POST-CHARTER LEGAL EDUCATION: DOES ANYONE TEACH LAW ANYMORE?

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How has the Charter changed legal education in Canada over the last quarter-century? Does anyone teach law anymore, in the way it used to be taught? Or is the teaching of law increasingly driven by the rights culture of the Charter, and the Charter precedents created in cases from the lower courts all the way to the Supreme Court? On the 25th anniversary of the Charter, McGill law professor Rod Macdonald offers what he terms "25 brief commentaries on post-Charter legal education." For each of these "factoids," he states "what I perceive to be a significant institutional, social, judicial or legal cultural change. Then I elaborate briefly upon how I perceive it to have affected law teaching." He begins with an important argument, that "the historical substance of constitutional law has been progressively displaced by a preoccupation with the Charter."

En quoi la Charte des droits et libertés a-t-elle modifié l'éducation juridique au Canada depuis un quart de siècle ? Enseigne-t-on toujours le droit comme autrefois ou cet enseignement est-il de plus en plus marqué par la culture des droits et les précédents créés en vertu de la Charte dans des causes jugées à tous les niveaux, des tribunaux inférieurs à la Cour suprême ? En ce 25e anniversaire de la Charte des droits et libertés, Rod Macdonald, professeur de droit à l'Université McGill, propose « 25 brefs commentaires sur l'éducation juridique depuis l'adoption de la Charte ». Dans chacun d'eux, il décrit ce qu'il considère comme « un changement pertinent » et les répercussions qu'il a entraînées sur l'enseignement. Selon lui, « la substance historique du droit constitutionnel a été progressivement absorbée par la Charte des droits et libertés ».

In 1975, at a conference celebrating the 100th anniversary of the establishment of the Supreme Court of Canada, my colleague Stephen Scott was asked what he would recommend as an appropriate commemoration of the event. Without missing a beat he replied: "Restore appeals to the Privy Council."

Regrettably, I have no witty remark like "Amend the Preamble to replace the Supremacy of God with the Supremacy of the Chief Justice" as a response to the question I've undertaken to address on the Charter's 25th anniversary. In fact, I'm a bit embarrassed by the request to consider how the Charter has changed legal education, for it implicitly brings home to me the uncomfortable fact that I am one of a shrinking cohort of Canadian law professors — those who were actually in the ranks prior to 1982.

I recall that shortly after Canada's purported passage from a state of nature to a state of grace on April 17, 1982, I was asked to participate in a Symposium Issue of the *Supreme Court Law Review*. My short essay, I vowed, would be my first, and last, published contribution to Charter scholarship. To date I've resisted the temptation to revisit schedule B to the *Canada Act 1982* (UK), although in other constitutional texts I have skirted its frontiers. Admittedly, there have been many times when frustration in the classroom has led me to add another paragraph to the apocryphal article I've been mentally composing in fits and starts since then. As yet I'm undecided as to whether this virtual parting shot will be entitled — evoking the memory of the barons at Runnymede in 1215, and in contrast to their efforts — Parva Carta, or perhaps more charitably, Media Carta.

Here, I have a different objective — namely, to consider in what ways teaching in law faculties has changed over the past quarter-century. In doing so I shall, of course, indirectly examine various changes to Canadian legal culture generally: (1) how law, and especially constitutional law, may have changed; (2) how politics may have changed; (3) how the practice of law may have changed; (4) how judging may have changed; (5) how legal scholarship may have changed; and (6) how law teaching and legal research in precincts other

than law faculties — for example, in political science, economics, sociology, philosophy, socio-legal studies, public administration and policy studies departments — may have changed. Nonetheless, my focus is on law faculties, and the object of inquiry is legal pedagogy. How do law teachers imagine their role? How do they perform it? What implicit messages do they convey to their students through their teaching, their research and the institutions and processes they esteem?

Before presenting my observations, I'd like to enter three caveats. One relates to the occasion for this text, one to the nature of the claims I shall be making and the third to the scope and purpose of this essay.

In deference to the anniversary we are commemorating, I have organized the reflections that follow as 25 brief commentaries on post-Charter legal education. The very fact that it is 25 (and not 19, 22 or 27) years of Charter dispensation we are observing reveals much about the mystical commitments that we associate with the document. Like the ancient Greeks who thought the key to the universe lay in mathematical relationships, in 21st century Canada we choose our celebratory moments on purely formal criteria — imagining not only that 25 is a more significant number than 24 or 26, but also that the mere coming into force of the Charter in 1982 was the most salient substantive event. Could we not also imagine artifacts such as the Canadian Bill of Rights, the Victoria Charter, the Quebec Charter of Human Rights and Freedoms, the Patriation Reference, the Meech Lake Accord, the PEI Judges Reference, the Charlottetown Accord, the Secession Reference or the *Anti-Terrorism Act* (and the dates associated therewith) as equally transformative constitutional moments? I pick up on this obsession with the Charter as artifact later.

My second caveat is methodological. I do not wish to be taken as claiming that the Charter has actually precipitated any of the changes in legal education that I note here. Absent a careful empirical and multivariate regression analysis I hesitate to make causal claims, although it is apparent that some of the changes I signal are more closely connected to the advent of the Charter than others. In this (perhaps false) modesty I take my distance from those preoccupied with the document who believe that the parentage of all significant changes to governance in Canada since 1982 — for better or for worse — can be attributed to the Charter. Again, I return to this naive conception of the relationship between law and social change at the end of this essay.

A third caution is stylistic. This is not a law review article. There are no footnotes. I have tried to avoid weasel words. I mean deliberately to be provocative. After all, whether I'm right is not that important. What really matters is to reflect on the scope and scale of these purported changes and to assess their impact.

What follow are 25 post-Charter pedagogical factoids. First I state what I perceive to be a significant institutional, social, judicial or legal cultural change. Then I elaborate briefly upon how I perceive it to have affected law teaching.

1. The historical substance of constitutional law has been progressively displaced by a preoccupation with the Charter. When Albert Abel published the 900-page 4th edition of Bora Laskin's leading casebook *Canadian Constitutional Law* in 1973, he left out the chapter on civil liberties that Laskin included in the 3rd edition on the grounds that the subject was not really constitutional law. The editor was obliged — in the guise of a revised 4th edition two years later — to add a chapter of 87 pages on the subject prepared by Bora's son, John I. Laskin. Laskin's original text of 1951 contained a concluding chapter (22 of 663 pages) treating what he styled as "Constitutional Guarantees." In the 1977 first edition of *Canadian Constitutional Law* Peter Hogg allocated 29 of 466 pages to "Civil Liberties." Today, the classic casebook treatment, *Canadian Constitutional Law* (3rd edition), devotes almost 60 percent of its 1,300 pages to "Rights" — with only 40 of those pages on "Rights" not dealing with the Charter, while the latest loose-leaf of Hogg's treatise consecrates over 40 percent of its pages to "Civil Liberties" — all but 25 of which concern the Charter. Few are the constitutional law teachers today who do not sacrifice their teaching of history, politics, institutions, practices, conventions and federalism on the altar of the Charter.

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2. Sections 91-101 and 133 of the Constitution Act, 1867 have been de-emphasized as structural reflections of the Canadian political community. Until the late 1970s, considerable effort in constitutional law teaching focused on how the then *British North America Act, 1867* sought to construct a federation not just of existing colonial political units, but of peoples and communities. The language of two founding peoples or of the Constitution as a "compact" between two nations acknowledged the centrality of ethnic, cultural, linguistic and religious diversity to the definition of the Canadian state. The key components of identity were nurtured through institutional arrangements such as the Senate, an upper house in Quebec, the attribution of marriage and divorce to federal jurisdiction and a plethora of administrative mechanisms guaranteeing political participation to minority (or to use the expression of the day — dissentient) communities. Today, the constitutional protection of social diversity is conceived as being primarily about anti-majoritarian constraints upon state action, rather than about the specific mechanisms and modes that ensure enfranchisement within a political community. Concomitantly, even when con-

stitutional law teaching focuses on "participation enhancing" institutions and practices, it does so almost exclusively by evoking justiciable rights attributed to individuals, and not the design and functioning of these institutions.

3. Conceptual classifications previously thought discrete no longer frame the interpretative logic of legislative jurisdiction under sections 91 and 92. Traditionally, constitutional review on federalism grounds began with determining the "pith and substance" of legislation, asking "What is the matter?" and then assigning any particular statutory enactment to one or another of the "water-tight" classes of subjects set out in sections 91 or 92. The difficulties courts experienced in applying the "double aspect" doctrine and their inconsistent responses to the question whether an "ancillary powers" doctrine formed part of Canadian constitutional law bedevilled the endeavour. Notwithstanding the attempt in *City National Leasing* to save the appearances of categorical exclusivity, over the past 25 years, a different discourse — pragmatic and functional rather than conceptual — has come to dominate. Contemporary law teaching largely follows this functionalist frame, to the point where conceptual arguments can no longer sustain even the organization of the curriculum. There is scarcely a course today that cannot be (always a logical possibility) and is not being (an epistemic choice) taught as a variation on a Charter theme. While functionalism overcomes misplaced formalism and invites law teachers to frame pedagogy around substantive issues, an over-commitment to imagining law pragmatically — as a seamless web — enables a tug on a single thread to unravel the whole, untrammelled by jurisdictional stitching.

4. The length of judicial judgments, especially in constitutional cases, and especially of the Supreme Court, has increased exponentially. Prolixity is fellow-traveller of pragmatic and functional reasoning. The seven separate opinions in the landmark 1959 case *Roncarelli v. Duplessis*, for example, took up only 65 pages in the *Supreme Court Reports*. By contrast, four opinions in the *M. v. H.* case in 1999 consumed 202. This inflation, which is probably inevitable given the complexity of issues now being adjudicated under general standards, has major consequences for the way that judicial decisions are compiled and taught. To take one example, in the 4th revised edition of Laskin's casebook, Cartwright's majority judgment in the *Coughlin* case was reproduced almost in its entirely, and Ritchie's dissent was edited by half; in the recent *Canadian Constitutional Law* (3rd) compendium, the 16-page case appears in an extract of 2 pages. Even contemporary cases are severely edited. In the latest version of Mullan's excellent *Administrative Law* materials only the *Baker* decision is reproduced in full. In such a presentation of cases, law teaching no longer focuses on the subtle processes by which the messiness of everyday life gets distilled into a judicial decision reasoned through from start to finish. In the manner of the apocryphal contracts professor who finds the *ratio decidendi* in the third last line of the fourth last paragraph of a judgment, much contemporary pedagogy rather imagines the case — or more frequently, the excerpt — simply as an alternative way of presenting a legal rule.

5. The scope of justificatory materials referred to in judicial decisions has been greatly enlarged. Prior to the mid-1980s it was rare for judges to cite sources apart from other cases in support of their opinions. The law reports are replete with judicial observations that extrinsic aids to interpretation were impermissible and living writers could not be cited as authority. Even after *Re Drummond Wren* opened the door, landmark cases like *Roncarelli v. Duplessis* contained no citation to parliamentary debates or to any scholarly text. By contrast, in the *M. v. H.* case, there were citations to almost 40 such sources. The broadening of justificatory materials may evidence a democratization of legal reasoning, but it also invites judgments in which reasons for decision sometimes seem more a recitation of *ex post facto* rationales than an engagement with the disciplining *ex ante* constraints of a coherent normative regime. That there is a concurrent professorial tendency to pass directly to questions of high political theory without careful consideration of the specific issue to be decided and the intermediate level questions of political, economic and social policy is hardly surprising. For many law teachers today, the judicial decision serves simply as a pretext for armchair philosophizing.

6. Courts have explicitly recognized and increased the normative weight given to unwritten, implicit constitutional principles. For its first hundred years, the Supreme Court only rarely acknowledged the existence of unwritten, implicit constitutional principles. The idea was floated in the *Alberta Press* case, *Re Initiative and Referendum* and certain "implied Bill of Rights" decisions, but was expressly rejected in the late 1970s in *Dupond*. Then the Senate, Patriation, Quebec Veto, and Manitoba Language References brought these principles back to consciousness, whence they emerged full blown in the PEI Judges and the Quebec Secession References of the 1990s. But because the theory of such overarching principles of the common law constitutional tradition was not fully articulated by scholars prior to the 1980s, their justification

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(wrongly) appeared to rest on little other than judicial fiat. Moreover, the rich history and jurisprudential grounding of implied principles of parliamentary intent such as the "rules of natural justice" have also been lost. While some professors essay to (re)construct such a theoretical ground, in many cases the teaching of basic principles of public law is often reduced to tactical invocations of favoured political theorists (Aristotle today, Rawls tomorrow), or non-contextualized assertions that are not rooted in legal culture, constitutional history and political philosophy.

7. Administrative law has almost disappeared as a separate field of public law, now being largely subsumed in doctrines of judicial review on constitutional grounds. In the 1960s and 1970s, administrative law was paradigmatically about the multi-functional regulatory agency operating as a "government in miniature." Soon thereafter, the belief that policy coherence could best be promoted through integrated institutional regimes that integrated legislation, administration, education, investigation and adjudication as instruments of governance fell victim to the ideology of deregulation. Emboldened by pseudo-constitutional arguments about judicial independence, and accustomed to defending common law rights against statutory encroachment, courts concluded that the rule of law requires the institutional independence of all third-party decision-makers. Since policy development through case-by-case rights adjudication within public agencies is now constitutionally suspect, the judicial branch has increasingly assumed the mantle of regulatory governance. The substantive law of public administration that previously focused on institutional design and the choice of governing instrument has been transformed by law teachers who do not reflect on when, why or how judges should have the last word. For them, administrative law means advanced civil procedure in the guise of constitutional review.

8. There has been a general tendency to legislative inflation (hyperlexis), and a proliferation of statutory instruments cast in broad, abstract formulas. The teaching of legislation has never been a strong point of North American legal education. For example, even in the 1960s most teaching of criminal law was grounded in the assumption that the Criminal Code was epiphenomenal. One learned the law by reading cases, not the Code. Today, a similar approach to interpreting statutes prevails — but for quite different reasons. Because many enactments (the Charter being only one) and many legislative phrases ("the best interest of the child," "humanitarian and compassionate considerations," for example) are cast in broad, abstract terms, statutory interpretation is rarely about the precise meaning of words and phrases as such. Legislative texts are reduced to formulas, and become mere themes upon which lawyers and law teachers incessantly incite courts to spin variations. While there is now much greater sophistication in specialist scholarly writing about legislation, non-specialist law teaching does not even make a pretense of attending to the text of a statute, and students receive little training as to how normative language can be cast in propositional form. Whatever the "principles of fundamental justice" may be, in the minds of many professors, they need not be connected to plausible received meanings of the words "principles," "fundamental" or "justice."

9. Cases and statutes are no longer read as exercises in practical reasoning about law reform but are simply seen as exemplifying a discrete rule of law. Changes to the length, form and structure of judicial decisions have also led to changes in how processes of judicial and legislative law reform are conceived. Contemporary casebooks rarely contain "wrong" decisions that are well reasoned, and "implausible" dissents are typically consigned to "editor's notes." Teaching compendia are now replete with "the latest case" which is advanced as standing for a doctrinal principle that is "true because the court said so." The use of a series of public law cases — for example the line of cases from *Tommy Homa* to *Christie v. York Corporation*, *Drummond Wren* and *Noble v. Wolfe* — to teach the logic of common law adjudication, the structuring of precedential claims in the flow of legal development, and the dynamics of judicial reasoning runs up against the inexorable logic of currency and relevance. Moreover, only rarely do teaching materials contain other documents that are not scholarly comments or editor's notes. Today, the dynamic of everyday law reform — a dynamic that law teachers once could nicely capture by teasing out the subtle interaction of power, politics, publicity, legislation and litigation driving situations like the *K.V.P.* saga of the late 1940s — gets played out only in the monotone of "Charter dialogue."

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10. As human rights becomes a focus of "progressive" law teaching, courses aimed at socio-economic inequality no longer excite the activist's legal imagination. In the late 1960s, the "progressive" component of a legal education defined itself as the struggle to overcome substantive social inequality. While law faculties did offer "civil liberties" seminars explor-

ing issues of criminal procedure and freedom of expression, the bulk of activist professorial energy was devoted to legal clinics, and to landlord-tenant, consumer, social welfare and poverty law. Today, by contrast, legal clinics struggle to maintain the educational and community organizing components of their mission. Landlord-tenant, consumer and social welfare law courses have become courses in judicial remedies. Civil liberties seminars have been re-engineered as human rights courses dealing with constitutional protections against the abuse of state power — paradoxically the one player best positioned to defend the vulnerable from private power. One law faculty now has no course in law and poverty, but eight offerings on aspects of human rights. Even when it survives, the teaching of issues relating to the distribution of social power has been refocused as the analysis of judicial decisions. On-the-ground "war on poverty" activities no longer elicit much professorial enthusiasm and enter the student imagination only as para- or extra-curricular commitments.

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11. The place of craft and technique and a respect for legal form have been displaced by attention to abstract argument and symbols. Two traditional staples of legal education are the professorial excursuses on the propositions that "a judge came to the right result, but for the wrong reasons" and that "the statute was meant to correct a mischief of the common law." Lying behind these aphorisms is the belief that there is a distinctive craft and technique to law. Law is, of course, a political act, and the mobilization of law in support of a political cause is a key feature of modern legal practice. Litigation often is "the continuation of politics by other means," but law is not just politics. There is a particular craft to law and to legal analysis. One reason why a manner and form requirement such as that set out in the 1960 Canadian Bill of Rights had meaning was the respect for craft. Yet when a blanket override of the Charter was deemed in *Ford* to be a permissible use of section 33 some saw a conscious disregard for craft in the Supreme Court's decision to treat what were carefully negotiated purposive arrangements as if they served no purpose. Increasingly law teaching takes manner and form requirements as mere formalities — abstracting from their evidentiary, channelling and cautionary purposes. Whether the topic is section 1 or section 33, and notwithstanding the contextual lines of inquiry invited by *Oakes,* abstract argument aimed at outcome rather than process too often frames classroom discussion.

12. Vast domains of legal regulation meant to enhance citizen agency have been consigned to the margins of legal consciousness. When I negotiated my initial teaching responsibilities in 1975, the "penance" course to which I was assigned was administrative law — a subject no one then wished to teach. By the time I was myself a dean in the mid-1980s I was obliged to give up teaching administrative law in order to induce a candidate to come to McGill. The past 25 years have witnessed the waxing in popularity of public and international law courses. While contracts and torts (taught as theoretical instantiations of corrective justice) still fire the legal imagination, many private law courses that focus on distributive justice and institutional design (for example, property, trusts, wills and estates, civil procedure) have dropped off the curricular "A-list." As a consequence, little attention is now paid to the allocational assumptions of private law and the political economy that these assumptions reflect. The focus is less on how the common law may "work itself pure," or how legislatures may correct the injustices of private law through overtly distributive regulatory rules, than on how courts may deploy constitutional instruments to like effect. After first year, distributive policy is taught almost exclusively in public law seminars, and the bulk of private law courses are consigned to practitioners whose pedagogy aims primarily at an uncontroversial presentation of black-letter rules.

13. Law and its processes are conceived more as vehicles of social control than as institutions meant to facilitate human interaction. In the 1960s it was typically believed that the instruments of the state could be wielded in the service of human liberation and equality. The creation of agencies, boards and commissions and the enactment of legislation to regulate market transactions were held out as the preferred vehicles for promoting social change. Apart from the criminal law, law was valued less for its constraining capacities than for its ability to empower the disadvantaged. The key spending programs of Canada's second national policy — unemployment insurance, pensions, medicare and student aid — imagined a major role for government. The teaching of the Charter, by contrast, is often framed as if market-disrupting legislation is inherently wrong and constraining. Once the state is recast as the enemy of liberty, legal rights enforced by courts emerge as the key to protecting freedom. Inexorably, this leads to teaching that celebrates a minimalist view of politics, a preference for limitations on economic redistribution and a belief that discrimination and inequality are caused by government "intervention," not by private belief and behaviour (and the failure of the state to correct inequality). In this understanding, law facilitates human interaction not when legislatures enact redistributive programs, but rather when courts overrule "discriminatory exclusions" from existing programs and benefits.

14. Empirical research has not achieved the role in legal scholarship predicted for it by those who built the Canadian legal

education establishment in universities. Traditionally, as noted in the *Law and Learning* report, most law faculty research was doctrinal. Occasionally an article would deploy social science methodology — scalogram analysis, jurimetrics, for example — but these studies typically focused on the measurement and prediction of judicial decisions. Only in the late 1970s did the idea begin to take root that legal scholarship should consider outputs and consequences as well as inputs. Even then, empirical research was highly contested as a pet project of leftist radicals who promoted the development of university-based legal education. Now, law teachers have practically abandoned field research, preferring broad ideological claims and citing dead white European males in support of anti-Charter ideology from the left, or living white American males in support of anti-Charter ideology from the right. Pro-Charter ideologues find comfort in a wider spectrum of socio-demographic authority, but none do empirical research. Neither today's tabulators of judicial decisions who seek to prove excessive judicial "nullification" nor contemporary proponents of dialogue theory between courts and legislatures feel obliged to test their hypotheses with data about how police, public agencies or other officials actually respond to Charter decisions. As goes research, so goes teaching. In addressing *ex ante* rights in the classroom, one need not be concerned with presenting statistics about the relative cost of political and judicial action (lobbying and litigating), and the impact of these costs on different categories of rights claimants and equality seekers.

15. Legal analysis grounded in abstract binary claims about the meaning of words has flourished at the expense of interdisciplinary legal research. Many critics of the Charter have bemoaned its tendencies to judicialize politics and to politicize the judiciary. These complaints, which may or may not be justified, are merely particular reflections of a more profound change in law's rhetoric. The last three decades have seen the triumph of rights discourse as a mode of making political claims. Rights discourse tends to reduce complex political negotiation to binary (I win — you lose) claims that can be circumscribed within a pre-existing conceptual logic. Rights discourse also does not delimit the substantive content of claims: by definition, what any particular litigant considers to be a right — for example, the "right to golf" — is for that litigant a right worthy of legal protection.

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To see interpersonal relationships simply as a congeries of rights against others is to assume that fundamental issues of social policy can be represented as single-instance justiciable claims without reference to systemic implications and the competing interests of those not actually present in the litigation. In such a "theological" universe, teaching validates professors as experts in any field having to do with the *res publica*, and dispenses them from having to engage in research and reflection about the politics, economics, sociology or ethics of the positions they adopt.

16. Third-party decision-making in a framework of adjudicative due process has become the invariable recipe for solving social and interpersonal conflict. During the 1960s and 1970s large chunks of public policy were developed by politically responsible agencies within which officials exercised considerable discretion. Increasingly, however, there has been pressure to require all decision-makers to find detailed textual authority for their exercise of power. Government action through explicit canonical norms has become the gold standard of law. Such a perspective has also moved our understanding of principles of human association from a concern for the informal and aspirational components of everyday life to a preoccupation with formalized rules of duty and entitlement. Following the Supreme Court decision in *Nicholson* many administrative law scholars sought to develop a conception of due process in public decision-making that respected the logic of procedural fairness, but that also was attuned to the wide diversity of social ordering processes deployed by statutory decision-makers. Today, despite the urgings of the Supreme Court in *Knight, Baker, Singh* and *Khan* to develop context-variable fairness standards, tribunals fall over themselves to emulate the procedures of courts. The teaching of policy development has been transformed in many faculties from a search for optimal processes of public decision-making attuned to the solution of polycentric problems of distributive justice into a quest for progressively refined models of adversarial adjudication.

17. Good governance, transparency and accountability are now thought achievable only through a judicially enforced

rule of law. The idea of constitutional government in the parliamentary tradition embraces a broad range of political, administrative, ethical and judicial practices and institutions. Constitutional principles such as cabinet subservience to Parliament, individual ministerial responsibility, an independent civil service and the prerogative power of the Crown were central to legitimating political action. Over the three decades preceding 1982 the temptations of power exercised by prime ministers trained as lawyers — St-Laurent, Diefenbaker and Trudeau — contributed to an erosion of these principles. Only Pearson seemed to understand that the statesman's question "Is this what I should be doing?" was more important than the lawyer's question "Do I have the legal power to do it?" Since the 1980s five more lawyers — Turner, Mulroney, Campbell, Chrétien and Martin — have accelerated the erosion. Contemporary law teaching reinforces the mantra that only independent courts can guarantee openness, transparency, accountability and good governance. A preoccupation with the judicial version of the rule of law means that relatively less attention is devoted to non-judicial institutions of accountability — ombudsman, auditor general, freedom of information commissioner, privacy commissioner, ethics commissioner, public service commission and so on.

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18. The "passive virtues" in judicial decision-making have been undermined as other institutions routinely abdicate their political responsibilities in favour of courts. A concomitant of the view that third-party adjudication is the optimal process of social ordering is that the possible is the necessary. Traditionally, courts were conceived as institutions of last resort. Consensual dispute resolution, negotiation, mediation, political lobbying, community organizing and other forms of social action were to be preferred. Frequently, courts declined to act directly — citing doctrines like exhaustion, ripeness, mootness, no standing, no interest, political question and so on, in order to remit matters to other forums for determination (sometimes with and sometimes without guidance about baseline entitlements that should condition negotiation). Today, attornment to these passive virtues is on the wane, especially among law teachers. The blandishments of academic commentators, the aggressiveness of certain litigators and the abdication of responsibility by governments have induced some courts today to take jurisdiction in cases previously seen as beyond their mandate. Where a constitutional document can be held out as a polity's primary vehicle for "framing values," public law teaching soon gives up on assessing the optimal institutional allocation of governance tasks. Instead its focus becomes illustrating that courts have the constitutional authority to take all manner of decisions, for all manner of reasons, in all manner of cases — and arguing that they should do so.

19. Constitutionalism is less preoccupied with the design of governance mechanisms, institutional competence and fixing an appropriate array of judicial remedies. A central characteristic of classical adjudication is that it imagines the resolution of actual cases and controversies on the basis of pre-existing rules as applied to settled past events. Admittedly, the case and controversy requirement has always been attenuated in Canadian constitutional law, as courts have typically agreed to give advisory opinions in "reference" cases. Likewise, in exercising their equitable jurisdiction courts issued simple and narrowly framed declarations, injunctions and orders for specific relief. Today, however, judges are routinely asked to issue intricate injunctions that require the spending of money on programs, the readjustment of government priorities and the detailed design of governance institutions. Many law teachers applaud this expansion of jurisdiction and compete to offer ever more complex coercive solutions to political conundrums that formerly lay within the purview of the legislative and executive branches. Indeed, until the *Chaoulli* decision, whenever courts declined jurisdiction by raising the "institutional competence" argument or tailored a judgment in deference to it, their decisions were typically taught as examples of judicial abnegation and irresponsibility.

20. The conception of the citizen as a constellation of particular identities deserving of recognition and protection now dominates understandings of legal subjectivity. Until the late 1970s most Canadian law faculties were instantiations of what John Porter called "the vertical mosaic." Courses, curricula and pedagogy assumed a "normal" that reflected the preoccupations of the existing cohort of law teachers. Since then, the socio-demography of the professoriate has changed dramatically and law faculties have sought to make space for different perspectives that challenge the assumptions of inherited normality. It is now conventional in law faculty discourse to characterize particular identities as fundamental to legal subjectivity. While section 15 arguments can be understood as the consequence of the framing of pedagogy and courses around equality claims, the section has by ricochet given a boost to causes that can be presented in this fashion. So, for example, the same-sex marriage debate was not cast in terms of the policies that lie behind a governmental decision to

provide for a legal structure within which persons in relationships of dependence and interdependence could build meaningful lives together. The claim was, rather, one of exclusionary discrimination. Almost noone argued that marriage ought no longer to be the touchstone of legal policy, even though the discrimination arguments could have been met either by including same-sex couples within the definition of marriage, or by simply getting rid of the concept. Not surprisingly, in legal education today the notion of equality tends to be argued as against existing discriminatory concepts and practices rather than as the search for even more expansive criteria that reframe the very grounds of inclusion and exclusion.

21. The neo-colonial experience of graduate education in constitutional law is increasingly being pursued in the United States rather than the United Kingdom. Until the 1960s the number of Canadian law teachers was relatively small. Moreover, throughout Canada the bulk of constitutional law teachers (Bora Laskin and Albert Abel being notable exceptions) had pursued graduate studies in the UK, if at all. A survey conducted a decade later found, however, that the tide had shifted: most young public law professors had studied in the US, while most private law professors did graduate work in the UK. Since 1982, the US genuflection has increasingly dominated constitutional law scholarship. The stylized doctrinal conflicts between originalists and interpretivists and the simplistic left-right framing of US political debate have come to mute the rich strands of organicism in Canadian political and constitutional thought. Graduate students from Canada have been quick to adopt the dominant liberal intellectual paradigm, and seem strangely uninterested in the developing civic republican strand of US constitutional scholarship. Hardly a surprise, then, that in the constitutional law teaching canon, Burkean "red Toryism" is now just a memory and socialism (except in certain communitarian variants) lives on only in wistful memories of Saskatchewan's agrarian radicalism.

22. Professors generally, and constitutional law professors particularly, teach a court-centric model of the legal universe. The traditional path to a post-war academic appointment in a Canadian law faculty passed by way of a graduate degree (typically a thesis LL.M.) rather than through private practice as had been previously the case. Beginning in the early 1970s, however, a further pedigree came to define suitability for a teaching appointment. Even though many more professors now have doctoral degrees, it is the judicial clerkship (and especially a judicial clerkship at the Supreme Court of Canada) that has become a ticket to a career as a legal academic. Implicitly, the recruitment of judicial clerks and the promotion of judicial clerkships among students as indicators of merit reinforce the notion that the judiciary lies at the centre of the legal enterprise. Admittedly, many passionate academic Charterphiles did not serve as clerks, and several innovative and interesting neo-institutionalist law teachers did. Nonetheless, within law faculties the reality of constitutional law is generally perceived by students to be Charter litigation. Today, writing memos to cabinet, drafting legislation and regulations, and planning governance through contract, taxation, subsidy, public-private partnerships or the creation of new torts do not constitute a significant part of the constitutional law course syllabus.

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23. Most law students are highly instrumental in their approach to legal education and its contribution to their future activities in the law. Over the past 30 years the socio-demographics of the student cohort in faculties of law has changed considerably. On the plus side of the equation, one finds a much more diverse student body with over 60 percent of law students in Quebec today being women and more than 25 percent self-identifying as belonging to a visible minority. In addition, students arrive at the study of law with much more formal education — several already holding MA and Ph.D. degrees. And still again, many more students have had international experience working with "human rights" NGOs in Africa, South America and South Asia. Yet this changing cohort has the vices of its virtues. An increasing number of students today are cause oriented — but not in the manner of the power-contesting idealists of the 1960s. Many with experience in an NGO have noticed that those with law degrees wield disproportionate organizational power and imagine legal knowledge as an all-purpose tool. Having already decided what is "right," they approach the study of law demanding access to the "keys" that will enable them to bend others to their will. As student aspirations reveal themselves as increasingly consumerist, legal education itself becomes instrumentalized. Teaching and learning law as a way of being alive — as a way of pursuing a life worth living — no longer fires the pedagogical imagination.

24. In the framing of legal practice, a conception of law as grounded in propositional ethics has displaced the notion of law as grounded in virtue. A central feature of legal education in the era prior to the establishment of university-affiliated faculties of law was the mentorship provided by senior lawyers to their arti-

cling pupils and junior associates. Learning law was as much about learning the role of a lawyer as it was about learning rules. When university-based law faculties assumed a larger place in legal education — in part because senior lawyers were either unwilling or unable to provide that mentoring, or if willing and able were hardly role models — the learning of rules of law came to occupy a larger place in the teaching endeavour. At the same time, because the intensive mentoring relationship was not feasible for professors, faculties acknowledged the need to "teach" legal ethics. Not surprisingly, within the university context, this teaching imagined ethics as the mastery of a set of universal propositions of proper behaviour set out in, for example, a code of professional conduct. Also not surprisingly, the teaching of these "ethical rules" involved the same rhetorical gymnastics as the teaching of "rules of law." Today law teaching based on the virtue of being a good lawyer and citizen has largely abandoned itself to the siren song of propositional ethics. Only rarely do law professors commit themselves to an ethical mentoring role that requires students to engage directly with the demands of virtue.

25. Modesty in the claims for law as an institution of governance no longer characterizes law teaching. A central feature of classical legal education was modesty about lawyering. The formal law of Parliament and the courts was conceived as only one of the many normative institutions of a healthy political community. Other organizations such as religious bodies, charities, clubs, voluntary associations, communities and families had equal place as contributors to the shaping and achievement of human aspiration. Historically, governments subsidized self-directed and community-based initiatives; through the 1960s and 1970s, however, these unofficial institutions of social solidarity were gradually displaced by state agencies and spending programs. Now, a sense of economic entitlement and a public resistance to economic redistribution have compromised the state's capacity to tax and spend for universal social programs. When governments cannot spend money as a policy instrument, they spend law. In legal education this translates into the belief that all social problems can be cured by the enactment of legislation declaring them cured. It also produces the inverse belief. If a particular social ill has been cured, it is because law (and particularly the Charter) has so declared it. No longer do law teachers insist that students interrogate the relationship between law and social change. No longer do they challenge students to resist the facile derivation of causation from mere correlation.

Since the advent of the Charter in 1982 there have been significant changes to legal education within Canadian law faculties. Why are these changes worthy of comment in a 25th anniversary celebration of the Charter?

Today's law students are tomorrow's judicial clerks, lawyers, legislators and judges. Almost half the practising bar in Canada learned the *Constitution Act, 1982* alongside the *Constitution Act, 1867*; already Parliament is populated by many MPs who attended law faculties after 1982; several superior court judges and a handful of appellate court judges have also been suckled on the milk of Charter analysis. How law professors teach and what they teach mightily shape the attitudes, ambitions and aspirations of their students. These aspirations will then influence how students understand law for their entire careers.

We are all the creatures of our time and place, in an infinite regression backwards. As a student of law teaching as practised in the late 1960s, I know that my legal world-view was shaped by a generation of professors educated 15 to 20 years earlier, just as I know that how I understood the coming of the Charter 15 to 20 years later cannot be dissociated from that 1960s experience. For law teachers of more recent generations, the Charter has become more than just the constitutional document it is for me. It is an icon for law and for legal education.

Whether or not changes to law teaching over the past quarter-century actually find their *efficient cause* in the Charter, "urban legend" holds this to be the case. Until each of them is held up to critical scrutiny we shall never know. Nor will we be in a position to judge if the second generation of Charter scholars who are just now entering the law teaching profession aim to chart a pedagogical course from their immediate predecessors whose careers began in the first flush of Charter enthusiasm. Hence the importance of attending to the central components of contemporary legal education in Canada — its professors, its students, its doctrinal and substantive content, its methodological presuppositions and its philosophical commitments — and to the way in which these components have changed over time. Absent such an inquiry, we shall not be in a position to answer the question posed in the subtitle to this essay, for we shall have no conception either of teaching or of law.

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