, or simply renamed the stroke with a label that does not reveal its fictitious origins.

In law, there are normally two kinds of cases where a lawmaker chooses to override a well-established fiction. Either public opinion has shifted so that a situation that previously could be dealt with only indirectly, can be explicitly treated. Or a lawmaker feels that it has enough evidence and understanding of a new situation that it can legislate directly to deal with that situation.

But these are not the only ways that legal fictions seem to disappear. Many lose their fictitious character when we forget that they are, in fact, fictions. One of the most important current examples is the business corporation. The law now generally treats corporations as if they were just the same as real people, and it gives them most of the same contractual and property rights. How many of us actually stop to notice either that this fiction – the corporation as person – is a fiction? More than this, how many of us realize that it is a legal fiction that could be changed easily if we wanted to abandon it?

Today, some of the most difficult issues in law reform arise because we have forgotten that our fictions are just that. We have come to take them as true, even when they cause us great difficulty. Tom Sawyer calling a shovel a "pen-knife" to help him dig a hole is a harmless fiction. If, however, his aim is to cut through a rope that is strangling someone, then reaching for a shovel because one thinks of it as a pen-knife fiction can be both unproductive and dangerous.

One of the most important tasks for law reform is to uncover situations where the law is now muddling through with fictions. Once these are brought to light, we must then ask whether the assumptions that sustained the original rules and their fictitious extensions are still valid. Where they are not, we should not be afraid to say so. It is, of course, impossible to abolish legal fictions; social life does not stand still. But by gaining a better understanding of how they work in specific cases, we will be better able to judge when it is time to replace a fiction with a legislative amendment or a new judicial interpretation.

SUGGESTIONS FOR FURTHER READING

Introduction

Much contemporary legal and social theory is devoted to explaining the differences between rules and norms, and the different kinds of rules. Standard sources include H.L.A. Hart, The Concept of Law, 2d ed. (Oxford: Clarendon, 1994); F. Schauer, Playing By the Rules: A Philosophical Examination of Rule-Based Decision Making in Law and Life (Oxford: Clarendon, 1991); and R. Dworkin, A Matter of Principle (Cambridge: Harvard University Press, 1985). In social theory, see J. Shklar, Legalism: Law, Morals and Political Trials (Cambridge: Cambridge University Press, 1983); and G.H. Von Wright, Norm and Action: A Logical Inquiry (New York: Humanities Press, 1963). Unfortunately, this literature is largely inaccessible to readers who are neither lawyers nor philosophers. On the other hand, S. Levinson, "The Adultery Clause of the Ten Commandments" (1985) 58 Southern California Law Review 719 is a highly readable analysis of the Ten Commandments as legal rules.

Written rules are not, of course, an inevitable feature of social life. For a discussion of the advantages and disadvantages of deciding to have a rule, see H.M. Hart and A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law (White Plains: The Foundation Press, 1994); and W. Eskridge, Legislation: Statutes and the Creation of Public Policy, 3d ed. (St. Paul: West Publishing, 2001). One of the best discussions of the forms and function of unwritten law is L. Fuller, "Human Interaction and the Law" (1969) 1 American Journal of Jurisprudence 3.

For the past two centuries there has been an increasing tendency to express law in legislation. The great European codification movements of the nineteenth century also had their reflection in North America. See the historical reviews in A.-J. Arnaud, Les origines doctrinales du code civil français (Paris: L.G.D.J., 1969); and in C.M. Cook, The American Codification Movement: A Study of Ante-Bellum Legal Reform (Greenwood: Westport Press, 1981).

The energy devoted to harmonizing law through international conventions and through various Uniform Law Movements is a contemporary reflection of the same goal. For an overview and critique, see M. Boodman, "The Myth of Harmonization of Laws" (1991) 85 American Journal of Comparative Law 699. In Canada the co-existence of common law and civil law systems, and the requirement of bilingualism create special difficulties: see The Harmonization of Federal Law with Quebec Civil Law and Legal

BIJURALISM (Ottawa: Supply and Services Canada, 1999). An excellent modern collection of essays is "Harmonisation et dissonance: Langues et droit au Canada et en Europe" (1999) 3 REVUE DE LA COMMON LAW EN FRANÇAIS 1-278.

Of course, rule-making is a central component of most official law reform endeavours. For competing perspectives and a summary of current theories, see R.A. Macdonald, "Recommissioning Law Reform" (1997) 35 ALBERTA LAW REVIEW 831, and the response by W. Hurlburt, "The Origins and Nature of Law Reform Commissions in the Canadian Provinces: A Reply to 'Recommissioning Law Reform' by Professor R.A. Macdonald" (1997) 35 ALBERTA LAW REVIEW 880.

The general problem of keeping written legal rules up to date in uncodified legal systems is discussed in G. Calebresi, A COMMON LAW FOR THE AGE OF STATUTES (Cambridge, MA: Harvard University Press, 1982). The analogous problem in systems of codified law is discussed in J.E.C. Brierley *et al.*, QUEBEC CIVIL LAW (Toronto: Emond-Montgomery, 1993), Part One.

SOMETIMES IT'S BETTER JUST TO FIX THE DOCK

Law is a "high-maintenance" social activity. While usages, practices and customs are constantly evolving, once rules are written down they acquire an inertia. This inertia is amplified because the process for making or amending written rules is typically laborious. This has led some to suggest that courts should have the power to amend or overrule statutes: see G. Calebresi, A COMMON LAW FOR THE AGE OF STATUTES (Cambridge, MA: Harvard University Press, 1982).

Even when Parliaments marshall the will to reform the law, it is often unclear how best to do so. Should they just tinker with a legal concept that is largely constructed on formal grounds, or attempt to rework a concept on functional grounds. For a thorough discussion of this conflict of law reform method in a commercial law context, see M.G. Bridge, R.A. Macdonald, R.L. Simmonds and C. Walsh, "Formalism, Functionalism, and Understanding the Law of Secured Transactions" (1999) 44 MCGILL LAW JOURNAL 567-664.

The debate over the possibility and desirability of civil code recodification can be understood as a disagreement over whether to opt for replacement or renovation in the repair of civil codes; see M. Planiol, "L'inutilité d'une revision générale du Code Civil," in LE CODE CIVIL, 1809-1904, LIVRE DU CENTENAIRE (Paris: A. Rousseau, 1904) 958; see also, L.J. De la Morandière, "The Reform of the French Civil Code" (1948) 97 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1. For an understanding of the recently enacted *Civil Code of Québec* as legal renovation, see J. Pineau, "La philosophie générale du Code civil," in LE NOUVEAU CODE CIVIL: INTERPRÉTATION ET APPLICATION (Montreal: Thémis, 1993) at 269.

Compare, however, P. Legrand, jr., "Sens et non-sens d'un Code civil européen" (1996) 48 REVUE INTERNATIONALE DE DROIT COMPARÉ 779.

External to law, disagreements over whether to replace or renovate institutions are pervasive. One can understand debates between (self-styled) revolutionaries and reformists as instantiations of this disagreement. In theological circles, the representatives of these two camps are respectively, liberation and liberal theologians. See, e.g., G. Gutiérrez, A THEOLOGY OF LIBERATION: HISTORY, POLITICS, AND SALVATION, translated and edited by Sister Caridad Inda and John Eagleson (Maryknoll, NY : Orbis Books, 1973); and W. Rauschenbush, CHRISTIANITY AND THE SOCIAL CRISIS, ed. R.D. Cross (New York: Harper & Row, 1964).

50TH ANNIVERSARIES AND FAMILIES

The challenge of multicultural and multi-ethnic societies has often been cast by political theorists as a challenge raising the relationship between identity and social diversity. It is the focus of much contemporary political and ethical reflection; see, e.g., W. Kymlicka, LIBERALISM, COMMUNITY AND CULTURE (Oxford: Clarendon Press 1991); and C. Taylor, MULTICULTURALISM AND THE POLITICS OF RECOGNITION (Princeton, NJ: Princeton University Press, 1992).

In everyday life, however, the challenge runs much deeper. It is not just political structures and organization that may require adjustment. Basic legal concepts – marriage, the family, property, successions, civil liability – are also the reflection of social context. For a detailed study of the legislative dilemmas and a bibliography of issues as they relate to close personal relationships between adults, see Law Commission of Canada, DISCUSSION PAPER: CLOSE PERSONAL RELATIONSHIPS BETWEEN ADULTS (Ottawa: Supply and Services Canada, 2000).

What constitutes a close personal relationship, and how society should understand these relationships is a theme that underlies many popular movies. The following show the diversity of such relationships and the range of social responses possible: BUTCH CASSIDY AND THE SUNDANCE KID, THELMA AND LOUISE, THE ODD COUPLE, and HAROLD AND MAUDE.

The question of how to adopt social institutions to changing social realities arises often in stories about immigrant populations. For a moving depiction of difficulties faced by second-generation Asian-American women in filling the institutional role of "daughter," in the face of the conflicting expectations of the wider culture and their "traditional" families, see A. Tan, THE JOY LUCK CLUB (New York: Vintage Books, 1991).

A good representation of the challenge of diversity for those who like brightly coloured illustrations to accompany their texts, see E. Carle, THE VERY LONELY FIREFLY (New York: Philomel Books, 1995).

Measure for Measure

The temptation to organize legal concepts and legal rules uniquely on the basis of "experience" or of "systemic rationality" confronts judges and legislatures. Usually, by the time the legislature is seized with a problem for decision, it has been framed as one for which a "systemic, rational" solution is appropriate. That is, the legislative process seems to privilege one type of organization of legal rules. This, indeed, lies behind repeated efforts to codify the law. For an early discussion, see the early nineteenth century debate between Bentham and von Savigny. See J. Bentham, Of Laws in General, ed. J. Burns and H.L.A. Hart (London: Athlone Press, 1970); A comment on the commentaries, ed. J. Burns and H.L.A. Hart (London: Athlone Press, 1977); and On the principlces of morals and legislation, ed. J. Burns and H.L.A. Hart (Oxford: Clarendon Press, 1996); and compare K. F. von Savigny, On the vocation of our age for legislation and jurisprudence (New York: Arno Press, 1975).

For an amusing illustration of potential tensions between "experience" and "systemic rationality," see J.L. Borges, "On Exactitude in Science," in Fictions (London: Calder, 1965) – being a fable about a map that exactly covers the entire landscape on a one-to-one scale.

This tension is a source of much literature, and often, either "experience" is romanticized and "reason" associated with modernity and denigrated, or reason and modernity are simply resisted. For the former, see e.g., the later works of Tolstoy, especially, The Kreutzer Sonatas, trans. Beatrice Scott (Greenwich, CT: Fawcett, 1961). Compare F. Dostoevesky, Notes from Underground, trans. Katz (New York: Norton, 2001), arguing that modernity will not eliminate the human desire to resist rationality. Thomas Gradgrind, in Dicken's Bleak House is another literary personnage who confronts these two ways of knowing, and who wants to remake education as exclusively concerned with "facts" and "systemic rationality."

In ethical writing, the extremes of the dichotomy are occupied on one hand, by emotivists, and on the other, by ethicists working in the anglo-american analytic tradition. For a discussion of the distinction, see R.M. Hare, Sorting Out Ethics (Oxford: Clarendon Press, 1997). See also D. Seanor and N. Fotion eds., Hare and His Critics: Essays on Moral Thinking (Oxford: Clarendon Press, 1988). For a recent work that argues that appeal to a broad range of ways of human knowing – both reason-based and experiential knowledge – is necessary for an adequate understanding of complex legal problems, see M. Somerville, The Ethical Canary: Science, Society and the Human Spirit (Toronto: Viking, 2000).

Much legal anthropology explicitly deals with the confrontation between local, experience-based indigenous law, and the systematic rationality of colonial law. See, for example, C. Geertz, The Interpretation of Cultures (New York: Basic Books, 1973); Local Knowledge (New York: Basic Books, 1983); and most recently, S.E. Merry, Colonizing Hawaii: The Cultural Power of Law (Princeton: Princeton University Press, 2000).

The claim that there are two kinds of knowledge – one grounded in experience, and the other in reason – has been articulated in feminist literature. See e.g., Feminist Approaches to Theory and Methodology: An Interdisciplinary Reader, ed. S. Hesse-Biber, C. Gilmartin and R. Lydenberg (Oxford: Oxford University Press, 1999); Knowledge, Difference, and Power: Essays Inspired by Women's Ways of Knowing, ed. N.R. Goldberger *et al.* (New York: Basic Books, 1996).

A fascinating exploration of the relationship between systemic rationality and experience in mathematics can be found in Georges Ifrah, The Universal History of Numbers (London: Harvill, 1998).

Legal Fictions - The Law's "Little White Lies"

Fictions have long been a popular topic in legal literature. In the nineteenth century Maine first explored the use of fictions as a technique of law reform, comparing them to other techniques such as statutes, and appeals to equity. See H.S. Maine, Ancient Law (Boston: Beacon Press, 1963). More recently, fictions have been understood as a necessary component of any system of knowledge that claims to be comprehensive in a field. See, for example, L. Fuller, Legal Fictions (Palo Alto: Standord University Press, 1968).

Contemporary legal fictions are explored in R. A. Samek, "Fictions and the Law" (1981) 3 University of Toronto Law Journal 290, who understands them as a means to facilitate the "meta-phenomenon," or the displacement of the primary (substantive) by the secondary (procedural). The idea is further developed in R. Samek, The Meta Phenomenon (New York: Philosophical Library, 1981), who like Fuller, draws on the work of H. Vaihinger, The Philosophy of "As If," trans. Ogden (London: Routledge, 1924).

In Hans Christian Andersen, Hans Christian Anderen's Fairy Tales (London: Children's Press, 1963), several stories, most notably *The Emperor's New Clothes*, explore the world of fictions.

The idea of the corporation has generated significant commentary in law as to whether it is a fiction. Compare, J.C. Coffee, "'No Soul to Damn: No Body to Kick': An Unscandalized Inquiry into the Problem of Corporate Punishment" (1981) 79 Michigan Law Review 386; and C.D. Stone, Where the Law Ends: The Social Control of Corporate Behavior (New York: Harper & Row, 1975). Both authors speculate on whether the fiction is a distinct legal technique, or simply an example of the law's need to label and categorize. Other knowledge disciplines confront the same problem.

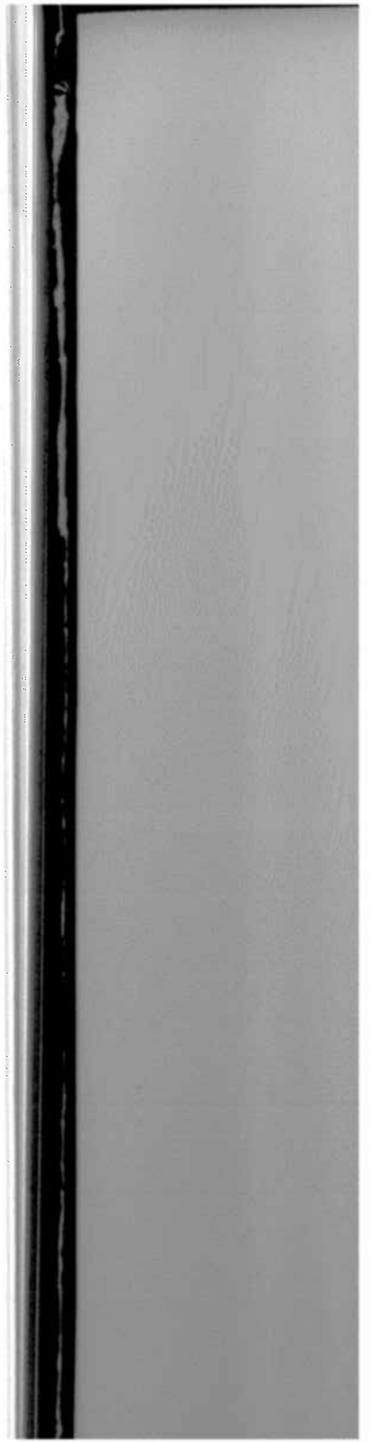
In medicine, the act of naming the unknown, or the different can be seen as an attempt to control it. The characterization of human behaviour as a syndrome (for example, Attention Deficit Disorder) or the identification of a pathology as a disease (for example, Acquired Immunity Deficiency Syndrome) appears to be a necessary step in the organization of activity to understand and treat the behaviour or pathology. For a discussion in the context of mental illness, see T. Szasz, LAW, LIBERTY AND PSYCHIATRY (London: Routlege, 1974); THE THERAPEUTIC STATE (Buffalo: Prometheus Books, 1984). Compare T.J. Scheff, "The Labeling Theory of Mental Illness" 39 AMERICAN SOCIOLOGICAL REVIEW 444-452. For a parody of the labelling process, see the movie THE MADNESS OF KING GEORGE.

G. Lakoff and M. Johnson argue that forming metaphors is a fundamental cognitive process in METAPHORS WE LIVE BY (Chicago: University of Chicago Press, 1980). M. Ball argues that metaphors constitute or create the reality that they seek to embody in LYING DOWN TOGETHER: LAW, METAPHOR AND THEOLOGY (Madison, WI: University of Wisconsin Press,1985).

The importance of metaphor is nicely illustrated by an examination of the connotations that attach to the "organic" state in T.S. Eliot's writing. On this point, see T. Eagleton, LITERARY THEORY: AN INTRODUCTION (Oxford: Blackwell, 1983). This analysis can also be applied to metaphors of the state as "family" and the related conflation of language, nationality and race; see, e.g., E.J. Hobsbawm, NATIONS AND NATIONALISM SINCE 1780: PROGRAMME, MYTH, REALITY (Cambridge: University Press, 1990).

PART THREE

DECISIONS



INTRODUCTION

Making decisions about rules is an everyday occurrence, not just for judges but for all of us. The process has many steps. First we have to decide whether in fact there is a rule to be applied at all. Is the so-called rule actually just a piece of advice, or a suggestion? Next, we have to decide if the rule is addressed to us. Do we fit the category of people – parents, consumers, tenants, employees, for example – that it targets? After that we have to decipher the precise meaning of the rule. What exactly does it actually require, or permit, us to do? Finally, in some cases of binding rules, we have to decide whether or not we are obliged to follow the rule. Does some extenuating circumstance excuse us from doing what the rule requires?

In the normal flow of events, of course, these various steps are rarely broken down into separate questions. Nor do they always present themselves in a logical order. Everyday decision-making does not seem to have, or to demand, the rigour we associate with formal decision-making by courts. For this reason, many people do not think that their routine decisions about the meaning of rules are really examples of legal decision-making. They believe that legal decision-making is what courts alone do. Only judges actually are required to go through the difficult process of analyzing and applying legal rules.

Nevertheless, the decision-making task at home, at work, or in the park, is every bit as complex as the task faced by judges. All legal decisions require careful attention to the facts, a thoughtful assessment of the rule to be applied, and a keen sense of what the justice of the situation requires.

The five stories of this part are meant to address some common difficulties and interpretive challenges faced by all legal decisionmakers. Law provides a wide variety of formal and substantive arguments that can be marshalled in

support of any particular outcome or decision. How does a decisionmaker weigh these different arguments? Sometimes, conduct seems to fall within the general scope of a rule, but is not directly covered by the specific words used to express the rule. How does a decisionmaker know when to follow the letter of the law, rather than its spirit, or its spirit rather than its letter?

Legal decisionmakers face other problems too. General rules that apply to ordinary, everyday situations allow us to plan and to organize our lives. Unfortunately, not all situations are ordinary. How does a decisionmaker know when to set a rule aside or adjust its application to deal with special circumstances? Again, courtroom rules of evidence are meant to enable judges to determine what the facts in any specific dispute might be. But they are not very good at getting to the bottom of any conflict that has a history. How do we know when to prefer legal processes that get at the whole story? Deciding the kinds of explanations to accept as being the truth for any particular purpose is one of a legal decisionmaker's most difficult challenges.

... BUT EVERYONE ELSE IS ALLOWED TO

The profound difference between decision-making by a computer game and real life human decision-making is often forgotten. Legal decisionmakers are never confronted by a rule or rules that apply automatically to decide a case. Rarely are the facts presented in the same way by everybody who has an interest in the outcome. This is true even in courts. Judges must always exercise discretion in determining what the facts are, and how to apply a particular rule to those facts. Most other kinds of legal decision-making are even less constrained than this. For example, at the point of law-making, officials have to decide whether to have a rule, how detailed it should be, and who should have authority to interpret and apply it.

Everyday legal decision-making – by parents, teachers, people in the public service, and the police – also involves the exercise of considerable judgement. Legal rules may set out the general framework within which a decision is to be taken, but the law also recognizes a wide variety of arguments that can be invoked to influence the interpretation of these rules. These arguments are very similar to those one hears every day in a family setting. The first task of the legal decisionmaker is to weigh and evaluate the merits of these different arguments. Then they have to be woven together so as to provide a persuasive rationale for whatever decision is reached about the meaning and application of the rule or rules in question.

Halloween is one of the great experiences of parenting in urban communities: watching hordes of gremlins parade up and down the streets, shrieking with joy; meeting friends and neighbours as they escort their children, and sometimes even their babies, from door to door; making costumes from old clothes; watching as the imagination of youngsters is fired by their desire to be fairies, sports heros, cartoon characters, animals, or whatever; and suffering a week's worth of temper tantrums while they gobble down the vast quantities of candy they have collected. These are just a few of the many highlights of the occasion.

Often, however, Halloween can lead to less pleasant exchanges. Few occasions spark the conflict between a child's desire to push the boundaries of parental authority and a parent's concern to nurture and protect offspring, as much as the annual request to stay out later or to visit more distant streets. Inevitably all parents are visited with the plea: "... but everyone else is allowed

to." Years ago, I made it myself. More recently, hearing it from my own children, I was much better able to appreciate how youngsters can be quite adept at making legal arguments.

LAWYERS BIG AND SMALL

Child psychologists tell us that eight to ten year olds are at the most legalistic developmental stage. My own children are now teenagers and our conflicts have moved on to other issues. What fascinated me when they were younger, however, was the richness of the claims they raised in support of their case for staying out later to "trick or treat." The angry outburst followed by tears was the furthest thing from their minds as they attempted to persuade my wife and I to change our minds. Indeed, their arguments and rationales were no less worthy than those routinely heard in the Supreme Court of Canada.

What were the kinds of claims made by these "little lawyers" among us?

Let me recite them, as best I can remember. First on their lips was: "Everyone else is allowed to." This was followed closely by: "Last year you let her (an older sister) stay out later." Before long the claim is: "You said that if I was good and did well at school I could have more privileges."

Then the bargaining gets more intense: "I'll go to bed early tomorrow night." Often the deal being offered is not very subtle: "I'll share my candy with you, and won't ask for money to buy more."

The pleas do not stop there. They move on to: "I bet you were allowed to stay out when you were young." Or again: "I'll be safe because I'll stick with my friends." More than once my son said: "There is no law that puts a curfew on trick-or-treating." I even remember my ten-year-old daughter proudly announcing: "All the books on being a good parent say you should be flexible about bed-times and other limitations."

And, of course, when all else fails, the claim is simply: "It's not fair! You're being unreasonable and mean!"

Fortunately, I knew almost all these arguments by heart, having used them against my own parents 30 years earlier. I could, therefore, quickly come up with counter-arguments. Not surprisingly, faced with these cogent counter-arguments, my children claimed that life was unfair. They were especially miffed because they had to argue with a lawyer, while most of their friends did not suffer the same disadvantage. After my wife and I partially gave in to them, I began to reflect on their claim to be at a disadvantage. The more I thought about it, the more I could see the point. Each kind of argument my children made, and each rebuttal, had a court-room equivalent.

LEGAL ARGUMENTS AND COUNTER-ARGUMENTS

Most often people think about legal rules as being indications of what to do. They do not see them as constituting arguments justifying a particular course of action or outcome. But that, in fact, is what they are. We do, of course, distinguish between a legal rule that we present to a decisionmaker, and the various arguments we present to convince the decisionmaker to interpret and apply the rule the way we want. Substantively, however, the rule itself is offered up to the decisionmaker simply as another reason for action. Consider the arguments made by my children at Halloween.

The "everyone else" argument is an appeal to community customs, practices, and usages. The "last year you let her" argument is nothing more than citing a precedent. The "you said that if I was good" argument rests on the idea of enforcing a prior promise, or an agreement. The "I'll go to bed early" argument is an invitation to negotiate. And the offer to "share my candy" is an economic argument that shows a willingness to arrive at a win-win agreement.

The "you were allowed to stay out late when you were young" plea is an appeal to tradition. The "I'll be safe" argument demonstrates some long-range concern about consequences. To say "there is no municipal curfew" is like pointing to a statute, or its absence. To make reference to "all the books" reminds us how much official, legal decisionmakers rely on outside expert knowledge. And complaining that "it's not fair" is a direct attempt to invoke a standard of justice, whatever that standard may be.

Depending on how narrowly one wants to define the concept, only one (the appeal to a statute) or at most four (the appeals to custom, to precedent, to tradition, and to a statute) of these types of arguments will normally count as a legal rule. Yet in any attempt to convince a decisionmaker they are all woven together with the other kinds of arguments is a single effort at advocacy. Every day, in every court, lawyers are making these arguments based on custom, precedent, prior agreements, proposed settlements, economics, tradition, consequences, statutes, expert opinion and justice. Recognizing that claims of this kind are as common in families as they are in courts is a first step to understanding the inevitable mixing together of rules with arguments about how they should be interpreted and applied.

MAKING RULES AND ARGUING ABOUT RULES

Just because there may be rules, does not mean that there are simple solutions to conflicts between people. Children know that the rules in a family are always anchored in a social context. They also know that whether the rules apply

in any given situation is rarely self-evident. This is why they are so good at making "legal-type" arguments. And they also know that what distinguishes arbitrary from responsible parents is a willingness to listen to these arguments about the meaning of the rules that have been made.

For their part, parents know that it is never enough simply to tell a child "Well, that's the rule." Of course, sometimes a situation requires fast action; sometimes parents are exhausted and do not have the patience to explain; sometimes children are simply being argumentative and difficult. But apart from these situations, parents carry a burden of justification when applying rules.

They know that, in the end, their rules are only as good as the reasons behind them. Every time a rule is being applied it is necessary to offer reasons to justify applying it. Wise parents also know that their rules alone do not provide specific solutions to specific problems. Their rules really serve as guidelines that set out the kinds of considerations parents find important. Rather than giving ready-made answers to questions, they actually invite further questions. Children will, and should, test their meaning and their rationale. By doing this, children can actually help parents make better rules.

The same is true for official legal rules. Part of the job of a lawmaker or a decisionmaker is, in the manner of children testing their parents' rules, to test the meaning and rationales of existing rules of law. In so doing, the aim is to explore how they might be changed or reframed in a way that helps everyone ask better questions about their meaning. And by asking better questions, and getting everyone to formulate more cogently the real arguments about justice being advanced in individual cases, we can turn many procedural claims like "everyone else is allowed to" into more substantive discussions about whether an outcome is "fair," and whether a rule is "just."

IT'S JUST A LEGAL TECHNICALITY

The decision to announce a rule to govern human conduct is just the beginning of the legal endeavour. A whole series of additional issues arises immediately. Most obviously, decisionmakers have to determine just what kind of conduct falls within the rule as announced. The solution to this problem is frequently bound up in everyday questions of interpretation: What do the words of the rule mean? But not always. Two other types of problem are common, especially where the criminal law is concerned. Sometimes, conduct clearly falls within the scope of a rule, but for a procedural reason a person is provided with an excuse not to follow it. This is where the expression "getting off on a technicality" is usually encountered.

But the expression also comes up in another case. This is where people are doing something that is very similar to what the rule prohibits, but that does not seem to be directly covered by it; and where, in addition, they are doing it to achieve the same outcomes as if they had engaged in the prohibited activity. Here, getting off on a technicality usually means that the decisionmaker has interpreted the rule according to its letter, rather than its purpose or spirit. A decisionmaker has to know when and why a technicality is not just a technicality but an important procedural feature of the criminal law. It is no less important to know when and why a literal rather than a purpose-driven approach should be followed in the interpretation of all types of legal rule.

Both my children are sometime baseball fans. Like many they were quite interested in Mark McGwire's 1998 chase of the single-season, major-league home-run record. Just as he was poised to break the record, however, newspapers reported that he regularly used a performance-enhancing drug of the steroid family. Basically, this was the same kind of drug for which Ben Johnson was stripped of his gold medal ten years ago, and a much more potent drug than the over-the-counter cold medicine that led to the disqualification of Olympic rower Silken Laumann.

Whether Mark McGwire should be permitted to play baseball or be recognized as setting a single-season home-run record is, I suppose, an interesting question. But for me, the incident raises a more fundamental point. Supporters of the baseball player repeatedly observed that in professional baseball, unlike in other sports (including olympic baseball), there is no rule that prohibits the use of performance-enhancing steroids. To McGwire's defenders,

the controversy can be resolved easily. Taking steroids is not illegal under the rules of professional baseball. No further inquiry into the question of whether any new record that he may set should stand is, therefore, needed.

In this kind of reaction lies a real challenge for the law. After all, we do not always decide if conduct is, or is not, appropriate simply by reference to what the law says. Think of the situation where a person is found not guilty of a criminal offence because evidence clearly proving the crime was improperly obtained by the police. How often we hear in such cases that the accused person "got off on a technicality." "Getting off on a technicality" means that we think the accused person really ought to have been convicted.

WHAT IS A "LEGAL TECHNICALITY"?

When people use the expression "legal technicality," what exactly do they mean? Why do they not say that Mark McGwire is "getting off on a technicality"?

These are not easy questions. Most people's view of whether a legal argument is just a technicality appears to turn on what they think about the alleged wrongdoing. That is, everything depends on how they frame the background issue: Is the alleged conduct ethically wrong?

We might, for example, believe that it is ethically wrong for any athlete (or perhaps a professional athlete) to take performance-enhancing drugs. In this light, to defend steroid users on the basis that taking drugs is not illegal under the current rules of professional baseball is simply to invoke a legal technicality. We would then say that taking steroids is wrong and that baseball's existing rules should either be amended, or interpreted so as to prohibit it. This type of attitude reflects a "spirit of the law" approach to legal interpretation: judges should interpret the law so as to catch all conduct falling within the scope of its purposes regardless of how these purposes are actually expressed in words.

Conversely, we might believe that it is not ethically wrong for athletes to take performance-enhancing drugs. In this light, unless we could point to a specific rule prohibiting players from taking steroids, there is no crime and there would be no such thing as getting off on a legal technicality. We would then be taking the position that crimes can only exist when the rules clearly prohibit conduct. So-called technicalities are actually part of the definition of what the wrongful conduct is. Here we can see an attitude that reflects a "letter of the law" approach: the law should only catch behaviour falling within the dictionary definition of the words it uses.

THE LETTER AND THE SPIRIT OF RULES

When my children asked me why Ben Johnson was disgraced as a cheater and Mark McGwire embraced as a hero, I had no easy answer. I found myself hard pressed to justify the difference simply because of the different rules adopted by the Olympics and professional baseball in the United States. Baseball is one of the most rule-bound games we play. But for all its rules about spit-balls, about putting pine-tar on bats and about the size of baseball gloves, there are no rules about steroids. Why not?

As I thought about this, I began to consider other possibilities. Perhaps it is not the rules of baseball, but the Olympic rules that should be changed. Why are we so concerned about drugs in sports anyway? We encourage athletes to train hard, sleep well, eat better, and take vitamin supplements. We do not even care if they take over-the-counter headache pills to improve their performance when they don't feel well. Perhaps the only reason that we have come to think of drug-taking in baseball as wrong is because it is generally against the rules in the Olympics. Maybe taking steroids is no different than taking vitamin supplements.

In discussing these ideas with my children, my doubts about the Olympic position disappeared. I came to see that what was really bothering me was the structure of professional baseball, and indeed the management of most professional sports leagues. The reason Mark McGwire's case attracted attention was because baseball's rules were out of step with our expectations about how games should be played. He could be seen to be exploiting a technicality because we feel that there should have been a rule to prevent drug-taking.

LINING UP RULES WITH UNDERLYING POLICIES

Sometimes a whole system of detailed rules can fail to capture the policies and values that actually underlie the rules that have been enacted. This failure to set out policies and values is more common in baseball than in the sports that do not have as lengthy a history. It usually happens in areas where the rules have been added bit-by-bit over time to deal with specific matters. Only after considerable experience does the rationale for the various specific rules clearly emerge.

Today, we can see that baseball's rules about spit-balls, pine-tar on bats, and the size of gloves are really rules about "fairness." They are designed to keep the playing field level. Their purpose is to prevent one person from gaining an unfair advantage over another – in a word, cheating. When they were first enacted, the only ways to cheat were by fooling with an athlete's

equipment or with the way the game was played. Today, of course, we know that we can cheat by fooling with the athlete. Putting foreign objects like cork inside baseball bats is "juicing the bat." Putting foreign objects like spit on the ball is "juicing the ball." Putting foreign objects like performance-enhancing drugs into a player is "juicing the player."

Rules in law are more like rules in baseball than rules in other sports. At some point or another they wind up falling out of step with our expectations. When that happens, they are added to incrementally to address specific situations. The challenge, however, is to avoid just piling on more and more detailed sub-rules. The challenge is to recast the law so that the words we use are adequate to reflect the policies we want to enact.

If we succeed, we will also keep alive the question of whether certain conduct is ethically right. This is a first step to achieving a more just regime of law. If we fail, however, we will soon come to think that the rules have no larger purpose than to regulate specifically identified conduct. Like defenders of Mark McGwire, we will just conclude that the only question worth asking is whether some conduct is legal according to the narrowest interpretation of the rules as they currently exist.

The tone of most public discussion about the relationship of drugs to Mark McGwire's athletic achievements is heartening. It illustrates that most people are not cynical about true "legal technicalities" and that they really do care about these difficult issues of legal regulation – whether in the context of a favourite sport, or the criminal law.

LET'S JUST STICK TO THE RULES

Much of our capacity to organize daily activities depends on there being a high degree of predictability in the actions of others. This is true not only of the informal routines of everyday life, but also of the general social rules we live by. In families, for example, it eases everyone's planning to know that supper will be served at the same time every day. Likewise, it is important to know that the police will display some consistency in interpreting traffic and parking regulations. Occasionally, however, we may have to set aside or modify a rule meant for the usual situations. Special circumstances are constantly confronting us. How are we to know when the rationale for the rule requires us to adjust its application in particular cases?

All legal decisionmakers, from senior public officials and judges to post office clerks and parents, constantly confront this challenge. Sometimes, it is possible to see how to apply the basic logic and goals of the general rule to novel or special circumstances. In these cases, most people are able to make the appropriate adjustment for the new situation without re-inventing the rule. Judges do this all the time. Yet there are times when it is more difficult to do so. Drafting rules that sufficiently reflect their underlying logic that they can be applied relatively easily to unusual situations, is a key to enabling legal decisionmakers to figure out when, and how, they should just stick to the rules.

There is nothing like the end-of-year holiday season to remind us just how fragile our everyday patterns of life, especially within families, can be. Comfortable routines are disrupted by visitors, overnight guests, having to purchase gifts, entertaining relatives, going to friends' homes for a meal, and so on. Compounding the uncertainty is the lack of structure caused by our children not having to go to school each morning. Nothing seems to work as it usually does. Is it surprising that children are quick to take advantage of the uncertainty by neglecting tasks and chores that they normally perform? Rooms are left messy, dishes are not done, sidewalks are not shovelled, plants are not watered, garbage is not taken out, and so it goes.

When called to account, their response is always the same: "Well, things are different during the holidays. If you want me to keep up the regular routine you should say so." They think the rules that normally apply do not (or should not) apply to situations that are not "normal." And yet, when parents neglect to make a meal at the usual time, for example, children are often upset

that the daily pattern has not been maintained. Without seeing the irony, here they are just as likely to say: "Why can't we just stick to the routine?"

No doubt, there are self-interested reasons for both these reactions. Just like many adults, children would prefer to avoid personal responsibilities but still hold everyone else to theirs. But another lesson can also be learned from these reactions. Everyday routines and rules are not like the laws of physics and chemistry. They do not describe patterns of motion and chemical reactions. Rather they prescribe patterns of human conduct. While they reflect the lessons of experience, they also constitute good reasons for action.

Whether in the family or in society, most rules are designed to address the normal situation in which people find themselves. They cannot possibly speak directly to all the unusual cases that may come up without becoming long, detailed, and complex. So the practical issue is to know what approach to take to general rules and routines when we face unusual situations. When should decisionmakers try to stick to the rules no matter what, and when should they take a more flexible approach?

PATTERNS OF LAW AND PATTERNS OF LIFE

Most of us have had the experience of lining up at a bus-stop. The rule-of-thumb, "first come, first served" is usually effective in avoiding conflicts and producing an ordered system for boarding the bus. But where traffic is backed up at an intersection, and the bus has to stop half-way down the line, the guidance provided by the rule breaks down. The line normally does not back up or reorganize itself so that those at the front are able to get on first. While some later arrivals may politely let those in front board ahead of them, if the people at the very head of the queue insist on pushing to get on first, the result is often chaos and anger.

In these unusual situations, one of two things normally happens to the line-up. Sometimes the front part of the line reverses itself until the person formerly first-in-line gets on board, and then the rest of the line-up continues. And sometimes the order of boarding alternates between the front part and the back part of the line. In both cases, the outcome is like the situation of children who react to an abnormal holiday situation by acting as if the regular routine does not apply. And yet, it is not as if a mob scene results. It may be that people are not able either to readjust the rule of lining-up to deal with this unusual situation, or to easily figure out how to move around so that the "first-come, first-served" principle is fully respected. Still, they develop spontaneous practices that recognize at least some priority in the claims of those at the front of the line.

This inventiveness and adaptability are often taken further. People are sometimes able to adjust practices so as to maintain the rule even in unusual cases. They can see how to extend the idea behind the rule cooperatively to an unanticipated situation. Think of what happens at city street intersections where the traffic lights are not working. Most often, traffic quickly falls into a pattern where one car heading north and south goes ahead, followed by one car heading east and west, and so on. Here, motorists are able to slightly modify the stop-and-go rule of working traffic lights to cover the unusual situation when the lights are not working. They turn defective traffic lights into the patterns of a four-way stop, even though most do not know that this is what the traffic regulations actually provide.

Of course, if the traffic lights also were to incorporate advanced or extended green signals to permit left turns, these refinements to the rule will not normally be carried forward into the practice that develops for the unusual situation. It seems that there are limits to the complexity of rules that can be replicated informally. Nonetheless, in most cases, the underlying pattern continues to be followed even where the legal rule itself does not operate directly. The outcome here reflects the same attitude as that of children who cannot understand why parents do not simply adjust the normal routine so as to maintain a predictable pattern of mealtimes during the holiday season.

THE RULE AND THE REASON FOR THE RULE

These two examples show that, in extraordinary situations where routines and rules cannot apply exactly as intended, people will react quite differently. Sometimes they can see the underlying pattern of the routine or the rule and apply that pattern to an abnormal or novel situation. Here the rule continues to be of assistance in helping them structure their conduct productively in a way that avoids conflict. Sometimes, however, the effort required to do so is either too great, or there are too many people who must all at once figure out what to do, or the issue at stake is too trivial to invest the energy needed to make the adjustment. Here, whether or not they manage to avoid conflict in reacting to the unusual situation, the rule seems to be of no great help.

Making rules that are effective in guiding human activity is no easy task. Rules do not apply themselves. It is not enough that rules can be easily interpreted and applied by experts. To work they have to be capable of being applied by the people to whom they are directed in the first instance. This means that their interpretation and application is relatively straightforward not just in regular situations, but that they can be extended to unusual situations as well.

When children say "things are different" they are acknowledging that rules only make sense when they speak to recurring real-life situations. But at the same time, they are claiming that the normal factual basis for the rule is absent and, therefore, it should not apply. When they say "let's just stick to the rules" they are acknowledging how useful rules can be in maintaining predictability even in new situations. In wanting to keep to rules and routines, children see that rules allow them to make choices about what to do, because they establish patterns of expectations about what others will do.

There are important lessons for the legal system in these stories. Not all social changes require explicit amendments to the law. People can often make the adjustments to their practices and routines themselves. Moreover, some rules are better than others in educating people about their underlying logic and rationale. These are the rules most easily extended to unusual situations. Good lawmakers understand how people are likely to respond to different kinds of rules. They also know how rules can be written so that it is relatively easy to apply their rationale to novel situations. This, in turn, enables legal decisionmakers – whether judges, the police, or citizens – to make wise choices about when it is better just to stick to the rules.

IT'S NOT FAIR, HE HIT ME FIRST!

Conflict and disagreement are practically daily features of life within families and society generally. Most conflicts are quickly and informally resolved with a spontaneous "Excuse me" or "I'm sorry." In other cases, even when an apology is not offered, the aggrieved person just walks away. Occasionally, disagreements escalate. When this happens, it is often necessary to call in a third person to help settle things down. Parents normally play this role when their children become aggressive toward each other. Once third persons are projected into a conflict, however, things change. Whether acting as judge or as mediator, they find it difficult to prevent the apparently simple disagreement from unravelling into a complex problem.

As more and more facts are explained, it often becomes harder, not easier, to figure out what is going on. This is not just because there are two sides to every story. The truth in a story often depends on how much of the story one is prepared to listen to. Especially where the goal of a decision-making process is to build for the future rather than just repair the past, the range of facts and issues that have to be dealt with expands enormously. Regular court processes are usually not adequate to handle these tasks of historical reconstruction. But other processes are. The challenge for decisionmakers is to know when they should try to search for the whole story, and when they should be satisfied with solving a narrowly-cast small dispute.

Arriving in the middle of an argument between children is a trying experience for parents. Often you become aware of the conflict only when you hear a scream or when one child comes running to you in tears. Even though you have not seen the whole affair, you are pressed to make an immediate judgement about what to do.

It takes just one mistake to realize that, before acting, it is best to ask both children what is going on. There are almost always two sides to every story. How many times does the response to the question "did you punch your sister?" turn out to be "but she hit me first"?

Everyday squabbles between children give a rich perspective on how difficult it is to be a parent. Often it is quite a trick just to find out what happened. And when you do get to the bottom of the story, you discover that the bottom is much deeper and more complex than you first thought. This is equally true of all types of legal decision-making.

FINDING OUT WHAT HAPPENED

Parents who are called upon to help settle arguments between their children are, of course, not exactly in the same position as judges and courts. For example, parents have a special relationship to their children that exists long before any particular conflict arises. Parents will also have a special relationship with their children long after the conflict has been dealt with. This means that they have concerns about maintaining harmony in the family that go beyond just settling the argument. It also means that they can bring much more context and background to family problem-solving.

Judges, by contrast, normally do not have this type of context and background about cases they decide. We would not expect a judge to say, in the middle of a divorce proceeding: "Wait a minute. That's not true. I know what kind of relationship you have with your spouse." A fair adjudication in court means that judges should have no objectives other than deciding the case according to the applicable legal rules. It also means that they should have no personal knowledge of the conflict to be decided, because that might prejudice or bias their opinion.

There are other differences between parenting and judging. Usually parents feel the need to personally take charge of discovering the facts, and to question each child closely. The activity they are going through is a bit like being a detective. They want to find out what is "really" going on. So they ask one child a question, and then the other, and alternate until they feel they have figured out the situation.

This is not the role our judges now play. We assume that people in court will present their own case in a manner that they think best. In court, there is no objective version of the facts – just two different versions offered by each person in the conflict. The procedure in a judicial setting is adversarial, and the judge is required to listen fully to the stories as presented rather than to run an independent investigation.

These two features distinguish normal court-room proceedings from family problem-solving. Judges do not have personal knowledge of disputes they are deciding. And judges do not take on the role of investigators.

As a way to decide conflicts the judicial process has both advantages and disadvantages. It ensures that the judge is impartial and does not come to a conclusion until the persons affected have had a chance to say all they want. It also ensures that the persons affected can tell their story in their own words, and not be required to reveal it only in response to a judge's questions. But judicial procedures mean that judges may often have to decide on the basis of less than complete knowledge. Any deeper context is excluded, and some questions that a judge might think worth asking usually cannot be fully canvassed.

WHEN HAVE YOU GOTTEN TO THE BOTTOM OF IT?

Courts, like parents, make good use of the methods they have for finding out what has gone on. But in family conflicts, the range of things that seem to bear on outcomes is always much broader and always involves many more considerations than court-room proceedings seem to allow.

I remember once, arriving home from work, being confronted by my daughter who was in tears because her younger brother had punched her. When I asked what the problem was, she said that he would not let her watch her favourite TV program. Immediately, I called on her brother to explain. Here is how the story unfolded.

"He punched me."

"Yes, but she bit me."

"But that's because he hit me first."

"But that's because she turned off the TV."

"But I did that because Wednesday is my day to watch my program at five o'clock."

"But I let her watch TV at five o'clock yesterday, when it was my regular turn."

"But that is because he was outside playing with his friends."

"But last week, when I watched on her day because she was at a friend's house, mum made me let her watch on my day."

"But dad, I had a really rough day at school today. The teacher made me sit in the hallway. No one wanted to eat lunch with me. And I lost my favourite pen. So I should get to watch my TV show anyway."

But..., but..., but..., but. What is a parent to make of all this? A first issue is to decide how much of the story is really relevant to settling the argument. Is it necessary to consider matters that go back weeks, or things that went on at school? Part of the problem is that when parents do ask probing questions, they discover that an important part of the story always relates to an event completely beyond the control of either child. More often than not, finding out the whole story just makes it harder to help children settle their argument.

A second issue relates to how one understands the conflict itself. Is the argument about who punched whom first? Is it about TV programs? Is it about trying to be sensitive to a child who is having other problems? More often than not, finding out the whole story just makes it harder to figure out what the argument is all about, and who it is really between.

DISCOVERING THE WHOLE STORY OR KEEPING A PROBLEM SMALL?

Generally parents try to discover the whole story in any conflict involving their children. Yet there are also times when parents with a lot of experience listening to arguments between children decide that it is better not to get the bottom of a conflict. For all kinds of reasons – time, energy, relative triviality, inappropriate situation – they decide simply to deal with the surface issue, at least for the moment. Exactly these kinds of limitations also affect the structure of decision-making in courts. Those who expect courts to routinely act like parents fail to appreciate the constraints that the judicial process imposes. Not every situation can, or should, be dealt with by a judge the way a parent would approach a family conflict.

This is not to say that law is powerless whenever it is necessary for the whole story to come out. There are many other kinds of legal processes besides those followed by courts. The procedures of Ombudsman Offices, Commissions of Inquiry, and coroners' inquests to take three examples, are designed specifically to get to the bottom of things by broadening the scope of the fact-finding investigation and enlarging the issues that are being considered.

Some of these processes are like an expanded court-room inquiry, and are meant to discover how a particular event happened. In this sense they resemble an everyday parental search for the facts in a family dispute. Others go further. They are task forces designed to examine a general issue of public concern and make policy recommendations. These inquiries resemble the parental investigation of the whole range of issues lurking in the background of a sibling conflict.

Obviously, the broader the scope of the fact-finding exercise and the larger the view of the issues being investigated, the more likely the decisionmaker will have to come up with creative responses in order to solve the problem. Understanding when to design and deploy procedures designed to keep a problem small and when to use procedures that let the whole story come out, is one of the most difficult challenges legal policymakers have to confront.

I WAS ROLLING ON THE FLOOR AND IT FELL IN!

Why do we not have better legal processes for getting at the truth? This is a question people ask every time a high-profile criminal trial ends in an acquittal because of a lack of evidence. Dissatisfaction with the criminal law can often be traced to popular misconceptions about what the trial process is meant to accomplish. The purpose of a criminal trial is not to discover the facts about a situation the way a scientist would. Its purpose is to determine whether the prosecution has proved beyond a reasonable doubt that accused persons have committed the crimes with which they are charged. Many rules of criminal evidence aim only at preventing people from being convicted wrongfully.

Occasionally, these rules can be quite hard on victims who have to testify. This is especially the case with rules governing cross-examinations. In a criminal trial, judges do not control the fact-finding process. The accused person is given much latitude in deciding what evidence to present and what questions to ask on cross-examination. Truth on cross-examination is not about learning the facts so as to prevent something from happening again. How far the "whole truth" extends depends only on the reasons why any particular question is being asked. Since different legal processes permit different kinds of truth to be pursued, the first question for policymakers in choosing a process is to decide on what kind of truth they looking for.

Almost 50 years ago I used to go to a play-group in a local church basement every Tuesday afternoon. Of course, after a couple of hours of running around, finger-painting, making monsters with plasticine, sticking paste in each others' hair and like activities, we would get pretty tired. So each week there would be "nap-time" at 3:30. We would all roll out our little "security blankets" onto the hardwood floor and lie down for 15 minutes.

One afternoon, I was restless and could not fall asleep. Close to my blanket, I spied a little wooden peg, about an eighth of an inch in diameter and about one inch long. Before long, I had picked it up, stuck it in my mouth, my nose and, finally, my ear. That was a big mistake. I could not get it out of my ear. Panicked, I began to cry. The caregiver could not get it out either, so my parents were called. Off we went to the doctor, who used his tweezers to extract the offending object.

As we were leaving his office he asked me "Young man, how did you get that peg in your ear?" Probably fearful of telling the truth I blurted out: "I was rolling on the floor and it fell in!" To my great surprise, my mother seemed to believe me, although both the doctor and my father were sceptical.

My explanation, and the reaction of those around me to it, raise two of law's central issues. How do we know when people are telling the truth? And what is truth in law anyway? It did not take long after I started studying law for me to realize my earlier good fortune. Thankfully, I was being questioned in a doctor's office and not when I was on the witness stand in a case called *Little Roddy Macdonald* v. *Greenborough Community Day Care.*

DISCOVERING WHO IS TELLING THE TRUTH

Television shows and movies constantly bombard us with courtroom dramas where a persistent lawyer finally catches a witness telling lies and forces him or her to blurt out a "true confession." The idea of cross-examining a witness to test for the truth of a statement is not hard to see. Even when not consciously lying, people will always tell a story that puts their own conduct in its best light. Directly confronting witnesses to probe for inconsistencies in the story they tell is one way to make sure that at least some version of the truth gets to emerge.

Of course, a cross-examination is not the only way in which evidence given by a witness can be put to the test. Sometimes there will be other witnesses to the event and these witnesses will have their own stories to tell. Sometimes there will be objects, fingerprints, and other evidence that either back up, or challenge testimony offered by a witness.

In many civil and criminal trials, however, the act which a person is being accused of committing occurred many years earlier. Often there is only one witness – the person who brings the complaint. Here rigorous cross-examination of the victim might be the only way that an accused person can establish his or her innocence.

Nevertheless, despite its effectiveness as a means for testing the reliability of testimony, cross-examination is an aggressive process that can be very hard on witnesses. This is especially the case where the event in question is an assault, rather than a burglary, theft, or other damage to property. Victims of personal assaults have a special vulnerability that comes from having to relive experiences that were an affront to their dignity.

Sexual assaults are among the most notable of the crimes that produce long-term personal stress and that are hardest to retell on a witness stand. Where the assault took place several years earlier, the retelling can bring back

long-repressed painful memories. If the victim is still a child, the trauma is compounded. A formal court process where a victim has to present evidence and then endure a cross-examination is never an easy experience.

PROTECTING VICTIM WITNESSES

Victims who are witnesses may be forced to testify even when they do not wish to do so. But they are rarely given adequate support. In a criminal trial, victims are not entitled to have the state pay for a lawyer to assist them. Sometimes there are no victim-services programs available. Often victims are required to reveal the humiliations they have suffered in a public setting. Today we understand the need to protect child witnesses, but we tend to forget that adults who have been abused as children can be just as vulnerable.

Is it possible to improve this process for getting information about an alleged crime? The interest of the defence in a full cross-examination cannot be contested. After all, a person accused of such a crime will suffer great damage to his or her reputation if convicted, as well as the likelihood of a significant term of imprisonment. But two features of the adversarial trial process, especially as it affects victims of sexual assaults have recently come into question.

First, publicity. Is it necessary for anyone but judge, jury, accused person, and victim-witness to actually be in the court room when the testimony and cross-examination takes place? Might not the interests of openness and transparency be served just as well by temporarily excluding journalists and the curious from the court room and videotaping the testimony?

Second, muckraking. Is it always necessary for a defence lawyer to ask victim-witnesses about their past sexual conduct? Imagine asking a homeowner to recount in a criminal trial how many times before an alleged housebreaking offence was committed his or her house had been burgled. So many assumptions we make about peoples' conduct in sexual matters are completely at odds, with no good reason, with assumptions we make about human behaviour in other settings.

TRUTH AND THE CRIMINAL LAW

Today many Canadians feel that the criminal justice system is "too easy on criminals." One commonly hears that guilty people are getting off because certain evidence cannot be presented at their trial. These comments mistake what the criminal trial process is designed to accomplish. The aim of a criminal trial is not to discover the whole truth about a situation in the manner of a scientist or an historian. Its goal is to determine whether the prosecution can

prove beyond a reasonable doubt that the accused person committed a crime. And not just any crime. Only the specific crime with which he or she is charged.

There are, of course, some types of criminal trial processes that are designed to do more. In many European countries the trial is an investigation, and the presiding judge takes the lead in asking questions and directing the process. The trial is meant to get at the whole truth in the larger sense. In Canada, however, a criminal trial is not structured as an inquisition. It is an adversarial proceeding in which the prosecution and the defence are each responsible for presenting evidence. What is more, they only need present the evidence they think is relevant.

The more limited objectives of a criminal trial in Canada can be understood with the help of an example. Imagine that there is a family rule that children should not drink milk in their bedrooms. A parent discovers a milk spill on the floor and asks a child: "Were you drinking a glass of milk in your room?" We might normally think that this question really means: "Were you responsible for the milk-spill?" But the criminal process, by contrast, is designed to produce the answer "No" to that specific question, if it should turn out that the milk was spilled not from a glass, but from a bowl of breakfast cereal being eaten in the bedroom.

This is not to say, however, that the law should never be interested in the "whole truth" in its broadest sense. Certainly the kind of medical inquiry that the doctor was conducting about the wooden peg in my ear should not be limited by the constraints of the criminal law. For him, the guilt of innocence of little Roddy Macdonald is not in issue. Finding out how the piece of wood got into an ear and where else it had been – for example, was it gently or violently pushed in, and had it been somewhere that would likely lead to an infection? – are the key diagnostic questions.

The whole truth in law, in other words, will always be relative to the context in which a question is being asked. And it will always be relative to the purposes for which the institution doing the asking has been established. It is frustrating for citizens to see people acquitted because they cannot be proven to have actually committed the specific crime alleged. Our constitution takes the position, however, that it would be worse if people could be convicted and fined or sent to jail simply because they were morally culpable of something or other.

But this is not the end of the story. Because of the impact of the criminal law process on witnesses, especially in cases where victims of humiliating sexual assaults are subjected to intense cross-examination as witnesses, many are now questioning other features of the criminal law. Might it be better to move away from the adversarial approach to finding truth in these cases, or

with these witnesses? The idea is that a judge-led process might be better at protecting victims while still ensuring a fair trial. Some even want prosecutions for sexual assault to be run like public inquiries.

There are, of course, many issues to be considered in any redesign of criminal procedure. One thing is, nonetheless, certain. Since different legal processes permit different kinds of truth to be pursued, the first is to decide upon what kind of truth we are going to look for. Only then will we be in a position to judge if it is appropriate, as my mother thought it was, to accept an answer like "I was rolling on the floor and it fell in."

SUGGESTIONS FOR FURTHER READING

Introduction

Legal decision-making, especially in courts, is a constant preoccupation of "access to justice" advocates. Several different considerations are present. For a general review of civil dispute behaviour, see L. Nader and H. Todd, The Disputing Process: Law in Ten Societies (New York: Columbia University Press, 1978). Often disputes never get beyond an informal stage, even when apparently "criminal" behaviour is involved. For a discussion of the rationales for informal dispute processing, see J. Skolnick, Justice Without Trial: Law Enforcement in a Democratic Society (New York: Wiley, 1975)

The movement to alternative dispute resolution is seen by many as a means to overcome the disadvantages of adversarial adjudication as a disputing mechanism. See generally, S. Goldberg, F. Sander and N. Rodgers, Dispute Resolution: Negotiation, Mediation and other processes (Boston: Little Brown, 1992); P. Emond, Alternative Dispute Resolution: A Conceptual Overview (Toronto: Canadian Bar Association, 1992); P. Noreau, Droit préventif: le droit au dela de la loi (Montreal: Themis, 1993).

Claims that the law should not be so reliant on adversarial adjudication are often raised by members of groups that feel excluded from the societal mainstream. For the situation of Canada's Aboriginal Peoples, see Aboriginal Peoples and the Justice System (Ottawa: Royal Commission on Aboriginal Peoples, 1993). The position of visible minority populations is considered in P. Ewick and S. Silbey, Differential Use of Courts by Minority and Non-Minority Populations in New Jersey (Trenton: State Justice Institute, 1993). A cross-cultural perspective of civil disputes emerges from the essays published in A. Hutchinson ed., Access to Civil Justice (Toronto: Carswell, 1990).

Most legal decision-making takes place within institutional structures. On the influence of institutions on decision-making processes, see M. Douglas, How Institutions Think (Syracuse: Syracuse University Press, 1986); M. Dan-Cohen, Rights, Persons and Organizations: A Legal Theory for Bureaucratic Society (Berkeley: University of California Press, 1986); F. Kratochwil, Rules, Norms and Decisions: on the conditions of practical and legal reasoning in international relations and domestic affairs (New York: Cambridge University Press, 1989).

In classical theories of adjudication there are two main considerations that influence decisionmakers – legislative rules and prior decisions. The application of the former engages the process of statutory interpretation, itself the subject of an enormous literature. For an excellent discussion, see W. Eskridge, Dynamic Statutory Interpretation (Cambridge, MA: Harvard University Press, 1994). Theories of precedent and the obligation of courts to follow their own prior decisions are equally numerous. See M. A. Eisenberg, The Nature of the Common Law (Cambridge, MA: Harvard University Press, 1988); L. Meyer ed., Rules and Reasoning: Essays in Honour of Fred Schauer (Portland: Hart Publishing, 1999).

... But Everyone Else Is Allowed to

The arguments put forth by children at Halloween, and by litigants pleading their cases in courts, are also canvassed by J. Paul, "A Bedtime Story" (1988) 74 Virginia Law Review 915. Of course, these same arguments are not just used when trying to convince parents and judges. They reflect structures of argument that are present in other domains as well.

Consider the typical claims made by advertisers. The "everyone else" argument, or appeal to custom is one commonly made by beer and fashion commercials. The argument from precedent is one made by any vendor who seeks to draw on consumers' past experiences and positive associations with the vendor's product, to make a sale; it is commonly made by established brands against less established ones. The "I'll go to bed early" or invitation to negotiate is the basis for any "or best offer"-type advertisement. The "you were allowed to," or tradition argument is commonly invoked by vendors who try to establish their credibility through an appeal to their own history; this is the tacit claim made by investment firms that show grainy black and white footage of their founders espousing the firm's central tenets. Finally, the "it's not fair" or appeal to justice arguments are a fixture of fund-raising appeals for charitable causes.

While these forms of argument are pervasive, they have a particular shape in situations where the decisionmaker is an adjudicator. For discussion, see L. Fuller, "The Forms and Limits of Adjudication" in The Principles of Social Order, ed. K. Winston (Durham: Duke University Press, 1983). The constraints of rule-based decision-making receives more detailed consideration in F. Schauer, Playing By the Rules: A Philosophical Examination of Rule-Based Decision Making in Law and Life (Oxford: Clarendon Press, 1991).

Not all authoritative decisions need be fully constrained by rules. What has been characterized as Solomonic or *kadi* justice privileges individual equity in decision-making over adherence to pre-existing rules. An accessible treatment of Weber's ideas about decision-making is given in A. Kronman, Max Weber (Palo Alto, CA: Stanford University Press, 1983) at 47-95. Again, in many modern forms of private arbitration the arbitrator is empowered to decide *ex aequo et bono* (in equity and good conscience).

Especially poignant studies of the kinds of considerations that weigh upon decision-making in different settings are seen in movies such as SOPHIE'S CHOICE (a two-party choice) and SCHINDLER'S LIST (a multi-party choice). Movies exploring situations of family breakdown, for example, KRAMER V. KRAMER, raise the same kinds of issues.

IT'S JUST A LEGAL TECHNICALITY

Some of the best discussions of interpretation can be found in studies of rules in sports. These are often found on the sports pages of newspapers and magazines. For 20 years, sports journalists have been asking about how hockey referees interpret rules such as the "foot in the crease" rule. Similarly, the changing strike zone in professional baseball has attracted much journalistic commentary. Baseball is a particular favourite among certain North American legal scholars. See, for example, "The Common Law Origins of the Infield-Fly Rule" (1975) 123 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1474; and C. Yablon, "On the Contribution of Baseball to American Legal Theory" (1994) 104 YALE LAW JOURNAL 227.

The question of "legal technicalities" as a strategy of interpretation arises in various other contexts as well. Frequently, it merges with considerations of formalism. For example, should a now 50-year-old couple be considered not to be married if at the time of the marriage one was only 16 years old? On this and related questions, see C. Blakesley, "The Putative Marriage Doctrine" (1985) 60 TULANE LAW REVIEW 1.

Not all interpretation is of words and documents. Patricia Williams, in the ALCHEMY OF RACE AND RIGHTS (Cambridge, MA: Harvard University Press, 1991) uses narratives of everyday experiences like apartment-hunting to show the range of issues that influence interpretation. Nonetheless, the idea of "technicality" invokes the idea of a rule or a direction stated in relatively precise terms.

The most common forms of legal writing are, of course, legislative instruments (constitutions, statutes, regulations) or contracts or wills. A fascinating account of the "technical" interpretative difficulties caused by an apparently simple provision in a will leaving a substantial sum "to the Mother who has since my death given birth in Toronto to the greatest number of children" may be found in M. Orkin, THE GREAT STORK DERBY (Toronto: General Publishing, 1981).

The choice between close adherence to the text of rules, and broad purposive interpretations is illustrated by contrasting regular broadcasts of the television program "Who Wants to Be a Millionaire," where participants are playing for themselves, and where the rules are strictly enforced, with celebrity-week broadcasts of the program, where celebrity-participants are playing for charities, and where the rule against unauthorized assistance is routinely breached (the breach normally takes the form of Rosie O'Donnell mouthing answers to other celebrity contestants).

The choice between these two general approaches to interpretation is also made explicit in the biblical dialogues between Jesus and the Pharisees. The divergent attitudes toward rules also captures a broad distinction between conservative and liberal approaches to religious practice. For a fictional illustration in a Jewish context, see Chaim Potok, THE CHOSEN (Greenwich, CT: Fawcett, 1967).

LET'S JUST STICK TO THE RULES

Understanding when, in the flow of everyday life, one is in an extraordinary situation calling for adjustments to settled expectations is one of the themes explored in M. Reisman, LAW IN BRIEF ENCOUNTERS (New Haven: Yale University Press, 1999). Gerald Postema has written extensively on this issue. See G. Postema, "Coordination and Convention at the Foundations of Law" (1982) 11 JOURNAL OF LEGAL STUDIES 165; "Implicit Law" (1994) 13 LAW AND PHILOSOPHY 361.

The question of sticking to the rules has implications for the way in which people react to the law and to legal institutions. For a narrative of the small claims court, see S.C. McGuire and R.A. Macdonald, "Tales of Wows and Woes from the Masters and the Muddled: Navigating Small Claims Court Narratives" (1998) 16 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 48. On general evaluations of civil disputing see Tom Tyler, WHY PEOPLE OBEY THE LAW (New Haven: Yale University Press, 1990); T. Tyler ed., COOPERATION IN GROUPS: PROCEDURAL JUSTICE, SOCIAL IDENTITY AND BEHAVIOURAL ENGAGEMENT (Philadelphia: Psychology Press, 2000).

The issue of the applicability of rules in special circumstances is the subject of much anthropological writing on "liminal states," see Victor Turner, THE RITUAL PROCESS: STRUCTURE AND ANTI-STRUCTURE (Ithica: Cornell University Press, 1991). See also Mary Douglas, PURITY AND DANGER: AN ANALYSIS OF THE CONCEPTS OF POLLUTION AND TABOO (London: Routledge and Kegan Paul, 1966).

For a non-scholarly analysis of liminality in narratives, see Joseph Campbell, THE HERO WITH A THOUSAND FACES (Princeton, NJ: Princeton University Press, 1968). The issue is also considered in popular literature. Consider, for example, William Golding, LORD OF THE FLIES (London: Faber, 1962).

At the extremes of human experience, appeals to pre-existing rules can seem beside the point. The ice-storm of 1998 in Montreal plunged an entire city into a survival mode in which "sticking to the rules" was not a relevant consideration. So too, in situations of hostage taking, high-altitude airplane crashes, and so on, the limits of "normal rules" are quickly perceived. For accounts, see P. Hearst, THE TRIAL OF PATTY HEARST (San Francisco: Fidelity Press, 1976); A.W.B. Simpson, CANNIBALISM AND THE COMMON LAW (Chicago: University of Chicago Press, 1984); M. Abley, THE ICE STORM (Toronto: McClelland & Stewart, 1998).

It's not Fair, He Hit Me First!

The "size" of a conflict vexes decisionmakers whatever the context. Much of the literature on dispute resolution attributes difficulties in settlement to the inability of parties to "fractionate" their conflict into issues that can be resolved through negotiation. See R. Fisher, Getting to Yes (New York: Penguin, 1992); Beyond Machiavelli (Cambridge, MA: Harvard University Press, 1994).

In courts, the question of the "size" of a conflict raises problems of evidence, but it also raises problems of institutional competence. Are judicial proceedings well suited to broad policy investigations? Usually, the issue comes up when judges are asked to make broad rulings about how public officials should manage organizations: school systems, hospitals, prisons, and so on. For an optimistic perspective, see O. Fiss, The Civil Rights Injunction (Bloomington: University of Indiana Press, 1978). Contrast the conclusion of the Law Commission of Canada in Restoring Dignity: Responding to Child Abuse in Canadian Institutions (Ottawa: Supply and Services Canada, 2000), reviewing the limits of the remedies that may be gained through the civil litigation process.

In recent years much energy has been invested in designing processes of civil disputing meant to increase access to justice for citizens who cannot afford a lawyer. For a review of the merits of different proposals such as informal courts, administrative agencies, community dispute-resolution centres, and so on, see Prospects for Civil Justice (Toronto: Ontario Law Reform Commission, 1995); Rethinking Civil Justice, 2 vols. (Toronto: Ontario Law Reform Commission, 1996). Much energy has been expended on determining how socio-demographic characteristics influence access to justice: see, for one empirical study, S.C. McGuire and R.A. Macdonald, "Small Claims Courts Cant" (1986) 34 Osgoode Hall Law Journal 509. Compare, J. Paquin, "Avengers, Avoiders and Lumpers: The Incidence of Disputing Style on Litigiousness" (2001) 19 Windsor Yearbook of Access to Justice 3, which explores "psychological" rather than "sociological" factors that influence disputing behaviour.

These studies suggest that perceptions of the process and potential remedial outcome of any decision-making process are fundamental to the decision to litigate. Interviews with judges, who say they generally do not wish to hear cases brought by plaintiffs on a point of principle, or in order to have the whole truth come out in public, confirm the point. See S.C. McGuire and R.A. Macdonald, "Judicial Scripts in the Dramaturgy of Montreal's Small Claims Court" (1996) 11 Canadian Journal of Law and Society 63.

The two functions of searching for truth – to uncover a particular fact or broad systemic problems – are played out in many different kinds of administrative proceedings. For example, in contemporary human rights litigation, commissions are often asked to inquire into and make findings about failures of entire systems: systemic discrimination. For contrasting views as to the capacity of decision-making institutions to handle allegations of systemic discrimination, compare Towards Managing Diversity: a study of systemic discrimination at DIAND (Ottawa: DIAND, 1991); and R. Knopff, Human Rights and Judicial Policy Making: The case of systemic discrimination (Calgary: Socio-legal Studies Unit, Faculty of Law, 1985).

In popular culture, these two approaches to truth-finding are represented respectively, in the detective novel and the conspiracy movie. See Arthur Conan Doyle, The Adventures of Sherlock Holmes (New York : Oxford University Press, 1993) and Oliver Stone's movie JFK.

The different approaches can also be seen in two movies about responses to the AIDS epidemic. In Philadelphia, the narrative was driven by the attempt to demonstrate that the protagonist was discriminated against by a group of individuals, namely the partners in his law firm. By contrast, in And The Band Played On, one of the recurring themes of the book was the systemic discrimination faced by the gay community. Finally, the two functions of truth-seeking are sometimes united in a single narrative. For example, the protagonist in Conrad's Heart of Darkness seeks to resolve a particular problem – finding Kurtz – while at the same time uncovering for the reader the nature of the colonial enterprise.

I Was Rolling on the Floor and it Fell in!

The civil or criminal trial in Canada today is a stylized process for making factual determinations relating to a relatively narrowly cast set of issues. It assumes that a fair understanding of a complex question can be derived by having protagonists present competing interpretations of events, and conflicting versions of events – these competing presentations are meant to cast the most favourable light possible on contested ground. For an accessible discussion of the trial process, see L. Fuller, "The Adversary System" in Talks on American Law, ed. H. Berman (New York: Vintage Press, 1961).

An inevitable by-product of the adversary system is the cross examination of witnesses. In criminal trials, the requirement that guilt be proved beyond a reasonable doubt often leads defence lawyers to undertake aggressive cross-examination of victim-witnesses. For attempts to palliate the effects of testifying on those who have been victims, see Protocol for Protecting Victim Witnesses (Ottawa: Department of Justice Canada, 1991).

In general, when a decision is made that the truth about a particular event needs to be discovered – a collapsed mine; suspicious hospital deaths; polluted ground-water; an airplane crash; a prison riot – governments use the public inquiry format. For an assessment of public inquiries as institutions for truth-finding, see E. Pross, I. Christie and J. Yogis, Commissions of Inquiry (Toronto: Carswell, 1990). Perhaps the most famous

inquiry into the truth of certain past events undertaken in recent times has been that of the Truth and Reconciliation Commission in South Africa. For a discussion, see D. Dyzenhaus, JUDGING THE JUDGES, JUDGING OURSELVES, TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER (Oxford: Hart Publishing, 1998).

Not all inquiries are strictly forensic. In some, the objective is to achieve a broad understanding that can be used to inform public policy. Two modern Canadian examples are the ROYAL COMMISSION ON CANADA'S ECONOMIC PROSPECTS and the ROYAL COMMISSION ON ABORIGINAL PEOPLES. In these latter types of inquiry the nature of the truth being sought is much different than that of a forensic inquiry. For a close analysis of the relationship of types of truth to occasions for lying, see Sissela Bok, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE (New York: Pantheon, 1978).

The claim that there are different kinds of truth has often been made in relation to the distinction between the humanities and the sciences. See C.P. Snow, TWO CULTURES AND THE SCIENTIFIC REVOLUTION (New York: Cambridge University Press, 1962). Isaiah Berlin has argued for different ways of "seeking" truth, which influence the kind of truth that is produced with his famous analogy of the hedgehog and the fox, see THE HEDGEHOG AND THE FOX (New York: Simon & Schuster, 1953).

Widely divergent understandings of what truth consists of can be seen in representative works by Enlightenment and Romantic writers, see e.g., Descartes, MEDITATIONES DE PRIMA PHILOSOPHIA : MÉDITATIONS MÉTAPHYSIQUES (Paris: Librairie philosophique J. Vrin, 1963); and Keats' poem, "Ode to a Grecian Urn." Robert M. Pirsig's ZEN AND THE ART OF MOTORCYCLE MAINTENANCE (New York: Morrow, 1974) gives a post-1960s interpretation of the problem of truth.

PART FOUR

CONCEPTS AND INSTITUTIONS

INTRODUCTION

Modern societies have developed and refined a number of concepts and specialized institutions to assist in discerning, stating and promoting the values to which they aspire. The effectiveness of these concepts and institutions in doing so should not be taken for granted. Nor should the effectiveness of the various rule-making and decision-making processes – like elections, contracts, adjudicating, legislating, and mediating – by means of which these concepts may be put into operation.

Law's capacity to organize, structure, and reduce the caprice of everyday life rests on a very small number of foundational postulates. Law must provide concepts that succeed in grouping human situations into easily recognizable categories. These concepts must succeed in capturing the values that a society seeks to promote. They also have to offer people options for characterizing life situations. Understanding how we have come to categorize the events of social life in certain ways, and the collateral consequences of these characterizations is a primary diagnostic ability in modern law. Keeping debate open about these classifications – both their defining features and their scope – is the mark of a democratic society.

Legal characterization is not just about situations and things. Contemporary law also attaches labels to people. This it usually does through the concept of identity. At one level, the law considers people to simply have a single identity as citizens. But just as the characterizations that law gives to everyday life are multiple, so too are the characterizations – by sex, race, class, status – that it gives to legal subjects are multiple. Permitting legal subjects a large measure of liberty to choose which of their possible identities they wish to adopt is the mark of a liberal democracy.

Law mediates, sometimes uneasily, between people and institutions, whether public or private. It provides the vehicles and agencies by which the state can recognize and express fundamental public values. Among these institutions are legislatures, courts, and governmental agencies. State agencies are an especially important site of legal regulation today. At the same time, the law also acknowledges the everyday law and private associations through which people express a sense of commitment to each other. Many of society's most important legal institutions arise in the law of everyday human interaction. Voluntary associations and community groups provide the link between official institutions and the informal practices by which everyday law is constituted, debated and modified.

Within both types of organization, law allocates the exercise of power and authority. It structures the relationships between formal office-holders and those whose influence is more subtle. The challenge for law today is to find the right balance within all types of legal institutions between official and unofficial, between explicit and tacit, and between formal and informal processes of social ordering and decision-making.

WHAT YOU SEE DEPENDS ON WHERE YOU STAND

One of the first human survival instincts is learning how to recognize different life situations and their likely or usual impacts. Knowing if something is safe or dangerous to eat matters. So does knowing if a person approaching on a sidewalk is going to say a friendly hello or violently demand money. And when driving a car, so does knowing if a road is a residential street, or a dead-end. The ability to see common features and to recognize situations – that is, the human capacity to categorize, to classify and to characterize – can reduce uncertainty in our daily lives and thereby increase cooperative action. Most characterizations are, of course, not given by nature. Nor are they self-evident. Different people characterize situations and events differently.

Law is one of society's highly refined classification systems. It gives us categories and concepts, and provides institutions and processes for piecing these categories and concepts together in a coherent whole. Like all systems of classification, however, legal characterization is neither given, nor self-evident. More than this, in law there is rarely a single characterization of a situation, a relationship or an event. The choice among law's several alternatives usually depends on the specific outcomes one hopes to achieve and values one hopes to promote as a result of the characterization chosen. Understanding the likely impacts of choosing any given characterization is, consequently, a key element in legal analysis.

Some time shortly after the birth of our daughter, my wife and I were visited by her three surviving grandparents: my father, my mother-in-law, and my father-in-law. One afternoon we all went out for a stroll. Shortly, we came across an accident involving a car and a bicycle. The police and ambulance had arrived and were attending to the injured cyclist.

The conversation that followed was very interesting. My mother-in-law, who had trained as a nurse, was most concerned about the injuries to the cyclist, noting that he was fortunate to have been wearing a helmet. My father, a retired civil engineer, commented on what he perceived to have been a defect in the design of the intersection and the placement of the traffic lights where the accident occurred.

My father-in-law, also retired, had been an airline navigator. He commuted to work by train from the small town where he lived to Dorval airport.

He remarked that traffic in cities was congested and that cycling was more fun and less dangerous in small towns. My wife, a social worker, observed that ambulance and other health-related social services in Montreal had become much more efficient over the past few years.

To no one's surprise, I was most interested in how the accident happened: In what ways did the conduct of the motorist and the cyclist contribute to the accident? Was the driver going too fast, or not paying attention? Did the cyclist make a foolish move, or go through a red light? In short, I wanted to know if anyone was at fault.

I am sure our daughter had no idea that the perspectives and preoccupations of her parents and grandparents were so different. If she were a few years older, she would have expressed her own views. And she would also probably have wondered, as I did, what else would have been said if all her aunts and uncles were present as well. Among these were an elementary school teacher, an urban planner, a marine biologist, a carpenter, a landscaper, and an artist. Once we get over the initial reaction to a situation like this – does anybody need any help? – our further thoughts are shaped by our prior experiences and our other preoccupations.

The diversity of our reactions to the accident points to an important feature of law that is often overlooked. One of law's main purposes is to label the events of everyday life. Law's labels then provide a framework within which we can discuss these events, make plans about how to manage them in the future and, where necessary, work through the conflicts that they may create. We must be on guard, however, not to think that the way law presents these everyday events is the only way in which they should be understood. The law's description is only one of several possibilities.

WHY DOES LAW CHARACTERIZE EVENTS AS IT DOES?

This story of the bicycle accident shows how much our own background shapes the way we come to think about the world around us. Of course, we should not think that our training or our occupation alone controls what we see. Nor should we think that we will always see things the same way. Our view is constantly changing as a result of our continuing life experiences.

So, for example, where one person may see a fair market exchange, another might see exploitation. Where one person might see a childish prank, another might see vandalism. Where one might see a "*bona fide* occupational qualification," another might see racial discrimination. Part of law's role is to help each of us sort out for ourselves which of these characterizations we wish to emphasize in different contexts, and why.

In passing laws that label life's everyday events Parliament often gives specific direction to our reflections. A good illustration of the impact that the different official legal characterizations can have is revealed in our very different attitudes toward four kinds of conduct that many people view as sins: consuming alcohol, gambling, taking non-prescription drugs, and prostitution. A century ago all four of these activities were generally looked upon with moral disfavour and as creating enormous social costs. The law was used to repress or strictly control them.

Today, however, the landscape is different. Legal regulation of two of them – alcohol and gambling – is minimal. In fact, in many provinces the government itself tries to assert something close to a monopoly in purveying alcohol and gambling. Yet Parliament continues to regulate prostitution closely, and possession of most non-prescription drugs remains a criminal offence.

Over the past 100 years, Parliament has gradually come to change its characterization of alcohol consumption and gambling. These are no longer seen as examples of an individual moral failing. Rather, they have been recast as social luxuries that can generate substantial revenues for the state. Along with this change in characterization, has come a change in the way Parliament thinks about possible social costs. The human costs of alcoholism and gambling addictions are acknowledged, but are thought to be best dealt with as issues of public health or social welfare.

Some argue today that exactly this type of change in characterization should occur in relation to prostitution and the consumption of non-prescription drugs. Legalize the behaviour. Perhaps even create a government monopoly. Tax it highly. And deal with the social costs as matters of public health or social welfare.

Others take the opposite position. Parliament should not fully legalize prostitution and other parts of the "sex trade." Nor should it relax its controls on non-prescription drugs, even so-called "soft drugs" like marijuana. In fact, some take the view that Parliament should now reverse its previous decisions about alcohol and gambling. Both should be either prohibited outright, or at least much more carefully regulated.

Whatever the outcome of these political debates, one conclusion is obvious. The way these activities are initially characterized has a large impact on how we, individually, view and respond to them.

MULTIPLE CHARACTERIZATIONS IN LAW

It is obvious that there are important differences in the way law and other disciplines – like medicine or engineering – characterize everyday life. But we should not think that there can or should be only one legal characterization

for any particular event. Law frequently offers us multiple ways of thinking about the same situation.

Some years ago, the Supreme Court of Canada had to decide a case that involved a manager of a shopping centre bringing a complaint under the *Petty Trespass Act* against an employee of a store that was leasing space in the shopping centre. The employee was picketing her employer. The manager argued that the shopping centre was private property and that the striker was a trespasser. The employee argued that lawful picketing was an exercise of the right of freedom of expression and that the manager should not be permitted to stop it.

The trial court and the appeal court in Manitoba came to opposite conclusions. Six judges on the Supreme Court decided in favour of the shopping centre manager and against the employee – primarily on the basis that the shopping centre was, in fact, private property. But three judges found in favour of the picketer – primarily on the basis that freedom of expression as reflected in the right to picket was a paramount value in Canada.

Commentators and lawyers were quick to point out that lurking in the facts of the case were many other issues that the court did not really address. Was the case really about deciding between private property and freedom of speech? Or was it about the relative power of employers and employees in labour disputes? Or was it about discriminatory wages paid to female employees – the reason for the strike in the first place? Or was it even about whether eighteenth-century English rules about trespass to land designed to protect private feudal estates should continue to apply in the twentieth century to public spaces like shopping centres?

Here again, it is obvious that how the court decides to characterize the issue in the dispute will have a major bearing on the decision that it ultimately reaches. What is more, by contrast with the cases of alcohol, gambling, prostitution, and drugs, here neither provincial legislatures nor Parliament have given a firm direction about which characterization should be preferred. How we, and the courts, decide this initial question of characterization tells us a lot about the social and legal values we think are most important.

DECIDING HOW TO CHARACTERIZE SOCIAL SITUATIONS

One of the easiest ways for law to fall out of step with the values and expectations of society is to get stuck in the way it characterizes events. If the only way that the law can look at a traffic accident is as an occasion to attribute fault to someone, then we are unlikely to ask whether civil trials are the best way to ensure the people who suffer harm receive proper compensation. If assigning blame to individual drivers exhausts law's contribution to understanding accidents, then we are unlikely to think about how improvements to design of cars and intersections, to the efficient delivery of ambulance services, and to the way we organize traffic in our cities, might reduce the number and severity of accidents in the first place.

These same types of questions about characterization can be asked in every area of the law. What factors would induce us to characterize everyday events as moral issues to be regulated by the criminal law, as public health issues, as economic issues, or in some other way? The challenge, both for lawmakers and for citizens, lies in the fact that there is no ready-made formula available to decide this question.

WHO DO YOU THINK YOU ARE ANYWAY?

The notion of personal identity plays a powerful role in shaping who each one of us thinks we are. Modern law even makes many visible human characteristics such as, for example, age, gender and skin colour important badges of identity. Yet other, less visible, identities escape or are denied official legal recognition. People are not, for example, thought to be constituted by traits of personality – their shyness or boldness, or whether they are pessimists or optimists – or by their intelligence, or by their deeply rooted likes and dislikes. There is no simple formula for deciding which of our various identities should count in law, and which should remain beyond its official reach.

That people may be legally constituted by several of their identities but still be just one person raises a central paradox. Contemporary law takes many of these partial identities into account in attributing rights and benefits upon groups. At the same time, the law attempts to overcome discrimination and disadvantage by recognizing and protecting diverse identities. It insists that they should not matter when people deal with each other in the workplace, the marketplace or the neighbourhood. And yet, it also treats most of these personal identities as voluntary. It permits people themselves to accept or to reject the legal rights and benefits flowing from them as they see fit.

Professional sports teams seem to have a great hold upon the imagination of North American males. My son and I are no exceptions. In Montreal there is constant talk that the city is about to lose its major-league baseball team, the Expos. Last year, the prospect of this loss led me to think about the meaning of team names. Would the name Expos (decided for its bilingual quality and to celebrate Expo '67) mean anything if the team moved to, say, Nashville or Washington? Is a team nickname just a label? Or does it in some way reflect the identity of the team? Take another example. In what way would the Montreal Canadiens hockey team still be the "canadiens" were Quebec to become an independent country separate from Canada?

Every time a team moves the relationship between name and identity arises. Are the Colorado Avalanche a new team or just the Quebec Nordiques in disguise? Are the Phoenix Coyotes really the Winnipeg Jets? There are even more striking examples. The Calgary Flames hockey team began life as the Atlanta Flames – the nickname referring to the burning of the city by General Sherman during the American civil war in 1864. What does the nickname "Flames" have to do with Calgary? Again, the Utah Jazz basketball team began life as the New Orleans Jazz. Jazz and New Orleans go together. Is it so clear that Jazz is the right name for a team playing in Mormon-dominated Salt Lake City?

There is more to team names than curiosities caused by franchise transfers. It is not hard to think of examples of sports teams that changed their name even while staying in the same city. The New York Jets football team began life as the New York Titans. The Houston Astros baseball team started out as the Houston Colt 45s. Even the Toronto Maple Leafs underwent a name change, from the St. Patrick's. Does changing a name always lead to a change in identity?

I do not raise these examples of sports teams changing their names just for fun. People also change their names. Yet there is more to the notion of identity than just a name. We all occasionally ask ourselves "who am I?" And we are all occasionally asked by others "who do you think you are?" Some of the most difficult problems of modern law can be traced to how it asks and answers these two questions about identity.

IDENTITY AS A LEGAL IDEA

Modern law generally rests on the view that human beings should have just one legal identity. This idea, of course, came out of the enlightenment. It was one of the ways by which the assumptions of feudalism were challenged and overcome. In most cases, law gives us a legal identity that we have in common with everyone else. So, for example, everyone has the same rights under section 7 of the *Canadian Charter of Rights and Freedoms*. People are simply people.

Now, however, more and more people see themselves not just as individuals, but as members of groups. Their identity is, in some sense, made up of their group attachments. The law is now coming to recognize this directly. Often it invites or requires us to take on a particular identity that we do not share with everyone. For example, adults have certain rights – such as the right to vote – that children do not. And certain classes of people have rights under section 15 of the *Canadian Charter of Rights and Freedoms* that others do not.

But how do we know which of our various identities deserve legal recognition? And how do we know when these particular identities should matter?

Some of our identities are very powerful in shaping who we are. This is often the case when they relate to our visible characteristics. The law accepts

that a person's identity can be constituted by, for example, age, gender, and skin colour. And yet, not all physical characteristics are legally significant. Some, like height, weight, eye colour, and hair colour, do not seem to count. Why the difference?

Canadian law also holds some not so visible characteristics to be important to identity: religion, sexual orientation, and mother tongue. Yet, other less visible identities escape official legal recognition. People are not, for example, thought to be constituted by their shyness or boldness, their like or dislike of sports, or by whether they are pessimists or optimists. Again, why the difference?

PARADOXES OF IDENTITY

To ask which of our various identities are to count in law, and which are beyond its reach, raises several difficult issues. How can the law view people as constituted by their multiple identities but still treat them as one person? And who should decide what identities are important to any given person?

Take my own several identities as an illustration. Which of them count when I act, write, and speak? Can I really claim that am I speaking "as" or "because I am" a 50-year-old, white male? Or as a tall, blue-eyed, bald person? Or as a married, heterosexual, bilingual, anglophone, Protestant parent of two teenagers? Or someone who is shy, a sports fan, a law teacher, or a resident of Montreal? Suppose I were to make a speech in favour of publicly-funded medicare. Would I be speaking as some of these things? As all these things? Or as none of these things? This is not a trivial point. Frequently, the law has to decide exactly who it is that I am when I act. Voting in local school board elections is one example where only one of my several identities, language, fully determines my legal rights.

More often, however, the law has to decide who I am when others act in ways that affect me. What right do other people have to make judgements about which identity is most important to me? Generally the law today answers "none." This negative response is what lies behind anti-discrimination law. Surely it is just as offensive to be told that you are only being heard "because of" one of your partial identities, as it is not to be heard at all. And it is just as offensive to be told that you are being refused a service because you are only being seen in one of these partial identities – as, for example, a woman, a person of colour, or a francophone.

Here is the paradox. At one and the same time, modern law has to take these diverse identities into account in order to recognize social diversity, and to insist that they should not matter when people offer goods, services, and jobs to others.

WHO DO I THINK I AM?

The composition of the Advisory Council of the Law Commission is an example of how identities both matter and don't matter. The Commission is required to choose an advisory council that reflects Canadian diversity. What does this mean?

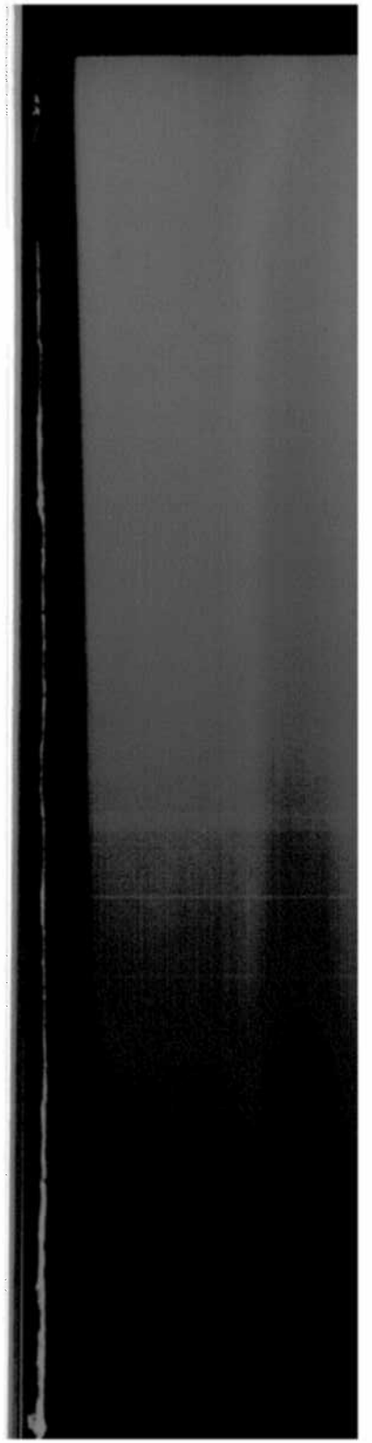
Currently, the Council consists of 11 women and 11 men. The oldest member is 71 and the youngest is 22. Members are drawn from every Canadian province and one territory. There are six francophones, eight anglophones, and eight allophones. The Council comprises members who are heterosexual, gay, and lesbian. It comprises two members of Aboriginal nations. Someone from most major religious denominations in Canada is a member of the Council, and several are agnostics and atheists. Some members have doctorates, while others have not completed high school. Seven have formal legal training. Eight members live in towns of less than 40,000 people, and seven members live in cities of more than half-a-million. And so on.

In this description of the membership of the Council, it should be noted that I am the one who pointed out these badges of identity. Why did I pick these ones and not others like ethnicity, height, weight, and political affiliation? And why am I the one who makes the choice? After all, each member has several concurrent identities. Surely it should be up to each one of them to decide for themselves who they are, and which of their partial identities, if any of them at all, is most important in any given situation.

For the Law Commission, the challenge is to reconcile the need to create an advisory council in which multiple identities are present, with the need for the Council to be comprised of people who do not just see themselves as representatives of one of these identities. For members of the Advisory Council, the challenge is how to act and speak in a way that reflects these diverse identities, but that does not reflect only one or the other of them.

THE CHALLENGE OF MULTIPLE IDENTITIES

In a liberal democracy, all identities must be legally equal. But some people suffer disadvantage because of one or more of their identities. A first challenge is, therefore, to understand when the best way to overcome discrimination and disadvantage is to recognize and protect diverse identities,



and to organize legal rights around them. The second challenge is to undertake this recognition and promotion in a manner that also permits people who may have one of the recognized identities to decline to consider themselves as having that identity.

Returning to nicknames of sports teams for a moment, these challenges can be expressed in the following question. What is the difference between the Expos moving to Nashville and retaining the nickname "Expos," and the Expos staying in Montreal, but adopting a new nickname like, for example, the "Olympics"?

The answer one gives reflects one's view as to whether law should take account of peoples' multiple partial identities, and if so, whether it should permit people to accept, mitigate or decline the legal consequences flowing from these several possible identities.

CAN WE GO TO A GARAGE SALE THIS WEEKEND?

At first glance, modern society appears to be dominated by the state. Everywhere we look, our activities and relationships are defined and regulated by government agencies. It was not always like this. Not so long ago in rural communities and in local urban neighbourhoods, people felt a strong sense of belonging and commitment to each other. Frequently, these ties originated in religious institutions. Day-to-day life revolved around the church, and its life-stage rituals: birth, marriage, death. Many schools, orphanages, retirement homes, and hospitals were sponsored by churches. As well, various non-religious associations and community groups mustered up other social services: museums, libraries, orchestras, sports teams.

Today, more and more people look first to government to provide services that were previously offered through churches, voluntary associations and local self-help agencies. And yet, as the role of these other groups diminishes, governments are finding it difficult to provide a full measure of social services for everyone. In responding to calls for privatization and deregulation, lawmakers face the challenge of ensuring that the values of democratic accountability and public participation are not totally displaced by a for-profit business model for delivering privatized and deregulated services. Here there is much to be said for remembering how social services were once organized by local, non-profit, community interest groups.

There is something magical about garage sales and yard sales. When my children were younger, these neighbourhood sales were their opportunity to pick up comic books, video and audio tapes, old clothes, and associated knick-knacks. Not least of the attractions they saw in garage sales was the chance to spend money buying things – to pretend that they were shopping. Of course, my wife and I also went to garage sales and yard sales, but with a different purpose in mind. We would buy used household appliances like toasters, radios and televisions, or junky old furniture to fix up. For us, the garage sale had an economic rationale that it did not for our children.

One Saturday, when my daughter was proudly showing off a set of plastic sand-box tools that she had acquired for $1.25, she asked me if I ever went to garage sales and yard sales as a child. I had to say that I did not remember ever having done so. But I do remember participating in two other types of

events that seemed to me to be very similar: the pot-luck supper, and the church-basement rummage sale. Both were community gatherings, like garage sales. Both had the feel and ambience of a bazaar, although not with a bazaar's crass commercial overtones. Both were occasions where things got exchanged from the relatively well-off to those who were less fortunate.

As I began to think more about garage sales, and tried to explain to my daughter what pot-luck suppers and rummage sales were like, I came to realize that these social events were actually quite different. In a garage or yard sale, any profits would go to the family or families running the sale. The money was not meant to support a church activity, a youth sports team, a new piece of equipment for the park, or a local clean-up drive. The items for sale belonged to the people organizing the sale. They were not donated by people in the community. Most people did not come looking for anything in particular that they needed. They just purchased whatever happened to catch their fancy.

This was not how I remembered pot-luck suppers and rummage sales. When I asked my father what he thought, he also felt that there were differences between rummage sales and yard sales. He also mentioned two other community events besides pot-luck suppers and rummage sales that served a similar purpose: barn-raisings and the volunteer fire-brigade. For him, all these events were cooperative community projects. More than this, perhaps because he was a long-time member of the Board of Stewards of his church, he described pot-luck suppers and rummage sales as examples of what he called "the social gospel." They were occasions for a community to put into practice the basic principle of fair distribution: from each according to ability to contribute; to each according to need.

DISTRIBUTIVE JUSTICE IN COMMUNITIES AND NEIGHBOURHOODS

I had never before thought about these church activities as anything other than a meal, a bazaar, a community social event, or a voluntary tax to support certain public goods. My father had a richer understanding. First, he gave me a quick lesson on the causes and consequences of social difference in any community. Some farmers and some business people are more successful than others. Some have better land. Some are stronger or work harder. Some are blessed with greater intelligence or a better business sense. Some may have a problem with gambling or an addiction to alcohol. Some are simply luckier. And in some, usually non-farm families, the husband may have run away without a trace, leaving his wife and children to fend for themselves.

In a rural community, few of these facts escaped public notice. According to my father, pot-luck suppers were an efficient way to manage social redistribution without the humiliation of organized welfare. Everyone brought as much food as they could afford. Everyone ate as much as they needed, and the left-overs were taken away by those families that needed them most. Under the tutelage of the church minister, the pot-luck supper was advertised and run as a church social event. The ulterior purpose of ensuring that the less-fortunate members of the congregation and community always had food to eat was never publicly avowed.

So it was, he explained, with the rummage sale as well. This I realized was the reason why, in contrast with a garage or yard sale, there was never any real junk at a rummage sale. People donated to the church any of their left-over clothes, furniture, and household objects that were still in good condition. These items wound up going mostly to certain families more in need than others. But the transfer was always structured as a market transaction in which the object and clothes were sold, not given away. Once again, the goal of social redistribution was camouflaged by a community event that described itself as something else.

MUTUAL AID IN COMMUNITIES AND NEIGHBOURHOODS

As my father pointed out, pot-luck suppers and rummage sales are not the only form of mutual aid in smaller communities or even in local neighbourhoods of larger cities. Barn-raisings and their urban equivalents such as the neighbourhood clean-up after a fire are two others. They permit a community to accomplish individual tasks beyond the resources or capacities of any one person. Built into the barn-raising process was the assumption of reciprocity: next time it will be my barn or my fence that needs repair, or my crop that needs harvesting in an emergency.

The volunteer fire brigade is another mutual aid enterprise. Here a community generates a social good that no individual could afford, or that even the whole community did not have the money to pay for. Volunteer fire brigades rest on a recognition that groups can effectively come together to pursue a common purpose in advance of any particular occasion where the purpose is needed.

These two kinds of mutual aid – one grounded in reciprocity, and the other grounded in the pursuit of a common purpose – seemed to me really only suited to dealing with pooling physical labour in rural areas. When I mentioned this to my father, he also gave me two other examples, drawn from the time we lived in a suburb of Toronto.

I recall some nights, the telephone ringing long after I was in bed, and my father having to get up to go out for a bit. I never knew why at the time. My father explained that we had a neighbour down the street who was a heavy drinker, and who became violent when he was drunk. The various men on the block organized themselves into a volunteer group to rescue his wife and children before he got out of control. She would call, and depending on the evening, either my father and two friends, or some other threesome would quickly go to the house to escort the husband out. He would spend the night in one of our garages where no children would ever see him. Of course, upon sobering up, he would always promise never to do it again, to join Alcoholics Anonymous, and to mend his ways. Sometimes the incidents were far apart. Sometimes, after he lost his job, they were more frequent.

My father also reminded me that neither he, nor my brother, nor I, ever did all the work that needed to be done around the house by ourselves. Of course, I shovelled snow. I mowed the lawn. I helped tend garden. I worked on the porch or the roof. But usually Grenville was there to help out as well. Grenville lived in a basement flat at one of my friend's homes. He was slightly uncoordinated, and even as children we knew that he was none too swift. But he was the community handyman, the minder of property during vacations, and everyone's general helper. What I did not know then, was that all the families of the community contributed to make certain that there was always enough paid work for Grenville to do.

BEFORE AND AFTER THE WELFARE STATE

In all these examples, one can see neighbourhood and community welfare in action before the welfare state. Community initiatives included various forms of mutual aid, economic redistribution, social regulation, and so on. While religious institutions played an important role in some activities, often as a cover for their true purposes, never was the benefit restricted to members of a given denomination. Indeed, many of the responses had no religious connection at all: the fire brigade; barn-raisings; the policing of domestic assault; or the employment of the unemployable.

For half a century we have looked increasingly to government to provide services that were previously handled through local self-help resources. Firefighting, community construction projects, policing, social welfare, and sheltered workshops are now all within the domain of the state. And yet, governments today are hard pressed to provide these services at a level the public expects. There is much call for deregulation and privatization.

In pursuing these themes by redesigning models of service delivery, policymakers face two challenges. They need to avoid harkening back to a mythological rural arcadia of private self-help welfare. Anyone who has ever lived in such a setting knows of the violence, prejudice, and dysfunction that were also often present. Nor should they simply restructure government functions by creating private bureaucracies. Part of our current sense of loss flows precisely because we have professionalized and bureaucratized community life.

The policy challenge is to find a way to marry the values of democratic accountability and participation in the newly-privatized services with the goal of efficiency. It is to ensure that the for-profit business model is not the exclusive template for replacing the state in the delivery of any privatized and deregulated social services. In planning new processes there is much to be said for remembering how the values of mutual aid and cooperation were reflected in the local, non-profit, community groups and voluntary associations through which these services were once organized. Overcoming both political slogans and unreflective nostalgia is the trick for finding the right mix of strategies.

OLD GUARDS

Organizing and structuring human relationships is one of law's most important roles. Sometimes private contracts are the device through which ordering is achieved. When more than two people are involved, relationships are more frequently nurtured within and through institutions that allocate decision-making authority and responsibility: corporations, unions, schools, churches, social clubs, universities, and so on. These institutions are usually complex and subtle. What look like the formal rules can often be overtaken by practices, tacit understandings, and accepted ways of doing things. And what look like the formal decision-making authorities can also find themselves obliged to share power with informal associations and groups.

Without informal practices and tacit understandings, and without informal organizations and groups, most complex institutions could not function. Of course, these informal associations and the tacit understandings through which they function are not monolithic. Several may co-exist within the same institution. Some are meant to accomplish particular aims. Others are inchoate and appear to pursue no obvious purpose. Some are more or less recognized within formal structures and are implicit delegates of authority. Others may be completely external to the formal hierarchy. Understanding the interplay between formal and informal associations in organizational life is a prerequisite for the design of effective legal institutions.

During the late 1960s and early 1970s, I spent my summers working at a boys' camp in cottage country just north of Toronto. After several years as a counsellor, in 1969 I became a section director. For the next half-decade, I held various positions as a member of the "senior staff" at that camp. According to the formal chart posted in the camp office, the senior staff comprised a dozen or so section directors and program directors. The senior staff was, in theory, responsible for deciding all matters of policy and for supervising general camp activity.

Yet, in parallel to this official council of decisionmakers there were other individuals who seemed to wield enormous influence within the camp. Collectively they came to be identified as "the Old Guard." Despite its name, this Old Guard was neither a reactionary body of aged warriors claiming to be "keepers of the true faith," nor an entrenched group covertly wielding power as an "old boys' network." Some members of the senior staff were members of the Old Guard, but some were not. More interestingly, there were a few

members of the Old Guard who were not also members of the senior staff. Many of those comprising the Old Guard had several years experience at the camp. Others had only been on the staff for a couple of summers.

To the law student that I was during much of this time, several features of this group appeared peculiar, if not perverse. There were no organized meetings. There were no specific matters over which it was given authority to make decisions. There were no recognizable rules even made by it. And there were no formal procedures that it observed. The camp director's tolerance of this loose association with a power and authority that overlapped and sometimes overrode the official decision-making bureaucracy puzzled me. I recall thinking that this was not an effective or honest way to run an organization.

One feature of the Old Guard really stood out. There were no guidelines about how one got to be a member. While staff members could lobby for and negotiate a position on the senior staff, it was hard to imagine them demanding appointment to a body that did not officially exist. Indeed, it was an incident relating to the question of membership that first caused me to reflect on what the Old Guard was, and how it functioned within the camp.

In 1972, a talented young philosophy student joined the camp staff as director of the canoe-trip program. This new staff member also happened to be the brother-in-law of a former long-time member of both the senior staff and the Old Guard. As a consequence, he knew a lot about the camp, its operations, its procedures, its personalities, and its history. Being quite smart and armed with this knowledge, he immediately began to insert himself into those casual, unstructured, speculative discussions about planning and policy which members of the Old Guard considered to be their exclusive preserve.

After two or three weeks, I was approached by a couple of other members of the Old Guard, who asked me (acting not as a long-time member of the Old Guard, but as the ranking member of the snior staff) to have a word with this upstart. At the time I did not see the irony of an officially non-existent group calling upon official authority within the camp to legitimate its non-existence.

WHAT IS AN OLD GUARD?

Shortly afterwards I had a chance to talk privately with him about the Old Guard. Because the conversation was so awkward I can still remember most of the ideas we discussed and the conclusions we reached. One of the most important conclusions was this. There was, in fact, not one homogenous Old Guard, but several sub-sets. These had only partially overlapping memberships, depending on the type of issue under discussion and the type

of counsel and advice the camp director was thought to be seeking. In this sense, Old Guard was, by contrast with the senior staff which had an explicit structure of committees and sub-committees, a strikingly plural and amorphous grouping.

Moreover, members of the Old Guard never referred to themselves as belonging to it. Indeed, the initial indication of membership was conferred almost incidentally by existing members reaching out to include potential new members in their episodic discussions. Once informally attributed in this way, membership was then confirmed by the off-hand usage of the epithet "member of the Old Guard" by the camp director in various settings around the camp. Despite the self-identifying and unstructured character of the Old Guard, the group was recognized by members of the camp staff. It seemed to be widely understood and even accepted as an institutional complement to the senior staff.

Even though the role of the Old Guard was acknowledged, its members never formally met as a group to discuss, or decide, matters of policy within the camp. To the extent that members of the Old Guard ever took a position on any issue, this was presented only as the opinion of one or another individual. At the same time, in most formal settings, such as regular senior staff meetings, members of the Old Guard were almost always of the same viewpoint about what should be done.

MULTIPLE OLD GUARDS

The various sub-sets of the Old Guard seemed to wield great informal influence. But they were only one type among several informal groups within, or associated with, the camp. The most visible of these other groups was the Nor'Wester Society, an ever-expanding body of about ten present members and about 60 former members of the camp staff. The Nor'Westers were the true "keepers of the faith" and overtly proclaimed this mission at the yearly Camp Nor'Wester Day. By contrast with the Old Guard, the Nor'Westers were an organized body of alumni, with a constitution, and with defined membership rules, settled procedures for deliberation and decision-making, including a committee structure. Like the senior staff, the Nor'Westers were an organized group. But their role within the camp was entirely informal.

Besides the Nor'Westers there were also various other groupings of staff members who contributed much to everyday camp life. Most of these groupings were informal, and self-identifying. But unlike the Old Guard, they did not coalesce around some vague sense of overall leadership. Rather, they were program specialists, linked by interest, talent or other commonality. Each group

came to play a well-defined and specific role within the camp. All the camp musicians exercised leadership in the presentation of music nights, rainy day programs, and camp fires. The athletically-inclined counsellors seemed to manage the camp's weekly regattas and competitive swimming, sailing, and canoeing events. Those staff members who were most religious looked after the Sunday chapel service. On so on.

Upon examination, leadership among the camp staff turned out to be quite diffuse. In theory, a formal, bureaucratic organization with a specific authority, the senior staff, ran the camp. In practice, at least three other types of association also played a role: a formal, bureaucratic organization that had no specific authority, the Nor'Westers; a series of informal, non-bureaucratic groups that handled particular events and particular occasions, the program specialists; and finally, a loose-knit association of informal, non-bureaucratic sub-groups that had no specific authority but enormous influence, the Old Guard.

OLD GUARDS IN EVERYDAY LIFE

Exactly a decade after I left summer camp, I became the dean of a Faculty of Law. Almost immediately upon taking office I noticed differences in the manner and substance of the contribution that various professors made to collegial life. Shortly after I had joined the faculty five years earlier, I became conscious that some professors' voices carried more weight than others. Until I assumed the deanship, however, I did not attribute much significance to the fact. Nor did I try to uncover any identifying characteristics shared by these influential professors, or seek out other explanations for the preponderance of their opinions.

Only later did I realize fully the extent of the differences between two groups of my colleagues. Those who held the rank of full professor or title of associate dean, and who by virtue of their rank or office presumably should have been showing leadership within the faculty. And those colleagues, some of whom were quite young or recent recruits to McGill, upon whom I actually tended to rely for counsel and advice. This latter group of professors was quite a disparate group, having little in common either as to age, sex, and ethnicity, or as to subject-matter specialization and theoretical approach to law. Nevertheless, I later discovered that they would often eat lunch together, and that they interacted socially both within and outside the university. Despite the fact that they never formally assembled as a group with an agenda, nor sought explicitly to come up with an understanding about how to deal with some current faculty conundrum, invariably the general line of their thinking was consistent.

Just as had been the case at summer camp, the Old Guard of the Faculty of Law unconsciously controlled its own membership. Just as at the camp, the feelings of the formally "elect" excluded from the Old Guard could be easily hurt. And just as at summer camp, not only was there an Old Guard which was a decidedly plural group, there were other groupings of professors playing important roles. The civil lawyers, common lawyers, and public lawyers each claimed a "program specialty" or authority similar to that of the camp musicians and sports enthusiasts. So too did the francophones and anglophones, and the doctrinal scholars and the legal theorists. Even the Nor'Westers had their reflection in the group of graduates who comprised the Law Faculty Advisory Board. Within the Faculty of Law, I was reliving various aspects of my summer camp experience, although as dean my own role had become more like that of the camp director.

Of course, it is not just in summer camps and faculties of law that one encounters Old Guards. For example, every legislative body has its political parties and informal caucuses. Without informal associations and groups, most complex institutions could not function. Institutions that are organized to deny or diminish the role of these informal associations and the tacit understandings through which they function become highly bureaucratic and rigidified. By contrast, formal institutions that recognize the plurality of informal, implicit, and inchoate associations and the role they play are better able to adapt to change and to effectively pursue the purposes for which they were established.

The best response to the inevitable existence of informal power is not to suppress it. It will just resurface elsewhere in different form. Rather, the best response is to give it a productive institutional outlet.

SUGGESTIONS FOR FURTHER READING

Introduction

The influence of law's conceptual structure on its institutional forms was a recurring theme of both Fuller and Carbonnier. See, in particular, the concluding essay in L. Fuller, The Problems of Jurisprudence (Mineola: Foundation Press, 1949). For a more mature exposition of Fuller's views, see "The Role of Contract in the Ordering Process of Society Generally" in L. Fuller and M. A. Eisenberg, Basic Contract Law, 3d ed. (St. Paul: West Publishing, 1973), 89-101. Carbonnier's understanding of law's conceptual structure and institutional forms are best expressed in Flexible Droit, 8th ed. (Paris: L.G.D.J., 1996).

Fuller's essay "Means and Ends" in K. Winston ed., The Principles of Social Order : Selected Essays of Lon L. Fuller (Durham: Duke University Press, 1983) is also helpful on this point, as are the essays by J. Vining, "Fuller and Language," and P. Teachout, "Uncreated Conscience: the Civilizing Force of Fuller's Jurisprudence," both in W. Witteveen and V. van der Burg eds., Rediscovering Fuller: Essays on Implicit Law and Institutional Design (Amsterdam: Amsterdam University Press, 1999).

Recent feminist scholarship has pointed to the gendered character of many legal institutions: see D. Rhode, Justice and Gender (Cambridge, MA: Harvard University Press, 1989). Similar observations have been made in relation to race, religion, and class. Competing perspectives on the rootedness of legal concepts and institutions are offered by P. Kahn, The Cultural Study of Law (Chicago: University of Chicago Press, 1999); and J. Shklar, The Faces of Injustice (Cambridge, MA: Harvard University Press, 1990).

The importance of para-public and private institutions to modern society is a constant theme in legal scholarship. See H.W. Arthurs, Without the Law: Administrative Justice and Legal Pluralism in Nineteenth Century England (Toronto: University of Toronto Press, 1985); Jerold Auerbach, Justice Without Law? (New York: Oxford University Press, 1983).

What You See Depends on Where You Stand

The nature and effects of legal characterization are discussed in numerous essays. A particularly insightful recent essay is P. Birks, "Introduction," in Introduction to English Private Law vol. 1, (Oxford: Oxford University Press, 2000). See also, G. Timsit, Les

NOMS DE LA LOI (Paris: PUF, 1991); J. Vanderlinden, "A propos des catégories du droit" (1999) 2 REVUE DE LA COMMON LAW EN FRANÇAIS 301-330.

Characterization is, of course, a more general social phenomenon. Two features merit particular notice. First of all, an organized structure of characterization permits discrete units to be separated from a larger whole. In law, this facilitates the transplantation of legal ideas and concepts across legal systems and legal traditions. For discussion, especially in connection with the survival of Roman law, see A. Watson, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW, 2d ed. (Athens: University of Georgia Press, 1993); THE MAKING OF THE CIVIL LAW (Cambridge, MA: Harvard University Press, 1981); THE SPIRIT OF ROMAN LAW (Athens: University of Georgia Press, 1994).

Secondly, characterization is largely driven by institutions and inherited structures of thought. See M. Foucault, THE ORDER OF THINGS: THE ARCHEOLOGY OF THE HUMAN SCIENCES (New York: Pantheon, 1970); Mary Douglas, HOW INSTITUTIONS THINK (Syracuse: Syracuse University Press, 1986); T. Kuhn, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS, 3d ed. (Chicago: University of Chicago Press, 1996).

The influence of perspective on how people characterize problems constitutes a trope, widely resorted to in cultural works. In cinema, perhaps the most influential treatment is Akira Kurowsawa's RASHOMON. High and low cultural forms use conflicting perspectives, and partially understood information flowing from cultural difference as devices to drive narrative forward. This is notably the case in Sophocles' ANTIGONE, and Shakespeare's OTHELLO.

The question of differing perspectives also permeates pop-psychology. See, for example, John Gray, MEN ARE FROM MARS, WOMEN ARE FROM VENUS (New York: HarperPerennial, 1994). The question of differences of cultural perspectives is a central motif in Japanese literature; see e.g., Natsume Soseki, THE THREE CORNERED WORLD, trans. A. Turney (New York: Putnam, 1982), and is the grist for many movies that deal with cross-cultural differences: DOUBLE HAPPINESS, ANNIE HALL, and GUESS WHO'S COMING TO DINNER being among the better known.

WHO DO YOU THINK YOU ARE ANYWAY?

A general theorization of the complex nature of identity has been developed in several works by Charles Taylor. See notably, SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY (Cambridge, MA: Harvard University Press, 1989); MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION (Princeton: Princeton University Press, 1994).

Of course, differences of gender, race, and class also bear on the way legal systems respond to potential litigants. In SOCIOLOGICAL JUSTICE (New York: Oxford University Press, 1989) Donald Black explores how social location shapes legal outcome.

The issue of multiple identities and affiliations has spawned a vast academic literature. See e.g., SLEEPING WITH MONSTERS: CONVERSATIONS WITH SCOTTISH AND IRISH WOMEN POETS (Dublin: Wolfhound, 1990); Lorde, "Age, Race, Class and Sex: Women Redefining Difference," in SISTER OUTSIDER (Trumansberg, NY: Crossing Press, 1984) at 114; and bell hooks, YEARNING: RACE, GENDER AND CULTURAL POLITICS (Toronto: Between the Lines, 1990). For a classic exposition see Ralph Ellison, INVISIBLE MAN (New York: Modern Library, 1992).

The nature of personal and group identity is also the source of much contemporary academic writing and popular debate about what has been called "cultural appropriation." The issue is not new. Generations ago Miles Davis accused white musicians like Dave Brubeck of cultural mis-appropriation. See Miles Davis and Quincy Trope, MILES: THE AUTOBIOGRAPHY (New York: Simon & Schuster, 1990).

Uncertain gender identity also figured in some of Shakespeare's comedies, notably A COMEDY OF ERRORS, TWELFTH NIGHT, and A MIDSUMMER NIGHT'S DREAM. Modern movies such as LA CAGE AUX FOLLES also play on ambiguities of gender.

CAN WE GO TO A GARAGE SALE THIS WEEKEND?

The two themes of this story – competing principles of social ordering and the relationship of state bureaucracy and voluntary associations – are not always linked. Twice Lon Fuller attempted to contrast alternative models of organization, models that others like Charles Lindblom describe as the contrast between politics and markets: see C. Lindblom, POLITICS AND MARKETS (New York: Basic Books, 1977). Invariably, those who draw such distinctions are preoccupied with reducing the size of government. The legal *locus classicus* in F. Hayek, LAW, LEGISLATION AND LIBERTY, 3 vols. (Chicago: University of Chicago Press, 1973).

Fuller's concern was less with whether governments or markets should organize social activity than with the forms by which such organization is achieved. At one point Fuller distinguished between "organization by reciprocity" and organization in pursuit of common ends: see "Freedom: A Suggested Analysis" (1955) 68 HARVARD LAW REVIEW 1302; later he revised this distinction as one between "the legal principle" and the pusuit of "shared purposes": see "Two Principles of Human Association," in THE PRINCIPLES OF SOCIAL ORDER, ed. K. Winston (Durham: Duke University Press, 1983) at 67.

Fuller was much influenced by Michael Polanyi's collection of essays THE LOGIC OF LIBERTY: REFLECTIONS AND REJOINDERS (Chicago: University of Chicago Press, 1951). Nonetheless, he did not believe that the "legal principle" could be deployed to accomplish all social tasks, a conclusion to which some welfare school economists and proponents of the "Law and Economics" movement appear to have arrived. Compare Fuller's essay

"Irrigation and Tyranny" (1965) 17 STANFORD LAW REVIEW 1021 with R. Posner, THE COLLECTED ECONOMIC ESSAYS OF RICHARD A. POSNER (Northampton, MA: Edward Elgar, 2000); and FRONTIERS OF LEGAL THEORY (Cambridge, MA: Harvard University Press, 2001).

As for the special problem of deregulation and privatization of governmental functions, the issue is well worked over in both legal and policy studies literature. One particular version is found in R. A. Macdonald, "Regulation by Regulations," in REGULATIONS, CROWN CORPORATIONS AND ADMINISTRATIVE TRIBUNALS, ed. I. Bernier and A. Lajoie (Toronto: University of Toronto Press, 1986) at 89.

In popular culture both governmental and non-governmental structures and organizations are typically stereotyped. Voluntary associations are often presented as part of idyllic communities that are free from the interfering influence of the state: see, for example, the various organizations as portrayed on the ANDY GRIFFITHS SHOW. On occasion, however, they are also conceived as sites of pathology, which require the intervention of state actors, notably the police, to redeem them: see, for an example of this genre, the movie WITNESS. State institutions are, of course, invariably portrayed as impersonal, insensitive monoliths. GRIDLOCK'D is a classic of this type. What is common to all movies that do not harken back to the arcardian past, is the apparent celebration of the individual's capacity to triumph against organizational evil – whether in the voluntary or in the public sector. This is true even when the hero is, himself or herself, part of the bureaucratic apparatus, as in THE DAY OF THE JACKAL.

OLD GUARDS

The literature on organizational theory and the sociology of organizations is enormous. One of the best studies of informal associations is Mary Douglas, HOW INSTITUTIONS THINK (Syracuse: Syracuse University Press, 1986). See also Herbert Simon, MODELS OF THOUGHT (New Haven: Yale University Press, 1955). The connection between rights and organizations is explored in Meir Dan-Cohen, RIGHTS, PERSONS AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY (Berkeley: University of California Press, 1986).

Unofficial organizations within official orders are a common feature of political parties, sports teams, and the military. From the essay by James Madison, THE FEDERALIST PAPERS, No. 10 to the present day, governance institutions have struggled with faction. In ROBERT KENNEDY: HIS LIFE (New York: Simon & Shuster, 2000), Evan Thomas writes that Lyndon Johnson resented the "Kennedy loyalists" within the Democratic Party after he became president. Within sports teams there are often factions whose members cannot be categorized within the official hierarchy of the organization (using titles and designations like manager, coach, captain) but that nevertheless exert a powerful influence. For a detailed examination of one such example, see S. Smith, THE JORDAN RULES: THE INSIDE STORY OF A TURBULENT SEASON WITH MICHAEL JORDAN AND THE CHICAGO BULLS. For an application of theories of informal organization to the military see the essay "The Western Concentration Block," in THE POLITICS OF COMMAND, by T. Connelly and A. Jones (Baton Rouge: Louisiana State University Press, 1973) discussing the role of different factions in the development of Confederate military strategy during the American Civil War.

An epistolic consideration of these same issues within a law faculty is essayed in R. A. Macdonald, "Office Politics" (1990) 40 UNIVERSITY OF TORONTO LAW JOURNAL 419.

In popular literature and movies, these informal organizations are almost always pictured (caricatured) as malignant. They comprise plotters intent on subverting an organization, or an entrenched force bent on stifling democratic reforms. A modern classic, complete with the conventional stereotypes is INDEPENDENCE DAY.