

Collage sur le droit et le savoir au temps de la pandémie

Law and Learning in the Time of Pandemic - A Collage

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Lorraine Pritchard
Oeuvre d'art: *Hopes 2020 / Espoirs 2020*
(Acrylic and washi, 10" x 13" ;
acrylique et washi , 10" x 13")

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BIOGRAPHIE DE L'ARTISTE / ARTIST'S BIOGRAPHY

Lorraine Pritchard est née au Manitoba. Son travail a été influencé par l'interaction des textures et des espaces des vastes plaines. L'artiste a pour motivation sous-jacente la recherche d'un langage visuel exprimant l'interrelation des réalités spirituelles et physiques. Son travail a été exposé au Canada, en France, en Belgique, aux États-Unis et au Japon (Ambassade du Canada à Tokyo). Elle vit et travaille actuellement dans son studio, à Montréal.

Lorraine Pritchard was born in Manitoba. The work has been influenced by the patterning and spatial relationships of the vast plains. As a visual artist her work includes drawings, painting, and constructed assemblages. The underlying motivation of the artist is a search for a visual language that expresses the interrelationship of spiritual and physical reality. Her work has been exhibited in Canada, France, Belgium, United States and Japan (Canadian Embassy in Tokyo). She currently lives and works in her studio in Montreal.

INTRODUCTION

Impressions in Time and Space - Impressions dans le temps et l'espace

In April of 2020, law teachers across Canada received a call to contribute their reflections on law and learning in the time of pandemic. That call suggested that, in a time of uncertainty and upheaval, we all continued to observe, think, imagine, adjust, participate, and contribute as legal scholars and law teachers. Colleagues were invited to share their voice and presence by submitting short pieces along a full spectrum of tone and content, and to do so according to a tight timeline.

The resulting collage, published as we head into the 2020-2021 academic year, illustrates the remarkable range of ways in which the experience of the pandemic has been woven into research directions, pedagogical initiatives, structures of governance, and relationships with the individuals and institutions in our lives. Together, the contributions provide a collective impression of the preoccupations, capacities, and creative possibilities that characterize our diverse community in general and specifically in this moment of crisis and challenge. They illustrate the many aspects of the vocation of law professor and the many relationships – with students, with colleagues, with our communities, with the world – that structure our work.

How did these law teachers answer the call? Some were poetic in their writing, some more prosaic, and others philosophical; the spectrum of expressive styles and talents mirrors that found within and across our law faculties. Some responded with frustration and anger, others with spirituality and self-discovery, still others with programmatic suggestions or personal stories. Of the 39 contributors, 16 do not have tenure; for them, the pandemic may underscore the already significant precariousness with which they live and work. Of course, some colleagues might have wanted to answer the call but couldn't. Some welcomed new babies in the spring of 2020, some were busy with providing care for family members or taking on the task of home schooling, and some were swamped with administrative responsibilities. Some may have felt simply speechless as they tried to figure out how to move forward from day to day, and to envisage the impact of this pandemic on our collective future.

The process from concept to publication included very specific instances of “answering the call”. When one of us first imagined the collection in her home office in Montreal, she reached out to a past student now living in Toronto and teaching at Western, and was delighted when he answered the call to co-edit the collection. When the two of us needed help with editing in French, we turned to Adrien Habermacher, a new professor at Moncton on whose doctoral defence committee we had both served. He answered the call with great enthusiasm and energy. And when we sent out the call in April, one of the very first responses came from Vincent Gautrais from the CRDP (Centre de recherche en droit prospectif) at Université de Montréal, eager to provide support in facilitating the publication and *rayonnement* of the project. We are delighted that *Lex electronica*, celebrating 25 years as an innovative venue for legal scholarship and housed at CRDP, welcomed the collection in a special issue. Together, these instances of answering the call illustrate intergenerational collegiality and generosity across institutional affiliations – both of which are crucial to the sustaining of our community of law teachers and legal educators across Canada.

When confronted with the task of arranging the contributions, we decided to forego conventional groupings based on substantive topics, instead opting for an organizing logic focused on the themes and moods. Consistent with the “collage” metaphor, we sought inspiration from a stunning piece of art by Lorraine Pritchard, a Montreal-based artist originally from Manitoba. Entitled *Hopes 2020*, the piece is featured on the cover of this collection. We see in Lorraine’s work a collage of six distinct colours: Blue, Yellow, Offwhite, Green, Rose, and Vermillion. Each of these colours invited us to associate words, in English and in French, all somehow reflected in the essays.

Blue inspired us to think of the theme of Balance or Blues. Yellow brought to mind the Young professors who contributed, and the reflections on the academic Year. Offwhite reflected the Optimism of many contributions and the timely preoccupation with Online learning. Green evoked themes of Governance or expressions of Grief. Rose recalls Resilience, or the multiple entries we received that discussed Research in the COVID-19 context. Vermillion evokes the candid expression of Vulnerability, or repeated reflections on Vocation we witnessed. Finally, the black resonates with the printed text, page after page.

These associations, of course, remain our own, and readers will no doubt see in the essays many other themes and connections among the richly allusive works. The diversity of ideas parallels the diversity of contributors: nineteen Canadian law faculties, schools, departments, or colleges are represented, and the authors vary widely in professional experience: fourteen have 5 or fewer years of teaching experience; twelve have taught for 6-12 years; four for 13-20; and seven for more than 20. Two contributors included a student co-author. The collection, therefore, represents a truly eclectic snapshot of an exceptional moment in history, Spring 2020. Each contribution, and the collection as a whole, is *sui generis*: it is neither representative nor generalizable. However, it may be possible, if one reads closely, to discern some timeless lessons for law and learning. We invite the reader to ponder this thought while dipping in and out of these remarkable vignettes.

En avril 2020, les professeur(e)s de droit canadiens furent appelés à partager leurs réflexions sur le droit et l'apprentissage au temps de la pandémie. Cet appel indiquait que, même cernés par l'incertitude et le chaos, nous avons tous continué d'observer, de penser, d'imaginer, d'ajuster et de s'ajuster, de participer, et de contribuer en tant qu'académiciens juridiques et professeurs de droit. Nos collègues visés par cet appel furent enjoins à partager leur voix et leur présence par l'entremise de courts écrits relevant d'un large éventail de registres et de contenus, et ce, dans des délais serrés.

Le collage résultant de cette invitation, publié à l'aube de l'année académique 2020-2021, illustre la remarquable diversité de manières par lesquelles nos expériences de la pandémie se sont immiscées autant dans l'orientation de notre questionnement que dans nos initiatives pédagogiques, nos structures gouvernementales, et les relations que nous maintenons avec les individus et les institutions présentes dans nos vies. Prises dans leur ensemble, ces contributions offrent une impression collective des préoccupations, des capacités et des possibilités créatives caractérisant nos diverses communautés en temps normal et, plus spécifiquement, durant cette période de crises et d'obstacles à l'échelle mondiale. Elles illustrent maints aspects de la vocation qui est la nôtre, et des multiples relations - avec nos étudiants et nos collègues, nos communautés et notre monde - qui régissent la structure de notre travail.

Comment ces professeur(e)s de droit ont-ils ou -elles répondu à l'appel? Les écrits de certains sont poétiques, d'autres se résolurent à communiquer en prose, et d'autres encore adoptèrent un discours plutôt philosophique. Certains répondirent avec colère et frustration, d'autres à travers la spiritualité et l'introspection, d'autres encore par le partage de suggestions programmatiques ou d'histoires personnelles; quoi qu'il en soit, la diversité de style et de talent - évidente dans les textes amassés ici - reflète celle qui existe au sein de nos facultés de droit. De plus, sur 39 contributeurs, 16 se trouvent sans la permanence à l'université où ils enseignent; pour ces derniers, la pandémie a le potentiel de souligner la précarité considérable dont est déjà imprégnée leur vie professionnelle. Bien sûr, nombre de nos collègues qui auraient voulu répondre à l'appel n'ont pu le faire : certains accueillaient, au printemps 2020, de nouveaux membres dans leur famille, tandis que d'autres s'occupaient des proches déjà présents, fournissant des soins ou assurant l'éducation à distance de leurs enfants. D'autres encore ont pu simplement se retrouver sans mots, tentant de rétablir leurs repères dans un monde rendu méconnaissable par des événements sans précédent, et ce, tout en envisageant l'impact de la pandémie sur notre futur collectif.

La trajectoire de la conceptualisation du projet à son éventuelle publication a été ponctuée par des gens qui ont répondu à l'appel lancé. Ainsi, lorsque l'une d'entre nous pour la première fois s'imagina, de son bureau à Montréal, la collection envisagée qu'est devenu ce collage, elle écrivit à un ex-étudiant, maintenant diplômé et enseignant à l'Université Western, l'invitant à devenir co-directeur du projet - elle fut ravie quand ce dernier accepta. Par la suite, lorsque nous avons eu besoin d'aide pour l'édition du français, nous avons fait appel à Adrien Habermacher, un nouveau professeur à l'Université Moncton que nous connaissions pour avoir servi tous deux sur son comité de défense doctorale. Il répondit lui aussi à l'appel avec énergie et enthousiasme. Et finalement quand, en avril, nous avons lancé un appel plus généralisé à tous les professeurs de droit canadiens, l'une des toutes premières réponses que nous avons eu le plaisir de recevoir fût celle de Vincent Gautrais, directeur du CRDP (Centre de recherche en droit prospectif) de l'Université de Montréal, exprimant le souhait de prêter main-forte en facilitant la publication et le rayonnement plus général du projet. Nous avons été d'autant plus

heureux que la revue *Lex Electronica*, célébrant cette année ses 25 ans en tant qu'arène innovative de la pensée juridique canadienne, décide de dédier une édition spéciale à la présente collection de textes. Ensemble, ces réponses illustrent non seulement la collégialité intergénérationnelle mais aussi la grande générosité qui caractérise nos affiliations institutionnelles. En effet, ces deux qualités sont cruciales au maintien de notre communauté formée des enseignants en droit et éducateurs juridiques à travers le Canada.

Confrontés à la tâche d'ordonner les contributions reçues, nous avons délaissé les traditionnels regroupements à base de sujet abordé, optant plutôt pour une organisation relevant des thèmes choisis et des émotions véhiculées par les textes entre nos mains. Restant fidèles à la métaphore du collage, nous avons puisé notre inspiration dans l'art éblouissant de Lorraine Pritchard, une artiste manitobaine établie à Montréal, dont l'œuvre intitulée *Hopes 2020 (Espoirs 2020)* orne la couverture de cette collection. Cette œuvre, elle aussi un collage, comporte six couleurs distinctes: bleu, jaune, coquille d'oeuf, gris-vert, rose, et vermillon. Chacune de ces couleurs invite à son tour une association à un ou plusieurs thèmes – exprimés en français comme en anglais – reflétés de part et d'autre des essais composant la présente collection.

Le bleu nous a inspiré à réfléchir au thème du balancement ou des “blues”. Le jaune évoque les jeunes professeurs qui firent part de leurs pensées, ainsi que les réflexions journalières portant sur l'année académique. Le coquille d'oeuf rallie l'optimisme de plusieurs de nos contributeurs, ainsi que les soucis générés par le déplacement de l'éducation vers un monde “online” (un sujet qui suscite à lui seul une conversation parsemée de coquilles d'oeuf et d'efforts pour éviter de casser ces derniers). Le gris-vert se rapporte à la gouvernance, mais aussi aux multiples griefs que nous formulons sans cesse à l'encontre de la délicate situation dans laquelle nous coexistons depuis quelques mois déjà. Le rose rappelle la résilience, évidente dans les nombreux textes abordant le thème de la recherche au temps du COVID-19. Le vermillon évoque, pour sa part, l'expression candide de la vulnérabilité, ainsi que les maintes réflexions reçues portant sur la vocation. Finalement, le noir retentit par sa présence à la base de chaque lettre, chaque phrase, chaque paragraphe et chaque page de la collection qui suit.

Ces associations demeurent bien entendu les nôtres, et nos lecteurs découvriront indubitablement plusieurs autres thèmes parmi ces pages débordant d'allusions. De plus, la diversité des idées contenues par les soumissions suivantes reflète celle observable chez les contributeurs. En effet, y sont représentés pas moins de 19 facultés, collèges ou départements de droit canadiens, et l'expérience professionnelle des auteurs présentés varie considérablement. Parmi ces derniers, 14 détiennent cinq ans ou moins d'expérience en enseignement; 12 enseignent depuis six à 12 ans; quatre de 13 à 20 ans; et sept depuis plus de 20 ans. Deux des contributions listent de plus des étudiants à titre de co-auteur. La collection forme donc un tableau, constitué de manière véritablement éclectique, dépeignant l'exceptionnel moment historique qu'est devenu le printemps 2020. Chaque contribution, tout comme la collection dans son ensemble, est *sui generis*, n'étant ni représentative, ni généralisable. Il est par contre possible, en s'adonnant à sa lecture de manière assidue, d'y surprendre quelques leçons intemporelles portant sur le droit ainsi que l'apprentissage. Nous invitons par conséquent le lecteur à contempler cette dernière pensée tout en entreprenant la découverte de ces vignettes.

Shauna Van Praagh
David Sandomierski

Montréal et Toronto, August-août 2020

VIDEO

Lien de la vidéo de la conversation-introduction:

<https://youtu.be/566-mppq8ss>

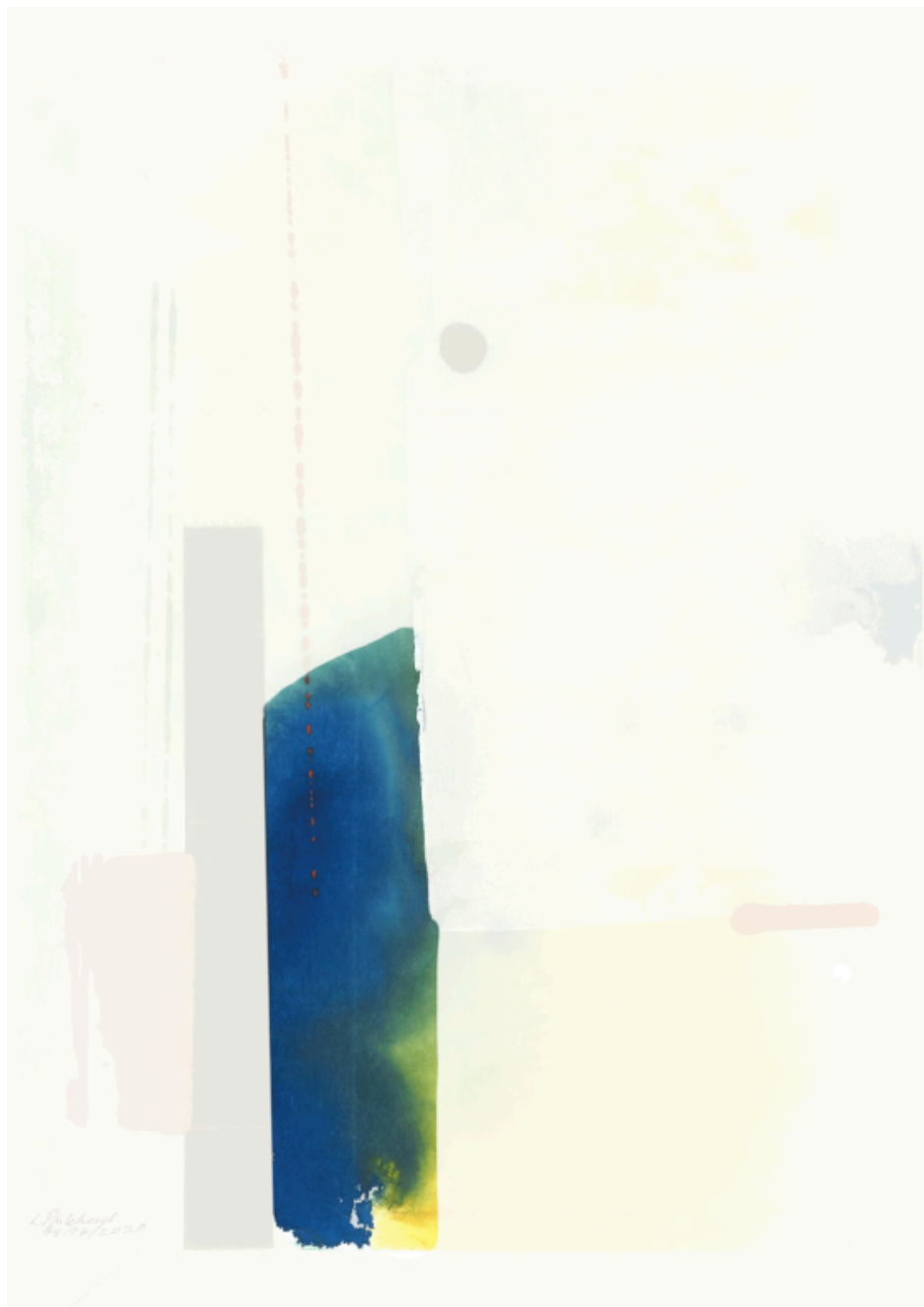


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- CALT/ACPD et Derek McKee, président de l'Association– for encouragement and connection.

BLUE/BLEU: **B**ALANCE/**B**LUES; **B**ALANCE/LES **B**LUES



Shauna Van Praagh & David Sandomierski
Collage sur le droit et le savoir au temps de la pandémie
Law and Learning in the Time of Pandemic - A Collage

THE SPEED BUMP – CHANGES IN THE NEIGHBORHOOD, SPRING 2020

Shauna Van Praagh¹

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Shauna Van Praagh
The Speed Bump - Changes in the Neighbourhood, Spring 2020

The view changes every day from my desk by the front window of my living room. This is my book-writing desk - bought and installed during my last sabbatical, painted bright blue to inspire creativity. In March of 2020, it was transformed into my general office: a site of withdrawal from a pandemic-stricken world while, at the same time, a vantage point for looking out and registering developments beyond the confines of home. From my window, I have watched piles of dirty snow slowly melt, deep purple crocuses emerge, my teenage son (with no school or extracurricular activities to keep him occupied) energetically cut down and dig out the roots of our dead pine tree, and elements of Montreal sidewalk etiquette evolve.

This past week, there was something new to watch. In what felt like a private performance over 24 hours, the construction of a speed bump took place directly in front of my house. Everything about the show was orchestrated with precision: each team of workers waited its turn and each had a different role. One made marks with fluorescent paint, another cut a careful rectangle in the asphalt, the next directed the dumping of new gravel, the last took on the task of rolling smooth the new little hill. There was obvious satisfaction at each stage. As each team packed up and left, it left this stretch of avenue Querbes irrevocably modified. My view from my desk now includes a solid speed bump, and the users of the road will have to adapt their behaviour accordingly.

Modification, adaptation and speed bumps (whether literal or metaphorical) are obvious parts of a landscape redrawn by the pandemic. Forced to slow down and shift gears, we are invited to adjust our trajectory and our regard for those around us. As I take a break from my desk to go for a walk, I reflect on pandemic-related changes to the neighbourhood, neighbours, and play – all core pieces of my research, teaching and writing as a law professor.

¹ Professor, Faculty of Law, McGill University

Outremont is a Montreal neighbourhood about which I have been writing for almost thirty years. A quarter of the population belongs to Hasidic Jewish communities, here for roughly seven decades and insistent on their distinctive insularity from their largely francophone and non-religious neighbours. Each community has its own synagogue, the common language is Yiddish, children attend private religious schools, girls and boys follow different educational paths, and women and men have gender-demarcated roles and responsibilities. These are families whose lives are governed by a network of religious rules and customs, whose connections beyond Outremont are primarily with their counterparts in New York and New Jersey, whose daily errands are primarily to Hasidic grocery stores and bakeries, who make a collective stop in their week to celebrate Shabbat from sundown on Friday to sundown on Saturday, and whose close communal life means that a virus can circulate fast and efficiently.

For a scholar interested in the contours of interactions among individuals, normative communities and the state, the Hasidic Jews of Outremont provide rich material and complex challenge. While they and their non-Hasidic neighbours tend to describe their co-existence as 'parallel', closer observation reveals constant interaction. Whether in the pediatrician's waiting room, the corner hardware store, or the public school playground on Sunday afternoons, residents of the neighbourhood share their space and the rhythms (good and bad) of everyday life. While some individuals have left Hasidism and are trying to figure out new paths outside communal constraints, others remain firmly rooted while at the same time willing to share their stories and engage in conversation. Norms internal to the communities are in constant interaction with those externally articulated and implemented – and the best places to understand those interactions are never the formal sites provided by charters, codes and constitutions.

The pandemic has proven that point by turning Hasidic law and life in Outremont inside out. As I walk around the block on a Saturday morning, the people and prayers that usually fill the inside of synagogues are now visible and audible to all. Bar mitzvah boys chant Torah on front porches, with men in prayer shawls joining in blessings from every balcony along the entire block. In the alley behind our house, a minyan of ten men – each standing two metres from the next – gathers at 9:00 each morning, and the neighbourhood air is filled with chanting for evening prayer at

sundown. The women pray too – inside while the men are out, or outside while the men are in – but they do so on their own, quietly swaying as they read and reflect. Their domestic space has been dramatically modified over the past weeks – almost never free from school age children and men – and I often see pairs of women in their long skirts and running shoes, keeping an appropriate distance from each other, out for very long and determined walks.

The moving of Hasidic synagogues to the front steps of homes throughout the neighbourhood has been met by onlookers with a mix of patience, curiosity and even admiration. The narrative – in Montreal newspapers and on the sidewalks of the neighbourhood – about the Outremont “other” has been temporarily transformed into a story of the calming beauty of religious melodies and the security of faith and prayer. The coexistence of communities and customs, of sources of authority and of organizing structures, was always there but is now transparent and explicit. Creativity and flexibility are exposed as crucial characteristics of shared space, and relationships between neighbours are indelibly altered.

“The rule that you are to love your neighbour becomes in law, you must not injure your neighbour...”

Who is my neighbour? Someone so closely and directly affected by my actions that I ought to have them in my contemplation... I have been teaching Lord Atkin’s neighbour principle to McGill law students for 25 years, working with them to figure out the “who”, “for what”, and “with what consequences” that complicate civil liability. Together, every year, we learn what it means to owe an obligation to act reasonably vis-à-vis others, neighbours, the people whom we should foresee as affected by our actions. We are all potential defendants and all potential plaintiffs – all potential wrongdoers and all potential victims all of the time – something that this pandemic underscores with striking emphasis. Indeed, the pandemic provides plenty of fresh material and hard-hitting examples for exploring the foreseeability of people affected by the actions of individuals, corporations, or state institutions.

Even more obviously, the pandemic complicates what it means to behave with requisite care, to take appropriate precautions, to act reasonably. This fall, it will not be hard to make students realize how quickly norms of acceptable behaviour can change, and how reasonableness can never be

a fixed standard. Neither will it be hard to get them to appreciate the destabilizing feel of uncertainty and the crucial importance of creativity and responsiveness. These ideas are tightly woven into the very fabric of private law governing human interactions but the pandemic might make them more visible and obvious.

The limitations of even a generous understanding of the duty of care will also be more apparent. At a time when vulnerability is highlighted and responsibility re-shaped, it will not be hard for students to understand that the moments in which they will have a true impact on other people may be those in which they move beyond simply fulfilling their obligations to offer care for others, provide support, say a kind word, or hold a hand.

Finally, as law teachers are urged to adapt to remote teaching and learning, it might be a good moment to turn to private law for insight on “remoteness”. To be labelled “remote” means to fall beyond the scope of responsibility or outside the orbit of obligation, to fail to meet the requirements of directness or foreseeability that would allow for a successful claim. Let us pay careful attention to what happens when learning in law shifts to “remoteness” mode, and ask ourselves what, if any, remedies might be forthcoming for the losses suffered.

My walk around the neighbourhood takes me past a park where the playground is firmly closed, tied off with “Danger”- imprinted tape. The message is clear. It is forbidden to climb, slide, swing or play in the sandbox while the entire world is shut down for a pandemic. Children cannot come together to learn, neither can they come together to play. Even if the initial fear of young people as silent and invisible vectors of disease has been discarded, their shared spaces remain tightly constrained.

Maybe we don’t need swings and slides, or the formally designated play spaces that include them. But we all miss and need the human contact, coming together, and creativity that play thrives on. I have often used the playground as a metaphorical image relevant to teaching and learning, research, and the meaningful, if messy, autonomy of youth – not a neat playground of safe and soft structures, but an “adventure playground” filled with materials that encourage risk-taking and dangerous encounters without parents in the vicinity. This is the kind of play that we can’t afford to lose: play that depends on peer contact, builds

trust, and infuses all structures and spaces for learning and developing. Safety at the expense of everything else is not good for kids, and that's a lesson important for people who aren't quite so young anymore.

I arrive home and settle back at my desk. The speed bump – installed for the safety of the children in the neighbourhood, and a literal reminder of the standard of care required of road users – has now become a place for play. As I watch out my window, I see Hasidic boys and girls, who would usually be sitting at their desks in separate schools, trying out their new roller skates together. A couple of teenagers appear with their skateboards and take photos of each other manoeuvring over the little hill in the road, and soon their friends arrive to try it out. A pre-schooler stomps on the smooth black surface with her father, both of them happily and daringly in the middle of the street. Late in the afternoon, the last work team turns up to cover the entire speed bump in fluorescent paint. There is no way now that it cannot be noticed. It has become a bright yellow site for developing norms of human interaction, risk-taking, and social proximity.

This is the view from my window. It seems to me that the pandemic, like my speed bump, provokes reflection on how we are learners and players and neighbours even with, or perhaps especially against, transformed landscapes. This is a bright yellow time for closeness and compassion, connection and continuity, care and courage, curiosity and creativity. If we are watching out of our windows, we can be sure that our children and our students are watching us back.

AN ESSENTIAL SERVICE: PUBLIC LIBRARIES AND THEIR ROLE IN LAW AND SOCIETY

Graham Reynolds¹

On March 16, 2020, in order to help slow the spread of COVID-19, the City of Vancouver closed all of its public library branches. I experienced these closures on a number of different levels: as a Vancouver resident who loves to read and to visit libraries, as the partner of an avid reader, as the father of a four and a half year old who is as excited about the prospect of trips to the library to pick up “fresh books” as he is with the chance to practise riding his pedal bike through the neighbourhood, and, among other identities, as a law professor whose work focuses on the intersection of copyright, human rights, and social justice, and who believes that libraries are integral to the achievement of the objectives of each of these areas of law. Drawing on these identities, I’ll reflect in this essay on the important role played by libraries and librarians in both law and society, on what is lost when libraries close, and what we should celebrate – and fight for – when they re-open.

Libraries advance what the Supreme Court of Canada (SCC) has described as the dual objectives of the copyright system: “promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator” (*Théberge v. Galerie d’Art du Petit Champlain*, [2002] 2 SCR 336 at para. 30). In particular, they fill a critical gap in the copyright system by ensuring that everyone, regardless of their income, has access to complete copies of works of expression in a non-infringing manner.

Copyright law helps to set the conditions under which works of expression like books and movies are created, disseminated, and used. Each work that meets the set of minimum standards outlined in the Canadian *Copyright Act* is granted a bundle of time-limited rights (*Copyright Act*, RSC, 1985, c. C-42). This bundle includes, among other rights, the right to reproduce the work in whole or in substantial part, and to communicate it to the public by telecommunication.

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The rights of copyright owners are not absolute. In addition to being time-limited, the *Copyright Act* provides for a number of exceptions and limitations to the rights of copyright owners, referred to by the SCC as user rights (*CCH Canadian et al v. Law Society of Upper Canada*, 2004 SCC 13 at para. 48). Fair dealing is the most expansive user right in Canada's copyright system. It ensures that despite the rights granted to copyright owners under the *Copyright Act*, space is preserved for non-copyright owning parties to continue to engage in certain types of uses of copyright-protected works, including those that help realize human rights both internationally-recognized and protected in the *Canadian Charter of Rights and Freedoms* (such as the right to freedom of expression) (*Canadian Charter of Rights and Freedoms*, s. 2(b), Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11). Like the rights of copyright owners, the user's right of fair dealing is also constrained. In particular, it is of limited utility if what parties want is to access a full copy of a work such as a book, movie, or piece of music.

Libraries help to fill this gap. Due in part to the artificial monopoly created by the copyright system, under which only the copyright owner has the *prima facie* right to reproduce a work or make it available to the public, many books or other works of expression are priced at a level above which some individuals are able to pay. For some individuals, the cost to buy a particular book, for instance, may be beyond what they are able to afford. For others, while they could afford to purchase one or more books (and may do so), they may not be able to afford to purchase all of the books that they would like to read over the course of a week, month, or year. Their access to books and other works of expression is constrained by copyright.

By giving everyone, regardless of their income, the ability to freely access books, movies, CDs, and other works of expression, libraries help address this inequity. At the Vancouver Public Library (VPL), residents do not need to pay a fee to get a library card. Card-holders also do not need to pay a fee to take out items from the library's collection or to put items on hold. If you are a card-holder at the VPL, you can walk into any branch, take a book off a shelf, check it out, and take it home. And you can do so knowing both that the copyright owner has been compensated either through the initial purchase of the work for the library's collection or the payment of a licensing fee in the case of digital resources, and that Canadian authors of works in the VPL's collection will receive payment

from Canada's Public Lending Right Program, should they elect to participate. By providing free access to works to everyone, while at the same time supporting authors and copyright owners, libraries help further the dual objectives of the copyright system.

Libraries also assist in the realization of human rights, including – but not limited to – the right to freedom of expression, which “include[s] [the] freedom to seek, receive and impart information and ideas of all kinds” (Article 19, *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976)); the right to education (Article 13, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, Can TS 1976 No 46 (entered into force 3 January 1976) (*ICESCR*)); the right to “take part in cultural life” (Article 15(1)(a), *ICESCR*); and the right of everyone “to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which [they] [are] the author” (Article 15(1)(a), *ICESCR*).

Furthermore, libraries and librarians play an important role in helping to advance social justice. We live in a time of extreme, and growing, inequality. Public library branches, including those of the VPL, offer an escape for many people from the inequities that they face on a daily basis. Many people experience VPL branches as inviting, welcoming, and safe spaces. They are climate-controlled. They have public washrooms. They have benches, couches, chairs, and tables that are designed to be comfortable and functional, and not to move people along. They are accessible. They offer educational resources, including courses and textbooks. They provide opportunities for connection and community building, including by hosting classes, workshops, and meet-ups. They offer resources in multiple languages. They distribute information about how to vote. They provide access to the Internet through the provision of public computer terminals, allowing patrons to engage in a range of online activities, including accessing health information, government services, and the legal system; checking their email; and playing games.

Despite the closure of all VPL branches on March 16, VPL librarians have continued to find ways to help people keep reading. On the VPL's website, it is noted that “[o]ur locations are closed, but VPL's Digital Library is always open” (“Updates on the Library's Response to COVID-19”, VPL, 15 May 2020, <https://www.vpl.ca/library/news/2020/updates-librarys->

[response-covid-19](#)). Through the Digital Library, library patrons “can access ebooks, movies, music, online courses and more – all from home with [their] VPL card” (*ibid*). The demand for digital library resources in Vancouver and elsewhere has significantly increased during the COVID-19 pandemic (Jesse Johnston, “Demand for Online Library Content Soars During Pandemic”, CBC, 1 May 2020, <https://www.cbc.ca/news/canada/british-columbia/libraries-online-services-covid-19-1.5551682>).

While the Digital Library has been an outstanding resource, the closure of physical library branches has significantly impacted the lives of many. For cardholders who do not have the means through which to access the Digital Library, the closure of VPL branches has limited their access to books and other resources. For others, the closure of library branches means their access to community is diminished. For others still, the closure of VPL branches means that they can’t check their email, that they have one fewer place to sit and rest, that their place of escape is gone.

I am writing this essay in mid-May, 2020. It is early in the morning, on what looks to be a sunny day. British Columbia has just entered Phase 2 of its Restart Plan. As part of this phase, libraries are permitted to re-open. While the exact details have yet to be announced, Christina de Castell, the Chief Librarian at the VPL, has indicated that reopening plans include both a “takeout model at select locations, and a computer lab downtown for those who don’t have computers with internet access and rely on the library for this” (“Looking Ahead to a ‘New Normal’”, VPL, 15 May 2020, <https://www.vpl.ca/library/news/2020/library-update-may-15>).

I will be grateful for whatever type of gradual opening is adopted. I miss being able to visit the Terry Salman Branch of the VPL (my “local”). I miss the experience of picking out, and reading, “fresh books” with my son. Eventually, the VPL will fully re-open. We will be welcomed back in to the library to browse, to sit, to search, and to connect. We will share the space among the stacks. We will pick up books that others have set down, without fear.

When libraries re-open, they will do so in the midst of an economic landscape that has been significantly altered by COVID-19. In the wake of this crisis, many individuals and families will need to make difficult decisions on where to spend their limited financial resources. In this environment, libraries – already critically important in so many ways – will

take on an even greater importance in the lives of individuals and communities. Books and other works of expression provide lifelines to people, opportunities to escape, information to help build a better life, and inspiration to take the next step. No-one should be denied access to a book or other works of expression because they can't afford to purchase or license it. At the same time, authors and publishers (or other intermediaries) need support or the supply of high-quality works of expression will decline. Libraries help to bridge these two needs. Libraries are also free, open, and public spaces. They are community hubs and gathering places. In a time of economic insecurity, the importance of such places cannot be overstated.

Like individuals, governments will need to make difficult decisions on where to allocate resources post-pandemic. Now is the time for anyone who believes in the power of libraries to effect positive social change to do their part to ensure that despite whatever challenges emerge as a result of COVID-19, that libraries continue to be robustly supported. We need to think about how to ensure – in an environment of limited resources – that public library branches remain open and that they continue to serve as welcoming, vibrant, diverse, accessible, and safe spaces for all. As a law professor and as someone who believes deeply in the importance of libraries, I am committed to helping in this process, including through my research and teaching.

The closure of VPL's branches due to COVID-19 has served to highlight the essential role that libraries and librarians play in the lives of many individuals, and in the community more broadly. Public libraries support authors, help ensure the proper functioning of the copyright system, assist in the realization of human rights, advance social justice, connect communities, and protect democracy. Now and in the future, let's celebrate – and fight for – public libraries.

ALL DRESSED UP WITH NOWHERE TO MOOT

Christopher Samuel¹

In the wake of the COVID-19 pandemic, all law students and instructors were forced to rapidly adapt to a new online-learning environment. With varying degrees of turbulence, students and instructors made the necessary changes and finished the year to the best of their collective abilities. However, at the University of Alberta Faculty of Law, there was one unique law school experience that did not survive the transition: the mandatory first-year moot courtroom exercise. (As a point of terminology, when I use the term “moot court” below I am referring only to the oral courtroom presentation and not the associated written factum assignment.)

Cancellation of the First-Year Moots at the University of Alberta

Virtually every Canadian common law program requires its students to make a moot court presentation in their first-year. If you ask any Canadian law graduate about the subject of their first-year moot, you’re likely to receive a detailed account of the specific facts and legal issues (mine had to do with a grandfather clock falling on the plaintiff while they were at an auction house). The unique combination of novelty, difficulty, and stressfulness of the moot creates an indelible experience that makes a lasting impression on developing law students. The University of Alberta first-year moot program also engages a large chunk of the local Edmonton bar, as practicing lawyers fulfill the role of moot court panelists. Over 200 volunteer hours every year are donated by practitioners who take the time out of their busy schedules to get up to speed on legal issues they might not have touched since law school.

At the University of Alberta, the first-year class was scheduled to make their moot presentations over a three-week block in March 2020. The onset of COVID-19-related public health restrictions meant that all mooting was immediately suspended on March 12th, after only the fourth day of the first week. As a result, only 50 out of 183 first-year students delivered their oral submissions before the remaining moot rounds were

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suspended and eventually cancelled. Unsurprisingly, the initial decision to suspend the moots generated intense feedback from the students. Much of this feedback related to whether the 50 students who had already completed the moot would be graded asymmetrically from the remainder of the class, with students expressing strong views in both the affirmative and negative. Ultimately, the University of Alberta decided to move the entire semester to a universal credit/no credit grading scheme. This rendered the asymmetrical grading question a moot point (forgive the pun).

Grading concerns aside, many students also expressed a sense of grief over their lost opportunity. For most students, the moot was the first-year assignment that bore the closest resemblance to their pre-law conception of lawyering. One student wrote to me and said, "I lost the chance to partake in the one activity I was looking most forward to." In an attempt to salvage at least some small semblance of the moot court experience, I gave students the opportunity to sign-up for optional, abbreviated one-on-one video sessions with me sitting as a single-judge panel. Approximately 20 students took advantage of this optional exercise and presented from their bedrooms, kitchens, or basements. Although the students who presented virtually were appreciative of this opportunity, from my perspective it still fell short of the sensation of being on your feet, gowned, and performing before a live panel of judges.

Upper-Year Moot Cancellations

Unfortunately, the first-year moots were not the only set of moots cancelled due to the COVID-19 pandemic. Several national mooting competitions were also cancelled on short notice, including two relatively nascent competitions in the Michel Bastarache Language Rights Moot and the Adam F. Fanaki Competition Law Moot. Fortunately for the majority of our upper-year mooting students, the bulk of the national competitions took place in February and early March. Therefore, most of them had been completed by the time a pandemic was declared. Although these cancellations were prudent and responsible, they were also disappointing to the students who were now unable to attend their respective competitions. This disappointment was understandable, since all of the would-be participants had to go through a rigorous qualification process to be selected for their respective teams.

Attendance at an upper-year competitive moot is a wonderful, unique experience. Rarely, if ever, do students have an opportunity to interact with a cross-section of students from different institutions who all share a mutual interest in the same field of law. Moreover, due to their inherently competitive nature these moot competitions attract top students who are especially skilled in oral advocacy. Furthermore, moot organizers go to great lengths to recruit senior practitioners and members of the judiciary to preside over competition rounds. Many competitions feature a Supreme Court of Canada Justice who chairs the final round panel and delivers a keynote address at the end-of-competition reception. In short, the opportunities for student interaction and network-building are unparalleled. These opportunities are now permanently lost to time. Although they may not be much in the overall scale of this global pandemic, they are still significant losses to the affected students.

Virtual Mooting and the Road Ahead

In the following months, legal research and writing instructors across the country will have to determine how to deliver a moot court experience that translates well into a virtual environment. Some of the old wisdom will have to be revised or discarded. For example, a common admonishment in mooting is to maintain eye contact with the panel. Does that sage advice still apply over a webcam? Our virtual solution will have to emphasize fundamental skills that are applicable to both online and offline courtrooms. In some ways, the task of organizing the 1L moots may have become easier. For example, under the old system, scheduling was constrained by physical courtroom availability; no more than one team could present at a time. In a virtual environment, that constraint is removed; in theory, every student could present at exactly the same time.

It is unclear how the moot cancellations will affect our current law students. If it's true that there is pedagogical value in completing the first-year moot exercise, then we should make sure there are enhanced opportunities for last year's 1L students to practice oral advocacy in order to make up for this loss. The National Requirement published by the Federation of Law Societies requires that all students demonstrate proficiency with both "oral and written legal communication" (National Requirement, B1.3).

With respect to the upper-year moot competitions, most organizing committees have begun planning to host their moot competitions online in 2021. Competition organizers do not want to risk cancellation in the event of a second pandemic wave and it is too cumbersome to plan both an in-person and a virtual moot. Some competitions, including the Willms & Shier Environmental Moot and the Davies Corporate/Securities Moot, have already announced that they will be postponing their competitions for the next year. I also note that additional complexities exist for competitions that have non-appellate formats, such as the Sopinka Cup Trial Advocacy Moot.

I hope that we can recreate the sense of triumph and visceral thrill that comes from finishing a moot round after being grilled by questions from a “hot bench” (moot lingo for a judging panel that is particularly active). I have a small set of practical recommendations that I believe will help preserve some of that old moot courtroom feeling:

1. Students should treat the virtual courtroom with the same degree of decorum that they would a physical courtroom. This means observing small formalities, such as bowing to the judge when a courtroom session begins, dressing in a similar manner to that of an actual court appearance, and using correct legal terminology.
2. If possible, students should present by facing the webcam while standing, behind a raised flat surface that can mimic a podium or lectern. If mooting during the daytime, students should not be standing in front of a window. Speaking materials should be printed and physically in front of the student. Students should not attempt to navigate an electronic document using the same laptop that they are presenting on.
3. Students should ensure that their computers are connected to external speakers, or that the volume is sufficiently loud on their computers that they can hear everything said by the judging panel. In a physical courtroom, the sound of a judge clearing their throat may be indicative of their desire to ask a question. The virtual courtroom should ensure that those small audio cues can be heard.
4. Similarly, students should view the judging panel in the highest possible definition. If they are using a laptop to present, this would ideally mean connecting to a larger external monitor.

5. Ideally, public health restrictions would allow law schools to establish one or more physical moot locations for students who may not have access to the correct equipment or a sufficiently large, quiet, personal living space. These on-campus spaces can be available but usage should be optional and not mandated.

6. A normal, pre-pandemic moot would have four student participants: two appellants and two respondents. If this format is retained, then the four students should be given some time together as a group at the end of their moot, in the absence of the instructor and the judging panel, to celebrate its completion.

In many ways, the questions faced by law schools about how to deliver a positive online moot experience mirror the questions that real-world court systems are facing. The COVID-19 crisis has forced reluctant courts to enter the 21st century. As we continue to transition to online dispute resolution conferences, hearings, and even trials, our profession may discover additional difficulties that we haven't even contemplated yet. However, the virtual courtroom is not going to disappear as soon as this current health crisis is resolved. A modern court system with an integrated online component has too many practical benefits; the courts can never do a full return to the old ways. It's therefore likely that our moot court exercises will never be the same, either.

HOW COVID-19 REKINDLED THE SPIRIT OF TEACHING

Nayha Acharya¹

The abrupt end to our classes in the middle of March 2020 due to the Covid-19 situation reignited in me the real sense of what it means to be a teacher. It brought me out of the superficial notion, where being a law professor just means being someone who has students who will listen to me talk about the law, and into the deeper sense - that being a teacher involves a very special human relationship. This transition arose in me, I believe, because the Covid-19 situation forced me to slow down and sit still for a while, and that moved me from a place of superficial busy-ness to grounded authenticity in all aspects of my life including teaching.

After some time of being immersed in listening to surreal news from all over the world and coming up with plans to end my courses online, I felt an increasing calm that emerged from not having anywhere to physically rush to. The slowing of the usual hustle brought with it an increased awareness of just how superficial a 'busy' life can be. I felt myself realizing that living through a busy routine can create a tantalizing, but false feeling of ease, security, and purpose. Running here and there, and rushing towards this or that deadline, racing to change the world before someone else does – that hasty existence was in fact allowing me to live at the surface of life, and mask the uneasy questions that occur in my deeper life about my *actual* worth, my *actual* place, my *actual* purpose. Busy-ness is a way to pack our lives so full that we don't have to deal with how frightening and unsettling life can appear – we grow old, we get sick, we are in a fragile, uncertain condition, and we die. The Covid-19 situation made all this stark, and also created space in my life to sit with it. As I did, I felt that the superficial parts of my life were being sifted out and I was experiencing more of the real. And although it may seem that sitting with these things can cause great anxiety and disturbance, yet quite to the contrary, I can report with much gratitude, that embracing life's uncertain fragility managed to give rise to a greater sense of earthy realness to my life. This translated into how I began to feel towards my students and my role as their professor.

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I remember feeling a sense of care, concern, and affection for my students. I do feel this way towards them generally, but however dishonorable, I confess that sometimes these feelings are less at the forefront, and my teaching is animated more by a sense of 'having to get it done.' But, in these moments, I felt less that the students are part of my job and more like they were part of my life, and I part of theirs. I felt responsible for them and for their well-being. These feelings did not arise logically or through my own thinking, they just came, sometimes as a flood, and they brought with them a tangible peace and genuine gratitude for my position as someone's teacher. I would define the experience in the words of my most influential and respected teacher: "It's a grace that comes with just being still and letting life flow around and through." (Professor Ronalda Murphy, in one of her many touching emails to me.)

I remember being overwhelmed at times by the notion of how much trust our students give to us. At times, I experienced the vivid realization that our purpose is to care about our students not just in relation to the content of the courses we teach, but as the whole person who is in our care for a short but crucial time period. To be in this type of relationship of care is an outstanding privilege. It brings our work into the realm of the sacred.

When these thoughts occurred to me over the course of March and April 2020, I wrote emails to my classes, recorded audios, and sent video messages to them. The most substantive was an audio recoding that I created for my civil procedure class, and I ended up sharing it with all my students across my classes. I called these my "Final Comments with Zaheer Beats" because my wonderfully talented cousin heard the comments, felt musically inspired, and allowed me to include a clip of his music at the end. The words are transcribed here because I believe they capture the essence of the shift in my approach to being a teacher that occurred at the beginning of the Covid-19 pandemic.

Hi everyone,

This would have been the last day that we would have met if this term had been more predictable. So, I thought I'd just share some thoughts.

I know you're probably all feeling busy with upcoming exams – so don't worry, there's absolutely nothing content related in this message, just some rambling, so feel free to unplug.

If we were together, I would have maybe opened up a discussion with you about your experiences of law school or your reflections on what is going on in the world right now, but since we can't do that in person, I thought I'd just talk to you a bit about my own experience with law and careers and stuff.

I think I have already told you that I went to the law school at the U of A in Edmonton, and then I started articling in a mid-sized civil litigation law firm. The part that I didn't tell you, and wouldn't usually, is that I hated it. I was extremely unhappy. And I'll tell you why I'm telling you this in a minute, but I want to just be clear that I am not at all saying that practicing law in a civil litigation law firm is at all inherently problematic – quite to the contrary, I think it can be a great choice. You can do really meaningful work in that context, and I am also very happy that I did have those years at the law firm, for many reasons – including that I think that having done that has enabled me to teach better.

So, don't get me wrong – law firm practice, and civil litigation can be awesome – I know people who find it exhilarating and really meaningful. And my sense is that many, many of the students that I have interacted with at Schulich, including many of you guys, would find traditional law practice to be like that - and that gives me great hope for the profession. Because we need lawyers who are truly passionate about practicing law in that traditional sense.

But for me, it simply wasn't a good fit. And I spent four years in that, but I think I knew within the first maybe three months that I was really uneasy in that environment. And I'm not sure that I can tell you precisely what the problem was for me, and that doesn't really even matter much. There were little things that I could point to, like I think law practice requires a bit of detail orientation, and I may have a bit of a more of a big picture tendency, and that can be dangerous in a law firm.

But that doesn't matter too much, because my point in telling you this is contingent only on the fact that it wasn't a good fit for me, and it doesn't matter why. But what I wanted to express is that I ended up with a lot of internal conflict because from an external perspective, I was doing everything right and apparently living a dream. But the reality of it was that it may be a dream for someone, but it wasn't really my dream, but I was continually trying to convince myself that it was my dream, because there are so many external forces (parents, society, the law school itself) telling you that that's the dream, or that that's success. So there was internal dissonance because internally you know that you don't belong somewhere, and you try to tell yourself that that's exactly where you belong. But thankfully, my internal reality never succumbed to my attempts to lie to it. And I don't think it ever does. So I remained uneasy, and that causes some suffering.

Now I know that people suffer in life in far more serious ways, but nonetheless, the suffering that results from the dissonance that I'm talking about is I think quite a widespread form of suffering (and we know that for one reason or another, studies seem to indicate that law just isn't the happiest profession. There could be lots of reasons for that – the hours, the billable hour, things like that. But to me it's also an indication that people in our profession are experiencing that dissonance that I'm talking about.

And I think that's because nowhere in the education system from grade school to professional school do we ever really encourage people to be in tune with themselves first. And then do things from that sense of being in tune. Instead we encourage people to be externally driven – like your teachers will tell you what you're supposed to do, and what success means, and we never really say clearly to people – you've got to look inwards and find your intrinsic or internal drive.

I certainly was basically exclusively externally driven until very recently, when I met someone who sort of slowly pointed all this out. (I happened to marry that person!)

I'm sharing this with you because I just want to encourage you to be very aware if something like the dissonance and internal conflict that I'm describing happens to you at some point. And the fact is that I

think it happens to a lot of people, but there is so much external demand to be ambitious towards only certain ideals of success, that it's hard to come out of it when you're caught in it. So, you have to put effort into continually asking yourself if what you are doing is in line with who you actually are.

Now even if you do that, of course there will be parts of your job that you don't like, no matter what. Like, I love this job, I have loved being with you in the classroom, but there are parts of it that are like arg!, this again! Like pouring yourself into an article for a year only to have it dismissed as "too obvious" to publish. That has happened, guys!

And the path to getting this job felt very rough at times, so I'm not saying be afraid of hard work, or expect to walk on rainbows all the time, and I recognize that there are practicalities in your lives like bills and responsibilities, that will make some of this seem irrelevant or more like a luxury, and in a sense you're right about that, but I don't think that there is anything more relevant than putting every effort into ensuring that you live a life that makes you feel....alive.

Some people may immediately go into careers that they love, and that's great, but that didn't happen for me, and it may not happen for some of you right away. So you'll have periods of uncertainty and uneasiness in your life – for sure – but I think what's key is that you know that you don't need to be afraid of that uneasiness – you have to be aware of it, and don't shut it up, because that's what is going to create a path forward for you.

In the end, while I care about how you do in Civ Pro, I care far more that you live very much in tune with yourself, so that you live very fully, and that your career is an expression of who you are, and not who you think you are supposed to be.

That is what I think is best for you and for the profession and for society, because when you're in-tune, then you'll find yourself working hard, being passionate, your creativity will flow on it's own, and you will walk the difficult paths, but you won't lose any strength in the process.

I know it may feel strange for me to be talking about this stuff given this quite remarkable period of history that we're in right now. But I

think that the message of being in tune with yourself is maybe even more relevant this year than any other year, and at least it's no less relevant this year.

But I know that many of you will have concerns for families right now who you can't be with, and maybe people are feeling isolation anxiety, some people's jobs and things aren't certain anymore. I know that's very tough, and there isn't much to say in response to that, except maybe the thought that we should always approach defining things as adversities or blessings with humility because the fact is that we don't know tomorrow's reality, and we are all very much together in that state of incomplete knowledge.

But that doesn't make tough moments necessarily easier to bear. So, let's just be easy with ourselves and each other.

For me, this pandemic awakened and re-kindled the spirit of what it means to be someone's teacher, and the special bond that emerges from that relationship. It reminded me that I cannot take teaching for granted. It grounded me into an ethic of care to guide my relationship with my students. It showed me how easy it is for me to get caught into the whirlwind of productivity, personal advancement, and 'busy-ness,' and opened my eyes to what I sacrifice when I do so, and I wanted to share that with my students. I hope that I will always look back at this period with much gratitude, because the Covid-19 slow down graciously humbled me and brought me back to life.

SAPERE AUDE ? TEMPS ET TANT DE QUESTIONNEMENTS

« Que "les choses continuent comme avant", *voilà* la catastrophe »

Walter Benjamin, Paris capitale du XIX^e siècle

André Bélanger¹

Il y a quelques années, alors que je préparais une intervention avec un jeune collègue, je lui demandais s'il allait jouer le rôle du jeune révolté et moi celui du vieux sage, ce à quoi il a répondu, doutant certainement de ma sagesse, qu'il était plutôt en mode « jeune désabusé » et que selon ma logique binaire passablement sommaire, il faudrait que je sois quelque chose comme le vieux jovial. Les doutes sont toujours les mêmes de mon côté, mais difficile dans le contexte actuel de *professer* jovialement, sans compter que j'aurais l'impression d'inscrire cette humeur joyeuse au sein de ce qu'un Marcuse contemporain qualifierait sans doute d'euphorie critique dans le malheur de notre réflexion universitaire et juridique. Tout n'a-t-il pas été dit sur l'importance de la critique en droit et au sein des universités ? J'ai bien peur de ne pas avoir de propos nouveaux à ajouter ici. Rien de bien nouveau, j'en conviens, mais à quoi bon une *crise*, si elle ne permet pas une remise en question de nos habitus?

Pourtant, après la précipitation vers la mise en ligne des cours et les inscriptions pour les sessions d'été et d'automne, tout semble avoir été fait pour « continuer la vie universitaire comme avant ». Et malgré le manque de temps, l'éloignement des étudiant-e-s et le malaise sociétal, le fait d'être ainsi déstabilisé me remet en tête cette citation de Benjamin, de même que plusieurs questionnements en lien avec mon rôle de professeur de droit, avec la gestion de crise au sein des facultés, la transformation en marche de l'enseignement et de la recherche en droit de manière générale.

Ainsi, nous semblons disposés à laisser aller, à cheminer docilement entre les balises tracées par nos administrations universitaires d'une part et, d'autre part, les dictats de l'économie du savoir qu'on annonce *d'avance* mise à mal par les circonstances. Mais alors, qu'en est-il de notre courage

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intellectuel à aller « au bout » de nos arguments, de nos réflexions juridiques ? Et, corollairement, quel est notre rôle, si ce n'est notre responsabilité, à l'égard des jeunes collègues qui entrent dans la course ? Je choisis ce terme car il s'agit bel et bien d'une course désormais, tant par le rythme aliénant que par la compétition plutôt vulgaire qu'elle instaure entre nous et qui tend à nous éloigner de l'idée initiale de l'université telle que préfigurée au XII^e siècle. Faut-il nous inquiéter, pour la génération de chercheur-e-s qui monte, de l'impact de ces formes d'autopromotion encouragées et valorisées par nos employeurs, des quêtes de subventions permanentes qui même lorsqu'elles sont « d'équipe » servent au final à redorer notre blason individuel de chercheur ? Je voudrais aussi questionner la pertinence de la multiplication des prix et des concours de tout acabit, questionner cette valorisation puérile des gratifications qui, inévitablement, affecte notre indépendance intellectuelle. Trop souvent il faut plaire pour remporter la palme, tandis que le savoir n'a a priori rien d'un agrément, à moins d'officialiser notre rôle de représentants commerciaux au sein de la marchandisation du savoir ? En posant de telles questions, en mettant en parallèle notre capacité à faire du droit un savoir avec celle de notre volonté heuristique en cours de carrière, suis-je en train de tomber de Charybde en Scylla, alors que tentant de guider le débat vers l'île de la critique juridique qui se peuple lentement, je nous déporte vers le récif de la question de l'indépendance universitaire ?

C'est donc plein de jovialité plus ou moins feinte que je formule l'interrogation : Osons-nous vraiment, toujours, faire ce qui doit être fait dans une optique de questionnement de ce qu'est la *vie bonne* – pour utiliser un terme cher à l'École de Francfort –, baser notre enseignement sur ce que nos réflexions nous indiquent comme étant pleinement justifié, présenter les résultats qui s'imposent intellectuellement, même s'ils peuvent irriter sur les plans de la politique facultaire, universitaire, subventionnaire, professionnelle et sociétale ? Ce qui nous mène à une question aussi fondamentale qu'évidente en raison de son essence – j'ose le terme – ontologiquement universitaire : est-il seulement justifié de poser une telle question ? Et voulons-nous nous poser cette question aujourd'hui ou cherchons-nous davantage à poursuivre sans trop de heurts dans notre carrière universitaire et cheminer rondement vers le statut de professeur titulaire, ou mieux, de titulaire d'une chaire d'excellence quelconque ? Peut-on vraiment imaginer aujourd'hui une jeune collègue de droit privé s'écriant *basta così!*, tel un jeune Gramsci, devant l'aboulie de notre indifférence contemporaine quant au projet de

carrière semé d'évaluations de toutes sortes, de défis stériles et d'étapes *gestionnariales* que nous dressons tous plus ou moins consciemment sur le chemin de sa réflexion de professeure? Et ce, même en temps de pandémie qui devait, disait-on, commander une pause?

J'exprimerais d'autres doutes candides si on me le permet : cette demande constante de « nouveautés » et de projets *subventionnables*, cette course à l'« excellence », à la création de chaires de toute espèce, n'est-elle pas au mieux naïve, l'université ne pouvant se réinventer en permanence et l'excellence ne pouvant, par définition, se généraliser ? Au pire, n'est-elle pas idéologiquement marquée puisqu'elle tend à nous éloigner des leçons « historiques » quant à la raison d'être de l'université en ne permettant plus au professeur de prendre les césures nécessaires à la réflexion – ne serait-ce qu'en temps de pandémie ? En nous pressant vers la nouvelle manne de recherche que représente la Covid-19, bien déterminé-e-s à démontrer avec fierté notre excellence de chercheur-e-s impliqué-e-s, en instituant de la sorte un rapport compétitif entre universitaires dans un contexte de crise, ne nous éloignons-nous pas d'un esprit proprement épistémologique et désintéressé ? Ne vaudrait-il pas mieux, en ce sens, revendiquer notre désir de nous extirper d'une médiocrité consciente, plutôt que de nous complaire dans cette ambiance aussi galvaudée que présomptueuse de prétendue « excellence » universitaire? Une recherche rapide sur le site internet d'une université indique que le mot-clé « excellence » se répète plus de 44 000 fois, alors que « médiocrité » ne donne que 341 entrées. Devant une surenchère aussi grotesque, j'en viens à préférer sans gêne ma médiocrité de professeur/chercheur dans le contexte troublé qui est le nôtre. D'autant plus que le droit, parce qu'il s'applique globalement et uniformément, est le sujet « médiocre » par excellence.

Ainsi, plutôt que de nous auto-accoler cette étiquette d'excellence, pourquoi ne pas revendiquer que l'excellence est une utopie, vers laquelle il faut certes tendre, comme vers toute utopie, mais que tendre vers, se tourner vers, ce n'est pas instaurer un régime d'évaluation perpétuel, ce n'est pas foncer vers les bourses et les concours, c'est plutôt accepter que par définition c'est un *non-topos* et que lorsque l'on prétend être sur ce lieu inexistant, on glisse inévitablement de l'utopie vers l'idéologie. Et rappeler au passage que selon Paul Ricoeur l'utopie s'oppose à l'idéologie, rappeler que l'utopie est une solution de rechange critique qui s'oppose à ce qui existe. Se souvenir aussi que Walter Benjamin liait, dans un texte

de jeunesse, l'excellence universitaire à l'idée de barbarie. Et garder aussi à l'esprit, pourquoi pas, que l'autrice Svetlana Alexievitch écrit qu'un homme sans utopie est bien plus terrible qu'un homme sans nez.

Aujourd'hui, en droit privé – on m'excusera j'espère de m'en tenir à mon domaine d'enseignement et de recherche –, comment est-ce qu'une jeune juriste privatiste peut développer un discours véritablement critique sans être *de facto* qualifiée au mieux de normativiste passéiste et au pire d'utopiste naïve ? Est-ce que le questionnement de l'état du droit privé et de son enseignement se résume à ce que Ferdinand Céline disait des intellectuels : « Il avait le vice des intellectuels, il était futile » ? Futilité donc. Est-ce que l'universitaire peut seulement revendiquer une certaine futilité ? Voire, est-ce que revendiquer la futilité aujourd'hui, en temps de crise pandémique, n'est pas un acte critique *per se* ? Faire le choix de ne pas faire de demandes de subvention, est-ce faire le choix de la futilité ? La futilité implique évidemment un jugement de valeur. Or, justement, qui juge de la valeur des réflexions des universitaires aujourd'hui ? De la pertinence d'une pause contemplative ? De l'intérêt d'un découragement épistémologique ? D'un recul pandémique ?

Ainsi, dans le contexte contemporain du droit privé, la jeune professeure peut-elle cheminer sans trop de difficultés si elle s'inscrit en faux avec le régime actuel de marchandisation du savoir d'une part, et de mercenariat des juristes privatistes d'autre part ? Peut-elle, ou mieux, doit-elle jouer franc jeu et se mettre à dos les institutions susceptibles de la subventionner, par exemple en droit des contrats et des assurances pour référer à ce que je connais le mieux, parce qu'elle considérerait, disons, que les organismes de défense des droits des consommateurs favorisent une forme de « sur-consommation durable » socialement dommageable ; que l'Autorité des marchés financiers, par l'intermédiaire de ses subventions, autorise allègrement et contrôle trop peu les acteurs financiers ; que les ordres professionnels recherchent des impacts concrets intéressés ; ou que les FRQSC et CRSH concentrent et orientent les domaines à explorer dans une perspective de capital politique peu subtil ? À toutes et tous nous coller le nez sur la Covid-19, sur les subventions de recherche et offres de cours qui s'y rattachent aujourd'hui, n'est-ce pas le doigt que nous regardons, plutôt que le champ des possibles qu'il pourrait désigner ? Une jeune professeure pourrait-elle revendiquer son rôle d'universitaire en refusant le jeu du financement-coronavirus ? Du « réseautage » pandémique ? Le jeu de

l'autopromotion ? Le jeu du narcissisme médiatique ? Le cas échéant, la laisserions-nous cheminer sans désavantage et difficulté, sans pression et avec le soutien de la communauté ou lui imposerions-nous indirectement la marche à suivre afin qu'elle ne s'écarte pas du droit chemin? En toute jovialité, (et à titre de médiocre par excellence), je pose la question et je me tais : y a-t-il une réponse autre à donner que *nous n'avons pas le choix* ?

ANALYZING THE EFFECTS OF COVID-19 ON LEGAL PEDAGOGY AND SCHOLARSHIP: A HURLY-BURLY IN FIVE- AND-A-HALF PARTS (A COLLAGE WITHIN A COLLAGE?)

Dwight Newman¹

Part I - Introduction and trigger warning

I appreciate all of my colleagues in the legal academy, even when I disagree with you on everything. I hope you can read my work in the same spirit even when it is provocative or unconventional in substance and/or rhetorical form.

Part II - Not a question but a comment consisting of three sub-vignettes

In what appears to be an unusual act, I spoke today with a dozen law students from across the country about the impact of COVID-19 on legal education. They told me repeatedly of decisions about the path forward having been decided in highly centralized ways, of well-intentioned professors doing things that caused them enormous stress, and generally of real disconnects between law faculties and students over the response to present circumstances. Govern yourself accordingly.

In what is an expected act, I attended over the last two weeks some remotely delivered sessions about remote teaching offered by my university's teaching and learning centre. A consistent message was the preferability of asynchronous learning. That message was delivered through sessions presented synchronously, with the synchronous format presumably chosen for some reason by the instructors and/or the centre.

In what is a mandatory act, I have been sitting at home toiling here for months. I sit here barred from my office and access to the physical books located in my campus office or in the libraries. The latter long declined to offer any means of accessing their collections for research purposes during the same period when most businesses more nimbly began offering curbside pickup.

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Part III - The locked storehouses of knowledge

Locked libraries are a physical phenomenon. Locked minds may face more powerful padlocks.

Contemporary legal scholarship has had surprisingly little to say about the pandemic. Or perhaps that is not surprising. It may instead manifest more profound ironies.

The contemporary has been always on the search for what is new. The ironic institutional inertia of graduate legal education in Canada is not that it has held students to traditional subject matters but that it has impelled an ever-increasing proportion of students to the study of “law AND” and/or of the international transnational interdimensional X.

Those trained in interdisciplinary methods have had little to say when an emergency has leaders asking about the parameters of power in deciding on policies to deal with a pandemic. Some constitutional scholars last read the *Charter's* mobility rights clause in 1982, though they recall fondly that year that time began. Writing on freedom of assembly has been panned as a peculiar niche. Studying the principles of parliamentary democracies has been for old-fashioned anglophiliacs best embalmed in museums.

There are old books that say things about the exercise of power in emergencies. They are locked up in libraries. Modern minds of the legal academy have long been locked against any ongoing study of such silliness.

Part IV - Resilience from the beforetimes

Sam and Sally felt stressed about exams. The thought of writing short comments in semi-literate form to reflect what should have been months of learning made their nights filled with images of dragons.

The law school was courageously ready to slay the dragons. High-priced consultants were hired. An answer emerged.

A bill was sent. The law school put a puppy in the student lounge. Joy returned to all the realm. Sam and Sally rejoiced.

Next semester, Sam and Sally were stressed when asked questions in class. The thought of engaging in discussion on cases that should have been the object of hours of study made their days filled with worry.

The law school was ready to save them yet again. It found a law professor working on other things and told the professor to stop studying law and to study how to make Sam and Sally less worried. Grant applications were submitted. The money would flow. The academy would rejoice.

An answer emerged. A conference presentation happened. The advice went out to all the land.

Now Sam and Sally went to class, each equipped with an assortment of coloured security blankets so as to be able to signal different moods on different days. They went to class in a round classroom without frightening linearities. (The furniture fit awkwardly, but no matter.)

The first month of classes became a set of puppet shows to demonstrate the cases so that nobody would be scared of them. Sam and Sally took their notes by making sculptures with playdough. Instead of a legal writing assignment that would involve inherent stresses, they submitted an alleged artwork. Instead of old-style numerical grading, the artwork was passed around the faculty's boardroom—even as contractors carried out measurements to try to carve off all the corners and make the room into a proper spherical shape so that meetings need not be so stressful—and leading scholars felt the texture of the papier-mâché.

Finally, stress was gone and resilience achieved. Reports were filed. Awards were won.

Then came coronavirus...

Part V - Selected entries from my CV from the first week of #WFH While Shakespeare Was Writing King Lear and Isaac Newton Was Discovering Gravity

Braised eggs with leeks and za'atar (co-authored with Ottolenghi; indeterminate % contribution – he wrote a recipe and I applied it to the facts of my pantry, drawing some necessary distinctions from the prior *ratio*) (Condominium: Kitchen Productions, 2020).

Sourdough starter, rated 4A (commenced well until Reviewer 2 identified mold on a corner of the starter), not consumed but encouraged to reapply.

Salmon bisque from canned salmon (Condominium: Kitchen Productions, 2020 reproduced from prior production in Iqaluit: Visiting faculty kitchen 2020).

Part V-and-a-Half. Reflection Journal

The response of the Canadian legal academy to COVID-19 will be complex and also constrained by various institutional realities. It has implications related to institutional decision-making and student issues, to research and fields of scholarship, and to the possibly remarkable value of very traditional modes of pedagogy.

First, the normal sort of decentralized decision-making processes present in law faculties are not necessarily well geared for quick and nimble decisions. As a result, the initial phases of COVID-19 saw some highly centralized decision-making in many institutions combined with a relative lack of transparency on those decision-making processes. Many decisions have taken more account of innovative theories and less account of student realities than might have been intended.

For example, while a shift to pass/fail grading at many institutions was meant as a means of providing relief to students amid highly unsettled circumstances, a significant difficulty with pass/fail grading is that it actually works significantly against social mobility. Pass/fail grades on a law school transcript will have different implications for a well-connected student with a business degree than for a student from an unconventional background who was ready to demonstrate particular ability at law through a transcript.

Similarly, the adoption of a range of additional assignments to promote student engagement in the context of online learning may well have unintended negative consequences on students. While it may promote engagement, it may actually promote the expenditure of excessive amounts of time into particular assignments in ways that cause added stress, especially once each student is loaded up with assignments from each of five classes at a time.

The shift to the online classroom—itself questioned by some students who see it as being driven by administrative convenience more than definite medical needs if it is in place at the same time that many other establishments are open—must provoke a range of thinking. Some pedagogical theorists will argue for the use of predominantly asynchronous teaching. They may even argue for this on the basis of equality between students with variable opportunities to participate in synchronous learning online. However, to do so is to argue for a sort of levelling down. That everyone must give up synchronous learning due to the situation of some does not make sense. At the same time, there are balances to be struck so as to attempt to reach all students as effectively as possible.

Those thinking about various policies and pedagogical techniques would actually do well to do something rather uninnovative (even if innovative relative to current practices): speak with a range of real students. There may be surprises in what students say.

Second, and considering some impacts on research, I would note a concern in reactions that sent an apparent message that research—or, at least, library-based research—was optional. While great efforts were made to continue classes, few efforts were made to keep libraries functioning. Students working on research papers have had to work around this. Graduate students and faculty have had to do so for an increasingly extended length of time. Aspects of research projects were no doubt subject to being postponed but researchers may also have been too accommodating and given impressions that we did not need library collections. Such an impression in the hands of some administrators could have negative long-term effects.

A larger concern that could arise is how many ideas are locked up in libraries because they are not the subject of ongoing discussion. The situation has highlighted the need for ongoing attention to issues of law that are not necessarily always considered trendy. It is important to have scholars working on a balance of different issues, including on issues that may not seem as contemporary but that could always become important again. While this reaction will likely not be shared by some professors working in the trendier areas, there is an element of current circumstances that actually makes me think we need to return to more traditional scholarly fields.

Third, there may also be reasons to return to more traditional approaches in pedagogy as well. Perhaps surprisingly, some very traditional pedagogical approaches may be suited to the most contemporary times. However, some of these approaches have worked across a wide range of circumstances in the past. The use of a Socratic method, so long as done in a way that is more respectful of students than was sometimes the case, can support strong student engagement. Oxford-style tutorials are resource-intensive but they are what is enabling Oxford to plan to continue teaching this fall with relatively few changes. While Canadian schools do not have the resources for large numbers of two-student tutorial groups, the idea of asking students to engage with written material and then come to discuss what they have then written could actually be surprisingly well-suited to current circumstances. Reading deeply is a great form of asynchronous learning. For some reason, there have been trends to turn away from various methods on account of alleged stresses from them when these methods may actually be remarkably suitable and effective both now and in the future.

I will sum up with what will no doubt be both a controversial statement and controversial way of putting it. Perhaps we have innovated too much and current circumstances offer a real opportunity to return to what works better than is sometimes acknowledged.

YELLOW/JAUNE: YOUNG PROFESSORS/ ACADEMIC YEAR; JEUNES PROFESSEUR(E)S / LE JOURNALIER



Shauna Van Praagh & David Sandomierski

Collage sur le droit et le savoir au temps de la pandémie
Law and Learning in the Time of Pandemic - A CollageThe Speed

FENÊTRES OUVERTES ET PORTES FERMÉES

Adrien Habermacher¹

Ma thèse fraîchement déposée, j'ai rejoint le corps professoral de la Faculté de droit de l'Université de Moncton pour la rentrée de septembre 2019. Lorsque la pandémie de COVID-19 est arrivée, je me dirigeais donc, haletant, vers la fin de ma première année d'enseignement à plein temps. Les effets de cette pandémie sur mon expérience de nouveau professeur de droit m'évoquent un coup de grisou qui aurait fait voler en éclat les fenêtres tout en fermant les portes d'un coup sec.

La première fenêtre qui m'a paru se fracasser est celle qui me sépare normalement de la vie personnelle de mes étudiantes et mes étudiants. Interagir uniquement à distance avec elles et eux m'a paradoxalement amené au plus proche de leur vie ordinairement cachée. Les échanges par vidéo bien sûr, mais aussi par téléphone, m'ont parfois projeté dans leur intimité d'une façon qu'il m'aurait été difficile d'imaginer auparavant.

Avant la pandémie il m'était bien sûr arrivé d'avoir des aperçus de leur vie au-delà des murs de la faculté. Je pense notamment à des personnes qui ont dû faire face à des événements inattendus et bouleversants pendant l'année, et qui avaient fait la démarche consciente de venir m'en parler pour m'expliquer des difficultés passagères d'apprentissage; cela m'avait ensuite permis de leur offrir une aide personnalisée pour atteindre les objectifs pédagogiques du cours.

Lors des échanges par vidéo à la fin de la session, la caméra m'a brutalement projeté dans la vie de mes étudiantes et mes étudiants. Toutes et tous perdaient beaucoup de contrôle sur le partage de leur vie privée, car je me retrouvais à voir et entendre l'intérieur de leur résidence. En nulle autre circonstance n'aurais-je pu découvrir la décoration de leur chambre ou du salon familial. Bien que je leur eusse donné le plus de liberté possible quant à l'utilisation ou non de leur caméra et de leur micro, plusieurs personnes étudiantes se sont retrouvées à m'inviter beaucoup plus loin dans leur intimité qu'en temps normal. Ainsi, lors d'une consultation, une étudiante m'a expliqué que les miaulements

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répétés et insistants de son chat couvraient ma voix. Elle a ajouté que le chat protestait contre la fermeture de la salle de bain pendant que son colocataire prenait sa douche. Ces informations banales m'ont laissé un sentiment de léger malaise car le colocataire en question était également un de mes étudiants. Je me suis senti chanceux quand, une fois sorti de la douche, ce dernier s'est contenté de contribuer à la conversation de loin, sans apparaître dans le cadre.

Le contraste entre cette situation et les relations que j'entretiens habituellement avec les personnes étudiantes fut d'autant plus fort que je cultive d'ordinaire une distance calculée entre nous, peut-être en raison des codes culturels que le système scolaire français m'a inculqué dès la tendre enfance, ou alors le souhait de construire (performer?) une certaine image du professeur légitime. Ainsi, entendre une étudiante m'interpeller par mon prénom dans le couloir de la faculté ou me tutoyer en salle de classe est une expérience encore très étrangère pour moi, alors que ce sont des comportements courants en Amérique du Nord, et peut-être encore plus en Acadie.

On peut probablement mettre l'exemple mouillé que j'ai décrit plus haut sur le compte de l'insouciance des protagonistes, accentuée en l'espèce par mon intrusion dans leur domicile par le truchement de la vidéo. Un échange vidéo n'était cependant pas nécessaire pour fissurer la digue entre la vie privée et la relation pédagogique. L'absence d'échanges vidéo m'en a aussi parfois également beaucoup appris sur les conditions matérielles de mes étudiantes et mes étudiants. Un exemple marquant est celui d'une personne qui m'avait contacté par courriel à propos d'une évaluation imminente. Pour m'assurer de clarifier mes attentes, je lui ai proposé une conversation de vive voix. Cette personne m'a indiqué qu'elle préférait franchement une conversation téléphonique traditionnelle à un appel vidéo. Bien qu'il ait pu s'agir d'une simple question de confort, le ton de notre échange et la mémoire d'autres signaux faibles qui avaient attiré mon attention pendant le semestre m'ont amené à penser que la raison sous-jacente avait sûrement plus à voir avec le coût d'un appel vidéo en l'absence d'accès Internet haut débit à la maison. Pendant notre conversation téléphonique, j'ai aussi pu entendre plusieurs voix en fond sonore, ce qui m'a indiqué que même pour un court appel à propos d'une évaluation il était difficile à cette personne de s'isoler du bruit et des activités environnantes, probablement de ses colocataires. Ces nouvelles informations ont éclairé d'un jour nouveau les difficultés de cette

personne pour étudier et réussir aussi bien que ses camarades, avant la pandémie et encore plus pendant la période de confinement.

La fermeture du campus et l'obligation d'enseigner uniquement par l'intermédiaire des technologies informatiques ne m'ont donc pas seulement ouvert une fenêtre dans la vie des personnes étudiantes; cette situation a aussi fermé une porte aux personnes qui s'appuyaient sur les infrastructures du campus pour réussir. Sans oublier les nombreux obstacles socio-économiques qui jalonnent le simple accès à un programme de droit au Canada, et les situations de handicap qui peuvent s'y ajouter, je ne peux m'empêcher de réaliser que la présence physique dans une même salle de classe impose une certaine égalité entre toutes les personnes étudiantes. Pendant le temps de la classe, toutes peuvent accéder de la même façon aux explications du professeur. Avant et après le cours, toutes peuvent également accéder au réseau Wifi de l'université, aux ordinateurs et aux logiciels qui y sont installés, ainsi qu'aux espaces d'études de la bibliothèque. La pandémie a empêché les personnes qui en avaient le plus besoin d'accéder à des outils essentiels, sur lesquels elles comptaient pour réussir. Cela s'ajoutait à la perte d'un emploi à temps partiel, à l'obligation de déménager en raison de la fermeture des résidences universitaires, et l'arrêt brutal de leur routine et rituels personnels, facteurs de stabilité et de confort.

Si pour la plupart des personnes étudiantes, les infrastructures du campus ne font que prolonger ce qu'elles peuvent déjà utiliser chez elles, pour les plus vulnérables le campus offre d'ordinaire le seul accès continu à une connexion Internet robuste et illimitée, à du matériel informatique fiable et à un espace calme de travail. La nécessité d'étudier à plein temps en présentiel pour obtenir un diplôme de droit au Canada a mené ces personnes à prioriser d'autres postes de dépenses que ceux nécessaires pour étudier à la maison; le passage à un enseignement à distance sans accès régulier au campus a complètement changé l'équation et a mis ces personnes face à de nouvelles embûches.

Cette situation a donc fermé des portes pourtant essentielles à la réussite de ces personnes malgré tous les sacrifices qu'elles avaient fait pour en arriver là, en porte-à-faux avec les attentes sur lesquelles elles avaient basé de tels sacrifices. Alors qu'une nouvelle session à distance, voire plus, se profile, je m'interroge sur la possibilité de concilier les impératifs de santé publique sans accentuer les difficultés des personnes les plus

fragiles. Cela prend encore plus d'importance au vu de la pénurie d'emplois d'été qui leur permettraient d'épargner et de réajuster leurs budgets au vu des nouvelles priorités. De plus, je me demande si l'accès à ces infrastructures ne risque pas de se réduire encore, même après la pandémie et la reprise des activités sur le campus, quand les autorités convaincues des bienfaits de l'enseignement à distance chercheront à faire des économies dans l'enseignement supérieur.

La porte de nos bureaux est une autre porte qui s'est fermée pour les personnes étudiantes comme pour les collègues. Ce sont les discussions spontanées qui sont souvent les plus fécondes. Entre collègues, le hasard d'une rencontre à la machine à café ou un sourire dans le couloir sont des invitations à la conversation. De ces moments impromptus découlent souvent des échanges de bonnes pratiques, des conseils avisés voire des confessions sincères sur des difficultés communes. Cette socialisation ordinaire construit le lien de confiance et la relation humaine. Il en est de même vis-à-vis des personnes étudiantes. Une porte de bureau laissée ouverte, tout comme une présence prolongée à la fin d'un cours, invite à l'échange informel.

Dans notre nouvelle réalité d'enseignement à distance, ces occasions fortuites disparaissent. Bien sûr, les échanges sont encore possibles, mais ils requièrent une planification, une démarche consciente pour enjamber les obstacles de la médiatisation. À moins d'organiser autrement ces moments informels entre collègues ou avec les personnes étudiantes, la situation actuelle nous laisse seuls au milieu du couloir face à des portes fermées. La nécessité de toquer à la porte et d'attendre le signal pour entrer diminue drastiquement la fréquence de moments de socialisation ou de mentorat pourtant si importants dans nos parcours.

Les conversations, souvent informelles, que j'avais eues avec de nombreuses professeuses et de nombreux professeurs de droit au Canada au cours de mon parcours doctoral m'avaient laissé entrevoir les défis auxquels m'attendre pour ma première année d'enseignement à plein temps. Maintenant que j'ai vécu mon baptême du feu, je m'estime chanceux d'avoir reçu tant de conseils pour gérer au mieux les nombreux obstacles qui ont jalonné cette première année. À nouveau, pendant la pandémie, les moments d'échange que j'ai réussi à maintenir avec quelques collègues m'ont fortement aidé à traverser la zone de turbulence de la fin de session. De tels moments sont particulièrement

utiles pour faire face aux obstacles inattendus, et pourtant la distanciation physique en temps de pandémie les rend plus rares, accentuant ainsi une véritable distanciation sociale.

J'ai une pensée toute particulière pour mes collègues qui comme moi sont en début de carrière. Tout d'abord, les effets économiques de la pandémie s'ajoutant à l'austérité plus structurelle risquent bien de réduire drastiquement les opportunités d'embauches, voire de renouvellement de contrat. Ensuite, même celles et ceux qui ont déjà un pied dans la porte ne peuvent plus compter sur autant de colloques d'été pour se faire reconnaître, construire leur dossier de recherche et élargir leurs horizons intellectuels. Enfin, nous avons dû réinventer notre pédagogie alors que nous enseignions déjà à flux tendu des matières trop souvent éloignées de nos spécialités et commençons seulement à trouver nos marques dans les salles de classe. Monter de nouveaux cours et se préparer à les enseigner en ligne sans repères instinctifs sur cette modalité d'enseignement ralentira sans aucun doute l'avancée des projets de recherche, alors que ce sont trop souvent ces derniers qui pèsent plus lourd pour les promotions futures que les immenses efforts déployés dans l'enseignement.

En somme, la pandémie et les changements soudains qu'elle a entraînés ont agi comme un révélateur. Ils m'ont révélé la fragilité de certaines barrières pourtant saines dans la relation pédagogique. Ils m'ont révélé des inégalités de conditions matérielles entre les personnes étudiantes qui me seraient d'ordinaire restées méconnues. Ils m'ont révélé le rôle important que jouent les installations physiques et informatiques qui entourent l'enseignement présentiel dans la réussite des personnes les plus vulnérables. Ils m'ont révélé la place non moins essentielle des échanges fortuits dans l'accompagnement des personnes étudiantes comme dans la socialisation entre collègues. Ils m'ont révélé la plus grande fragilité des professeures et professeurs en début de carrière face à une soudaine réduction des opportunités d'embauche et de colloques, ainsi que face aux défis accrus de l'enseignement de nouveaux cours à distance. Ces enjeux ne sont pas spécifiques à l'enseignement du droit. Tout au plus, la grande résistance du monde juridique à une formation essentiellement à distance nous a privé de modèles pour repenser nos relations sociales et pédagogiques ainsi que les besoins de nos étudiantes et étudiants. Les difficultés que j'ai décrites tiennent peut-être plus d'une transition soudaine à de nouvelles modalités d'enseignement que de

défauts insurmontables des relations à distance. Néanmoins, avec le prolongement pendant plusieurs mois de l'enseignement en ligne, il nous faut repenser en profondeur comment garder les bonnes portes ouvertes et les bonnes fenêtres fermées.

ACCOMMODATE US ALL PLEASE: A CASE AGAINST THE STATUS QUO

Jeffrey B. Meyers¹

Over the past six years, I have taught every subject in the mandatory or core 1L curriculum in the Canadian JD as well as upper year seminars. I am not on a tenure-track. I do have a PhD and some publications, lots of community involvement and a great smile. But I am not competitive for tenure-track postings. I have not published enough or received significant grant monies. The more years that pass between the completion of my doctorate and the present, the harder it becomes for me to get a permanent job in the academy. That is my reality and a reality shared by many others. Precarious faculty are now under even more pressure to add value. But, I refuse to go back to legal practice because I enjoy my work as a teacher, researcher and intellectual. My comments on the question of teaching law in the Covid19 environment are shaped by this background.

A pattern has established itself in my professional life: My teaching contracts have been renewed at the last minute and I have found myself preparing to teach at least one course that I have not taught in the dying weeks of the summer more than once. As all legal academics will know, summer is *the* time you are trying desperately to think, research and write. Bouncing from contract to contract in my mid-forties is not exactly what I envisioned when I completed my PhD a decade ago. But, I have formed an identity as a teacher and a law school instructor despite the precarity of my position in the academy and I am thankful for that.² I have also never given up on research and scholarly knowledge transmission.

During term time, I strive to be student centered. Everything else, including research and service, takes a backseat during the schoolyear to the hours I spend in the classroom, in my office and on the phone or in video calls with students, particularly 1Ls. Students are perennially in

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² My experience as a full-time teacher of every subject in the 1L has been smoothed by the support of certain special colleagues. At UBC's Allard Hall in my first two years of lecturing it was Graham Reynolds' generosity in Property Law and Joel Bakan's in Constitutional Law. Two years later, at Dalhousie, far away from my family and home, Naomi Metallic, Kim Brooks and others reached out to me with enormous kindness. Now at TRU I am indebted to Janna Promislow, Charis Kamphuis, Nicole Schabus and many others for similar support. I would not have the clarity or insight that I now have without these treasured colleagues.

crisis, many experiencing mental health problems or feeling marginalized because of disability, race, gender or sexuality. Students also come to me for career and personal advice or to talk about politics and public engagement in a meaningful way. I love this aspect of my job. Many of my students gain my respect and admiration. Occasionally, a few demoralize me. Particularly those more concerned about grades than learning. But, I remind myself of the pressure students are under in the market model of legal education, and I soften. I also think of the need for universal design and a deeper imagining of equity diversity and inclusion than the one which is normally permitted. From what I can tell, the end of classroom teaching corresponding with the Covid19 pandemic will move more of this activity online, however it is not clear to me that it will improve some of the suffering or anxiety law students were already experiencing as part of their legal education, particularly in the 1L.

Similarly, the competitive, market-driven model of legal education was already in crisis, well before the arrival of the public health pandemic of 2020. It is likely that the pandemic has the potential to continue to exacerbate and deepen existing inequities among students and faculty. Surely, now is not the time for a competitive or social Darwinist view of competition for scarce resources such as jobs and grades. Surely now is also not a time to add pressure to students whose families are experiencing job loss or who may have families of their own. A lot of folks have kids at home while they are trying to do intellectual labour. Caring and intellectual labour are combined for many of us now on a 24/7 basis. It requires accommodation.

Against this backdrop, I have little time outside of course prep and the pivot to online to do much else. So, my experience of the pandemic as a law school teacher is not unlike my entire teaching career to date. Precarious. What I recognize is that students can also be more or less precarious. Under the present circumstances more than ever, vulnerable students are precarious in terms of their financial situation and connection to their families.

This year, by the time Covid19 hit I had already established a rapport with my students in the classroom so the transition online was more of a technological bricolage than a complete remake of the time-space continuum. I recognize that in the fall I will have to radically revise, reconceive and reshape all of my course content for online delivery. It will

not suffice to simply turn my lectures into endless YouTube videos or use sheer force of personality to compel students to the narrative of the course. It will now be necessary to leverage technology to reinvent the course as something else altogether. This will bring me outside of my comfort zone and away from the reading, writing and scholarship normally undertaken over the precious few months offered to me by the summer. But I owe it to the students.

Did I mention that my office is currently off limits to the pandemic and that my partner also works full-time in postsecondary education from home? And, oh yeah, my kids are five and ten years old! I worry that wherever I lean in at work one of my children is languishing in the other room. That is not a great feeling. When I engage fully with my child I worry that I should be doing course prep, service, research or writing. I check my email constantly; I worry if my contract will be renewed. Covid19 just intensifies all this. I remind myself constantly that students, support staff and other colleagues and their loved ones may be in similar circumstances, or worse.

When I first began teaching, I was struck by the cult of PowerPoints in students' imagination. I graduated from McGill in 2004 and do not recall the hegemony of PowerPoints having taken hold yet. I am not sure when the first iteration of PowerPoint found its way in the law school classroom but there can be no question that they came to be of such fundamental importance to law students and perhaps the whole human race that it was an open secret that no pre-tenure prof could dare teach a 1L course without PowerPoints.

The problem with PowerPoints is that students think they contain the germ of truth which they require to achieve success. When they find no such germ or kernel they are bound to be frustrated with the slides. No matter how voluminous or text intensive a law school course may be, it is not just a lot of words than can properly be summarized into a few more limited words on a slide. We should freely admit that both to ourselves and our students. It would be quite liberating. Will the current Covid19 necessitated move from the bricks and mortar classroom to the virtual one be an opportunity to solidify or critique the hegemony of PowerPoints?

These are themes toward which my mind drifts. I often think about them alongside questions about law school teaching and its role in the persistence of legal formalism and legal positivism as ideologies of absolute privilege in the traditional 1L curriculum. Let us admit the truth of this. Why else would we have open book 100% final exams sat in 3-hour increments in April if this were not the case? I am tired of trying to explain and justify this system to students and I see no evidence that this form of legal education is beneficial to students, the profession or the academy. So, the need for curriculum reform as much as universal design, even before Covid19, was obvious to me.

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The deeper questions, both before and after Covid19, are about whether law is a vocation requiring an instrumental education or a craft requiring a more complete ethical formation. What is depressing to me though is that students seem to become convinced before they arrived in law school that legal education is exclusively a question of learning the positive law and instrumentalizing it for the benefit of clients, hypothetical and real. This view strikes me as transactional and neoliberal in the extreme. This is especially true in a deregulated tuition environment in which the price of legal education swells relative to the lower income which can be expected in the first few years of legal practice and creates heavy debt loads unmanageable for students. The mental health and substance abuse effects of this are also fairly predictable. The most astute students always recognize these structural problems and remark on them. In the context of Covid19 and the transition to an online 1L curriculum in the fall (and likely beyond) I fear these tendencies will be worsened rather than improved. The bricks and mortar communities with living breathing people in them are the law schools, without the bricks and mortar we are exiled in some ways. So, we grieve and hope for a fulsome return to our classrooms, offices and communities at the same time as we plan for a different sort of immediate future.

As the Covid19 pandemic was unfolding in my own law school and the debate around the wisdom of pass/fail or credit/no credit response was reaching its apex, it was obvious to me that the world was rapidly changing, for the worse, in unpredictable ways. Students were looking to the faculty for leadership and for a model of how to handle decision making under pressure. It seemed important to me to dispense with the regular way of marking and allocating prizes for academic performance. Many students were desperate to be with their families out of the city and

province. Many faculty colleagues had care giving obligations now competing with their capacity to mark voluminous 100% final exams. I anticipate this type of debate will intensify in the fall, particularly in the context of what is sure to be an ongoing economic crisis, if not a serious recession.

Jobs for law school graduates will not be as plentiful as they once were. Indeed, the entire legal profession and the courts are currently reinventing themselves along with the rest of civil society, including the university, to adapt to the new reality of uncertain length. This period will not be easy and students will be more worried about distinguishing themselves from their peers than ever. Unfortunately, law firm recruitment fosters a competitive tension among students which will now be less offset by the bonds normally created in person by physical and embodied attendance in class and at law school events. Do we, as legal educators, want to be part of that? Are we still going to cling to our 100% finals in the 1L and to our preference for hypothetical and fact patterns to essay and more critical or reflective questions? Is any residual suspicion of writing or speaking or activism or research projects in the 1L curriculum really merited anymore? Was it ever?

What about the enormously rich world of Educational Technology, are we going to be supported to become informed and trained in our usage of these technologies? Are we going to learn about alternatives to expensive textbooks and access codes in the world of open learning? Are we going to think about collaborating across courses to reinvent the curriculum altogether? What better time to do this than now? I often ask students to re-imagine the 1L curriculum. How would they design it? How would they teach it? We begin with the taxonomy of the 1L subjects. Why insist on the nineteenth century categories of legal education?

These questions are more pressing now than ever. Once we have acknowledged the loss of our bricks and mortar law schools for at least a period of time, we can begin our experiment with building community, knowledge and skills online for the fall. But our horizon must be a future in which rethink our old conventions around marking, exams and even our commitment to the standard curriculum itself. The current public health crisis presented by the Covid19 pandemic is the first time law schools have been physically shut down in Canada and many other

jurisdictions globally since their founding, it is a moment not only for grieving but also for reinvention.

THOUGHTS OF A NEWLY APPOINTED ASSISTANT PROFESSOR: LEARNING ABOUT PLACE IN THE TIME OF A PANDEMIC

Tenille E. Brown¹

Place is important to me. I think about it, write about it and teach it. My research agenda is centered on questions about how law can be better understood if in our research, writing, teaching and practice we prioritize place in all the ways that it matters to people. Places can be positive. These are the ways in which locations are personal, it is community, knowledge of ourselves and others in a space that we care about. Places can also be negative. Those places where one may feel physically unsafe, an institution that is unwelcoming or outright hostile. A place can be inaccessible until that time when an individual has gained confidence to take their seat or has fought for their seat. Thinking about place and attachment and belonging is almost a pre-given for me: an immigrant to Canada, I have lived in multiple countries navigating different contexts, and I am now an Assistant Professor in the Bora Laskin Faculty of Law at Lakehead University, Thunder Bay, Ontario. Finding my place is a preoccupation of mine. But I think the importance of place is a universal truth for people and that the navigation of place is at the heart of so much of the law.

I brought these interests into my conversations when I was interviewing at Bora Laskin Faculty of Law, Lakehead University, in the winter of 2020. Thinking about how to centre legal education on the many ways that people and institutions create the geographies of law is – I said – a perfect fit with the ongoing work of the Faculty. The Bora Laskin Faculty of Law centres its legal education on three pillars – Aboriginal law and Indigenous legal traditions, natural resource law, and small firm and solo practice. These are reflective of the Thunder Bay environment and the geography in which the law school sits. The economy of Northern Ontario is based primarily on the natural resources, mining and forestry industries. Five-hundred kilometres north of Thunder Bay is the “Ring of Fire,” one of the world’s largest chromite discoveries and estimated to be

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worth \$30 billion.² Thunder Bay has a long and troubled history of conflict towards Indigenous peoples, and particularly in the treatment of Indigenous youth, as was so heart-wrenchingly written about by Tanya Talaga in her 2017 book *Seven Fallen Feathers*.³ Given its location the environmental impact from any developments will be felt by remote First Nations communities first. The three focus areas offered are essential to the places of Northern Ontario and by extension to the practice of graduates of the law school.

My goal for my first year as an Assistant Professor has always been to teach from a perspective of grounding the law in place. Whatever “the law” may be. Whether it is to teach individual subjects of property, trusts, torts, and others, as inherently contextualized and connected to histories. Or perhaps it is to teach about law as it exists as a system that so often brutalises indigenous peoples and other minorities. For both of these perspectives, law is an institution containing boundaries, rules, and regulations, which in turn impacts and creates legalized ways of being. Teaching law through the lens of place requires that students bring their experiences to legal analysis. It requires attention to the places that law has created, and consideration of the ways legal issues are manifested in these places. Law can only be understood through attention to place as something that is more than that contained in law-books. Place-based learning requires consideration of how you as an individual move in space while being open to understanding that the same place holds completely different experiences for others.

As I move my thoughts into course design for a school year that will involve social distancing and distance learning, I have been thinking about the different ways in which I have incorporated place into my teachings in the past. I have incorporated walking tours into property curriculum, assigned field research tasks that require students to work in teams⁴, and asked students to write reflection pieces on places that matter to them. Utilizing these tools have been my way of making law real, of requiring students to visit places that matter, and of empowering students to understand that the practice of law requires engagement with

² Ontario Nature, “Mining in Ontario: a Deeper Look” (2017) at 2. Online: < <https://ontarionature.org/wp-content/uploads/2017/10/mining-in-ontario-web.pdf>>.

³ Tanya Talaga, *Seven Fallen Feathers: racism, death and hard truths in a northern city* (Toronto: Anansi, 2017).

⁴ Most recently I have been able to collaborate with property professors at the University of Ottawa to incorporate a field memo assignment into the delivery of property law course, building on first iteration of an assignment written by Angela Cameron.

community. Introducing teaching and learning methods that exist beyond the text contained in black letter law has been done from the relative safety of the law school institution. It is possible to think critically about law and connect it to places in the field when students have the institution of law and the physical building to return to. The law school building is the physical space that allows students to connect while they are required to go through the difficult work of learning the lawyerly skills of reading cases, writing case briefs, exploring legal argument and more. Without the certainty of the law school as the centre point for students' learning, introducing additional teaching methods begins to feel a little tenuous.

Combining social distancing with the law school with legal-field research assessments is difficult to imagine, especially if students are dispersed and some not located in Thunder Bay. A number of years ago I taught a "Property 101" course, as part of the mini-enrichment programme carried out in universities across Ontario in which high schoolers attend university for a week to learn a little about university life. My course was an introduction to property and to law generally. We spoke about the difference between tangible and intangible property and had an excursion to the Ottawa courthouse. I spent a day teaching about propertization of the moon where students were introduced to Lockean property ownership and they absolutely understood a class exercise based on a story about space exploration as an analogy for colonisation. For one exercise I used a mapping programme with the students. Through this programme I printed out maps of downtown Ottawa that were linked to an online database. We went on a class walking tour⁵ and students were introduced to indigenous histories in places of Ottawa. I had students log these buildings and histories into the database when we returned to the classroom. Students were excited to have a day for the walking tour and recording the places we saw onto our maps made sense. Returning to the classroom and figuring out the computer labs and digitizing records was to ask to students to re-consider the city of Ottawa in new ways.

Though I actively use mapped content to convey legal information, I have not adopted the active use of a digital mapping database in my law school

⁵ The walking tour was from the "Indigenous Walks" tour group, founded and led by Jaime Morse. See a recent report on Morse's work: Stephanie Cram, "Indigenous Walks tour tells forgotten history of downtown Ottawa," CBC Radio (May 22, 2020). Online: < <https://www.cbc.ca/radio/unreserved/from-the-house-to-the-red-chamber-how-indigenous-people-make-their-voices-heard-on-parliament-hill-1.5577591/indigenous-walks-tour-tells-forgotten-history-of-downtown-ottawa-1.5578828>>.

classroom. I have not developed a class room exercise that utilizes digital mapping largely because of time constraints: after the walking tour we had a half day in the computer lab on campus to collate printed and hand drawn maps to the online database, all the while de-briefing on the difficult topics we learnt about on the walk. Nonetheless, this example raises important questions for me about how to create a dynamic and engaging interaction around legal-place. Are exercises based on the use of a digital mapping programme the type of work that I should bring into the “virtual” law classrooms for my students? How feasible is it to require students to learn new forms of technology or take on additional online communication time as part of their degree work? How can we minimize the use of yet more technologies, tools and “extras” that students will have to learn to navigate in order to succeed in law school? How difficult will it be to teach out challenging subjects without the benefit of returning to a classroom to debrief?

I have written this reflection while sitting in my rental car in between appointments to view spaces to live in Thunder Bay. Driving around Thunder Bay I have been making note of the neighbourhoods, of where the parks are and of heavy traffic roads, but in reality my priorities in finding a space to live have shifted. Top of my list are questions about how I can create a comfortable space to allow for teaching from home. I look for living spaces that have good lighting and strong internet connectivity. Should we go into another shut down, or however the coming school year may look, I need the security of being able to continue teaching and working with my students and colleagues. I look for ways to remain secure and in (my) place should there be a need. What a privilege. Not all students will have the same privilege. At the same time, I am weary of bringing the space of home and of work too close together. I rely on professional boundaries in the law school in order to create a safe space for me - a junior female academic - to carry out my work. The role of places remains a personal and professional endeavour, but boundaries between place, location, and institutions are shifting.

It is not lost on me that so much of *my* unknowns about getting to know a new city and community during social distancing are reminiscent of the challenges of being a law student, especially a first-year law student. Creating ties with the places that matter in Thunder Bay will be my priority this year and we need to impress on students the importance for them of also creating ties. For some students, it may be that a de-

centralized learning model in which students are free to learn from the safety of their homes and not required to be in the institution of the law school may feel like a relief. This is actually the worst-case scenario that could come out of social distancing: that those who have been historically unwelcomed in the institution of law do not have an opportunity to confront law and its institutions, to create their place within it. Connections between the law school, the community, and students' personal sense of belonging are all integral to development as a lawyer. Recognition of the many ways that students and their legal community is connected through space and place will, I believe, open up possibilities for innovation in legal institutions and make for greater ownership of spaces of law.

TEACHING ESSENTIALLY: EMERGENCIES, FLIGHT INSTRUCTION, AND THE LAW SCHOOL CLASSROOM

Ryan Gauthier¹

I arrived home at 10pm on March 4, 2020, thankful that the craziest part of my year was over. A two-week long whirlwind trip included a visit to Vancouver Island to meet my one-week-old niece, time in Vancouver for Jessup Moot practice, travel to Toronto for the national Jessup competition, and a short hop to Ottawa for some meetings. The trip ended with a drive from Vancouver to Kamloops, travelling through the snow on the Coquihalla Highway beginning at 5am on March 4. I had to be back in time to teach my Sports Law class that afternoon, and to judge two first-year moots that night.

Those weeks were busy, but energizing. What was exhausting was the background noise of 2020. Wildfires in Australia, the threat of war with Iran, and of course, the novel coronavirus – COVID-19. One week later, on March 12, I texted a friend of mine who works in the European Commission, pleading “Can we just suspend 2020 for a few weeks? Like, the first day of 2020 was solid, but it’s just been a shitshow since. I think we all need a bit of a breather, and we’ll try again in May”². The next day would be the last day of in-person classes at TRU Law for 2020.

Be careful what you wish for.

Emergency Response – Lessons from Flying

In my pre-law life, I was a flight instructor with the Air Cadet Gliding Program. I was responsible for teaching students to fly the Schweizer 2-33A glider in less than six weeks.³ Each flight lesson was preceded by a ground briefing by one of the flight instructors. The ground briefing was a place to discuss the theory of manoeuvres like turns, stall recovery, take-off, or landing. These briefings were vital, as there was no time for theoretical discussion in the glider. An average glider training flight lasted about 15 minutes. After accounting for take-off and landing, an instructor

¹ Associate Professor, Thompson Rivers University, Faculty of Law

² Whatsapp Message, March 12, on file with author.

³ My then Chief Flying Instructor said that the program was developed so well that we could teach a monkey to fly a glider, just maybe not in six weeks.

would have about 5–10 minutes to demonstrate the manoeuvre, and have the student perform the manoeuvre to the required standard. With each lesson, a new manoeuvre had to be mastered, leaving little room for review.

This approach requires instruction to be stripped to the essentials, using many shorthand phrases designed to stick with students. In particular, in an emergency, pilots are taught to “aviate, navigate, communicate”⁴. Fly the plane first. Then, focus on where you need to go. Finally, inform and call for help as necessary. Twenty years after receiving my gliding wings, this lesson came in useful as a law professor.

Aviate

I imagine that many instructors were beset with apprehension and even fear as courses moved online — I was no different. Like entering into a spin in flight, the shift was sudden and jarring. Bearings were lost.

Mr. Rogers famously suggested that people “look for the helpers” in times of crisis.⁵ And the helpers arrived — *en masse*. Well-meaning e-mails flooded my inbox. Advice from tecno-savvy faculty members. Concerns from those less used to technology. Course shells created in learning management platforms. Courses to make one a better online teacher. Workshops. Office hours. Discussion forums. Task forces. Self-reflection. Commiseration. My own questions about technology persisted, prompted by well-meaning advice. What do I use? Zoom? BlueJeans? Teams? BigBlueButton? What approach is best? Discussion boards? Forums? Podcasts? Notes in Powerpoint? Blog posts? H5P? Wordpress? What concerns should I have about any given platform? Privacy? Academic integrity? Accessibility? Costs? Time zones? Engagement? Person caps? What’s my password for each of these? Do I need to buy a microphone? A headset? A 4k webcam? THE WORLD IS SPINNING!

Cue an e-mail from my amazing colleague Katie Sykes on March 26, 2020:

Connect. Any way you can.

⁴Air Cadet Gliding Program: How to Glide Manual (Department of National Defence, 2017), 1-4.

⁵For a critical analysis of this phrase, see Ian Bogost, “The Fetishization of Mr. Rogers’s ‘Look for the Helpers’” (Oct. 29, 2018), *The Atlantic*, online <<https://www.theatlantic.com/technology/archive/2018/10/look-for-the-helpers-mr-rogers-is-bad-for-adults/574210/>> [<https://perma.cc/DV2U-BUK4>].

It's simple, it doesn't take any technical expertise or special preparation, and I believe that it means an enormous amount to our students.

Everyone is lonely, and everyone is worried. Connection helps.⁶

Ok. Break the stall. Stop the rotation. Pull out of the spin.⁷ In this case, deliver the last few lectures of the semester. Adjust final assignments as needed. Check in with students. And breathe.

Navigate

Now that we are out of the immediate emergency of shifting online, instructors are faced with the task of navigating the next year. Navigation includes setting the course, identifying where the plane is at, and adjusting as required.⁸ In the law school classroom, it is designing a good course, an approach which is technology-neutral.

Navigation today often uses tools such as GPS. However, pilots also use more traditional methods such as maps, or "pilotage" — navigating using physical landmarks.⁹ Similarly, even the online teaching book *Small Teaching Online* begins with a discussion of principles of course design.¹⁰ Teaching online will require instructors to plan their courses in advance more than we are accustomed to. Recorded and live lectures, assessments, and other teaching activities will require significant pre-planning and structure to adjust to an online environment. And instructors will need to more deliberately identify where their class is at, and adjusting the course with intentionality.

Discussions of online teaching that I have been part of eventually settle into questions of which technological platform, app, or microphone will miraculously solve all of our problems — preferably without forcing us to modify our courses or teaching approaches too much.¹¹ Technology

6 E-mail from Katie Sykes, March 26, 2020, on file with author. Katie also led a team of current TRU Law students and recent graduates in creating the COVAID app that enabled people to provide people answers about the Canada Emergency Response Benefit (CERB) and mortgage deferrals, amongst others. "Law Team Creates Blog and Apps for COVID-19 Assistance" (Apr. 22, 2020), *TRU Law*, online <<https://inside.tru.ca/2020/04/22/law-team-creates-app-for-covid-19-assistance/>> [<https://perma.cc/5RY9-V785>].

7 This is the recovery procedure from a spin in flight. Air Cadet Gliding Program, 6-4.

8 Royal Canadian Air Cadets Squadron Training: Level 3 (Department of National Defence, 1998) 10-10.

9 Ibid at 10-1.

10 Flower Darby & James M. Lang, *Small Teaching Online: Applying Learning Science in Online Classrooms* (San Francisco: Jossey-Bass, 2019) at 7-10.

11 And ideally helping me reverse the "Quarantine 15" weight gain brought on by stress eating absurd amounts of Easter candy throughout April and May.

matters, and we will need to learn to do things like record videos or create online quizzes.¹² But technology is also varied and complicated. And the more I learn about the various technological platforms, the less I'm convinced that there is a "correct" answer out there, and the less concerned I become about any particular technology to get me to where I need to go.

A focus on course design over technology does not mean that I am a luddite. As an early millennial, I'm much closer to being a "digital native" than my faculty peers. I spent high school transitioning from dial-up internet to broadband, and programs like Napster and ICQ were all the rage.¹³ When I started law school in September 2006, Facebook still required a college e-mail address to sign-up. If I am overwhelmed by technology, how must everyone else be feeling?

Communicate

After we plot the course, we must communicate with students. Just as a pilot informs air traffic control where they are situated, where they are going, and why, we must do the same with our students, and with each other. Pilots must also communicate efficiently, without overwhelming air traffic control or other pilots with too much extraneous information. Similarly, law professors must avoid overwhelming our students with too much substantive and administrative information. Actions such as regular meeting times, scheduled appearances on a discussion board, e-mail updates and virtual "office hours", if used with intent, keep the lines of communication open, hopefully without overwhelming either side.

Preparing the Approach

In 1999, at the same time I was adding friends to ICQ¹⁴, I started teaching with the Royal Canadian Air Cadets.¹⁵ I was an Air Cadet for seven years, and an officer for three more years. In their fifth year, senior Air Cadets

¹² Thank you to Thompson Rivers University's amazing Centre for Excellence in Learning and Teaching, and Learning Technology and Innovations team for running courses that address these issues! "Concrete Teaching Support During Unsettled Times" (May 20, 2020), *Thompson Rivers University Newsroom*, online <<https://inside.tru.ca/2020/05/20/concrete-teaching-support-during-unsettled-times/>> [<https://perma.cc/8FVS-BB23>].

¹³ ICQ is one of the first instant messaging services. While writing this, I found that ICQ is still around, and I had to go have a sit-down to process this fact.

¹⁴ I will neither confirm nor deny the use of Napster.

¹⁵ For those unfamiliar, the cadet movement is a youth organization for those aged 12–19. The goals of the cadet movement are to "develop in youth the attributes of good citizenship and leadership; promote physical fitness; and stimulate the interest of youth in the sea, land, and air activities of the Canadian Forces." Royal Canadian Air Cadets Squadron Training: Level 1 (Department of National Defence, 1998) 2-5.

act as instructors to junior cadets on a regular basis. By the time I was seventeen, I was usually teaching one or two 35-minute classes each week on topics ranging from foot drill to citizenship, leadership, or flight-related topics. Before I was legally allowed to drink, I was teaching cadets how to fly aircraft in my role as a gliding instructor.¹⁶

The constraints of online teaching compel us to re-consider our approach to teaching. In contrast to academia, instruction in Air Cadets is highly-regimented, and academic freedom is not the order of the day. Instructors are generally given lesson plan outlines with the main teaching points to be covered. Yet, even in that environment, instructors are encouraged to be creative in delivering their classes.

Like many law school instructors who engage in experiential learning, air cadet instructors are encouraged to “allow as many cadets as possible to participate in practical exercises,” and to “see whether certain parts of the lesson could be held in real situations”¹⁷. Freed from the shackles of the 90-minute classroom lecture (willingly or otherwise), we now have an opportunity to re-consider how we communicate material and facilitate learning.

Sticking the Landing

My background has given me (perhaps undeserved) confidence in my ability to teach online. Surely, if an 18-year-old me can communicate how to recover from a stall to a 16-year-old student pilot while 2,500 feet in the air, today's me can communicate the basics of duty in tort law in an online class of 1Ls.

Any emergency, whether in flying or through a pandemic, people finally focus on what is essential.¹⁸ Pilots are trained to “aviate, navigate, communicate”. During COVID-19, society has been forced to examine what is “essential”. At a societal level, there is agreement that hospitals and grocery stores are “essential”. But differences of opinion exist about

¹⁶ This made for awkward times at the Officers' Mess.

¹⁷ Royal Canadian Air Cadets Squadron Training: Level 3 (Department of National Defence, 1998) 8-4, 8-5.

¹⁸ Greg McKeown defines “essentialism” in contrast to non-essentialism. Non-essentialists believe that everything is important, that everything *has* to be done, and that they *can* do everything. Essentialists focus on only a few things that really matter, recognize that they can choose what needs to be done, and that they cannot do everything. *Essentialism: The Disciplined Pursuit of Less* (New York: Currency, 2014) at 32.

personal services, religious institutions, and professional sports.¹⁹ At a personal level, many have focused on essential activities such as cooking more in lieu of eating out, calling family and friends in lieu of text messages, or going on walks in lieu of going to the gym.

If we focus on what is essential in teaching, it matters far less if we teach in a live classroom, online, or in a glider. What is most important is ensuring that students leave with the “enduring understanding” that we wish to impart.²⁰ I imagine few of us remember the precise lectures in the fourth week of first-year torts. Instead, what we remember are broader experiences such as the kindness or professionalism of a professor, the overall theme of a course, or the feeling of accomplishment when we understood the material. I often liken teaching or oral advocacy to a live concert. We can’t expect the audience to remember every single song, let alone every single note. But we can hope that the audience leaves with the general feeling of the performance.²¹ I think we can achieve this goal offline or online.

Ultimately, I am hopeful about the transition to online teaching. There are many ways to teach online well, and to teach online poorly. The same is true for in-class instruction. But if we focus on what is essential and enduring for our students, helping them navigate through law school, and connecting with them, we’ll not only get through this period, we’ll emerge as stronger instructors for it.

¹⁹ Liverpool FC manager Jürgen Klopp wrote that “football always seems the most important of the least important things.” *Jürgen Klopp’s Message to Supporters* (March 13, 2020), online: Liverpool FC <<https://www.liverpoolfc.com/news/first-team/390397-jurgen-klopp-message-to-supporters>> [<https://perma.cc/X2BQ-AUW3>].

²⁰ Darby and Lang, *supra* note 9 at 7.

²¹ But I’m a tuba player, so it’s not like I play anything memorable anyways!

NARRATIVE, INTERRUPTED: REFLECTIONS ON A FIRST SEMESTER AS A NEW LAW PROFESSOR LIKE NO OTHER

Gerard J. Kennedy¹

The Paper Chase. Legally Blonde. Lady Bird. The *Harry Potter* universe. There is a reason that great works of fiction set in schools, whether law schools or not, frequently track the trajectory of the school year, beginning with the promise of September as summer is ending, travelling through the wintery (literally and figuratively) middle months, before ending with the triumph of graduation in the hope of late spring/early summer. For me, the 2019-2020 academic year was to be a transition year – complete my doctorate at Osgoode Hall Law School before beginning a new position as a faculty member at the University of Manitoba's Faculty of Law (also known as Robson Hall). It was a major part of the narrative of my life and career. Needless to say, things did not go as planned. The narrative was interrupted as we appear to remain in a “winter” that will not end in short order in higher education. Students – especially those meant to finish or begin their degrees in 2020 – are similarly in an in-between zone. When narratives go awry, the sense of loss is palpable. But like most characters in interesting narratives, there is optimism we can discover what is most valuable, what we did not know we had till it was gone (to quote Joni Mitchell), and hope for as happy an ending as possible.

My first year as a faculty member at the University of Manitoba's Faculty of Law was always destined to not totally follow the narrative of a year given a start date of January 1. But I still had a narrative, spending the autumn putting final touches on my doctoral dissertation. When my defence was scheduled for January 21, it was clear that my first three weeks of the semester would be incredibly busy. I managed to return to Toronto for a successful defence, returning to Winnipeg the evening of January 21, celebrating with my spouse, and looking forward to the rest of the semester – my first as a tenure-track professor. The next morning, January 22, CBC's *Frontburner* podcast (which I listened to quasi-religiously) aired its first report on a “new coronavirus” “spreading out of China”.

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The unlikely villain of the semester had made its appearance. But as with many narrative villains, I was initially not concerned. On the contrary, I found myself jumping into university service, looking into getting called to the Manitoba bar, and figuring out how to teach the Supreme Court of Canada's latest incarnation of administrative law, prescribed only a month before in December 2019's *Canada (Minister of Citizenship and Immigration) v Vavilov*. The middle of the narrative had arrived. And I was looking to the end of the narrative, making plans for a summer of research projects, getting my dissertation published, and ordering my York University doctoral gown and hood. I could not wait to wear it, first at Robson Hall's convocation, and then at my own with a Ph.D. from Osgoode Hall Law School.

Then news from Italy and Iran suggested that the story's villain was more deadly than we first suspected. Then Washington State. And then. And then. The rest is history. Our narrative at Robson was thrown off course. With some experience in online teaching, stopping in-person classes was not as shocking for me as it was for some of my colleagues. And I commend my colleagues for supporting each other in this time. I even learned something along the way: in my Legal Profession and Professional Responsibility class, I found that many students' presentations appeared more comfortable one-on-one (even knowing that the presentations were being recorded and their classmates would see/hear them eventually) than live in front of fifty-plus colleagues. I will leave it to the pedagogical experts what to make of that, but it was interesting.

But more profoundly, there descended a sense of "this is not how the narrative is supposed to go". There would be no "last class" farewell. No in-person goodbyes. No pre-exam sitting in office hours waiting to answer questions. On the few occasions I needed to return to my office to get materials, the building felt eerie. The 3Ls were denied their convocation – a celebration that they and their loved ones so richly deserved (read Caitlin Flanagan's piece in *The Atlantic* for a more poetic take than I can give). I wouldn't be wearing my new gown and hood after all.

Just as I could not bade farewell to graduating students, ending the beginning of a new job, I could not finish with a convocation at Osgoode. My terminal degree thus never reached its celebratory conclusion, even if I can feel fortunate that the actual defence allowed a celebration of a

different sort. Again, there were blessings. Leftover travel and expense funds allowed me to hire an additional student as a research assistant. With awe, I watched Peter Sankoff's #100Interns project come to realization. But a feeling that things are on hold remains.

Many academics may be introverts – much of our work is done alone. But that is not synonymous with desiring no human interaction. It is trite to say that we are social creatures. I have come into my office a few times since March 21 to gather materials. It is eerie to see the university so quiet. One indeed does not know what one has until it is gone. A secure job in a lively workplace. Great colleagues. The opportunity to meet with students and colleagues in person. And a story – of one's own career and education (as I realized with my own doctorate) and one's students (as the academic years follow their natural flow). For all of legal education's imperfections, this loss of narrative is a real loss, even if it cannot compare to the lives saved as a result of the lockdown.

Do not get me wrong. I am enormously privileged in the grand scheme of things. Neither my spouse nor I are front-line health care workers. Manitoba never experienced the outbreak of COVID-19 that came to most other provinces. On a personal level, things became slightly scary when the provincial government announced that it was going to reduce university funding (allegedly due to the impending financial crisis). But after significant protest, the extent of the cuts was much less than originally feared. In fact, my spouse actually got a new job (yes, in the midst of a pandemic) beginning in early May. So our greatest preoccupation became taking care of a toddler in the absence of child care – something we are hardly alone in doing. In this sense, we are sharing a narrative with millions of other working parents. And my spouse arranged a lovely Zoom convocation with my parents, siblings, doctoral supervisor, graduate program director, and dear friend from U of T's Architecture School that I will forever treasure.

But the interruption to the narrative is not over. It now appears as though the Fall 2020 term is also going to be taught online. As much as I would love to channel *Dead Poets Society* and teach (partially) outside, this seems the responsible course of action as we continue to learn how to best combat this new disease. And I am looking forward, albeit with trepidation, to the opportunity to experiment pedagogically come the autumn. Undoubtedly, I will learn through a different mix of teaching

methods (such as recording a lecture in advance, and then dividing the class up into smaller groups to have “tutorials” during lecture time) and will learn from my colleagues’ experience. So perhaps the interruption to the narrative is merely an important side journey.

But there are others who cannot begin their narratives, at least not in any traditional sense. 1Ls commencing their law degrees in the Fall will be lacking the orientation and small section comradery that tends to create one’s best friends for three years, if not for life. Graduate programs filled with international students may have years that are very empty. Two new colleagues scheduled to start at Robson Hall as assistant professors on July 1 could not have the typical start to their year. A third was unable to start at all. These narratives are off to starts that are atypical at the very least.

Daniel Kahneman (*Thinking, Fast and Slow*) has noted that human beings wish to tell a story about themselves – this “remembering self” is very important to our identities, and we are willing to endure unpleasant momentary experiences (or forego pleasant ones) in our “experiencing self” in order to be able to tell that story. And we all had visions of how the school years would transition into each other, not only for ourselves but for our students. So it seems as though our narratives – as professors – are on hold, or at the very least on a side journey. In this vein, our stories are intimately tied to our students. The price we are paying may be small to combat a pandemic, but it is a price nonetheless. We can only hope that “Narrative, Interrupted” leads to a better narrative when the interruption ends.

POEMS AND DRAWINGS

Jonas-Sébastien Beaudry¹

Introduction

I enjoy drawing and writing poetry in my spare time. I have selected three drawings and three poems that somewhat reflect emotions and ideas I have had in relation to the current pandemic and how it affects our personal lives.

The poems explore different ways of dealing with cataclysms or unavoidable ruptures of routines and personal relationships: running away, being patient, self-help. The overall tone is not particularly optimistic. For instance, in “Guide to Purpose”, I parody self-help literature, perhaps questioning its limitations.

The collages juxtapose playful or comforting subjects (a cat, an amusement park, a family dinner) with otherworldly invasions. Familiar settings, pets, gatherings, food all become threats. For instance, in “The Family Dinner”, the family meal, a lobster, towers above Prague’s Old Jewish Cemetery, surrounded by a Norman Rockwell family, whose endeavour to be normal in these circumstances is not very much less uncanny than the monster itself.

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My Dream

When the flood came
the giant knew he wouldn't fit in
he never had – and yet he
carried in his hairy hands
many to the safety
of warm houses and safer lands

When the flood came
barricaded in sinking cars
drowned fathers drove
swaddled passengers by the cove
running away feet set in tar

So, the flood came.

We never thought it would come here
from the highest branch, my cat saw
the zoo of dignity and fear
break out like the walls of our law
and wild giraffes
bleat, cry and laugh
in streets made of paper and glass
from Madrid to Warsaw

The Fog

I sit in the fog
with you

I want to be here.

It is a little scary
the way fog interrupts
time and interrupts space
but it doesn't need
to interrupt us

the sound of teacups
and hiccups and beer
would travel even through milk

I'll be back
soon, rejoice
you could not be alone if you tried

I dream of a summer day

if the fog ever rolled out
from the feathers you hide in your pillow
you would find it at your feet
the thing you believed
was far away and out of reach
sleeping like a newborn sparrow

Guide to Purpose

Sit

down. Make a list of seven activities you enjoy. If this proves difficult, search for “fun things to do” on the Internet. You will be surprised at how many things people find fun. If you do not have the Internet, ask your friends for a piece of yarn. If you have no friends, call your mother. If she is on a safari, buy a puzzle. Sort pieces by colour until you feel pleasure.

List as many goals as you can.

I want: To stay in bed

I want: To be reincarnated

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Make sure your goals are gender-specific.

I want: To be reincarnated as Central Park

Stay two meters away

from people above your social class and aneurisms.

Write poetry

“If you were a lake
I’d never want to breathe air again”

Don’t quit your day job. Buy

a cat. Name it after a shortage
of canned goods. Prepare 51 gallons of fish stock. Survive the war. If there
is no war, consider pretending.

Be aware of mental health stressors:

Absence of people
People
Everything that is not purple

Brainstorm solutions:

Assimilate
 Exterminate
 Learn Italian

Walk in the forest, listen to birds, make peace with the sea,
 befriend ants and sharks. God only disappoints
 with occasional deluges.

Try
 running. If this is not possible, hide. If hiding is not an option
 find a sharp object and commit to violence.

Keep
 a gratefulness diary. Write a letter to someone who helped you.

"Dear [Name],
Thanks for: helping me get in your neighbour's apartment._
I am: not a janitor.
I will: bring organs to orphans
who need them more than we do. When all this is over
perhaps you will be a bench in Central Park."

vuoi sposarmi?
 — "will you marry me?"
si prega di chiudere la porta
 — "please close the door"
non lasciare che la morte entri dentro
 — "don't let death come inside"

Remember
 You do not need to forgive. Gently
 Focus your mind on the task at hand
 let it go back and forth like a serrated leaf.

The inescapability of bliss concludes Disk 1
 of the *Guide to Purpose*. To find everlasting love
 Insert Disk 2.

The Giant Blue Cat



The Fair

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Poems and Drawings



The Family Dinner



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Jonas-Sébastien Beaudry
Poems and Drawings

OFFWHITE/COQUILLE D'OEUF: **O**PTIMISM/ **O**N-LINE; **O**PTIMISME/'**O**N-LINE'



MY COVID PAUSE

Jennifer Nedelsky¹

By the middle of March my husband, Joe (75), and I (70) had absorbed the presence of COVID. We stayed inside and came to accept our identity as “vulnerable”—receiving local grocery delivery and kind help from students and former students. At first, I didn’t go outside at all, and then I realized that was increasing my sense of fear and anxiety. Now we get out every day with the dog to a local park. And I started jogging three times a week. This was the first of a set of seemingly spontaneous, unplanned changes in my behaviour. I finished teaching via Zoom by early April. Having cancelled travel plans, suddenly there was a lot of clear time. Indeed, my whole relationship to time (and work and remembering appointments) seemed to have shifted. My days took on a different rhythm. I was having long phone conversations with old friends, I was writing down dreams, I was doing a bit of journaling, I was actually meditating almost every day. I was in Pilates and Alexander Zoom classes three times a week and cooking healthy meals. I used my new-found Zoom skills to organize meetings for my little United Church congregation and began hosting Sunday services. I devote a lot of time and attention to my little garden. I pick kale and lettuce every day and go out each morning to see how all my plants are doing.

I had not exactly planned any of these things. I had a sense of watching myself out of the corner of my eye, noticing all kinds of new behaviour. The earlier anxiety gave way to a kind of curiosity about all this welcome, but unplanned transformation. There were, of course, recurrent times of fear and anxiety, and sometimes I would have a dream full of terrors that suggested I was not really as calm as I thought. There were also waves of distress at the suffering and the incredible inequalities of this crisis we were supposedly all in together. Despite that, somehow it has been an oddly positive pause in a mode of living (and writing) that had not actually been quite what I wanted. A pause for priorities.

COVID heightened a long-standing awareness of our privilege and the tensions surrounding it. My “pause” is possible because we are insulated

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from anxiety: our children are safe, we feel financially secure, and we have the support to stay isolated. It is painful to contrast this with COVID's intersection with long standing racism, poverty, and indifference to the vulnerable. Even the pain reminds me that privilege makes it possible to turn away when it seems too much. I do believe that my inward-turn will better enable me to not turn away and to take action for change, but sometimes self-care feels like an indulgence.

When COVID hit I was close to finishing *A Care Manifesto: (Part) Time for All* (co-authored with Tom Malleson). It was percolating in the back of my mind as this "pause" evolved. I welcomed the sustained media attention to the importance of care and all its inequalities, at the same time that I was reminded how deeply embedded our collective denigration of care is. Meanwhile, an important shift in my attention was happening.

The book argues that we need radically new norms of work and care: no one does paid work more than 30 hours a week, and everyone does unpaid care 22 hours a week. In the sections where we define what counts as care for these purposes, we say that the kind of care we have in mind builds relationships between care giver and receiver. We include care for the earth, but we also insist that activism and community participation (although vital) are not a substitute for direct care. During my COVID pause I spent more and more time thinking about responsibility for care for the earth and how little we had said about that. In the context of human to human care, I had quite clear ideas about the difference between direct care and advocacy for, say better child-care policies. (Direct care counts for one's care obligations; advocacy, while admirable, does not. Making important contributions to Greenpeace doesn't mean you don't have to take care of your kids or wash the dishes.) What, I started to wonder, was the analogue with respect to care for the earth? I read more work by naturalists and Indigenous scholars, trying to understand how one learns to care for the earth. I see the answer as a combination of patient practices of attentive observation and direct activities of care. Both allow one to learn what one needs to know in order to care well and to feel the loving responsibility of mutual earth-human care.

The book has a section on learning from human-to-human care. It is crucial to our argument that everyone needs to provide care not just to share the burdens of care, but to learn the value of care in a first-hand,

visceral way. I am certain that there is something similar to be said about the physical and emotional experience of direct care for the earth, whether by tending gardens or forests, planting native plants, removing waste from land, caring for animals, raising monarch butterflies, or protecting ancient rock formations. These examples all require attentive observation and might combine with advocacy.

I am now extending the argument about human care to say that everyone should also care for the earth. Some caring practices may be material (like gardening); some will be aimed at learning from the earth through receptive observation: of bird song, or moss, or changing seasons (*Gathering Moss*, Robin Wall Kimmerer; *Our Wild Calling*, Richard Louv). I find this extension challenging given the urgent need for policy changes to respond to the climate crisis. But as in the human to human context, I think policy advocacy is vital, but not a substitute for a caring connection to earth. Advocacy won't teach you the same things. Western societies need to learn how to learn from the earth. Caring and receptive attention are direct ways of cultivating the necessary capacities.

Everyone needs to learn to experience the nurture the earth provides and our reciprocal responsibility for care. (Some already have.) The earth requires and deserves care, not just for instrumental reasons of human necessity, but because it is a living system—comprised of a vast interdependent community of plants, animals, microbes, and geological formations. Humans are part of that system and we rely on it. But there is a difference between seeing our reliance in instrumental terms that call for prudent resource management, on the one hand, and a sense of loving, respectful mutuality of care, on the other. The ancient language of “Mother Earth” expresses this mutuality. We should think about making judgments about how to care for the earth the way we would for a beloved parent in urgent need of complex care, not with the cost benefit analysis that resource management is likely to yield. Trade-offs that might be acceptable in cost benefit analysis (economic growth vs. species extinction) would become unimaginable in the context of care for a loved one.

Of course, I say all this knowing that collectively, most western countries have chosen to underfund care for the elderly to an alarming extent that has become obvious during the COVID crisis. It turns out we are quite capable of making cost benefit choices for the care of our parents in ways

that are every bit as callous and destructive as our treatment of the planet. I am quite certain that the denigration of care and those who do it is connected to the disregard for the well-being of the earth.

There are puzzles in both cases. The first is, how can we *not* know that care is fundamental to our well-being and that it requires skill and attention? How can we collectively and individually participate in the denigration of care in ways that are radically at odds with what we must at some level know? The book presents active participation in care by *everyone* as a way to redress this painful puzzle. The puzzle of the ongoing, permanent, dangerous harm to the earth is connected to the denigration of care, but it has an additional dimension: the idea, promoted for centuries by Christianity, that seeing plants and animals as having spirits or the earth as truly a living entity deserving of care and respect is a mark of a primitive religion and civilization. (See Thomas Berry, *Dream of the Earth*.) Such views were marks of the inferiority of Indigenous people that justified taking their land. This belief about primitive inferiority is an important part of how we, as a culture, can “know” that we are dependent on the earth yet continue to harm it. The dominant relationship with the earth is one of resource extraction, not mutual interconnection and care. It is, of course, an improvement that more people are advocating for *prudent* resource management. But I do not believe that will be sufficient to accomplish the profound change in world view that will be required to reorganize our economies and societies so that we stop harming the earth. We have already seen that compelling science about how imprudent our current management is, is not enough to get people to change.

Of course, today many people who are part of “established” religions like Christianity, Judaism, or Islam can make sense of the idea of all of creation bearing the spirit of the divine within it. Those for whom this language does not make sense need another kind of language to capture a sense of inherent value in the earth community that does not foster an instrumental approach. Jane Bennett’s *Vibrant Matter* is one such effort but I am not sure it can generate the affect of care that I think is required. I believe that our personal choices, as well as our laws and policies, need to be guided by a sense of being embedded in a mutual relation of care with the earth. This relation, like all human relations of mutual care, can give rise to feelings of fear and frustration as well as wonder, love, and appreciation. Whatever the language used to ground a caring relationship

with earth, the capacity for that relationship needs to be learned. When learning to overcome deeply embedded denigration (of all care and all non-human entities) and limited understandings of human interdependence, both embodied practice and conscious intention to learn will be important. To get started will require a recognition of the terrible harms of our current practices.

In my COVID pause, I started taking better care for my body and soul. And I turned my mind to the lessons my work on the embodied practice of care had pointed me toward, but which I had not pursued. The embodied practice of care for the earth will now have an important place in the book, even though the full dimensions of that issue will require more later. I feel grateful that the pause meant I did not send the book off for publication without this addition. Finally, there is a further demand of care for the earth that the book project does not itself address. It is obvious that some of the most important resources for rethinking our relationship to the earth are the legal, cultural, and spiritual traditions of Indigenous peoples. It should be equally obvious that settlers cannot imagine that we can “take” and absorb the knowledge of the deep connection between the land and Indigenous peoples without acting to redress the massive wrongs of dispossession of their land. For settler societies like Canada, creating a just and caring relationship with the earth and with each other will have to entail a serious redress of these wrongs. It is a daunting project but as we feel the fragility of our lives and their reliance on mutual care, COVID could give us pause and call forth a response.

WEIRD LEX BUT OK – A SONG FOR THE UCALGARY 1L CLASS OF 2020

Words and Music by Howie Kislowicz

Words of advice (in order of appearance):

Heidi Exner, Wei Wang, Florence Hogg, Lisa Dahlke, Shuna Williams, Alice MacGregor, Manpreet Dhillon, Joshua Sealy-Harrington, Ashley Weleschuck, Geoffrey Urch

Sitting around one day
You'd watched all of Netflix and all of YouTube
You saw the global pandemic
And you thought, "What a good time to start law school"

But you know that we're happy to see you
Even if we wouldn't want to be you

It's gonna be pretty weird
But it'll be ok
Sometimes it's gonna be hard
You'll get through it anyway
When the times get tough, just know that we'll hold you up
From a safe distance away
It's gonna be pretty weird
But it'll be ok

You're gonna make a lot of good friends
All wondering how they can be both stressed and bored
You're gonna read a lot of pages
Written by a bunch of wig-wearing English law lords

You'll sort it out though it takes a minute
But you gotta just jump right in it

It's gonna be pretty weird
But it'll be ok
Some of you will grow beards
And some learn to crochet
When the times get tough, just know we'll hold you up

From a safe distance away
It's gonna be pretty weird
But it'll be ok

There's lots of ways to do law school
Give it time and you'll come to your own philosophy
We may not share a classroom
But you won't get stuck in a line for your coffee

There's a lot we can make the most of
So let's ride this Coronacoaster

It's gonna be pretty weird
But it'll be ok
You're gonna learn law on the Information Superhighway
When the times get tough, just know that we'll hold you up
From a safe distance away
It's gonna be pretty weird
But it'll be ok

BOUNCE BACK – A SONG FOR THE UCALGARY LAW 2020 GRADUATING CLASS

Howie Kislowicz¹

Words & Music by Howie Kislowicz

Address to students by Dean Ian Holloway

Tambourine by Prof. Jennifer Koshan

Backing vocals by Prof. Kristen Van de Biezenbos

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Looking out the window any day this week
You see the world's on fire
The whole thing's on fire
Any other year you might at your peak
But now you're just plain tired
Feeling uninspired

We've seen your brilliance
Equal parts genius and resilience

You know you're gonna bounce back
You're gonna gonna bounce back from this
You know we're gonna bounce back
We're gonna gonna bounce back from this
And so just take a minute
To recognize that it was hard, and you freakin did it
We're gonna bounce back

So think back on the times in the last few years
When you've been so strong
You've been oh so strong
Think of all the people who have held you up
Who said you're one of us
Who told you belong

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We've seen you striving
 We believe that come what may you'll soon be thriving
 You know you're gonna bounce back
 You're gonna gonna bounce back from this
 You know we're gonna bounce back
 We're gonna gonna bounce back from this
 And so just take a minute
 To recognize that it was hard, and you freakin did it
 We're gonna bounce back

So when all of this is past and you hold your own
 Just know we're rooting for you
 Yeah we're cheering for you
 Remember why you started down this bumpy road
 And just take whatever you got
 And do what you can do

So maybe take a staycation
 And while you're there, please accept our congratu-freakin-lations!

You know you're gonna bounce back
 You're gonna gonna bounce back from this
 You know we're gonna bounce back
 We're gonna gonna bounce back from this
 And so just take a minute
 To recognize that it was hard, and you freakin did it
 We're gonna bounce back

MAKING SOMETHING NEW: LEGAL EDUCATION IN A PANDEMIC

Blair A. Major¹

Every cloud has a silver lining. I've heard this phrase so many times in my life that it's difficult to have a neutral and rational response to it. I think it can be used rightly and wrongly, or positively and negatively. The negative side of its use is when it diminishes the cloud. Things are sometimes very hard and there are times of real loss. The positive side is a deep truth that goodness is not entirely dependent on circumstance. In fact, the good is something that accompanies the bad. One insight related to this is the persistent power of our own agency. How we experience things is often times dependent upon how we choose to see things.

The positive side has another aspect. Loss of one thing does not equate to loss overall. In fact, loss of one thing can lead to positive gains somewhere else. I think of poetry. Placing some arbitrary restriction on writing makes poetry possible. This might be imposed rhythms, rhymes, thematic unities, syllables, or the shapes that the lines of a text must take. The point is that restrictions—even arbitrary ones—do not necessarily diminish what is produced, but rather they may actually *enhance* what is produced. Part of the reason for this is because restrictions demand creativity; they push the mind to think outside of the box and that makes new forms of expression possible. Of course, restrictions could diminish the output. But whether the text is better or worse for the restrictions is up to the author and the reader to decide.

When we transitioned our courses online to finish the 2020 Winter term at TRU Law, I felt like I was just doing the bare minimum to push my students across the line. It seemed tolerable at the time because we had already covered the bulk of the term's work prior to the shut-down. What was to be covered electronically felt like an appendix to the course.

I was teaching Administrative Law during the COVID19 shut-down. I saved the newly-reformed substantive review part of the course for the end of

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the term. As chance would have it, the pandemic shut-down the course just as we were about to start this part. Although disruptive, this was a bit of a blessing in disguise for me because it gave me permission to really focus on the essential aspects of the new framework given by the Supreme Court of Canada in *Vavilov*. I threw out some of the historical and more academic material regarding substantive review that I had planned to cover with the students and settled on a deeper dive into the *Vavilov* decision itself. What took me completely by surprise was the quality of answers on the final exam that had to do with substantive review. It seemed that the more bare-bones presentation on *Vavilov* made sense to the students. They showed that they understood what *Vavilov* accomplished in the area of substantive review, and they showed that they were able to use the *Vavilov* analytic framework properly (albeit on a fairly simple question).

As I've reflected on this, I've decided that I've been teaching Administrative law incorrectly. In the past I have tried to push students to really think deeply about all of the principles that we have worked through. Since Administrative law is in flux, and influenced by a variety of theoretical considerations, I thought that the best preparation for them would be to internalize the concerns that animate judicial decisions, rather than simply learning the rules and analytic steps the decisions establish. I still think that this is correct. The problem with what I was doing before is that as I worked through the different topics of Admin law, I mixed together the acquisition of the basics with more advanced questions and ideas. What might work better is to give students a really clear and bare-bones idea of the principles and analytic framework first, then to cover the territory again to dig out the underlying concerns and ideas that allow for deeper reflection and understanding. Because, of course, students will be able to understand nuance only after they acquire a basic understanding. I'm still working out exactly how this looks in practice, but I feel that I'm gravitating toward more of a "flipped" class model.

Now we are starting to see that the pandemic is not a 6-8 week experience but will be longer lived. COVID-19 will claim much more than the last three weeks of Winter, 2020. It will claim the Fall of 2020, and maybe even the Winter of 2021.

I feel a great sense of loss at the likelihood of not having regular face-to-face classroom interactions with my students for the next 6-18 months.

But I also feel that this provides an opportunity to re-invent the way that I approach teaching. Crucial to the asynchronous online teaching model is clear, concise explanations of core concepts in easily consumable and relatively short snippets. In order to offer this, I will have to think carefully about what the basics are, and how best to teach these basics to the students.

Of course, the students require more than the basics. They require a deep understanding of the law, so that they can use it as they move forward in a changing world. This means that after mastering the basics, the students will have to take their knowledge to the next step, which includes critical reflection as well as creative application. This, I think, will be done in assignments and projects that require students to engage with the legal material more deeply.

Pedagogy here informs assessment. Going the way of the dodo is the 100% final, which I never liked anyway. Now dawns the age of the creative law assignment, which includes group work, creative thinking, self-directed study, creativity, and real-world application. The task of designing this new course experience is as exciting as it is daunting. But the great gift of the COVID-19 pandemic is that it has now taken away the old chains of “this is how we have always done things.” There is no “this is how” anymore.

I really believe that this is going to drastically improve legal education for all of our students. The first term might be a bit of a fumbling mess for some of us. But the way that it will stretch all of us to re-think design, delivery and assessment of course material will, I believe whole-heartedly, bring a lasting improvement to the way that law school is offered.

The stillness of the university is opening up space for me to reflect on who I am as an academic lawyer, and what I’m contributing by teaching at a law school.

Part of who I am is connected to the machinery of daily life. I help teach and train people who are on the journey to become lawyers in our society. The ideas that I teach are about the things that are guiding and supporting the interactions between people, and between people and the state. The COVID-19 shut-down has stilled a huge portion of life, which I

have been experiencing existentially. Without businesses running, without courts operating, without the daily rhythm of life I have very little to offer to other people. What can I teach people about? What can I write about?

I am dependent on the machinery of daily life. That's clear. But it strikes me that this dependence is not simply passive but also active. The active aspect is the way that the legal mind looks at things and questions them, asking if they are legal and just. As the world changes and old patterns of living and relating give way to something new, the judicial interrogation begins. New claims, new relations, new principles and interests give rise to a new framework for acting upon. The legal mind sustains the old, by drawing on it, but it also creates something new, by innovating and responding to novel circumstances. I am not just dependent on the machinery of daily life. I also help form it.

My role as an academic lawyer is to train and shepherd new legal professionals, who face the unknown and carve legality into it. Law school produces professionals, not technicians, of the law. Legal education is a type of moral education. Its form of moral education is unique in society because it is oriented around the legality of relationships. Other forms of moral education foster particular aspects of human life. Religion, family, volunteering, political participation, book-clubs, sports, all develop in us some kind of good. Law is meant to navigate the intersection of these different goods, not to supplant or supersede them, but to provide a language and practice that is shared by all and particular to none. Legal education helps form an attitude of legality. This formative exercise involves the heart as well as the mind. A legal mind is one that feels the force of legality and seeks out justification for action. A legal heart is one that longs for justice and is willing to serve.

Although the world is changing, the fact that people need lawyers will remain. Although the world is changing, the need for education, the need and desire to learn, will remain. As the world changes, it will be extremely important to have deep, academic and professional reflection. Old questions will persist, new questions will arise. Curiosity, creativity and courage are needed. The well-trodden paths are shifting, some of them closing, and new routes for travel are becoming possible. Things that seemed settled before are now open and contested. We need people who rigorously explore and challenge the terms of our relationships as they

are mediated through the law. This is important because it creates accountability and fosters our aspirations to justice.

My role as part of the legal academy is to carry this professional, moral aspect of legal education with me as we migrate to online instruction and learning. How to do this effectively is, I think, the most important question that I have to answer this summer.

The COVID-19 pandemic has brought some clarity to my understanding of the central mission of law school, as well as to my own calling as a legal academic.

As a young and junior faculty member at a law school, I have found myself constantly (against my own better judgment sometimes) conforming to the prevailing patterns of teaching and evaluation. COVID-19 has introduced me to an environment where there is no prevailing pattern of teaching and evaluating. We are now in the process of adapting our entire law school curriculum to online digital delivery—something that has never been done to this degree in Canada before. There is no general wisdom of what the best way is to ‘do’ legal education in this environment. Suddenly, the big, foundational questions of legal education have opened up to me. What the end goal of legal education is takes on new importance as I consider and plan my courses. I am facing this new law school environment alongside my colleagues, with our arms joined and forming a straight line. Despite us all having varying degrees of experience in the pre-pandemic law school context, I am just as much a creator as a reproducer of the legal educative norm as we all take this next step forward.

This new freedom is exhilarating. And it is also daunting, but not in a negative way. It is daunting in the same way that being a legal professional is daunting. I/we have a responsibility to our students to reflect on, articulate for ourselves, and embed into our course pedagogies, the fundamental purposes of legal education. I cannot do this without also drawing on my training and ability as a scholar. Likewise, I cannot do this without seeing myself as a constitutive member of a community of education, and working together with my colleagues to

build a community and educative program that reflects the point and purpose of law school.

The other side of this equation comes when our students “return” in the fall. They will be looking to consume the product that we develop. But the consumption must also pull them into being members of the community, constituents in the process of legal education, and active participants in the acquisition of their legal knowledge and in the formation of their own professional identities.

There will be another, greater return when we get to hold our classes in person again. What will our students find when they make their way back to campus? Passing through the frigid waters of COVID-19 will transform us, and the courses we teach will reflect that. The result of this is not given to us. We get to author the fate of our schools.

Like a river that suddenly has no bank
 But still has yet to end,
 What was before doesn't mark the course,
 But its force gives some direction.
 Two alternatives that momentum and
 Gravity guide toward:
 A new path is formed of least resistance
 Or the journey simply ends.

If the soil is torn, carried in sojourn
 To the sea, the minerals bring
 Food for all through algae bloom,
 Happy herring flap their fins.
 Or instead the soil, not sea, is home,
 Catching water like a sponge,
 Bringing life to trees, to moose and bees,
 An oasis in the sun.

How shall we pick which way to go?
 But don't you think it seems,
 That either way our gifts are given
 And the landscape is transformed?

CORONAVIRUS ET ... DROIT MUSULMAN !

Harith Al-Dabbagh¹

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Harith Al-Dabbagh
Coronavirus et ... Droit musulman !

Il va sans dire que la maladie à coronavirus a frappé le monde entier. La COVID-19 s'est propagée à une vitesse inouïe dans les quatre coins de la planète. Le monde musulman n'y est pas resté étranger. Des mesures de confinement ont été imposées partout pour restreindre les déplacements, les rassemblements et les réunions publiques. Mosquées et lieux de cultes de différentes religions ont été fermés et les fidèles ont été invités à prier chez eux et à accomplir les autres rituels individuellement. L'intensité de ces mesures a été ressentie doublement d'autant plus qu'au moment où ces lignes sont tracées, elles coïncident avec le début du mois de Ramadan, mois de jeûne, de spiritualité et de solidarité très respecté en terre d'Islam. Dans la majorité des cas, les instances religieuses ont obtempéré et ordonné à leurs adeptes de rester à la maison, rompre le jeûne et prier chez eux. Le paiement de l'aumône (*zakat*) et les œuvres de charité, hautement valorisés ces jours-ci, ont été aménagés de manière plus discrète pour prévenir la propagation. Les cafés, restaurants et espaces publics, habituellement très achalandés et festifs le soir après la rupture du jeûne, sont restés vides.

De l'Indonésie au Maroc en passant par le Pakistan et l'Égypte, le message de santé publique semble généralement bien reçu. Ce qui a facilité les choses, c'est que dans l'orthodoxie islamique, il n'y a point d'église, point de sacerdoce (Al-Dabbagh, 2017). La relation entre le croyant et Dieu est directe et s'exerce sans intermédiaire, ce qui permet la pratique individuelle en toute intimité. Toutefois, des voix dissonantes se sont élevées ça et là pour réclamer la fin du confinement pendant le mois sacré et le libre exercice du culte en communauté. La loi d'Allah a préséance sur celle des hommes, avance-t-on. Certains religieux, plus farfelus, ont appelé les fidèles à braver l'interdiction et à venir se recueillir en communion, car un bon fidèle, prétendent-ils, est immunisé contre ce fléau et un malade pourra, en ce faisant, retrouver la guérison ! Mais, que dit exactement le droit musulman du coronavirus ?

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Il est certain que les crises sanitaires, comme par ailleurs les guerres et les catastrophes naturelles, ne sont pas chose nouvelle dans l'histoire de l'humanité. De tout temps, l'humain a dû affronter l'adversité. La fameuse « immutabilité » du droit musulman pourrait laisser penser que la Charia, Loi de Dieu, ne saurait subir d'entorses (Linant De Bellefonds, 1955). Toutefois, la rigueur habituelle cède ici la place à une surprenante souplesse en temps de crise. Le droit musulman regorge d'exemples de prise en compte des événements imprévus de la vie. Pour faire fléchir la règle de droit, on invoquera d'autant plus aisément des considérations de nécessité (*darura*) ou d'utilité publique (*maslaha*) et même l'usage courant (*urf*) ou la convenance (*istihsân*).

En dépit de son caractère éminemment casuistique, il existe dans le corpus juris ancien (*fiqh*) un certain nombre de « règles globales » (*kawaïd kulliyah*) qui reflètent les fondements sous-jacents à la loi islamique. Elles tiennent lieu des principes directeurs à portée générale qui s'appliquent à toutes les questions particulières qui s'y rattachent (Jahel, 2003). Le *medjellé*, codification du droit musulman selon l'école hanéfite faite sous l'Empire Ottoman en 1877, referme dans sa section préliminaire quarante-deux (42) de ces règles, qualifiées de « Principes fondamentaux du Droit sacré » (Young, 1905). Contentons-nous d'en esquisser quelques-unes, ayant particulièrement trait aux assouplissements requis en ces temps mouvementés. La première règle, celle de l'article 17, semble irradier sur tout le reste : « La difficulté provoque la facilité. En d'autres termes, la nécessité de remédier à une situation embarrassée est un motif légitime pour prendre, dans ce but, des mesures propres à résoudre les difficultés et pour se montrer tolérant [...]. Les atténuations et tempéraments apportés par les jurisconsultes à la rigueur de la loi en découlent également ». L'article 18 abonde dans le même sens en précisant qu'« Il faut se montrer large dans l'application des règles aux choses dont l'exécution est difficile. Autrement dit, lorsqu'on voit de la difficulté dans l'exécution d'une chose, on peut avoir recours à des tempéraments ».

La notion très souple de *darura* (nécessité) dont les jurisconsultes musulmans ont abondamment usé en toute matière permet de justifier de larges entorses au statut légal sans enfreindre pour autant les principes fondamentaux ni en déformer l'esprit. Le *medjellé* l'érige en principe dérogatoire à l'article 21 selon lequel « la nécessité rend licite ce qui est prohibé », ou « la nécessité fait loi », comme nous disons

aujourd'hui. Ainsi, sur le plan de l'exercice du culte, puisque la difficulté (*mashakka*) appelle la facilité, on permet à un musulman souffrant ou en long voyage, d'être dispensé de l'obligation de jeûner pendant le mois sacré et de compenser cela par un don de bienfaisance versé aux indigents (Al-Doulaimi, 2018). Dans le domaine des transactions pécuniaires, l'interdiction de prise d'intérêt, relevant de l'usure (*riba*) prohibée par la Charia, est tempérée par un mécanisme qui lui sert de substitut en cas de nécessité. La vente à réméré permet, dans les faits, de dissimuler le prêt à intérêts sous le couvert d'une vente simulée à un pseudo-prix incluant ce qui représente la rémunération du prêt (Cardahi, 1955). Le *medjellé* ne répugne pas à l'admettre expressément à l'article 32 : « Ce qui est exigé pour la satisfaction d'un besoin public ou privé est admis comme une nécessité légitime. C'est en vertu de ce principe qu'on a permis la vente à réméré. Cette espèce de vente a été admise pour la première fois en Boukhara [région musulmane de l'Asie Mineure, aujourd'hui située en Ouzbékistan] où le grand accroissement des dettes de la population l'avait rendue nécessaire ».

En ces temps de pandémie, le principe de proportionnalité et l'exigence de mise en balance des différents droits en conflit sont de mise. Deux textes du *medjellé* (art. 26 et 27) permettent de raisonner en ce sens : « On doit préférer le dommage privé au dommage public » ; « On peut réparer un dommage considérable par un dommage moins important ». Certes, le confinement et la mise en veilleuse de la vie sociale et économique engendrent un dommage important, mais ce dommage devrait être supporté pour prévenir un dommage encore plus grave, celui portant sur la vie, la santé et l'intégrité physique des personnes. N'est-ce pas là l'expression de cet adage de sagesse populaire : « De deux maux on choisit le moindre », qu'énonce expressément l'article 29 du *medjellé* en vue de résoudre un conflit d'intérêts ?

Au demeurant, on peut convenir avec l'article 30 que « La préservation d'un mal est préférable à la réalisation d'un profit ». Toutefois, l'article 33 nous apprend que « Le besoin, quelque grand qu'il soit, n'anéantit pas le droit d'autrui. Ainsi, celui qui, poussé par la faim, mange le pain d'autrui est tenu d'en payer ensuite la valeur ». Une telle règle pourrait fonder l'obligation de l'État d'indemniser toute personne ayant subi un préjudice en raison des mesures de confinement et de l'impossibilité de travailler qui en découle. Il est aussi bien « défendu de causer un dommage que

d'y répondre par un autre dommage », énonce l'article 19 du Code ottoman.

« Le pouvoir de toute autorité est fondé sur l'utilité générale », nous enseigne par ailleurs l'article 58 du *medjellé*. Si une telle disposition est de nature à légitimer les mesures de contrainte prises par les pouvoirs publics pour remédier à la crise, la crainte est grande que celles-ci puissent être utilisées pour brimer de manière permanente les droits et libertés. Ici encore les règles globales de la Charia semblent pouvoir être invoquées pour imposer des balises et prévenir l'abus : « Ce que la loi permet en raison d'un motif déterminé, cesse d'être permis une fois que ce motif a disparu » (art. 23) ; « Lorsque l'obstacle qui s'oppose à l'exercice d'un droit disparaît, celui-ci reprend sa vigueur » (art. 24). Le confinement doit dès lors être levé dès que la pandémie est endiguée. Il devrait de même être allégé s'il est à craindre qu'une famine généralisée frappe la communauté, car on ne saurait « réparer un dommage au moyen d'un dommage semblable », comme l'énonce le vieux Code (art. 25). Peut-on aller jusqu'à prétendre qu'il est incongru de restreindre la liberté de l'ensemble de la population pour protéger une catégorie bien déterminée (personnes âgées et personnes souffrant de maladies chroniques) ? Si au Québec, comme dans la plupart des pays occidentaux, on semble se diriger vers un déconfinement ciblé permettant une reprise graduelle d'activités par les personnes les moins à risque, en droit musulman cette possibilité est aussi ouverte : « le dommage doit être écarté autant qu'il est possible » et « la nécessité doit s'apprécier à sa juste valeur » préconisent respectivement les l'articles 31 et 22 du *medjellé*.

En définitive, la souplesse inhérente à ces règles globales de la Charia apporte un démenti aux interprétations rigoristes tenues par certains dignitaires religieux, soucieux avant tout de garder leur emprise sur les fidèles. Dès lors, on ne saurait que saluer cette proclamation heureuse de l'article 39 du vieux Code musulman : « Il est hors de doute que l'application de la loi peut varier avec le temps ». Tout est dit !

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LEAVING THE CLASSROOM BEHIND? LESSONS LEARNED FROM DESIGNING AN ONLINE LAW AND FILM WEBINAR SERIES

Nicole O'Byrne¹ & Alden Spencer²

My research assistant Alden Spencer and I would like to thank David Sandomierski and Shauna Van Praagh for creating this opportunity for us to reflect on our recent attempts to adapt to teaching online. We have spent the past several weeks working together to redesign my Criminal Law and Evidence courses. We will start by sharing our individual perspectives and then put forward our shared experiences, experimentation, and vision for transitioning law and learning onto an online environment.

Teaching during a Pandemic: A Teacher's Perspective

On the afternoon of Friday March 13th, I was enjoying a pint with my colleagues at the Grad House Pub when I checked my email: "All UNB in-person classes will be suspended for the remainder of the academic year effective as of tomorrow, March 14, at 8 a.m. Starting Monday, March 23, classes will resume using alternative methods to support delivery outside of the classroom." I read the email to my colleagues. We ordered another round and toasted our uncertain future. The only thing we knew on that day was that everything would change.

The past three months have been extremely challenging for everyone. Personally, I faced the gargantuan task of converting my Evidence lectures and my Advanced Evidence seminar to an online format. I knew that the students were going to have a difficult time with the transition to an online environment, so I thought it best to replicate the in-class experience as much as possible. I told them that it may seem absurd to be studying hearsay and the voluntary confession rule during a global pandemic but that we should strive to maintain routine in uncertain times. So, I asked my students to attend live 8:30 a.m. lectures via Zoom and to submit their infographic assignments on time. The Evidence final

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exams and the research papers in my Advanced Evidence and Directed Research seminars were comparable to previous years. I have been astounded by the resiliency and tenacity of my students. And it has been difficult for them. Since March, I have heard from dozens of students about some of the challenges they have faced. For example, the university administration decided to offer all students an option to receive a credit on their transcript rather than a letter grade. Unlike other universities where students could make an election after the grades were calculated, our students were compelled to make the choice prior to writing their exams. Many students could not pursue the credit option because their scholarships depend on maintaining a certain GPA. Others were scared that the wrong choice would harm their job prospects or eliminate other possibilities such as selection for moot teams, internships, and other experiential learning opportunities. Thus, the uncertainty of the crisis was unnecessarily compounded by our university administration's decision to take steps without sufficient consultation with individual faculties or programs.

If anything, the current crisis reminds us all that we need to listen to our students if we are going to adequately respond to their needs. Over the past few weeks, our law faculty administration has since taken steps to respond more sensitively to student needs. Our Health and Wellness Committee has surveyed the students and created a database of available university, community, and provincial resources. We managed to triage the end of the semester. However, we must take more measured steps as we plan for the upcoming academic year. We are very lucky at UNB to have a small, collegial faculty where students, staff and faculty work well together. I am confident that we can tackle the challenge of moving our program online if we listen to the students and prioritize their needs.

Learning during a Pandemic: A Student's Perspective

Learning law online during a pandemic was not how I imagined the last three weeks of my first-year law experience to be. My professors had one week to prepare, and I think they did the best that they could given the circumstances. There definitely were some successes. Professors began recording their live lectures, which allowed students to revisit the material. This practice encouraged us to focus on the material during class rather than compulsively writing down every word the professor said for fear of missing something important. Other professors switched

to a flipped classroom model by holding live Q & A sessions during which we could work through problems. This also encouraged students to learn the material on their own time and then apply the knowledge in a class-like setting.

In my opinion, some of my professors encountered some difficulties that could have been easily avoided had they been more sensitive to the challenges we faced. Some of my professors expected higher quality work and graded more harshly due to the extra time allotted for writing exams (i.e. we had 4 hours to write a 3-hour exam). Others took advantage of this extra time to lengthen their exam despite regulations to the contrary. Students who were taught by practicing lawyers found it difficult to contact their instructors. Understandably, Covid-19 impacted their clients as well; however, this diverted the instructors' attention away from students.

My advice for law professors who must offer courses online this fall is to not attempt to put an in-person class online. Instead, take the course material and redesign a brand-new course specifically created to take full advantage of the online platform. For example, try using discussion forums to allow students to interact on a topic while not forcing them to appear on camera. In-class polls and quizzes keep students attentive and promote interaction during class. Assign material from a range of media such as text, film, and podcasts. These materials appeal to many students and better accommodates diverse learning styles. As someone who took many undergraduate classes online, I can attest that using a variety of materials and moving beyond the video conference keeps students engaged.

While We Are Apart: A Non-Credit Summer Course

Over the past several weeks, we decided to embrace the possibilities of online learning by designing a Law and Film summer non-credit course. In this section, we will outline how we developed the eight-week course and how it works in practice. The course has given us the opportunity to design and test various online teaching techniques such as polling, breakout rooms, and video-editing.

Why Did We Develop This Course?

We took the idea for a non-credit Law and Film course from Paul Bergman's article "Teaching Evidence the "Reel" Way", in which he outlines how to use clips from popular films and television shows to teach evidence law.³ We knew that many students had lost their summer positions and would be interested in getting ahead for next year or applying knowledge they learned in their Evidence course in a more relaxed environment. Initially, we put together a list of approximately 12 films and series episodes and then we narrowed it down to eight.⁴ We selected two evidence issues per show and set to work collecting relevant articles suitable for background reading. For example, we assigned Justice Binnie's article "Science in the Courtroom: The Mouse that Roared" to introduce the students to the use of expert witness evidence in the first two episodes of the Netflix series *The Innocence Files*.⁵ Once the films and reading list were finalized, we attended several webinars to observe how to best encourage student participation in an online environment. We learned how to incorporate online polling, breakout rooms and chatrooms. These webinars confirmed that we should not attempt to recreate the in-person experience and that the online environment offers a new range of possibilities.

How Does the Law and Film Webinar Work?

All of the films and television episodes we chose for the webinar series are available on Netflix, Cineplex or for rent on YouTube. However, we faced a challenge finding a suitable platform to host readings, clips and other background material. We wanted the course to be accessible to members of the community and non-registered students so we could not use Desire2Learn or TWEN. After exploring various options such as setting up a website, we decided to create a private group on Facebook to which we could invite participants. We currently have over 70 members including students, retired professors, lawyers, journalists, and community members. The mix of participants from different backgrounds has led to fascinating commentary, questions, and discussion.

3 Paul Bergman, "Teaching Evidence the "Reel" Way," 21 *Quinnipac L.Rev.* 973.

4 Our final list: 1) *My Cousin Vinny* (Opinion Evidence and Eyewitness Testimony); 2) *The Innocence Files* Episode 1 and 2 (Expert Opinion and Junk Science); 3) *Legally Blonde* (relevance and cross-examination); 4) *Silk* Season 2 Episode 3 (relevance and the twin myths); 5) *All the President's Men* (journalist-source privilege); 6) *Amistad* (the legality of slavery and *habeas corpus*); 7) *Just Mercy* (wrongful convictions); 8) *Philadelphia* (probative value v. prejudicial effect).

5 Ian Binnie, "Science in the Courtroom: The Mouse that Roared," 56 *UNBLJ* 307.

Each week, we post a film trailer for the upcoming film or episode along with a selection of relevant articles in the Facebook group. All participants are asked to watch the show and read the material prior to the webinar held every Thursday evening on Zoom. As part of our course design process, we experimented with various delivery platforms; however, Zoom provides the easiest to use interactive features such as polling and breakout rooms. During each webinar, we introduce various Evidence concepts with a brief substantive lecture that incorporates various clips from the film or episode. The participants then discuss (as a group or in breakout rooms) how the clip illustrates an evidentiary issue. We also present topical examples from recent Canadian cases, such as the Oland murder trial, to illustrate the importance of the evidentiary issue in contemporary Canada. We also do our best to avoid 'Zoom fatigue' by inviting guest lecturers to give a brief overview of one aspect raised in the film. For example, we asked a professor who teaches legal ethics to discuss the issue of sexual harassment in the workplace during our Legally Blonde webinar.⁶

Lessons Learned

Over the past several weeks, we have learned many lessons from designing and running the Law and Film webinar series. First, it takes time to become familiar with the technology. Second, it takes longer to cover material because people need to unmute their microphones and the instructors need to set up clips, run polls, set up breakout rooms, etc. Third, it takes more preparation to plan an online class. There is much less room for spontaneous interaction so the instructor must be more active in choreographing the design and flow of the discussion. Fourth, the students are not necessarily comfortable gleaning content from watching videos. They are used to reading and listening to lectures. Instructors must carefully draw the connection between concepts introduced in the background material with the clips. Fifth, it is useful to have some help run the chatroom because it can be difficult to keep track of the live and online discussions at the same time. Sixth, you can have honest and authentic discussions via an online platform such as Zoom; however, it takes more time to build community if the participants do not know one another in person beforehand. Seven, we are all adjusting to this new

⁶ We chose Legally Blonde to introduce participants to relevance and cross-examination. The main character Elle Woods is sexually harassed by her professor/employer. We asked our guest lecturer Professor Basil Alexander to outline the options that are available to students who find themselves in a similar situation.

learning environment – not just the teachers! We all need to be compassionate as we collectively move to a new style of learning. Eight, people are craving community and connection now more than ever. We encourage you to try various formats and experiment with your students. Nine, this course has acted as a transitional learning experience regarding course design. It has challenged us to think about pedagogy and learning outcomes in a whole new way. Ten, the professor has finally realized what her student has been saying all along – you simply cannot put an existing course online. You must completely redesign the course so that it suits the medium. Finally, this experiment has helped us better assess the challenge that lays ahead: how do we teach substantive law courses online during a pandemic?

Looking to the Future: Course Delivery during Fall Semester

We are now engaged with redesigning an online first-year Criminal law course for the upcoming academic year. Building upon our success incorporating visual material and using interactive pedagogical tools such as breakout rooms and live polling, we have decided to build our course around six episodes of arguably one of the greatest shows of all time: HBO's *The Wire*. We started with syllabi from previous years to see which substantive topics were covered in first year criminal law. With these subjects in mind, we watched the first six episodes of the first season of *The Wire*. The show explores topics such as search and seizure, interrogation, the right to counsel, and systemic racism within the criminal justice system. We plan to assign readings relevant to the issues that emerge during each episode. Unlike the Law and Film series, we will watch the episodes together during class time. We will also use the Desire2Learn Learning Management System to post course materials, host discussion groups, and post assignments. However, we plan to follow the basic format of the Law and Film webinar series: live discussion, breakout rooms, live polling, and chatroom discussion. We hope that the structure of the class will be engaging enough to inspire students to talk about the episodes outside of the classroom. We plan to assign study groups in hope that the students will be able to build an online community beyond the classroom.

Some Concluding Thoughts

Since the announcement on that Friday in March (which seems so long ago...), students and professors have confronted unprecedented challenges. We all did our best to finish the academic year under very difficult circumstances, and now we are mourning the loss of our in-person community. However, we have discovered that during even the most trying of circumstances people want to learn. We set up the Law and Film series to experiment with online course design. To our amazement, we have created a forum through which a vibrant online community has emerged. Teaching online will never be the same as teaching in person. However, once you realize that in the properly designed format online connections may be real as any classroom environment, then new possibilities begin to reveal themselves.

DELOCALIZING LAW AND LEARNING: CHALLENGES AND OPPORTUNITIES FOR INTERNATIONAL COOPERATION IN THE TIME OF PANDEMIC

Joao Velloso¹ & Vinícius da Silva²

International cooperation, or internationalization more broadly, is a key aspect of fundamental research and graduate studies in law, being present more and more in strategic plans of law schools across Canada. There is no doubt COVID-19 will influence internationalization, in fact it is already affecting ongoing projects and the recruitment of graduate students. As most scholars, we had to alter our immediate plans for international conferences, summer schools and research collaborations with colleagues abroad. Last February, when borders started to close in Europe and the effects of the COVID-19 reached Canada, we were both celebrating grants for two South American visiting professors and putting on hold the planning of their visits next year. We put in applications for international mobility grants to help financing the fieldworks of graduate students in the Summer 2021, but we were a bit sceptical on how this would unfold in practice. After the universities closed in Canada, we received positive news on all grants without celebrating them. Our priority in March was to figure out how to end the term and how to help another visiting professor get out of the country before the shutdown of flights and borders. Today, most borders across the globe are still closed, there are no flights to/from South America before late August and who knows what is going to happen next. However, as Brian [the “Messiah”] put at the end scene about his life: “Some things in life are bad/ They can really make you mad/ (...) Don't grumble, give a whistle/ And/ Always look on the bright side of life”³.

Our objective in this chapter is to look on the bright side of life in the time of pandemic by discussing opportunities and the acceleration of processes already in play before COVID-19. We will argue that law schools will become more and more international and that methodologies related

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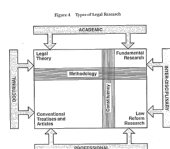
² Ph.D. student in Law, Faculty of Law Common Law Section, University of Ottawa

³ Terry Jones et al. *Monty Python's Life of Brian*. 1979; Culver City, California: Sony Pictures Home Entertainment, 2007.

to fundamental research⁴ will become even more hegemonic in a context of distance learning. Indeed, we will show how internationalization is linked to the development of fundamental research. The pandemic will close borders, but also local spaces, opening both settings to cyber interactions. Legal research and education will not become more localized; quite the contrary, they will become more delocalized, plural and transsystemic.

The origins of Western legal science and legal education at the University of Bologna in the 11th century was essentially an international enterprise⁵, both in terms of students and professors. The early stages of legal education were not about being local or learning the prevailing law as we are used to see in professional programs in law (JD, LLB or LLL). It was about the (re)invention of (Modern) Law by reinterpreting the ancient manuscript that later became known as the Justinian Code (*Corpus Iuris Civilis*) and developing methodologies to study, solve contradictions and systematize legal knowledge.⁶ Such methodologies were based on the science of the time (scholastic method) and the legal reasoning developed in Bologna is still very present today in both Common Law and Civil Law traditions, especially regarding the doctrinal and professional dimensions of law.⁷ The scientific method changed drastically over the centuries but legal reasoning changed less (some would say it did not change at all). This was one of the core reasons for the creation of the *Consultative Group on Research and Education in Law*. Back in 1978, Canadian legal research was not very scientific according to the *Social Sciences and Humanities Research Council* criteria or as the Consultative Group put it “we conclude that law in Canada is made, administered and evaluated in what often amounts to a scientific vacuum”⁸. It is interesting to note two elements regarding this digression to Bologna. First, what was exported, then has

4 Consultative Group on Research and Education in Law. *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada* (Ottawa: Minister of Supply & Services, 1983). We are going to mobilize throughout this chapter the same categories used in the famous “Figure 4. Types of Legal Research” from the *Law and Learning* report (p. 67), see on the right:



5 Harold J. Berman, “The Origins of Western Legal Science,” (1977) 90:5 *Harvard Law Review* 894.

6 *Ibid.*

7 *Supra*, note 2.

8 *Ibid.*, p. 70.

reached the West, was the legal reasoning (methodologies) and not the prevailing (local) law, which was not even part of the curriculum.⁹ Secondly, as Harold Berman also pointed out, the Western Legal Tradition anchored to the pair doctrinal and professional dimensions of law survived major revolutions¹⁰ and multiple plagues by the way, but it was facing a major threat in the 70s and 80s due to the rise of critical legal studies and interdisciplinary approaches to law.¹¹ The debate was not that different from *Law and Learning*, but Berman's conclusions were. The Consultative Group suggested that the "major threat" was not a threat, but part of the solution.

Internationalization was not really discussed in *Law and Learning*, but it appears here and there when discussing more academic and scholarly legal research (e.g. when recommending refereed, nationally and internationally recognized scholarly journals in law).¹² It was a different time with different priorities; the focus was to make law schools more academic and scholarly, which was already very radical at the time. In Ontario, for instance, legal education was not university-based until very recently. The *Law Society of Upper Canada*¹³ literally owned the only accredited law school in the province until 1957 (Osgoode Hall). The University of Toronto had a law school since 1949, but the degree was not recognized by the *Law Society*.¹⁴ The Faculty of Law of the University of Ottawa was created in 1953, but only offered a Civil Law program at the time, which was recognized by the *Barreau du Québec*. All other law schools in Ontario were created after 1957. Their priority was the quest for increasing academic autonomy and the right to develop their own programs. The Consultative Group did not advocate for internationalization, but for fundamental research, interdisciplinary, full time scholars, graduate studies. Retrospectively, however, we can argue that the level of internationalization we experience today in Canadian law

9 In fact, the prevailing law became part of the equation centuries later due to the rise of nation states, differentiation of specific legal traditions (Common Law and Civil Law) and local associations of legal practitioners.

10 Berman, Harold J. *Law and Revolution*. (Cambridge, Mass: Harvard University Press, 1984).

11 *Ibid*, p 33-41; 164.

12 *Supra*, note 2, p. 158.

13 It changed its name to Law Society of Ontario only in 2017, becoming official in 2018 after legislative amendments to the *Law Society Act*.

14 Harry Arthurs, "Valour Rather than Prudence: Hard Times and Hard Choices for Canada's Legal Academy," (2013) 76.1 *Saskatchewan Law Review* 73. Arthurs, chairman of the Consultative Group, did his LLB at the University of Toronto during the final years of the Law Society monopoly over legal education in Ontario and in the 1960s, as a professor at Osgoode Hall, he actively participated in the transition of the law school from the Law Society to York University. These are recurrent topics in his writings and is quite developed in his autobiography: Harry Arthurs, *Connecting the dots: The Life of an Academic Lawyer*, (Montreal-Kingston: McGill- Queen's University Press, 2019).

schools is, at best, a collateral consequence of the *Law and Learning* report and, as Arthurs himself later suggested, such processes cannot be dissociated from structural changes in the world economic system (globalization).¹⁵ Law schools are typically less international than many other disciplines and programs at any Canadian university. This is explained by the local character of the professional degree in law and the regulation of the legal profession. However, law schools are quite international regarding fundamental research, interdisciplinary and graduate studies. It is no coincidence that internationalization thrived especially in the aspects more aligned with the *Law and Learning* core proposals.

In “Law and Learning in the era of Globalization”¹⁶, Arthurs updates his analysis about the future of law schools by linking it to the adoption of globalized standards and ideology (“neo-liberal globalization of the mind”, wondering if the adoption of globalization agenda was a “conscious choice” or a necessity to adapt under the “new realities of a global political economy”)¹⁷. His pessimism towards globalization is explained by the assumption that regulatory values were becoming more and more market-centred, which would rapidly undermine the role of the state – and state law. Such a scenario presents deep implications for *Law and Learning*, as it enhances the role of global legal institutions, accelerates “the process of space-time compression” and de-couples “the idea of law from the idea of the state”¹⁸. Thus, globalization increases the potential of non-state law and changes the priorities of legal teaching.¹⁹ Arthurs has it all in mind when he assessed McGill’s transsystemic curriculum as one very well suited due to the stress of “law’s radical indeterminacy” and its detachment from boundaries.²⁰ Here his optimism takes shape. McGill seems to offer a model that compensates the pressure of the neo-liberal

15 Harry Arthurs, “Globalization of the Mind: Canadian Elites and the Restructuring of Legal Fields,” (1997) 12:2 *Canadian Journal of Law and Society* 219. Harry Arthurs, “The Political Economy of Canadian Legal Education,” (1998) 25 *Journal of Law and Society* 14.

16 Harry Arthurs, “Law and Learning in the Era of Globalization,” (2009) 10:7 *German Law Journal* 629.

17 *Ibid*, p. 632-3.

18 *Ibid*, p. 633-5.

19 “After all, by whatever means we have traditionally taught students to “think like lawyers”, we will have to do something different to teach them not to think like lawyers – or at least not like the lawyers we’ve been training up to this point. Instead of parsing judicial decisions, for example, they may have to peruse arbitration awards or observe mediators at work; instead of reading legislation, they may be asked to scrutinize corporate codes of conduct or consult ethnographic studies; and instead of being taught to fetishize fairness, rationality, predictability and clarity as law’s contribution to social ordering, they may find themselves learning to value pragmatism, imagination, flexibility and ambiguity.” (*Ibid*, p. 635).

20 *Ibid*, p. 638.

political economy with the strengthening of the value of academic or interdisciplinary fundamental legal research that he once pointed out as the basis for a more autonomous project of legal education and research.

Although Arthurs does not address internationalization in his article, there are clear connections. The first one is related to students' expectations. Arthurs stresses the increasing relevance of student fees for the financial wellbeing of law schools²¹ and we know that internationalization works to a great extent to accomplish this task, especially regarding graduate studies. The need to attract international students compels law schools to compete in the global legal education market and respond to the expectations of a very diversified profile of students. The second connection is that fundamental research methodologies (related to the pair "academic"/ "interdisciplinary")²² are more suitable to fulfill the multiple expectations in this market than those of traditional approaches to law (the pair "doctrinal"/ "professional")²³, at least concerning graduate studies and research, since the first is not exclusively rooted in the local and prevailing state law. In this sense, internationalization seems to reinforce law schools' autonomy in two ways: as competitive actors in the global markets and, more importantly, as knowledge validation criteria that are established and recognized primarily by the academic field, regardless of determinations from the professional field.

Research on internationalization conducted at the same time Arthurs wrote his article has supported a tendency towards the prevalence of fundamental research methodologies over traditional approaches in all levels of legal education. Gail Hupper's study²⁴ about international students in doctorate programs in the United States shows that the most prestigious law schools stimulate the engagement with theoretical and interdisciplinary approaches ("theoretical/ interdisciplinary model") that foster the use of abstract thinking to mobilize fundamental concepts in law, contextual methodologies that connect law to other aspects of

²¹ *Ibid.*, p. 638.

²² *Supra*, note 2.

²³ *Ibid.*

²⁴ Gail J. Hupper, "The Academic Doctorate in Law: A Vehicle for Legal Transplants?" (2008) 38:3 *Journal of Legal Education* 413.

modern social life, and policy-driven analysis.²⁵ Catá Backer & Stancil²⁶ argue that the most successful internationalization model is the one that aims at producing generalists capable of interacting with different realms of law. This is also the most difficult model to implement due to the “large commitment in terms of resources and a willingness to change their [law schools’] approach to teaching and perhaps even to research”²⁷. When assessing McGill’s transsystemic model, Dedek & de Mestral²⁸ opposed it to the “Europeanization” model that seeks to train law students in different national state laws and in the European law by using traditional approaches. For them, the transsystemic model will dissociate legal education “from its ties to a positivistic training in the law in force in a certain jurisdiction”²⁹. Therefore, as professor Kasirer (as he then was) suggested, the transsystemic model gives more importance to the role played by the university because of the increasing centrality of the ideas instead of the centrality of geography.³⁰

Before returning to *Law and Learning*, it is crucial to consider that, among the innumerable effects of COVID-19 on modern life, the consolidation of the cyberspace as the new geographic centre of social interaction might accelerate the restructuration of the entire legal field, with side effects on international cooperation and the global legal education market. Definitely, it is a new *chronotope*³¹ (spatiotemporal setting) grounded in *genres* (ways of communicating) and worldviews where the local is less relevant. This movement has the potential of eliminating our physical presence in many activities related to law, including lawyering and judging, teaching and learning, and legal research. This is something already very concrete for the next academic year. For instance, scheduling a graduate student seminar has to take in consideration that students will be in different places and time zones. We are not talking about a three hour continuum related to one physical space anymore. The same thing is

²⁵ *Ibid*, p. 433.

²⁶ Larry Catá Backer & Bret Stancil, “Global Law Schools on US Models: Emerging Models of Consensus-Based Inter-nationalization or Markets-Based Americanization Models of Global Legal Education,” (2011) 3 *Revista de Educación y Derecho/ Education and Law Review* 2 102.

²⁷ *Ibid*, p. 119.

²⁸ Helge Dedek & Armand de Mestral, “Born to be Wild: The “Trans-Systemic” Programme at McGill and the De-Nationalization of Legal Education,” (2009) 10:7 *German Law Journal* 889.

²⁹ *Ibid*, p. 898.

³⁰ Nicholas Kasirer, “Bijuralism in Law’s Empire and Law’s Cosmos,” (2002) 52 *Journal of Legal Education* 29.

³¹ Mikhail Bakhtin, *The dialogic imagination: four essays*. (Austin: University of Texas Press, 1981). Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance*. (New York: Routledge, 2015).

happening with visiting graduate students. Universities are adjusting to this new reality and, at the University of Ottawa, it is now possible to host international students virtually, which means conducting research and supervision in different countries and possibly time zones. There are important logistical challenges, but those who are more used to internationalization will probably agree that these new internationalization strategies are way simpler to handle than dealing with international trips, airports, borders, jet lags, etc. Also, it is very productive to collaborate in different time zones, as there is always someone in the team working while others are literally sleeping. Indeed, the way we are coping with the pandemic seems to accelerate the process of enhancing the role of global legal institutions, disrupting and compressing space-time, delocalizing relationships and de-coupling even more law from the state as a consequence of a more virtually integrated world.

In a plausible scenario where lawyers become capable of working on cases anywhere and students are able to attend classes anywhere on the globe without having to travel abroad, internationalization cannot be seen any more as a mere alternative for the financial wellbeing of law schools or as a marginal program within legal education, confined in graduate studies and fundamental research. It may become the *raison-d'être* of law schools, and universities, in a process that can be traced back to its origins in Bologna. The fundamental research methodologies are, possibly, the best product law schools have to trade in a very competitive global legal education market. They offer a flexible platform to deal with the diversity of legal problems in a plurality of legal orders, including state law or the prevailing local law of their clients. They have become more and more mainstream while traditional approaches to law usually remain attached to the local professional components of legal education, which will still be relevant for the undergraduate degree. However, while Arthurs would possibly express optimism about this orthodoxy of fundamental research and transsystemic approaches in post-pandemic legal education, his pessimism about the effects of neo-liberalism on *Law and Learning* would still be valid. As such methodologies are appropriated by the global legal education market and become mainstream, they may lose the critical, law reform and social justice potential that have historically characterized them. As Arthurs feared, without our attention, they may be very well neutralized and retooled to sustain legal hierarchies or even to

promote the abuses of private power.³² More than ever, we need to look at the consequences of the pandemic and be proactive in the face of the changes in internationalization, legal research, and education. If we do not, we will leave it all to the market.

³² "My pessimist's conclusion, to reiterate, is that political economy does much to determine the ends and means of legal education and research. And because globalization is a dominant influence on political economy, it becomes the 800-pound gorilla whose presence in our deliberations we can hardly avoid." *Supra*, note 14, p. 630.

GREEN/GRIS-VERT: **G**OVERNANCE/**G**RIEF; **G**OUVERNANCE/**G**RIEF



Shauna Van Praagh & David Sandomierski
Collage sur le droit et le savoir au temps de la pandémie
Law and Learning in the Time of Pandemic - A Collage

ON RACE AND ACADEMIA IN THE TIME OF COVID-19

Carol Liao¹

As I start writing this on May 29, 2020, Minneapolis is burning. It is the fourth night of protests since George Floyd's murder, bookended by the viral video of a White² Canadian woman calling the police on Christian Cooper, a Black man who asked her to leash her dog in Central Park. Before that there was the video of Ahmaud Arbery, gunned down while jogging in his neighbourhood in South Georgia. Demonstrations continue for Breonna Taylor, murdered when police broke into the wrong house in Louisville, Kentucky. These are just some of the stories emanating from my newsfeed for the month of May during COVID-19.

As I reflect on what is occurring now in the United States, I wonder if these growing protests will have any resonance in Canada. We are often quick to condemn racism south of the border, while allowing a conflated sense of Canadian superiority erase our own systemic racism. There is a strange amnesia about Canada's past; for example, the Sixties Scoop and residential schools, Japanese internment camps, the Chinese head tax and *Exclusion Act*, Komagata Maru, legalized slavery, Africville.³ There is silence about the ongoing violence and brutalization of Indigenous peoples. Canadians prefer to pretend we live in a decontextualized, ahistoric reality in which racism is always over there, but never here. I am so used to Canadian politeness and passive-aggressive mannerisms that I always find myself somewhat startled by the American frankness in talking about race. We have a deep reluctance to acknowledge racism until racial hierarchies erupt into murder or hate crimes (caught on video) – which we can all easily say we abhor. Racist events are compartmentalized as isolated acts until there are too many to do that anymore. Then, for a period, we draw links, only to later forget what that linkage reveals about the structures and institutions central to our social, political, and legal systems. Why do we, as Canadians, have so much

¹ Associate Professor, Peter A. Allard School of Law, University of British Columbia

² Ann Thúy Nguyễn and Maya Pendleton, "Recognizing Race in Language: Why We Capitalize 'Black' and 'White,'" *Centre for the Study of Social Policy* (23 March 2020), online: <<https://cssp.org>>.

³ Credit to Alicia Elliott @WordsandGuitar (2 June 2020), online: <<https://twitter.com/wordsandguitar>>.

difficulty admitting our own racist history and how this history continues to shape the present?

I suppose my reflections may be flowing from my experiences over the past few years conducting workshops on gender and race to corporate boards with my industry partner, Shona McGlashan. In those sessions, Shona and I address colonialism, misogyny, and systemic racism immersed within corporate culture. We point executives towards the overwhelming research in order to raise awareness and have those difficult conversations on how to elicit change within their organizations. Every time Shona and I do our sessions with boards, I confess that I feel like I am giving up a piece of myself. I speak so carefully, with such concern over the defensiveness that is lurking if I suggest anything is the fault of anyone in the room. I have trained myself to educate people on race within a White system, and it drains me. It is not as easy for me to talk about these things. I often need to siphon energy from Shona to push through these sessions. But the strange thing is that I prefer running these workshops ten times over attempting to raise any conversation about race within my own institution.

I live in the world of academia, where there is ample resistance in acknowledging privileges and complicity in systemic racism. We are conditioned to protect Whiteness; this protection manifests itself in how we appoint faculty members to the academy, how we support them, how we choose to amplify or silence them. I have lost count of the number of White colleagues that have told me they are “colourblind” or “don’t see race” and who have shut down any discussion on the lack of racial diversity in our professorship. I have lost count of the meetings where I am the only racialized person in the room, and the panels where I am the only non-White speaker. Power disparities within faculties flow from deep-seated structural inequalities, and academia is rife with them. Yet White supremacy is not something you say in the halls of academia unless you are referring to someplace else.

The issue of racism has us both coming and going, a bit like a pushmi-pullyu.⁴ Prior to George Floyd's murder and the growing protests in the United States, I heard many people in Vancouver state that anti-Black racism cannot exist here because too *few* Black people live in Vancouver. After the Canadian Broadcasting Corporation invited me to write an opinion editorial on anti-Asian racism during the pandemic, I had numerous people express surprise that this was possible given how *many* East Asian people there are in the city. It seems racialized people are either too few to matter, or too many to matter. So the Goldilocks question: what is the *just right* number of Black, Indigenous, and People of Colour (BIPOC) needed before people are willing to recognize White supremacy and the existence of racism?

As a Taiwanese Canadian, I know I have benefited from systems of White supremacy and White adjacency, both rooted in anti-Black and anti-Indigenous racism. The selective recruitment of Asian people and their perceived successes within White supremacist systems are designed to bolster the status quo and minimize the role racism plays against BIPOC groups. Yet the model minority position has its limitations – butting up against the bamboo ceiling⁵ and demanding conformity within these systems. The increased anti-Asian racism during COVID-19 is just another reminder of our conditionality. It is important to also recognize how anti-Blackness and White supremacy are steeped within Asian communities – look at the shadeism, the lightening creams and eye-widening surgeries, the rampant interminority racism, for example. It is time for us to confront these issues head on within our communities and our own institutions.

In April during COVID-19, the exponential rise in anti-Asian hate crimes amidst the pandemic was something I could have predicted from miles away. I knew by January that I was not to cough or sneeze in public for fear of terrifying anyone around me. On two occasions that month, I had people decline to shake my hand and then promptly shake the hand of

4 Hugh Lofting, *The Story of Dr. Doolittle* (1920). A pushmi-pullyu “had no tail, but a head at each end, and sharp horns on each head...[and] no matter which way you came toward him, he was always facing you.” The pushmi-pullyu is also a fitting example given the author Lofting was known to be “a white racist and chauvinist, guilty of almost every prejudice known to modern white Western man.” Jeva Lange, “A Tribute to the Pushmi-Pullyu,” *The Week* (16 January 2020). Thanks to Margot Young for the example:



5 Jennifer L. Berdahl and Ji-A Min, “Prescriptive Stereotypes and Workplace Consequences for East Asians in North America” (2012) 12:2 Cultural Diversity and Ethnic Minority Psychology 141.

the White person next to them, with no shame. My face reddening as I tried not to take it personally. Politicians like Trump were inciting hate over the airways, calling COVID-19 the “Kung Flu” and “China” virus. Reports of East Asian people getting shot at, punched, kicked, spat on, or yelled at started popping up in the news, some accompanied with videos. By mid-March, when COVID-19 began affecting everyone’s routine, my siblings and I called our elderly parents together and we told them not to go anywhere in public, even for groceries. It was not worth the risk. As the hate crimes against any Asian-looking person began to increase in Vancouver, my parents and I stayed home and my husband, who is White, picked up the groceries for both our households every week.

Of course, anti-Asian racism in Vancouver is nothing new. Reporters ask if the racism due to COVID-19 is as bad now as it was during the SARS outbreak. Wrong question. I do not have to look back 18 years to find examples of anti-Asian racism in this city. In the past several years as Vancouver’s housing prices have skyrocketed, there has been a great deal of collateral racism. I’d be having coffee with a group and overhear the person one seat away declare that she did not want to sell her house to an Asian person, as people nodded in agreement. “The neighbourhood is changing,” said another, looking straight at me with some indignation. Or there was the time when a man shouted a racial slur at me as he drove past me down a narrow street in Kitsilano; my three young children were in the backseat of the car, hearing it all. The man was not some lunatic as some may assume. He was White, probably in his early thirties, and there were two White women in the car seated next to and behind him. His blue eyes bore into me as he shouted, “Get out of the way, Chink!” and then drove off. It still upsets me to this day that my children had to witness that. These examples are recent and they were pre-pandemic. I have an extensive collection of these stories and countless micro-aggressions from childhood to present day; most BIPOC do. Why are White people surprised by this?

If this essay in the collection is meant to be a time capsule of what is going on right now in terms of my “learning” during COVID-19, it is that Canadian legal academia is due for a racial reckoning. The stories of the past few months during COVID-19 have been preceded by years of research on racial injustice across our academic institutions. We know a lot about this phenomenon. White fragility runs deep in the ivory tower, forcing pre-tenure faculty to conform to standards of White supremacy

for that all important future tenure vote. Any challenge against racial hostility or inappropriate behaviour is met with “a tsunami of hysterical defensiveness”⁶. So it feels safer to stay silent. White faculty members select which BIPOC voices they amplify and which they reject (as the model minority myth goes), and those same members are then disproportionately and publicly rewarded for such efforts. Moving beyond White fragility demands that the self-rewarding cachet of seeming “woke” must be surrendered and not leveraged against racialized and Indigenous faculty when they assert their perspectives. That is the start of how colleagues can truly be partners in creating fairer, more inclusive, anti-racist institutions.

It is beholden on all of us to recognize where we are situated in White supremacist institutions. I would have never written a piece like this but for the tenure letter I received in March. So this is the freedom many of my White colleagues have enjoyed. I hope I never forget the feeling of systemic silencing I had as a racialized female pre-tenure faculty member. Our institutions are structured to preserve White supremacy and those it benefits, and you cannot change what you refuse to see. I hope now, with the growing protests in the United States, we can spend less time discussing whether racism actually exists within our institutions and focus more on what can be done about it. We need deliberate, ongoing anti-racist interventions from both individual and organizational levels. We need to amplify Black and Indigenous voices, racially diversify our leadership, put in place whistleblower protections and non-retribution policies for BIPOC and allies, show demonstrable inclusion practices, and have actual accountability on the power dynamics within our own institutions and what constitutes inappropriate conduct by senior faculty and administration.

Change is the result of concerted, persistent, and ongoing efforts of many individuals that collectively build anti-racist communities. I suppose this essay, though doubtful it will be read as such, is a love letter⁷ to my institution – I still have faith and hope for change, though the mechanisms for accountability are weak. But the weight of fostering change is borne unequally. Being tenured brings great relief; it also brings

6 Aisha Ahmaud, “A Survival Guide for Black, Indigenous, and Other Women of Colour in Academe,” *The Chronicle of Higher Education* (6 July 2020), online: <<https://www.chronicle.com/article/A-Survival-Guide-for-Black/249118>>.

7Credit to Patricia Barkaskas and Elsir U. Tawfik who, in separate conversations on different topics regarding resistance, gave me the inspiration to use this terminology.

feelings of responsibility and, oddly, sadness. There is a lot of meaningful work to do, but I believe the opening to really discuss race within a White establishment will soon die down and those who have spoken up from the margins, and others who have spoken up in allyship, will be systematically punished. I wish I felt more positive that global events could change things within our organizations. But time alone will not change things, and White supremacy is a powerful drug.

GRIEVING AND LEARNING IN SOLITARY CONFINEMENT: SOME UNCANNY PARALLELS

Rosalie Jukier¹

I lost my beloved mother on May 3, 2020, right in the heart of the COVID-19 crisis. My mother was 100 years old. She lived a long and eventful life. She was an amazing role model and inspiration. She left a wonderful legacy. Moreover, she died as she had always wanted to – at home, without a lingering illness. Perhaps most importantly for me, and unlike so many in these COVID times, I got to see her to say goodbye. In my darker moments, I force myself to focus on all these blessings and that sustains me. That is because what happened in the aftermath of her death, from her funeral to the mourning process, was, to say the least, less than ideal. In truth, it was brutal. Grieving in solitary confinement can be cruel. Grief is a time when we crave connection with others for comfort the most; yet during COVID times, it is denied to us. The COVID version of a funeral which is, let's be honest, really only a graveside burial, is restricted to a handful of people standing apart, appropriately socially-distanced, far from the bereaved, unable to touch, kiss, hug, or console. Out-of-town family members are not entitled to attend due to travel restrictions and quarantine requirements. They must rely on Zoom technology to give them a peek into the ritual of saying goodbye to a loved one. The ceremony is brief, almost perfunctory, with many of the usual sacraments pushed to the wayside. After all, there are so many to bury these days and because the service takes place outside, a damp and rainy day – the weather the day of my mother's funeral – does not bode well for a long service. As hard as all this was to bear, it is perhaps the image of men in hazmat suits, taking the place of pallbearers, who brought my mother's casket to the grave, that continues to haunt me.

Coming home after the funeral was among the strangest moments of my life. I was well accustomed to the ritual of walking into a house of shiva (shiva being a week-long mourning period in the Jewish religion), with mirrors draped, and the presence of low, hard chairs on which the mourners sit. There was none of that. But, more poignantly for me, there was not the familiar house full of friends, family, colleagues and

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neighbours all there to help me deal with my profound loss. For anyone who has experienced it, shiva is an incredibly cathartic ritual. Rather, the feeling I experienced at coming home to my empty house was that of being left to fall off a cliff. I felt loneliness and nothingness. This at a time when all I craved was community and connection.

What, you may ask, does all this have to do with law and learning in the time of pandemic. What relevance is all this to legal education, particularly the type of legal education we will be offering in these pandemic times? In reflecting on my experience of grieving in what I call solitary confinement, I find many uncanny parallels with the legal education we will be experiencing as teachers and students in the coming academic year.

The word we now use to describe the environment of legal education in pandemic times is “remote”, as opposed to “on-line”. And although remote seems a softer, more palatable way to describe a new way of delivering legal education, it is, like my situation of grieving, less than ideal. Most law professors are going to be spending considerable time this summer thinking about ways to adapt their courses to this remote environment. Regrettably, some will simply replicate over Zoom what they ordinarily do in the classroom. Others will be more imaginative and attempt to incorporate various modes of teaching remotely throughout their class periods, ranging from pre-recorded capsules, time for Q and A using the Zoom chat function, and small group work in Zoom break-out rooms. In all cases, however, there will be noticeable changes and a risk that much will be lost.

Teaching to the class as a whole, I know I will lose the ability to gauge my students’ interest, understanding and engagement. After all, with so many students reduced to small icons on my screen, I will not be able to follow their nodding heads, quizzical expressions or make the usual eye contact that enables me to tailor my lecture to their needs.

Moreover, while those in charge of remote learning try to show us that there are on-line equivalents to everything we do in the physical classroom, one need only look superficially at Zoom break-out rooms to see how this is not the case. Can a group of five students put randomly into a break-out room on a screen truly collaborate on a problem? Is this the same as working physically in the classroom, especially when some of the students do not turn on their video feed for reasons of privacy or

poor internet connection? And what of the students who are not following the course synchronistically? How do they work collaboratively with their classmates?

Perhaps most importantly, I fear we will lose precious moments of informal learning that come about in less conventional sites outside the classroom. Here, I reflect on the wise teachings of one of the greatest pedagogues I have ever known – Rod Macdonald. Macdonald rightly taught us that our view of legal education is too narrow if we think it occurs only in the classroom. Rather, he caused us to understand that it occurs both inside and outside the classroom, and indeed the faculty, formally and informally, in a variety of sites and often in implicit and inferential ways. In the world of remote teaching, it is this precious informal learning that I fear we will lose. I know I will lose the last-minute before-class chat with my colleague teaching the same course as me in the hallway outside of our respective classrooms. I will so miss the after-class cluster of students who stick around to ask questions, raise issues and, most importantly, listen to, and learn from, each other. What I will miss, and what I fear we will lose, are the precious connections that we traditionally make in all the informal and unlikely sites in which we learn. I fear we will lose our nature of a “community” of learners. I fear we will lose exactly what I lost in my grieving process – connection and community.

If I learned anything from my mother, it is that we need to view the cup as half full and not half empty. In that vein, there are surely good things that will come out of remote teaching, some of which will endure even after we return to the physical classroom. History shows us that humankind often uses crises as opportunities. COVID-19 will be no exception. I am willing to accept that remote learning has many benefits. For instance, since we will be recording our remote teaching sessions, it will allow students a second look, an ability to go back, re-listen and review what was taught which will, it is hoped, lessen misapprehensions. The asynchronistic aspect of remote learning will also allow those with time constraints, due to childcare responsibilities for example, to learn at times more convenient to their schedules. Moreover, some early studies show that in a Zoom environment, there is greater “participation” from students via the chat function and that students, who would have been too shy to have raised their hand in class to ask a question orally, which for some is a highly anxiety-laden exercise, are chatting away, writing questions and

comments in the class chat. Finally, getting students used to listening to pre-recorded capsules might help pave the way for many of us to institute some form of a flipped classroom when we return to the physical lecture hall, where class time is used more for applying knowledge rather than just acquiring it.

Moving beyond the classroom to the broader legal profession and judicial system, some are touting the pandemic as the push our antiquated and sluggish court system needed. On May 20, 2020, the Canadian Institute for the Advancement of Justice (CIAJ) featured a special webcast by the Chief Justice of Canada, the Right Honourable Richard Wagner, and Professor Richard Susskind entitled, “Will COVID-19 Be the Catalyst We Were Waiting for to Modernize the Courts?” In a nutshell, the thesis is that the pandemic could push the courts to become more on-line which would, in turn, transform litigation, the legal system and offer the public better access to justice. At a time when the Supreme Court of Canada, in its 2014 decision of *Hyrniak v. Mauldin*, proclaimed that, “[e]nsuring access to justice is the greatest challenge to the rule of law in Canada today”, better access to justice would be a wonderful fall-out of this crisis.

Even for those who are not religious, it is at times of life cycle events, such as birth, marriage and death, that we often turn to religious ritual and custom for comfort and community. In the Jewish religion to which I belong, kaddish is the mourner’s prayer that one recites at the graveside to conclude the burial ceremony. It is the also the prayer that is recited nightly during the week of shiva that follows the funeral. However, the kaddish prayer requires a minyan to be recited, namely, a quorum made up of a gathering of ten men in the orthodox tradition (or ten men and women in conservative and reform traditions). Because there was not the requisite quorum at my mother’s funeral, the mourners were denied the privilege of saying kaddish for her.

At first, I was quite upset that my Congregation was not seemingly able to “pivot”, as we have all been expected to do during the COVID crisis, in order to recognize the existence of a minyan over Zoom so that mourners could say kaddish. When I demanded to know why this was the case, I was told that a minyan requires all ten people to be in one and the same place. And with Zoom, we are not in that same place. While I would have greatly appreciated the ability to recognize a Zoom minyan so that I could have recited kaddish for my mother, after a time of reflection, I have been

able to rethink my position. If we recognized a Zoom minyan, I realize that we would be acquiescing to the view that everything we used to do in person can now be replicated via remote platforms. While that may be true for some things, I think that would be propagating the wrong message. Universities cannot assume that we will be able to do remotely what we did face to face. Yes, as pointed out earlier, some things will be better and we need to hold on to those things. But we must also recognize that in a remote environment, some things risk being lost. While students will not lose out on information, they risk losing a necessary sense of connection. And while they might not lose out on the acquisition of the skills of legal research, writing and analysis, they will likely lose out on a sense of community. Prayers that require a minyan do so precisely because we recognize that we need community. For the same reason, classrooms exist so we can be what we are meant to be – a community of learners.

When I lost my mother, I grieved not only her loss, but the loss of connection and community COVID foisted upon me. We must all be conscious of the loss of this very same connection and community that remote teaching risks entailing. Both law professors and law students must use all the imagination and energy they have to mitigate those risks until one day, we may be together again, learning formally and informally the great lessons of the law.

WAR FINANCE VS. PANDEMIC FINANCE

Colin Campbell¹

Discussion of the emergency finance measures taken with respect to the coronavirus pandemic, to provide income support for individuals and businesses, healthcare spending and research sometimes draws comparison with the measures taken to finance Canada's participation in the Second World War. The comparison is apt and may shed some light on the issues raised by our current predicament.

In both cases the crisis was unexpected and developed quickly. The real crisis in the war arose not on the outbreak of hostilities in 1939, but in the spring of 1940 with the German blitzkrieg in the West and the fall of France. The Canadian government led by Mackenzie King had planned a limited war effort, perhaps requiring federal government expenditures to double over two years from their prewar level. In May of 1940, in the space of three weeks, it committed Canada to "total war", the commitment of all resources physically possible and, necessarily, financing that commitment. As a result, by 1943, federal expenditures were ten times their prewar level, dwarfing the perhaps 50% increase in the current fiscal year due to the pandemic. In addition, they continued at that level until early 1946; the pandemic expenditures are not anticipated to continue at their current level for more than a year. How was that wartime spending financed?

From the outset, King's wartime finance ministers – J.L. Ralston until June 1940 and J.L. Ilsley until 1946 – were determined to avoid the wartime inflation which had caused economic and social dislocation in the First World War, Canadian participation in which had been financed entirely by the issuance of debt. The policy in 1939 was to "pay as you go" - raise taxes instead of borrowing (after a short grace period while unused capacity in the economy, still recovering from the Great Depression, was taken up). Modest tax increases in 1939 were followed by more substantial ones in 1940. In the face of the crisis of 1940, they were not enough. In early 1941, Ilsley began a transformation of the Canadian income tax system, proposing "staggering" tax increases to the Cabinet.

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Further increases in rates and reductions in exemptions in 1942 raised the number of Canadians required to file tax returns from about 300,000 in 1939 to more than 2 million by 1944. Most commodity taxes were also increased and new ones imposed. In 1941, Ilsley revolutionized federal-provincial financial relations, forcing the provinces to give up income taxation for the duration of the war in return for cash payments.

Increased tax revenue, however, filled only part of the gap and Ilsley orchestrated a series of Victory bond campaigns, designed to raise funds by removing purchasing power from the public, both funding the war effort and combatting inflation. Finally, in October of 1941, he played a key role in the imposition of comprehensive wage and price controls. The trifecta of tax, public borrowing and control kept Canadian inflation to single digit wartime increase. By 1942-43 the federal deficit, financed by borrowing, was equal to about half of federal expenditures, a situation which continued until 1946. As a result, government debt in Canada exceeded the gross domestic product (GDP). By comparison, the current projected federal deficit will likely equal about 10% of today's GDP (prior to the pandemic, all government debt in Canada equaled a little more than 50% of GDP) and, barring a worse prognosis for the pandemic, would only remain at that level for perhaps a year. While a matter of obvious concern, we have managed much worse.

The fiscal response to the pandemic by all levels of government in Canada has been different in other respects. Perhaps the most obvious is the apparent lack of concern about inflation. This is understandable – inflation is a peculiarly acute problem in wartime when people are being paid to provide goods and services which they cannot buy. In the current situation, people cannot in the short run buy and bid up prices because most opportunities to spend are foreclosed. In the longer run, goods and services will again be available and spending power may have been reduced somewhat. In contrast to 1940, increased government spending has been financed effectively by increasing the money supply – printing money through the purchase of government (and some corporate) debt by the Bank of Canada. There have been no suggestions at any level that taxes be increased – yet – let alone controls on wages or prices. Silence from the Bank of Canada and other central banks suggests they simply do not know whether inflation is a threat. That was not the case in 1940. Hard decisions were made then and unpopular policies enforced.

The greater fear today is too little demand and the threat of economic recession. Hence the massive government support, both for temporarily unemployed individuals and for businesses threatened with insolvency, whether by outright grants, loans or even equity infusions. That too became an issue during the Second War, after 1942 when victory was on the horizon and policy-makers began to anticipate peace. Recession had followed the First World War and the fear was that the cessation of war production and the release of military personnel would similarly cause economic contraction. By 1943-44, the Department of Finance and the Bank of Canada, now increasingly influenced by Keynesian economic theory, turned their minds to recovery. Their solution was similar – creation of demand either by direct government spending (infrastructure investments figured large in that) or by increasing consumer spending power. While the family allowance program is generally remembered as a pure social welfare measure, it is less well-known that the Department of Finance viewed it more as a means of stimulating demand and supporting wage and price controls.

The end of the war also enabled reductions in taxes and elimination of borrowing as federal spending rapidly decreased. The end of pandemic spending will reduce deficits but is unlikely to leave room for tax cuts and projected economic growth will not be sufficient to generate the decade of budgetary surpluses that followed the end of the war. Indeed, the pressure for increased social spending may require increased taxation. That, in turn, will raise issues of both efficiency and equity. The strain on government finance will be offset to some extent by extraordinarily low interest rates, in some respects a mixed blessing.

In an interesting parallel with today's situation, reform or expansion of social welfare measures played a major role in federal government thinking in the latter part of the war. In late 1939, Ian Mackenzie, newly demoted from the defence portfolio to pensions, began to create what became the most generous package of veterans benefits among the Allies. He then moved to create the James Committee to consider a wider program of social welfare measures. The committee in turn commissioned Leonard Marsh to produce his now well-known blueprint for a Canadian welfare state. War tends to produce social and political dislocation and by 1943 increasing success in the collective war effort produced expectations for a future brighter than the 1930s and demands for social change. The King government, concerned for its political

survival, committed itself to putting to the provinces a program which would both serve welfare ends and stimulate the economy. It was presented in an extended federal-provincial conference which ran intermittently for 9 months in 1945-46 and included the continuation of the wartime tax-sharing agreements, effectively giving the federal government dominance in the principal tax fields. In addition to family allowances, it proposed an enhanced national pension scheme and a form of universal medical care. In the face of federal over-reaching and unyielding opposition from Ontario and Quebec, the conference ended in failure and only family allowances among the federal policy proposals were immediately instituted.

The current crisis has produced demands in at least two social policy areas. The shortcomings of employment insurance have been highlighted by the massive and near universal short term income support policies devised in March and April of 2020 and have given new life to proposals for a guaranteed annual income. The shocking outbreaks of disease and death in homes for the elderly will also result in demands for major reform. Some critics have also suggested other changes to the healthcare system, including some form of pharmacare. As in 1945, these issues involve areas of provincial constitutional jurisdiction and, without doubt, would produce dispute about funding and federal trenching on provincial rights. The uneven financial impact of the crisis on the provinces (Newfoundland and Labrador facing possible bankruptcy) echoes the devastating effect of the Depression on the prairie provinces. Federal-provincial financial relations are never far from the surface in the Canadian political arena and the pandemic could well bring them to the fore again. In 1945, resistance to federal initiatives was led by Ontario; in 2020, Quebec and Alberta are more than ready to assume that role.

In the months to come, we might do well to reflect on how we faced the crisis of 1940. There are lessons to be learned but also comfort to be taken.

LAW SCHOOL ASSESSMENT REVISITED

Gemma Smyth¹

In response to Covid-19, law faculties across North America quickly moved their curriculum online and attempted to assess performance in one of the most stressful moments in many students' lives. Clearly, pedagogy was not top of mind for most, yet instructors tried to maintain coherence and integrity alongside compassion. Universities across North America adopted a range of grading methodologies. Some retained numerical grades, some moved to a pass/no pass (pass/fail) model, and others adopted a mix of approaches. Ostensibly the move to a pass/no pass system was meant to ease burdens on law students and instructors alike. For some schools, this (theoretically) less stressful approach was meant to increase equitable outcomes, avoid the inevitable connotations that would differentiate pass/no pass from grades, and allow for flexibility on the part of both students and professors. In practice, the change to a pass/ no pass system generated fascinating reactions from students, the profession and instructors, surfacing long-standing assumptions about the role of grades in legal education. Pass/no pass was interpreted and experienced wildly differently from student to student and from instructor to instructor. It has raised issues that go to the heart of why and what we assess in legal education as well as thorny questions of outcomes, competencies, and the role of law firms in determining law school pedagogy. While the consequences of this change will play out over the next several years, this short commentary offers reflections on the "no numerical grades" experiment and the more existential questions that have followed. What is the current function of grades? Whose interests do they serve? Do they function as proxies for more meaningful assessment? What would holistic assessment practices look like? And what other possibilities exist?

Although it was challenging to quickly abandon numerical grades, pass/no pass models are not new or particularly unique. Clinical and experiential programs in law schools and elsewhere often (although not always) use pass/no pass models of assessment. Many professional schools have long adopted pass/fail modes of assessment including dentistry and medicine

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either in part or in full. For most law schools, however, the pass/no pass model remains a significant departure from the traditional law school assessment model, which – again, with the exception of many clinical and some experiential programs - relies heavily on numerical grades (100% or 4.0) to assess students. In practice – and based only on experience rather than quantitative data – the pass/no pass system was imperfect. Students and instructors alike struggled to use online teaching and assessment methods, internet access was spotty, students' personal lives were upended, and their financial wellbeing impacted. Yet we also know that other students have types of privilege that shielded them from some or all of these impacts.

For many instructors, pass/fail assessment eased the micro-divisions required under a numerical grading system. However, it increased the importance of meaningful, constructive feedback. Indeed, instructors were forced to quickly pivot from existing rubrics that relied on graded performance to pass/fail, often absent support to meaningfully understand what it means to “pass”. For some, it refocused the importance of learning outcomes. For some, it felt arbitrary. This move also raised many unknowns for instructors and students alike. How will this impact students applying to graduate school? How can an instructor simultaneously avoid a “race to the bottom”, support students under tremendous pressure, and give meaningful feedback – particularly given the huge range of students' realities?

For some students, a move to pass/no pass was interpreted as being able to perform at “50%” – which became quite difficult to predict in practice, especially given that students are typically graded against one another. Others interpreted a “pass” as requiring significantly more work than they otherwise would have committed, perhaps again because a “pass” standard was – in some cases – opaque. In the struggle for the more intangible ways of showcasing their work, some students sought to distinguish themselves. Interpretations for this behaviour range significantly based on the student's standpoint. For example, students may be facing additional barriers based on social markers. Some might have less tacit knowledge about the legal community and fewer personal and professional connections (for example, students who are “first in the family”). The commonality amongst these is, of course, the pressure to secure an articling position which students believe (and evidence confirms) relies heavily on grades as a primary way to identify students of

interest. Absent grades, the potential for murkier criteria such as references, last names, and other status markers to influence hiring loom much larger.

As many others have noted, grades – perhaps particularly in the law school context – serve many purposes. Incentive theory would argue that grades offer competitive incentive to succeed based on carefully considered learning outcomes, especially for extrinsically motivated students. Others might argue that grades feed into hierarchy and competitiveness based on ill-considered outcomes and outdated assessment practices (most typically, 100% exams – incidentally, still sometimes used as a method to determine bar passage).

Absent very few exceptions, grades have dominated the market's assessment of student competence, at least in the preliminary stages. As such, this moment might be an opportune time to engage in deeper questions about what role grades really play in our collective understanding of student success and what new hiring practices might be adopted by the market. Might this be a moment for law schools and the legal profession to reimagine our understandings of good teaching, learning and practice? One model gaining steam over the past several decades is competency-based assessment. Similar to the many other professions that have adopted a competency-based model, the relevant actors can co-create understandings of the knowledge, attitudes and behaviours that denote excellence in their field. And this is, perhaps, what is particularly thorny in law, a field that has long struggled with its many identities - preparing students for practice, "thinking like a lawyer", inculcating critical perspectives in and on law, engaging in public advocacy, and acting as schools of philosophy and jurisprudence, among others. While there is healthy tension between these and other roles, these tensions are not understood by the vast majority of students nor, indeed, the profession. Seeking clarity without sacrificing independence is, I hope, one purpose of better understanding competency-based assessment.

What is competency-based assessment? There is no single definition or set of established practices. Indeed, its lack of definition gave rise to articles such as "Competency based education: A bandwagon in search of a definition" (Spady, 1977). It also tends to be polarising, much like the abovementioned, long-standing debates in legal education between

theory and practice. While this short piece does not aim to definitively settle the matter, a summary of key competency based education (CBE) concepts most likely includes: a shared understanding of what students should be able to know, do and value by the time they graduate and at what level. It can help more coherently structure how students learn as they progress through their education and support them more effectively in understanding the purpose of various tasks. Other aspects might include focusing on student capability and need rather than a time-based understanding of learning (for example, eschewing “3-hour classes”, “3-year degrees”, etc. in favour of student-centred and criterion-referenced timelines). It might go some way in reducing competition between students that is the antithesis of healthy learning environments. CBE might also more clearly denote purpose to external actors who are often pejorative about legal education, and whose views often reflect a view of legal education more than a century out of date.

Significant and valid concerns are often raised that competency-based assessment focuses on rote skills and is subject to market capture, thereby supporting a neoliberal agenda that leads to further bureaucratisation and scrutiny of higher education for profitability rather than learning. This will indeed occur (and is occurring) absent law schools defining competencies for themselves. Critics might also consider the hard realities of market capture in legal education as it stands. Current understanding of the hiring process for articling (the apprenticeship process required in Canada as part of licensure, which therefore acts as a requirement (sometimes barrier) to entry) is based on a set of inferences often made based on such things as: the school from which a student graduates, the professors from whom a student learned, the names of students’ references, the volunteer and co-curricular activities undertaken by the student, the student’s name and (presumed) various social markers, and – of course – grades.

This is not a uniquely Canadian problem. The mismatch between the competencies employers claim to value and the ones they actually hire for was well documented in the “Foundations for Practice” (Institute for the Advancement of the American Legal System) study. While employers – or possible employers – clearly claimed to value skills embodying what they called “the whole lawyer”, they also note, “[w]e know that legal employers tend to hire on traditional criteria-law school attended, class rank, and law review- that may tell them much about the intelligence of the job

candidate but very little about the character quotient of the lawyer or about the whole lawyer” (online: <https://iaals.du.edu/publications/foundations-practice-whole-lawyer-and-character-quotient#tab=putting-foundations-for-practice-into-practice>). Students are therefore left with dizzying uncertainty about which courses to take (“bar courses”?; courses preferred by certain firms?; courses with a certain professor?; courses for the love of learning?), how to secure references, what to highlight in a cover letter, whether to whitewash their resume, wear a wedding ring, rack up debt for a fancy suit, and so on. While clearly competency-based assessment cannot solve inequality, it can go a long way in clarifying expectations and – hopefully – reducing the opacity that dominates student understandings of excellence in law.

If – as I argue – it is time for law schools to examine the possibility of competency-based assessment, what are the implications? First, I want to be clear that law schools should be setting competencies based on their own specific values and priorities. The Federation of Law Societies of Canada has already embarked on a path toward competency-based assessment in the NCA process (online: <https://flsc.ca/wp-content/uploads/2018/01/National-Requirement-Jan-2018-FIN.pdf>) and, one would assume, are interested in a similar approach in Canadian common law degree granting institutions. Similar to most regulator-mediated relationships, the Federation and Canadian law schools have not often seen eye-to-eye. It is obviously tempting, but likely unprofitable, to ask for collaborative decision making between these bodies absent more foundational discussions. Useful conversations might also be had about the role of competencies and various understandings of academic freedom.

In sum, this moment of uncertainty has offered a less-than-ideal experiment in pass/no pass grading models. It offers law schools an opportunity to think about the content, form and purpose of learning. I propose CBE – or parts of CBE – as one method to rethink legal education, one that might eventually be imposed absent an alternative. Can CBE be framed in mechanistically and restrictively? Of course. Can it be holistic, aspirational, and socially responsive? I think that, properly implemented, it can.

HOW NOT TO THINK IN AN EMERGENCY

Jason MacLean¹

« On dirait que l'épreuve épidémique dissout partout l'activité intrinsèque de la Raison... »

Alain Badiou, *Sur la situation épidémique* (Paris : Éditions Gallimard, 2020)

"Thinking and emergency action are deeply compatible."

Elaine Scarry, in David. V. Johnson, "Thinking in an Emergency: An Interview with Elaine Scarry" (13 July 2011), *Boston Review*, online: <<http://bostonreview.net/elaine-scarry-thinking-in-an-emergency>>.

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In February 2019, I attended the Harry Crowe Conference on Academic Freedom in Toronto. I was there on behalf of the faculty association that I represented at the time. It was a doubly dissonant experience. Surrounded by dedicated faculty association representatives from all over Canada, it was tempting to imagine that all was well in academe; it could hardly be otherwise, if these conference participants were at all representative. Yet each successive presentation painted a more alarming picture of academic governance than the last.

Peter McInnis, a labour historian at St. Francis Xavier University (SFXU) and Vice-President of the Canadian Association of University Teachers (CAUT) executive, delivered the conference's concluding remarks. I was particularly keen to hear what Professor McInnis would say. Professor McInnis taught at SFXU, where as an undergraduate I fell in love with anthropology and statistics and paleoecology and the study of Canadian colonialism and genetic algorithms and about twelve other subjects. But I had another, more pragmatic interest in Professor McInnis's closing thoughts. As this otherwise stimulating conference drew to a close, its

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whole remained less than the sum of its parts. Could Professor McInnis tie it all together?

Strike!

Successful faculty associations, like all successful unions throughout Canadian labour history, must be prepared to strike, Professor McInnis explained.

Academic freedom, he continued, isn't just an idea. Academic freedom is a way of being alive as a scholar and teacher.

Collegial governance, Professor McInnis concluded, must be *practiced*, not merely preached.

It had all come together, and I'd understood, I thought, something transformative. As it happens, I didn't understand, not really.

But I do now (I think).

* * *

Nearing the end of March 2020, law faculties across Canada muddled through the process of transitioning and finishing up our courses online before turning our minds to the question, especially fraught in faculties of law during even the best of times, of how to grade our students, only this time during a global pandemic.

Only two months removed, I recollect the experience at the law faculty where I taught at the time as being frenzied, almost hysterical, and at the same time hollowed out, not only literally but also intellectually, ethically, culturally. It was an exceptional time, an emergency. We were all trying to do our best. But it was hard to think.

Our Dean appeared oddly preoccupied with the prospect of student protest; I say "oddly" only because, despite his preoccupation, the thought of consulting our students appears not to have occurred. Instead he presented faculty members with a choice ostensibly out of nowhere – a kind of *sui generis* Overton window – among three options: (1) the status quo ante; (2) universal Pass/Fail; or (3) a "hybrid" of the first two options,

what one of my first-year law students would later call the “worst of all worlds.”

The Dean exhorted faculty members to contact him individually – “please don’t reply-all” – to express our preferences. There was almost no support for the status quo ante, the Dean reported back. Neither was there unanimous support for a universal Pass/Fail approach. We would accordingly proceed with some version of the “hybrid” approach, he decided. No one thought to question whether the “hybrid” model attracted more or less support than universal Pass/Fail had. It was an emergency, and it was hard to think.

Up until that point, the grading question hadn’t really captured my complete attention. Pedagogically, I was preoccupied with completing my course and capping off my students’ learning experience. But the “hybrid” approach, no matter how exceptional our predicament, smacked of the worst kind of policy, the kind that issues, not from principle, but from the interest-group politics of appeasement. The “hybrid” approach was designed to offer something to everyone. My intuition was that it would please no one.

Moreover, I was concerned that the “hybrid” approach, whereby students would be able choose between receiving an alphanumeric grade or a Pass/Fail designation after completing and reflecting on each of their exams, risked eroding academic integrity, which as a Faculty we hadn’t yet abandoned, at least not expressly.

I decided to survey my students, who, after all, had the most to lose. I presented them with the three options that the Dean had presented to us – status quo ante, Pass/Fail for all, or some ex-post mix of the two – and invited them to reply with their preferences and their reasons. Among those who took me up on my offer (over 80% of my class of 64 students), a supermajority (68%) preferred Pass/Fail for all on both ex ante and ex post fairness grounds.

I shared this finding with my colleagues, including the Dean. No one responded.

Meanwhile, I was feeling increasingly uneasy about imposing a grading scheme on my students that lacked both fairness and integrity. I was also growing uneasy by how little discussion that we as a Faculty were having

about our options and our values. And I began to think – slowly, in fits and starts, uncertainly – that the decision about how to assess my students’ learning was ultimately my decision to make, as a matter of collegial comity and academic freedom.

To pursue this strangely shaky thought, I wrote a memo to my colleagues to express my concerns about the “hybrid” approach and the governance process by which it had been adopted, and I specifically asked the Dean to speak to his understanding of his administrative authority to impose a grading scheme on individual faculty members. My understanding of academic freedom, I explained, was that it extended to the assignment of grades as an integral part of teaching. I then cited the definition of academic freedom stipulated in our own institution’s Collective Agreement:

The common good of society depends upon freedom in the search for knowledge and in its exposition. Academic freedom in teaching, scholarship and research at the University is essential to society. Accordingly, all employees, whether tenured or not and regardless of prescribed doctrine, are entitled to the exercise of their rights as citizens and to freedom in carrying out research and in publishing its results, freedom of discussion, freedom to teach the subject assigned in classes, freedom to criticize the University and the Association without suffering censorship or discipline. Academic freedom does not require neutrality on the part of the individual, but makes commitment possible. Academic freedom carries with it the duty to use that freedom in a manner consistent with the scholarly obligation to base teaching and research on an honest search for knowledge.

This is a broad and robust definition of academic freedom. It does not specifically discuss grading, I allowed, but neither does it exclude grading, either directly or indirectly, the way it indirectly excludes from academic freedom the freedom to choose which classes we university teachers will teach.

I also shared the CAUT’s policy guidance specifically on the assignment of student grades:

Academic Freedom in the Assignment of Student Grades – CAUT Policy Statement

The assigning of student grades is an element of academic freedom, which includes the academic staff member's right to autonomy in establishing a pedagogical approach and assessment of student work.

An essential element of this academic freedom is that the academic staff member has the sole authority to assign student grades, keeping in mind the official grade appeal policies and procedures of the institution.

It is a violation of academic freedom for any administrative official unilaterally, arbitrarily, or outside of official procedures to influence, attempt to influence, or intervene in, the grading or evaluation of student performance by the academic staff assigned evaluation responsibility for a course or part of a course.

It is a violation of academic freedom to impose a mandatory grading policy which constrains or prohibits an instructor from issuing grades which he/she deems and can defend as reasonable.

* * *

There's a line near the very end of Giorgio Agamben's almost impossibly ingenious book *States of Exception* that I return to often when I'm trying to think about how to make space for transformation in our collective lives. Agamben says that true political action "severs the nexus between violence and law."

What Agamben means, I think, is that transformational action can only occur in those spaces where we insist upon thinking for ourselves, and where we give our own reasons in response to one another.

I try to think universities and faculties of law can continue to be such spaces.

I received three responses to my memo on academic freedom and the assignment of student grades, each from a senior faculty colleague.

First:

As we all know, academic freedom is never unlimited and with respect to grading, in particular, is constrained by university policies and college regulations. I had understood this to be a consensus decision rather than one that was being imposed, and would hope that all colleagues would respect it as such even if it is not what they personally would have chosen. If need be, though, I expect we can pass a motion adopting whatever arrangement is worked out.

Second (received three minutes later):

I agree entirely.

Third (received 12 minutes later):

I also agree.

No further discussion followed. Separately, however, another senior colleague responded to me directly:

I can tell that you feel strongly about this, Jason. We are all doing our best, under a fair amount of strain and with limited channels for communication, to make good choices for ourselves and the students. The Dean has been gently trying to move this towards common ground, and most faculty have settled on the hybrid approach as one they can live with. As we move forward, I see it as very important that we figure out how to come together as a college, in every way we can. I'm really hoping we can do that, even though there will be times we are each uncomfortable.

Difficult times, I replied, were "all the more reason to exercise our ability to think clearly, to demand transparent and compelling arguments and evidence, and to resist groupthink". I hoped we might now begin to think through these issues together.

Alas:

"There are a number of assumptions in your email, Jason - assumptions that I simply don't agree with. I'm guessing that pursuing this conversation isn't going to change your mind."

* * *

Describing her book *Thinking in an Emergency*, Elaine Scarry explained that she had devoted her career to studying the problems that arise when populations suspend their responsibility for self-governing actions. People are often seduced into giving up on collective action and mutual aid by declarations of emergency – times are difficult, time is of the essence, there's no time to deliberate, there's no time to think.

As I concluded this essay in early June 2020, the university where I then worked remained closed "until further notice."

The same might be said of our collegium.

Reflecting on Professor McInnis's powerful remarks on the practice of collegial governance, his point, I think, was altogether subtler, and more radical, than I'd originally understood. The suspension – and the silencing – of academic freedom can be entirely self-imposed.

All it takes is an emergency.

L'APRÈS COVID-19: DES PRÉMISSSES À RECONSIDÉRER EN DROIT DES SOCIÉTÉS ET DE LA GOUVERNANCE

Ivan Tchotourian¹

La pandémie de Covid-19 qui sévit sur la planète et à laquelle le Canada a été confronté à partir de mars 2020 amène à renouveler en profondeur la réflexion sur le droit des sociétés et la gouvernance de l'entreprise. Crise sanitaire devenue protéiforme (économique, financière, sociale, politique), elle place l'entreprise au cœur d'une relance durable... une entreprise qui se doit de devenir progressiste. Cette entreprise, dont le droit doit accélérer la transformation, présente les traits caractéristiques suivants :

1. elle repose sur une structure juridique innovante;
2. elle est définie de manière différente;
3. elle est juridiquement reconnue;
4. elle est gérée avec une préoccupation de l'Autre;
5. elle assume une responsabilité sociétale.

1. Une entreprise qui s'appuie sur un modèle innovant

La sortie de la tempête économique causée par la COVID-19 ne se fera qu'au prix d'entreprises qui vont reconstruire leur gouvernance, redéfinir leurs objectifs et repenser leurs relations avec leurs parties prenantes. Pour ce faire, le droit doit proposer une nouvelle structure de déploiement de l'activité économique. Depuis longtemps, les grandes entreprises dominent l'activité économique. Construite d'abord autour d'une logique de réunion de capitaux en vue de poursuivre un objectif économique, la société commerciale s'est imposée comme modèle d'affaires; le droit lui apportant la consécration au XVIII^e siècle. Mais, les entreprises se sont progressivement financiarisées et déshumanisées pour devenir d'authentiques actifs. Elles ont par la même occasion

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organisé une lucrativité outrancière en faisant supporter aux tiers leurs externalités – quelle qu'en soit la nature : environnementale, sociale, fiscale... Des stratégies sont venues soutenir cette financiarisation. Alors que la responsabilité sociétale et l'éthique renvoient à la responsabilité élargie des entreprises, cette responsabilité fait cohabiter deux objectifs en apparence contradictoires : être rentable et être responsable. C'est dans cette perspective que s'inscrit l'entreprise à mission sociétale. Prenant la forme d'une société par actions, cette entreprise est construite pour allier rendement financier et mission sociétale. Rappelant l'institution sociale porteuse d'espoir qu'ont pu être les sociétés commerciales, l'entreprise à mission sociétale offre une structure adéquate qui doit être davantage promue par le droit (notamment canadien), seul à même de transcrire les valeurs d'une communauté et de défendre la justice sociale.

2. Une entreprise qui rompt avec la lecture économique dominante

La gouvernance de l'entreprise a été bâtie sur plusieurs théories d'essence économique. Jusqu'au milieu des années 70, la théorie micro-économique a été dominée par la théorie de l'équilibre général assimilant toute organisation à une « boîte noire ». Puis, les théories contractualistes, dont la théorie du réseau de contrats (« *nexus of contracts* ») et la théorie de l'agence (« *agency theory* »), ont servi d'assise scientifique aux règles structurant la gouvernance de l'entreprise qui ont été érigées en *dogma*. Ces théories ont analysé les conflits d'intérêts entre les acteurs économiques d'une organisation, les coûts qui y étaient associés et les mécanismes de contrôle de tels conflits. L'analyse contractuelle qui en résulte, en plus de nier le concept de personnalité morale en légitimant la propriété des actionnaires, a placé ces derniers au centre des décisions et des choix de l'entreprise. Les dictatures du court terme et du dividende ont été alors légitimées au prix de l'apparition de nouvelles pratiques managériales, tels les licenciements boursiers. La valeur de l'entreprise a été assimilée à la valeur actionnariale et le droit a fourni l'armature institutionnelle. Mais, la COVID-19 rebat les cartes de cette perception restreinte de la gouvernance de l'entreprise centrée sur l'actionnaire, héritage des propos de Milton Friedman exprimés dans le *New York Times*. La volonté de sortir de la pandémie de coronavirus fait émerger une volonté de réinventer certains présupposés économiques. La voix des juristes doit se faire entendre sur ce sujet et aussi sur ce

qu'est l'entreprise et sur ce qu'implique une personnalité morale. Le manifeste de Davos et la *Business Roundtable* y contribuent en redéfinissant la relation de l'entreprise avec ses parties prenantes.

3. Une entreprise qui n'est plus « hors-la-loi »

Les problèmes contemporains les plus graves (pollution, crise climatique, violation des droits de l'Homme...) ont le plus souvent lieu dans le cadre de groupes de sociétés, c'est-à-dire les entreprises « multinationales » ou « transnationales ». Les groupes sont en effet souvent utilisés pour contourner la responsabilité qui devrait découler de leurs activités économiques si elles étaient menées par une seule et unique société commerciale. Les stratégies fiscales des GAFAM (*Google, Apple, Facebook, Amazon, Microsoft*) illustrent cette instrumentalisation des structures sociétaires. L'utilisation stratégique des groupes fait obstacle à l'identification et à la sanction des véritables responsables des activités économiques. En dépit d'une définition du groupe par les lois en société par actions, le droit ne régit pas la gouvernance des groupes ni la responsabilité de ces structures pour se concentrer sur chacune des sociétés commerciales composant lesdits groupes. Cette irresponsabilité est d'autant plus problématique que les groupes disposent d'un pouvoir considérable proche, voire parfois supérieur, à celui des États. Plus de la moitié des 100 plus grandes puissances économiques sont des entreprises privées (et donc des groupes). Les 500 plus grandes multinationales ont contrôlé 52,8 % de toutes les richesses produites sur la planète en 2009. Si les solutions à apporter ne sont pas aisées, la COVID-19 doit amener le droit à améliorer sa compréhension de la dynamique des groupes afin de contribuer à leur responsabilisation et réconcilier *ad fine* pouvoir et responsabilité. Le droit doit faire obstacle aux stratégies d'instrumentalisation des groupes de sociétés. Ce sont les doctrines américaines de l'entité (« *entity theory* ») et européennes de l'entreprise qui sont réactivées et montrent toute leur utilité. Les groupes constituent une unité économique formée par une combinaison de sociétés commerciales et dotée d'une animation commune sous l'impulsion de la société du groupe détenant le pouvoir : la société tête de groupe (ou société mère). Si le devoir de vigilance a été récemment consacré comme source possible de responsabilité extracontractuelle (le dépassement de la personnalité morale se révélant trop complexe à prouver), ce devoir manque encore de mordant et sa construction est loin d'être achevée. En droite ligne, la pertinence des mécanismes alternatifs

de règlement des différends (Point de contact national ou Ombudsman) ou, encore, l'accessibilité difficile des victimes à la justice doivent être débattues.

4. Une entreprise qui est animée par une gouvernance de l'Autre

Avec la COVID-19, le conseil d'administration (CA) fait face à un défi de taille qui requiert que ses membres se posent les bonnes questions. Longtemps simple organe de prestige à la fonction symbolique, le CA occupe depuis une vingtaine d'années un rôle central dans la gouvernance et, conséquemment, dans la sortie de crise qui se dessine. Placés devant des risques démultipliés, les CA deviennent les dépositaires d'une entreprise orientée vers des objectifs plus larges que la satisfaction de l'intérêt des apporteurs de capitaux. Sujet longtemps dans l'ombre, la rémunération des hauts dirigeants est aujourd'hui dans la lumière et son fondement de l'alignement d'intérêts entre dirigeants et actionnaires de plus en plus contesté, encore plus depuis que la COVID-19 a créé de profondes inégalités. Devoir de loyauté et devoir de prudence et de diligence sont des outils à leur disposition pour définir de larges objectifs, à condition d'être interprétés de manière originale. Pourquoi ne pas consacrer un nouveau devoir pour relayer ces larges objectifs comme le préconisent certains auteurs : un devoir de responsabilité sociétale ? De leur côté, les actionnaires sont revenus sur le devant de la scène et le droit leur a octroyé de plus en plus de prérogatives au point d'avoir le pouvoir de mettre en péril leurs propres entreprises, sans que leurs devoirs aient cependant fait l'objet d'une attention identique. L'incompréhension entourant leur irresponsabilité est aggravée par le fait que les actionnaires ont changé de visage, loin de l'image de petits porteurs qu'ils ont longtemps eue. Ils ont aujourd'hui des moyens pour peser de tout leur poids sur les entreprises et pourraient offrir une voix à l'entreprise de demain, à condition que leurs devoirs fiduciaires ne se limitent pas au strict intérêt financier des bénéficiaires. Longtemps concentrée sur la seule relation entre dirigeants et actionnaires, la gouvernance doit faire place à bien d'autres relations et acteurs. Salariés, retraités, fournisseurs, professionnels des chiffres, gouvernement, environnement sont apparus comme des acteurs devant être pris en compte. La COVID-19 place les salariés et les retraités dans une situation vulnérable et les CA ne semblent plus pouvoir les exclure de leurs réflexions sur la bonne gouvernance de leurs entreprises. L'objectif et la raison d'être (le « *purpose* » qui prend tant de place dans les travaux

universitaires) des entreprises occupent d'ailleurs une place inégalée dans l'histoire du droit des sociétés. Si des modèles de gouvernance alternatifs ont été développés par le passé, ils trouvent le moyen de s'épanouir avec la pandémie de coronavirus. Pourtant, du chemin reste encore à parcourir : l'acceptation d'une vision ouverte de l'intérêt social ou la reconnaissance de recours judiciaires au profit des parties prenantes.

5. Une entreprise qui porte un destin public

Si les entreprises ont pris des engagements de longue date en matière de responsabilité sociétale (RSE), il y a toujours des doutes sur leur sincérité. La société commerciale traditionnelle – qui prend la forme juridique d'une société par actions – semble vouée dans l'imaginaire collectif à faire du profit (elle a été inventée en partie pour cette raison) et une grande méfiance l'entoure quand elle prône un autre objectif. Elle est souvent perçue comme opportuniste recherchant un gain financier au travers une démarche sans profondeur ou réel investissement. La RSE est vue comme un moyen pour une fin : la rentabilité. La société commerciale nourrit d'ailleurs cette méfiance quand elle délocalise à l'étranger, n'hésite pas à polluer, ne respecte pas les droits des communautés locales à l'étranger, corrompt pour arriver à ses fins, méprise l'État et la démocratie, joue avec les règles juridiques et les limites inhérentes à leur territorialité, ou encore sacrifie ses retraités. Dans ces situations, les parties prenantes subissent une injustice qui est paradoxale dans la mesure où tout est souvent parfaitement légal. L'entreprise elle-même se sent schizophrène ayant toutes les peines à concilier ses responsabilités économique, juridique, sociale et morale. Avec la COVID-19, il est attendu des entreprises qu'elles assument enfin leur destin public (vis-à-vis de leurs salariés, de leurs fournisseurs, de leurs clients, de la communauté) et pas seulement économique. Dans le contexte de crise sanitaire, les entreprises peuvent être porteuses de valeurs sociétales, en rupture avec le libéralisme sans cesse accru et un recul de l'État qu'elles ont prônés. Les entreprises doivent comprendre que la RSE n'est ni une contrainte ni un coût... elle est une rencontre à ne pas manquer. Le droit doit être en relais et apporter sa pierre à l'édifice du changement. Dans ce cadre, les avancées dans le domaine de la transparence non financière démontrent une volonté de sortir du schéma de pensée réduisant les conséquences des activités des entreprises aux données chiffrées. De même, les États et les organisations internationales commencent à saisir l'importance de s'intéresser au financement des entreprises pour asseoir la pérennité

d'une finance sociale qui ne demande qu'à croître. Dans le contexte de la COVID-19, l'encadrement des politiques de placement, la création de taxonomies pour les investissements durables, ou l'engagement sont autant de pistes à explorer pour les juristes.

La COVID-19 permet la remise en cause de multiples fondamentaux du droit des sociétés et de la gouvernance d'entreprise. Cette remise en cause est plus que nécessaire sous peine de bloquer l'émergence d'un capitalisme de parties prenantes qui seul assurera la préservation et la résilience à long terme des sociétés commerciales et leur ancrage dans la société.

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ROSE/ROSE: **RESILIENCE/RESEARCH;** **RÉSILIENCE/RECHERCHE**



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STOICISM AND PROFESSIONAL RESPONSIBILITY IN A PANDEMIC

Annalise Acorn¹

Every year I do a section on procrastination in my Professional Responsibility class. Procrastination, like (and often in combination with), stress, anxiety, depression and substance abuse can be a springboard for lawyer misconduct. I have the students read Neil Fiore who claims that procrastination is a mechanism for coping with anxiety about self-worth. Much of the time, the reason people avoid beginning or completing a task is that they fear their performance will be disappointing, that the imperfectly done thing will reveal all flaws and shortcomings. Procrastination is not always task aversion. Rather, it's the impulse to leave our ideas in the inchoate realm of an imaginary future so that we never have to confront the artifacts of our limitations. The claim is that if you stop letting your performance determine your self-worth you will be able to jump into the tasks more freely and effectively. You'll get the inevitably imperfect job done -perhaps even done well.

The topic came around a few weeks after we'd gone remote. I had been taking a "business as usual" approach to seminars online. The form had to be altered for extraordinary times, but why alter the content? In the first half of the class we had a panel on developing competences representing Indigenous clients. Even though a number of the Indigenous lawyers joining us were coping with the many legal problems facing Indigenous communities as a result of the pandemic, they were able to pop into the Google meeting at their convenience, and give us the benefit of their insights on cultural sensitivity and Indigenous clients' needs, and pop out again. This would not have been possible without remote delivery.

Next we were onto procrastination. I had not yet figured out how to prevent my slides from taking up the whole of the screen. So I couldn't see anyone's faces. Nor could they see mine. I put up some questions for discussion:

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1. How do the “victim role” and “I have to” messages contribute to procrastination? How can one turn this around?
2. How does Fiore think the ideas of freedom, responsibility and choice are helpful in overcoming procrastination? Do you agree with him?

The argument I wanted the students to engage with was this: to avoid procrastination it helps to take responsibility. If you have a paper assignment in PR, for example, and you don't want to do it, you have a choice to make. That choice has consequences but law school is not compulsory. There are plenty of other worthwhile things to do. Do you choose to do the paper or not? Make a decision but don't drag yourself into the task with a begrudging sense of “I have to.”

It's always difficult to interpret my students' silence; more so when I can't see them. But this silence felt like skepticism mixed with anger. And I was beginning to realize I had led them down a road more perilous than I had anticipated. And I didn't have the agility to do anything besides, in an even more than usually over-hearty way, trying to encourage them to share their thoughts. Not having the presence of mind to shift back from the slide to the webcam, I couldn't even try on-screen pleading eyes and hopeful smile. A few voices questioned the assumption of autonomy. Then in the comments came this,

“I don't want to apply for EI this week. I don't choose to apply for EI this week. I have to.”

Oh dear! How could I begin to imagine all difficulties students must be facing; financial difficulties, child and elder care demands, having to leave their residences, being suddenly deprived of many of their support systems? Choice? Autonomy? Maybe not. What was more, the power and privilege gap between students and me had never seemed like such a chasm before. What could I do or say to acknowledge this student *having* to apply for EI? I might have said something helpful, but I didn't. Was it something about the chat box that made responding seem optional to me? I don't know. But I ignored the student's truth, shifted out of “present” mode, into “gallery view” and doubled down on the chirping:

“OK, so let's take a look now at Fiore's ‘worry worksheet’ which gives us some tools for dealing with the kind of anxiety that sometimes makes it

so hard to move forward with a task. Here are some questions we can ask ourselves when we find ourselves paralyzed.”

- 1.What is the worst that could happen? And if that happened, what would happen then?
- 2.What would I do if the worst really happened? How would I take care of myself? How would I make the best of things?
- 3.What can I do now to lessen the probability that the worst will happen?

More silence! Now I was really panicking. The worst that could happen? Why ask anybody to descend the spiral of worst-case scenarios now? I was used to the good old days when the worst cases consisted of things like failing a course, flunking out of law school, having a panic attack, fainting during a moot, disappointing your parents. For these sorts of risks who could not benefit from creating a “Personal Safety Guarantee”? This was part B of the exercise where students were then to plan how to recover from the imagined worst, how to cope and remain connected with their own values and sense of self.

As I struggled to make human-to-human contact, experiencing the disorientation of ersatz eye contact, I had a rush of imaginings of the future they might be envisioning. Of course, we had pivoted now from what’s the worst that could happen as regards your PR paper, or the file you’re working on, to a global kind of worst-case of a pandemic. I felt unable to make space for the depth of the discussion I had initiated. More silence from the students. More chirping and stammering from me. Why hadn’t I thought this through!? How could I drop the ridiculous pose of authority I had struck about the manageability of their futures and offer some real compassion for their situation?

Eventually, of course, time ran out. As soon as I “left the meeting” I tried to think about damage control. I fired off an email to the class.

Subject: And speaking of cultural insensitivity...

Dear All,

Please do **not** think about worst-case scenarios right now!!

It was an egregious player-error on my part to suggest that might help.

Culture is also relative to time and this is not the time to be writing out scenarios about the worst that can happen!

And yes, I also see that the assumption of choice sounds a bit entitled at the moment.

We are all digging in and hoping for the best.

Thank you all so much for showing up today and for your insights.

Very best wishes,

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No sooner than I hit "send," I saw I might have erred again, now missing the mark in the other direction. Stoicism, after all (and the exercise is a quintessentially stoical one) was never a philosophy for the comfortable. It was born in desperate times. The point of the exercise, after all, was to liberate the soul, foster equanimity and build resilience in the face of adversity. Having been wrong to recommend envisaging the worst case scenario, perhaps now I had been wrong to advise them against it. Maybe there was value, even in these terrifying times, in imagining the worst that could happen. Why had I again paid insufficient attention to the need to articulate all this?

I received only one response to that email.

Hello Professor Acorn,

As per last class, I didn't find the worksheet you gave us to be in poor taste at all. I hope students were able to see the difference between engaging in worst case scenario thinking during normal times and crisis times.

The exercise you gave us is one I've worked through over the years and I have found it very beneficial! I hope students were able to take the good out of it. I've found it has built my resilience to the events around me and even as we enter this time of uncertainty I find myself to be remarkably calm. Life timelines are altered, but things will work out! Even the "worst"

case scenario is not that bad, and we can always choose to move forward. The power of choice is real!

I was grateful for his response. But what *was* the difference between engaging in this kind of exercise in crisis times as compared to normal times? The obvious difference is the nature of “the worst.” Now? Well, we could all die in horrible pain and isolation. The university could collapse.

Even the possibility of a degree could disappear. We could face unprecedented levels of unemployment, far worse than the great depression. Food supply chains could falter. There could be mass starvation. Worst-case scenario? The end of humanity as we know it.

Again, the goal of the exercise is to foster detached resilience; a willingness to embrace risk based on a provisional pessimism about possible outcomes combined with optimism about one’s capacity to cope. But maybe when the worst cases are catastrophic this brand of stoicism carries the seeds of a cosmic death wish. Of course, equanimity about death has always been a core tenet of stoicism. But so much death? Can facing *that* disastrous a possibility still have a liberating effect?

A few days later CBC aired an episode of *Ideas* entitled “Taking it Like a Stoic: coping in the time of coronavirus.” The guests recommended the same exercise calling it “negative visualization,” noting, “It might be imagining that members of your family or you yourself get coronavirus. It might be imagining that you have trouble accessing food. It might be that you’re isolated for maybe a year from your immediate family.” These were definitely not the worst I could think of. The benefits of the exercise were described as follows, “If it does happen you have mentally prepared yourself and if it doesn’t happen you appreciate the circumstances that are free from those terrible things.”

Yet surely as the worst cases become more extreme, the benefits of mental preparedness decrease. How, for example, would it help to be mentally prepared for, say, slow starvation? In the procrastination context, of course, there are other hoped-for benefits. The desire is that such negative visualization (about what could happen as a result of completing a task) will break down the anxieties giving way to enthusiastic engagement with the work. But when the fact of a pandemic compels us

to overlay onto that so many other catastrophic possible worsts what does *that* do to motivations and capacities for action?

I don't know. I continue to believe, however, that the pedagogy of professional responsibility should make space for discussions of anxiety; especially the anxiety associated with the development of professional voice and professional competence. Such conversations are always delicate. The vast store of information that comes with face to face discussion (body language and all the nuances of personal presence) are essential to effective facilitation of these communications. Even then, there is always a risk that academics, from a position of relative safety, can fail to appreciate the pressures and risks facing students trying to find work and steeling themselves for legal practice. Everyone is now more anxious. Everyone now has more to fear. There is more desperation. And it will be the lawyers, not the legal academics, who are likely to have to manage more of that fear and with higher stakes. As the need to arm our students with tools for recognizing and coping with anxiety becomes increasingly pressing, giving them those tools has also become more difficult partly because of the limitations of remote delivery (which may be our classroom reality for an indefinite future) and partly because our students may be increasingly (and rightly) skeptical about their instructor's ability to relate to the realities they are facing.

LES CHERCHEUSES ET CHERCHEURS DANS LA CITÉ EN TEMPS DE PANDÉMIE – LA COVID COMME RÉVÉLATEUR DU CARACTÈRE COLLECTIF DU TRAVAIL INTELLECTUEL ET SCIENTIFIQUE

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Il n'y a pas d'image plus emblématique de la solitude que celle de la chercheuse et du chercheur enfermés dans leur boîte crânienne. L'exil n'est-il pas la condition permanente de ces esprits inquiets, consumant leur longue journée devant l'ordinateur, la tête entre les mains. La pandémie entraînée par la Covid-19 permet de mettre en évidence le caractère suranné de cette image et fait tout à coup apparaître l'idée trop souvent oubliée que la recherche, inscrite dans le lien social, répond à une ambition collective.

Ainsi, il est étonnant que la concertation des chercheuses et chercheurs engagés dans la découverte d'un vaccin surprenne tout le monde, alors que cette coopération est un fait constant dans le domaine des sciences médicales. *A contrario*, même dans les disciplines les plus refermées sur elles-mêmes, et souvent fondées sur un idéal « médiéval » de la connaissance, la fermeture des bibliothèques a fait réaliser que l'esprit le plus universel a besoin de l'univers, ou du moins de *l'Univer-sité*, pour se perfectionner lui-même. Bref, on n'échappe pas au constant débat qui lie les chercheuses et chercheurs les uns aux autres et à la société. La vie intellectuelle est plus souvent qu'autrement le fruit d'un travail collectif comme le révèlent les origines mêmes de la pensée occidentale. Ainsi on n' imagine pas Socrate sans l'échange qui fait le dialogue. Et la forme théâtrale par laquelle la pensée philosophique a souvent dû transiter révèle que dès l'Antiquité, on saisissait la vacuité d'une pensée qui prétendait se déployer dans l'esprit d'un seul, sans jamais atterrir dans l'espace de la discussion publique.

Cet impératif est plus évident encore depuis la modernité où il ne suffit plus de traquer les signes semés dans *l'ordre des choses* par quelque divinité pour en retracer la signification, mais de s'interroger sur la

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mécanique du monde, d'en tirer un sens, sinon une histoire. Il s'agit encore là d'une aventure collective. Car l'action intellectuelle n'est possible qu'à certaines conditions. Comme le développement du langage ou de la culture, elle est un produit collectif. Sortir des savoirs établis exige de rompre avec la certitude ! Cette ambition n'a de sens qu'au sein de sociétés où cette quête est permise, sinon valorisée. Comprendre mieux le monde où nous vivons exige que nous multiplions les points de fuite par lesquels passeront nos questionnements et nos insatisfactions. On doit alors accepter de transpercer la voûte étoilée, pour voir ce qu'il y a derrière. Or cette possibilité n'a pas toujours existé. On comprend encore ici en quoi la recherche – et pour tout dire, le simple désir de comprendre – est une entreprise collective. Elle suppose notre consentement à être constamment déstabilisés.

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C'est encore plus vrai dans le domaine des sciences sociales. Car contrairement à ce qui a souvent été dit des sciences de la nature – où l'observateur et l'objet constituent des termes différents – les chercheuses et chercheurs des sciences sociales ne sont jamais complètement constructeurs du sens de ce qu'ils observent. C'est à la fois dû au fait qu'ils font entièrement partie du monde qu'ils observent, mais aussi parce que ce monde produit constamment son propre sens. Or c'est ce sens qu'il convient de restituer. Ainsi la fonction des sciences sociales n'est pas tant de donner un sens au monde que de restituer celui que le monde se construit continûment lui-même. Encore là, on saisit toute la dimension collective du savoir.

L'évolution des modalités de la recherche a rendu encore plus évidente cette réalité collective. La recherche est ainsi de moins en moins vécue comme une aventure personnelle et mobilise souvent d'importants réseaux de chercheuses et chercheurs. Elle nécessite le concours des autres membres de la société. Tôt ou tard, il est inévitable qu'elle dépasse les espaces où elle a été conduite pour devenir objet de débat au sein de la communauté de recherche, puis au sein des milieux sociaux qu'elle interpelle plus directement et avec le concours duquel elle a été menée, avant de devenir un objet de débat public au sein de la société. C'est cette constellation de liens sociaux que la pandémie a mis en évidence dans une multitude de formes et de dimensions.

La recherche, inscrite dans le lien social

Le développement des projets, la collecte des données, l'analyse, l'écriture, toutes les étapes de la recherche mobilisent et sollicitent un travail concerté et dynamique : une discussion, une émulation et un constant travail de co-construction par lequel émergent les connaissances et les interprétations. C'est le cas dans le cadre de projets conçus en équipe, mais c'est paradoxalement vrai aussi des projets menés seuls, alors que c'est dans l'échange avec la littérature que naissent les idées. Mais tout cela n'est jamais si clairement démontré que dans le contexte des échanges qui nous lient aux collègues, aux étudiantes et étudiants, aux partenaires, sinon aux alliés que nos projets mobilisent. C'est particulièrement le cas alors que se forment les questions, les collaborations, les interprétations.

Au-delà des liens que nous créons avec des collaboratrices et collaborateurs qui partagent avec nous la même ambition de savoir, la recherche nécessite également de tisser des liens de diverses natures avec la société dans laquelle les chercheuses et chercheurs évoluent : que ce soit avec les participantes et participants qui co-construisent avec nous les savoirs et les connaissances; les partenaires aux contributions variées; les groupes sociaux et professionnels qui bénéficient des fruits de la recherche; sinon la société dans son ensemble concernée par des enjeux collectifs qui lient ses membres et animent les débats d'idées. Il s'agit là de liens sans lesquels la recherche ne peut prendre forme, avoir un sens, exister, être utile et utilisée. La pertinence de la recherche dépend de son ancrage dans la cité.

En ces temps de Covid où les chercheuses et chercheurs ont été du jour au lendemain privés de ces liens sociaux, comment se porte la recherche ? D'aucuns pourraient affirmer que les réunions Zoom remplacent efficacement les réunions en personne. Or, en plus des aléas des connexions Internet, qui se multiplient avec le nombre de participantes et participants, la distance qu'impose le médium lui-même – notamment l'impossibilité de voir le détail du visage des personnes présentes, de capter les non-dits, de communiquer autrement qu'avec des mots – dépersonnalise les relations et les échanges. S'il est possible de partager son écran, de mettre en commun des documents, des logiciels, des bases de données, il n'est plus question de travailler *ensemble*, seulement de partager de l'information; au mieux de travailler en parallèle. Ce que Zoom ne peut en aucun cas remplacer, ce sont les rencontres et les discussions fortuites et informelles au détour d'un

couloir, d'une réunion, d'un café et même d'un apéro. Or c'est dans ces contextes où se mêlent différents niveaux d'échanges que les meilleures idées émergent, que les collaborations se tissent, que toute une partie du travail de recherche s'accomplit. L'enfermement des chercheuses et chercheurs est donc en ces temps de pandémie un fait bien réel : la technologie ne permet pas de remplacer les dynamiques interpersonnelles qui se tissent au fil des rencontres en face-à-face, qui permettent non seulement de travailler ensemble, mais surtout de se nourrir mutuellement. C'est en effet dans le lien social que naît la collégialité et la complicité essentielles au travail intellectuel.

Au-delà du déroulement des collaborations de recherche, la pandémie complique substantiellement les liens entre les chercheuses et chercheurs et leur communauté, et plus particulièrement avec les groupes sociaux les plus marginalisés qui sont déjà difficiles à rejoindre. Si des entrevues avec des professionnels peuvent être menées par *Zoom* ou au téléphone, c'est tout simplement impossible avec des personnes préoccupées par leur survie, isolées, détenues ou ne disposant pas d'Internet ou du téléphone, et ce tant pour des raisons pratiques qu'éthiques. Or différentes décisions politiques et sanitaires ont profondément bouleversé le quotidien de ces personnes, que l'on pense aux interdictions de visite des parents ayant un enfant pris en charge par la Direction de la protection de la jeunesse; l'isolement obligatoire sans décision judiciaire des personnes à risque de contracter la Covid; l'interdiction de sortie, même sur les balcons, des personnes hospitalisées en psychiatrie; l'isolement 23 heures par jour de tous les détenus de certains secteurs des prisons et pénitenciers; etc. Il faut de même reconnaître que les mesures de distanciation sociale rendent compliquées, voire impossibles, l'ethnographie ou les observations menées sur les lieux de gestion de la pandémie comme les refuges, les hôpitaux, les centres d'hébergement et de soins de longue durée, etc. Les partenaires de la recherche, pour plusieurs d'entre eux en gestion de crise, sont obligés d'adapter leurs méthodes de travail ou de composer avec des mises à pied. Les organismes communautaires, plus particulièrement, comptent sur des ressources limitées et sont débordés par les demandes de personnes fragilisées par la pandémie. Ils disposent d'encore moins de temps et de possibilités de poursuivre des collaborations ou d'allouer du temps à la recherche.

Ancrer la recherche dans la cité en temps de pandémie

La question qui se pose pour les chercheuses et chercheurs en ces temps de Covid est donc celle de la pertinence sociale de leurs recherches dans un contexte où les modalités du développement et du maintien des liens sociaux sont changeantes et instables.

Il apparaît en effet utile et urgent de documenter, du point de vue des sciences sociales, les effets des mesures d'exception mises en place pour faire face à la pandémie. Si on peut penser qu'il sera possible, lorsque ces mesures prendront fin, de mener des recherches auprès de certains segments de la population, il sera trop tard pour documenter la mise en pratique de ces mesures ou encore la réalité des groupes sociaux les plus affectés. Il va sans dire que ces mesures, malgré leur caractère général et universel, touchent plus particulièrement les personnes les plus démunies. De même, les recherches déjà en cours ne peuvent pas ignorer, au-delà des mesures d'exception, la transformation et le développement de nouvelles pratiques qui, dans certains cas, pourraient perdurer : audiences au téléphone et en visioconférence en matière de détention et d'internement, consultations médicales et psychologiques à distance, enseignement et apprentissage technopédagogiques à tous les niveaux de formation, etc.

En fragilisant des liens sociaux déjà instables et nécessitant un investissement sans cesse renouvelé, la Covid menace non seulement la capacité des chercheuses et chercheurs à achever des terrains de recherche en cours ou qui doivent être menés de manière urgente, mais également à maintenir le contact avec les organismes qui œuvrent au plus près des communautés; elle compromet l'ancrage de la recherche dans la cité.

Il faut donc se montrer imaginatifs et imaginatives pour maintenir les liens essentiels à la pertinence de la recherche, en prenant des nouvelles et en maintenant des contacts informels, mais aussi en acceptant de modifier des projets en cours pour s'adapter à des contingences pratiques, ou en imaginant de nouveaux projets pour répondre aux préoccupations des partenaires de la recherche. Dans ce contexte, explorer de nouvelles méthodes pourrait s'avérer non seulement nécessaire, mais d'un réel intérêt du point de vue scientifique et intellectuel.

La Covid nous rappelle que la recherche répond à une ambition collective et qu'elle ne peut avoir de sens qu'ancrée dans la cité, d'où l'importance de l'engagement dans des liens sociaux authentiques. À cet égard, bien que plusieurs rapportent leur incapacité à mener leurs activités de recherche dans ce contexte, l'après pandémie révélera la disposition et la capacité des chercheuses et chercheurs à réinventer ces liens. Ils et elles seront alors soit déconnectés (au seul sens véritable du terme, son sens social), soit en phase avec les besoins de recherche d'une société dont les codes sont bouleversés.

UNIVERSAL DESIGN IN LEGAL EDUCATION IN A TIME OF COVID-19

Anne Levesque¹

Introduction

When the University of Ottawa announced on March 13, 2020 that it would no longer be offering courses in person because of the COVID-19 outbreak, the Common Law Section of the Faculty of Law promptly struck an *ad hoc* committee of tech savvy professors (or in my case, an aspiring tech savvy professor) to support colleagues who were less familiar with online learning tools. From the outset, the committee was chiefly concerned with how the transition to distance learning would impact our students who already faced challenges in their studies. The members of the committee worried about students who would have to finish their classes with young children at home, about the unique and heightened barriers faced by those with learning disabilities, about those who experienced significant anxiety and those who did not have laptops, adequate workspaces for learning or fast internet connections because of their financial situation. With these students in mind, we swiftly developed what turned out to be a fairly comprehensive guide for our colleagues in French and English regarding various distance learning tools and strategies. When we reached out to professors to offer our assistance, even those who had always relied exclusively on conventional teaching and evaluation methods echoed our concerns. Later, when another committee was created to provide guidelines on final evaluations, it urged professors to offer students an alternative to three hour final exams. It was recognised by nearly everyone that this would be not be a fair or effective way to evaluate students in light of the circumstances. Just like that, universal design seemed to have become a common value shared by nearly everyone at the Faculty and I was absolutely overjoyed about it.

Part I - What is Universal Design

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Universal Design in Legal Education in a Time of COVID-19

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Universal design is a concept that originated in architecture that means “designing products and environments to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design”². It is inspired by the “social model” of disablement that advances the view that disability-related limitations or exclusions are caused not by biomedical conditions but by environmental, attitudinal, communication and organisational barriers related to disabilities and disabled people.³ In the context of education, universal design means considering “the differences between students and differences that characterize groups of individuals when making design choices to avoid creating barriers”⁴. It requires adapting one’s teaching, educational activities, assessments and evaluation methods to different learning styles, skills, abilities and circumstances. The approach aims to give every student a fair opportunity to succeed in his or her own unique way.

Most law classes before the pandemic did not adopt universal design. Lengthy class lectures with little student engagement have been shown to create barriers to learning for students with attention disorders, mental health issues and certain learning disabilities. In fact, these types of lectures are even ineffective for students without disabilities. Most detrimentally, high stakes three-hour written exams pose significant challenges for various students including those with children, those with mental health issues, and those with learning disabilities. All of this is confirmed by research. But we professors also know this to be true because we are inundated with requests for accommodation from students. Critical disability scholars who subscribe to the social model of disablement would contend that the significant number of students seeking accommodation in law schools says little about these students and more about the norms and standards to which they are being held. In fact, they would claim that this is a telltale sign of ableism.

Accommodation practices in law faculties are often touted as evidence that we take the removal of barriers to education seriously. This is not the case. Accommodation should always be viewed as a Plan B when it comes to equality and inclusion. Plan A is universal design. When the needs and

2 Ronald L. Mace, Graeme J. Hardie, Jaine P. Place, “Accessible Environments: Towards Universal Design” in W.E. Preiser, J.C. Vischer, and E.T. White, eds, “Design Intervention: Toward a More Humane Architecture,” (New York: Van Nostrand Reinhold, 1991) at 195.

3 Michael Oliver and Colin Barnes. *The New Politics of Disablement*. (Basingstoke: Palgrave Macmillan, 2004) at 22.

4 Ontario Human Rights Commission, “Guidelines on Accessible Education” (28 September 2004) at 12, online : Ontario Human Rights Commission http://www.ohrc.on.ca/sites/default/files/Guidelines%20on%20accessible%20education_2004_0.pdf12

circumstances of a variety of students are considered from the get-go, accommodation is often not required. In addition to being a more inclusive way of teaching and evaluating law students, universal design is also actually more reflective of the panoply of skills required to succeed in the smorgasbord of career paths available to jurists. Some of our graduates are in court every day and rely nearly exclusively on oral advocacy to advance their clients' interests. Others spend months, if not years combing through the minute details of international trades deals. For some, the work of a jurist is one of solitude, while others always work in large teams. As educators, we ought to strive to provide educational activities and evaluation methods that allow each student to discover what career path will be more suitable for them and showcase their personal strengths.

What baffles me the most is that conventional teaching and evaluation methods in law schools are not actually reflective of the requirements of our profession. They do not reflect how students will acquire and convey their knowledge once they become lawyers. Clients do not spontaneously walk into lawyers' offices, present them with complicated fact patterns and ask them to mechanically emit all of the possible legal causes of actions relating exclusively to solely one area of law. Even if this situation were to occur, it would be irresponsible for a lawyer to attempt to provide an answer in three hours based solely only on their existing knowledge without conducting further research or consulting other colleagues as required. Moreover, legal practice requires other important skills, such as problem-solving, listening, empathy, conflict resolution, negotiation, advocacy, which are not taught or examined in the traditional lecture/exam model of law school. This makes conventional teaching practices and evaluations methods that are known to adversely impact certain groups of students indefensible from a human rights perspective. Canadian human rights case law recognises that once a norm or standard is proven to have a disproportionate impact on a group protected in the legislation, it must be shown that it was established with a purpose that is rationally connected to a legitimate objective. When this is not the case, the norm or standard in question must be eliminated.⁵

Part II - Giving everyone an equal chance to succeed

⁵ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3, para 54.

I saw first-hand the devastating impact that widespread failure to adopt universal design in law school education can have on certain students. During my time working as the Director of the French-language Law Practice Program, I had the great privilege of crossing paths with over fifty individuals who had graduated from law school and who, for various reasons, did not or could not pursue the conventional path of articling. Many of them faced multiple barriers that prevented them from having an equal chance to excel in law school classes that adopted traditional teaching styles and with high stakes exams. One of them, who came to Canada as a refugee, studied law as a mature student while working night shifts at McDonald's in order to provide for his three children. Two of them were autistic. He explained to me that he often did not perform well during exams, particularly when they were scheduled in the morning when he would not have time to rest after finishing his shift. I sympathized with him. Though I did well on exams when I was in law school, I didn't have children at the time. Any law student with a toddler knows that they are just one midnight bed wetting away from being transformed into a headless zombie in the morning destined to drastically underperform in an exam.

Despite his variegated law school transcript, this individual did wonderfully in both the practice and training component of the Law Practice Program. He had a knack for explaining the law in an accessible manner. He was kind and compassionate with his coworkers and supervisors and was gifted at resolving interpersonal disputes. His ability to weigh strategic considerations and real word context when approaching a legal problem was masterful. He was just one of the many other very capable individuals who took part in the Law Practice Program whose true talents often went unseen in conventional law school classes. These individuals have gone on to work for government, in prestigious law firms, community legal clinics and non-for-profit organisations. I am incredibly proud to have played a small part in helping them to find their place in the legal community. Access to justice is better served and the legal profession is enriched because these individuals with diverse backgrounds, abilities, and life experiences are now lawyers.

As a human rights lawyer, inclusion and equality have always been values very close to my heart. They are also important to me because of my own lived experience. More than a decade after finishing law school, I learned I was dyslexic. I had always experienced challenges in reading and writing.

It was never about content but about form. While in university and in the workplace, I attributed my frequent typos and lack of attention to detail to my background. I am the first and only child in my family to finish high school, let alone go to university. I figured I made these errors because I simply did not have the same strong genetic predispositions as my classmates and colleagues who seemed naturally more skilled than me because their parents were mostly professionals.

I got tested in my late thirties. After telling me I had severe dyslexia, the person who had administered the test asked me what I did for a living. She laughed in disbelief when I told her I was a lawyer. After all, writing and reading is what we are paid to do. She was even more shocked when I told her I completed graduate studies at Oxford. Fortunately for me, such attitudinal barriers did not prevent me from achieving the goals I set out for myself because I did not know I was dyslexic. Perhaps if I had known all along that I was dyslexic, I would have believed the commonly held stereotype that people like me cannot become lawyers or academics. Yet, until now, I have rarely disclosed to others around me that I am dyslexic. It is telling that I would rather people perceive me as careless in my work than disabled.

Looking back, I now realise that I had universal designed my own career without even knowing it. I have always loved working in a team and I have intuitively gravitated toward collaborating with remarkably patient and meticulous lawyers who selflessly detect my frequent errors. I am particularly grateful for the generosity and compassion of members of the Caring Society legal team and staff.⁶ These individuals have supported me not because human rights legislation requires them to but because each member of the team is deeply respectful of the skill set that each member brings to the table. We share our work based on each team member's skills, interests, availability and other obligations such as child care. People with dyslexia are often creative and big picture thinkers. I like to think that these strengths helped me contribute to some of the original arguments we developed that were adopted by the Canadian Human Rights Tribunal in its historic decisions affirming the equality rights of First Nations children. In other words, I think I have been able to contribute not *in spite of* my disability but *because of* it.

⁶ The author thanks in particular David Taylor, Sarah Clarke, Barbara McIsaac, Dr. Cindy Blackstock, Andrea Auger, Robin McLeod-Shabogiesic, Spenser Chalmers and the entire Caring Society team as well as Justice Sébastien Grammond prior to his appointment to the bench.

Since July 2019, I have had the great privilege to join the Programme de common law en français at the University of Ottawa. I am frankly awestruck by the beautiful mosaic of talent at the faculty. My colleagues are nationally recognised television personalities, international human rights advocates, grass-roots anti-poverty activists, dedicated pedagogues, Indigenous leaders and community organisers. If there is one profession that adopts universal design par excellence, it is academia. Indeed, two weeks before the lockdown, both my daughters were sick. Though our productivity was impacted, my partner (who is also a professor) and I were able to seamlessly adjust our work schedules without making a formal request for accommodation to our employer. I am deeply grateful for the inherent flexibility in our jobs that allows each one of us to define our own success based on our interests and strengths in a way that adapts to our individual circumstances. I hope I will never ever take this for granted. Each academic is able to thrive in their own unique way. It's time for us to also seek to provide this opportunity to our students.

Conclusion – Build back better

In early May 2020, the University of Ottawa announced that all of the courses in the fall 2020 would be offered online. As professors, we have no choice but to break from the past. At the same time, we are being propelled to make deliberate decisions about our pedagogy. We too can build back better after the pandemic.

The good news is that online platforms already available in most law schools lend themselves well to teaching and evaluating students with various learning styles and in different circumstances. In fact, they were designed precisely with this objective in mind. We can transfer knowledge and engage students through videos, texts and audio. We can intentionally design assessment and evaluation methods that aim to reduce some of the barriers that can come with online learning. We can establish flexible schedules and seek to measure the wide range of skills it takes to succeed as jurists. This will make us better educators to all of our students. Indeed, disability advocates have been telling us this for decades: universal design does not just benefit people with disabilities. It benefits everyone. A parent with a baby in a stroller can easily navigate through a wheel-chair accessible building. Likewise, research shows that even the most attentive students tune out after more than fifteen minutes of passive online content. Adopting universal design in our

classes moving forward will provide each of our students with a fair opportunity to shine at a time where all of us need more light in our lives.⁷

⁷ For more tips on designing an accessible course, visit CAST, online (last visited on 1 June 2020) : <http://www.cast.org/our-work/about-udl.html#.XtUx2C97QdU>

THE COVID-19 PANDEMIC, ACCOMMODATIONS AND LEGAL EDUCATION

Ruby Dhand¹

As law professors are preparing to teach remotely during COVID-19, the issue of accommodations is significant, particularly for students with disabilities. Law faculties have consistently struggled with how to appropriately accommodate students with disabilities (Lorne Sossin and Benjamin Berger, 2017; Bruce Pardy, 2017). Often, law students with disabilities have felt marginalized in the process of requesting and receiving reasonable accommodations. As a law student with a disability recently explained, “wow, it took a pandemic for me finally to receive accommodations.”

The COVID-19 pandemic challenges law professors to ensure that all of our students are accommodated. We must rise to the challenge of asking how we can alleviate student stress and how our institutional structures may impact or exacerbate mental health issues amongst law students. How do we factor in the intersectional nature of discrimination? What about those students without highspeed internet and social supports? What about those students with childcare and care-giving responsibilities? What is the appropriate pedagogy for teaching remotely? How will this impact their mental health and vulnerabilities? Will our law students ultimately be able to find jobs in the legal market when this is all over? There are so many questions. In regard to the challenges of teaching remotely and alternative modes of delivery, we, as law professors, often prioritize the following issues: grading schemes, the educational, emotional, financial and employment impacts of the pandemic on students, the pros/cons of asynchronous, synchronous and blended teaching options and the requirements that we as educators must adhere to when considering which approach we will ultimately adopt. But have we seriously contemplated the impact COVID-19 has on law students with disabilities? In this article, I highlight the barriers law students with disabilities face vis-à-vis accessing appropriate accommodations during COVID-19 and various approaches law professors and law schools can adopt to address these barriers. As a law professor and disability rights

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advocate, I use an intersectional framework drawing from the social model of disability framework, while applying the principles of equity, diversity and inclusion to legal education and institutional structures.

Recognize the Barriers and the Intersectional Nature of Discrimination

Law students with disabilities face multiple barriers in law school pre-pandemic, which are clearly exacerbated by the COVID-19 crisis (National Educational Association of Disabled Students, 2020). The process of requesting and receiving appropriate accommodations is daunting, particularly given the heightened and rigid requirements of providing medical documentation within Canadian law schools (Roxanne Mykitiuk and Tess Sheldon, 2020). Often, the primary barrier to inclusion and accessibility for law students with disabilities is attitudinal. Many students who request accommodations often feel marginalized in the process, worried about confidentiality, attaining a formal diagnosis/medical documentation and disclosing their private medical information. Specific barriers that law students with disabilities experience include “prejudice; discrimination (from peers and faculty); lack of accommodation and support; difficulty finding employment; being told that accommodations were considered to be too expensive; disclosure of disability leading to adverse treatment; being marginalized...and instances of harassment” (Law Society of British Columbia, 2001; Roxanne Mykitiuk and Tess Sheldon, 2020).

These barriers are further complicated as intersecting identity characteristics impact disability such as race, gender identity, gender expression, ethnicity, sex, sexual orientation, family status, culture and social class (Ruby Dhand, 2016). For those law students with disabilities who ultimately receive appropriate accommodations, they often face the “allegation” from other students and faculty members that they are trying to “game the system” (LSUC, 2005, pg. 40; Roxanne Mykitiuk and Tess Sheldon, 2020). Consequently, it is not surprising that many scholars have identified how the competitive law school experience exacerbates mental health issues, particularly amongst students with disabilities. As Gallacher argues “[t]here is little question that the law school experience causes many students to suffer psychological harm” (Ian Gallacher, 2010, pg. 35). The evidence regarding the high rates of depression and anxiety amongst law students and within the profession is uncontested. But, what impact

will COVID-19 have on law students with disabilities? What can we as law professors do to appropriately accommodate and provide supports for them?

We must first recognize the barriers that law students with disabilities experience and the intersectional nature of discrimination. When we are debating whether to adopt synchronous, asynchronous or blended remote learning approaches, we must ensure our materials (powerpoints, videos etc.) and exercises are accessible for students with disabilities. We should be aware of how the “digital divide” (access to the appropriate tools required for online learning) may adversely impact students with disabilities (UNESCO, 2020; National Education Association of Disabled Students, 2020).

Endorse the Social Model of Disability and the United Nations Convention on the Rights of Persons with Disabilities

Our accommodation processes, teaching and related practices should adopt the social model of disability. The Supreme Court of Canada used the social model of disability in *Granovsky v Canada* explaining: “[e]xclusion and marginalization are generally not created by the individual with disabilities but are created by the economic and social environment and, unfortunately, by the state itself” (*Granovsky v Canada*, 2000 SCC 28, para 30). This is further recognized in the *United Nations Convention on the Rights of Persons with Disabilities* (*Convention on the Rights of Persons with Disabilities*, 2006). In contrast, law faculties often focus on the medical model, which defines disability as an illness that requires formal diagnosis and medical intervention (ARCH Disability Law Centre, 2013; Dianne Pothier, 1992). Consequently, accommodations are often only provided to law students on the basis of the medical model, creating “disabling” barriers for law students with disabilities. By embracing the social model of disability and recognizing that disability is socially constructed, we can create a “culture of accessibility” (Mahadeo Sukhai and Chelsea Mohler, 2017, p. 57-59; Ruby Dhand and Dipesh Prema, 2019) within legal education during the COVID-19 pandemic and for the future.

Integrate Empathy as a Core Lawyering Skill

We cannot ignore how law students' existing vulnerabilities along with systemic, procedural and attitudinal barriers to inclusion impact law students with disabilities during COVID-19. We must strive to understand the impact of ableism and injustice within legal education. We have an obligation to challenge our own beliefs, values and attitudes. In the context of COVID-19, we should remind ourselves that some law students are more vulnerable than others because of their existing disabilities and other social factors. Some law students are sick with COVID-19; some are immunocompromised and have to take additional precautions to protect themselves; some are experiencing mental distress; some require home care and some are caring for family members and friends with COVID-19. Many of our students are worried about the future job market prospects. *We have to listen and show empathy.* As Henderson suggests, empathy is a "form of understanding, a phenomenon that encompasses affect as well as cognition in determining meanings; it is a rich source of knowledge and approaches to legal problems - which are, ultimately, *human problems*" (Lynne Henderson, 1987). Pre-pandemic course and accommodation processes implementing the duty to accommodate pursuant to human rights legislation should be modified and flexible to ensure accessibility, particularly in regard to medical documentation. The process of receiving appropriate accommodations for law students with disabilities should not be stressful or arduous.

Students with disabilities must be involved in the conversations regarding online teaching, alternative delivery options and accommodations; their voices should be heard and prioritized. As COVID-19 evolves and unprecedented changes occur, the timeline for when Canadian law faculties will resume to face-to-face classes is still unclear. Law faculties need to be accountable to ensure that the delivery of teaching is accessible, additional supports are available for students with disabilities and accommodation processes are inclusive and accessible. During COVID-19, we should critically analyze how we can offer law students accommodations and supports appropriately with multiple options such as extra time allowances; alternative formats of exam and assignments content; adjusted start times; take home-exams; mentorship and flexible course load requirements.

Embrace Human Rights and Provide Support

We need to critically examine how the rapid rise of infection rates during COVID-19 will continue to impact the mental health of all of our students, and particularly those with disabilities. We cannot ignore the fact that those with lived experience of disability will “worry that priorities or the way access criteria are interpreted and applied, whether deliberately or through oversight, will put people with disabilities at or near the bottom of the priority list for care” (Roxanne Mykitiuk and Trudo Lemmens, 2020). We must raise these significant human rights and access to justice issues within our virtual classrooms. As lawyers, we have an obligation to require governments to be accountable and affirm the human rights of people with disabilities during COVID-19 (Roxanne Mykitiuk and Trudo Lemmens, 2020; ARCH Disability Law Centre, 2020).

For law students with disabilities in COVID-19, the anxieties and fears of not being a “priority” for access to health care transcend to legal education. It is without a doubt that law students with disabilities often fear asking for accommodations and, therefore, do not request them during law school and beyond in articling or job placements. We must support our law students to ask for accommodations and find ways (formal and informal) to support them to receive appropriate accommodations, through individualized and systemic measures. This is essential. Our crisis planning needs to prioritize the voices of law students with disabilities. We must also analyze and identify the unique transmission risks and develop appropriate and equitable responses for law students with disabilities to resume face-to-face classes, along with their peers.

Conclusion

The pandemic has significant implications for the future of legal education and the legal profession. COVID-19 is disproportionately impacting our students with disabilities and their voices must be heard. We cannot entrench more inequities for law students with disabilities. Instead, our choices and support can impact their access to an equitable education, mental health and quality of life. By recognizing how law students experience disabling and intersecting barriers to accessibility during COVID-19, we can embrace the social model of disability in our approach to providing accommodations and teaching. We must adopt an empathetic approach to providing accommodations for law students with disabilities and prioritize the voices of students with disabilities in our

crisis planning. Now is the time for us to create transformative changes to increase accessibility, diversity, inclusion, and equity in legal education and the profession.

TEACHING WITH HOPE DURING LESS HOPEFUL TIMES

Vanisha H. Sukdeo¹

For most individuals the Covid-19 pandemic has created an atmosphere of stress, uncertainty and concern, and for some sickness and grieving. For many academics, this time of year (May to August) is often spent working from home, researching and writing. Whilst the pandemic has changed life because of the risk of sickness and the need to physically distance oneself and remain at home, many professors have not experienced the same level of disruption as many workers in healthcare and other essential services. Those lives have been severely altered. It is difficult to continue to be present in one's work without acknowledging these trying times. We are living through a pandemic the consequences of which include lockdown, isolation, loneliness, and unemployment or at least uncertainty about one's economic security. How does a teacher and scholar contribute to the ongoing discussion about Covid-19? What issues should academics be focused on? What about the increased attention to racism and police brutality in America?

How can a scholar and teacher best use their knowledge and skills to further social justice? It depends on each scholar's differing perspectives as each occupies a different role. Does informing your students about how current events fit into a narrative about racism and slavery that began hundreds of years ago help or hinder? Should professors be marching in the streets or writing at a desk? Can one do both? In my most recent book (Sukdeo, *Business Ethics and Legal Ethics: The Connections and Disconnections between the Two Disciplines*, LexisNexis 2020) I examine the notion of disobeying an unjust law and how that fits into the narrative of social justice and legal ethics. Is there an underlying moral duty to oppose or try to "fix" an unfair law? If one benefits from an unjust system does one continue to support that system without acknowledging the inherent injustice built within the system? To amend the book now I would have looked at the role of protest in the streets versus achieving change through the political process and legal system. Both can be used to mobilize change. Is one route more effective than the other? Does one bring more lasting impacts?

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In his book *Radical Hope*, Kevin Gannon argues “teaching is a radical act of hope. It is an assertion of faith in a better future in an increasingly uncertain and fraught present.” (Gannon, *Radical Hope*, West Virginia University Press, 2020, Page 5). Gannon is prophetic as this was written before Covid-19 and the increased attention to racism in the United States after the killing of George Floyd. While reading *Radical Hope* I am reminded of the empowering role of teaching. As a teacher, one has the ability to educate, inform, discuss, and analyze issues in the classroom -- even if that classroom has moved online. What issues do we want to leave our students contemplating in the classroom and outside it? The most pressing issues of the day being the pandemic, social justice, climate change, anti-black racism, and compassion. I recently wrote a blog post that examined the notion of compassion fatigue: a term used to signify that there is a finite amount of compassion, and once exhausted we may feel numb or apathetic. We cannot believe that notion to hold true. We cannot let this moment, with the potential for change, pass unappreciated and unfulfilled.

On Friday, March 13th York University, Toronto, announced by email that classes would be moving online from March 16th. I did not feel the need to relay to my students that I cared about them during these times. Nor did I receive any emails from them expressing concerns. They already knew how I treat my teaching and I did not feel the need to send additional messages that conveyed my feelings. Sending ineffective messages during these times, like any other time, does not ring true.

How can collaboration on research move forward? This can be done through online technology but nothing can replace in-person interaction including eye contact. Teaching online allows for both professors and students to be able to remain in the comfort of their own homes and save on commuting time and cost. However, that sense of place and community gained by walking through a campus, be it the beautiful and picturesque Queen’s in Kingston or the gothic ambience of Western in London, will be lost by relying wholly on online teaching and electronic communications with our peers and students. Each university campus has a unique feel based on its geography, climate, architecture and the people be they students, staff or the wider community.

The pandemic has halted “normal life,” and will leave lasting effects, and precipitate major social and economic upheavals in societies across the

world. It is up to all of us, not just those who teach and learn, to make that “new normal” more equal and just. We have to focus on this pandemic, to build resilience and compassion to underpin a better society in its wake.

“All the flowers of all the tomorrows are in the seeds of today” – Indian proverb

ANXIETY, AMNESIA AND FINDING ONE'S INTELLECTUAL WAY THROUGH A PANDEMIC

Brenda Cossman¹

As we moved quickly from nervous anticipation to lockdown, and as my colleagues had to scramble over a weekend to move their teaching online, I felt incredibly fortunate that I was not teaching this term. I did not have to deal with the technological logistics of Zoom teaching, and the inevitable “is this thing on” fumbling.

My overwhelming sense of gratitude faded as I started to reflect on my place in the pandemic. Sure, I could just keep working on my book. That was, after all, what I supposed to be doing this semester. It felt... underwhelming. I got stuck on one thought: I had absolutely no useful skills in a pandemic. As an immune compromised 60 year old, all I could do was be a responsible citizen and stay home. I could use my superior online research skills for the hunting and gathering of groceries to sustain my family. It took a lot of time, and even more anxiety.

But I had no *socially* useful skills. Not only was I not a health care worker or an essential services provider, but even my areas of legal expertise seemed deeply unhelpful. Maybe if I knew something about health law, or privacy law, or technology law. International trade law or the law of emergencies. Nope. My areas - the legal regulation of family, sexuality and gender - just didn't seem to have any immediate purpose or traction.

As my university kept churning out reports of the crucial research being undertaken by my colleagues in public health, medicine, life sciences, all towards understanding the virus, my sense of relevance just continued to diminish. It got to the point I couldn't read the news bulletin or the media reports. Why hadn't I gone into science? I was reminded of a headline years ago, about one of my colleagues discovering a new galaxy, and asking myself, well, what did *you* do today?

I decided to reach out to my students. I had a few JDs doing directed research, and a sizable gang of doctoral students. I reached out to my students to see how they were doing and ask how I could help. It wasn't

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much. But it seemed to mean a lot to them. And then, I gathered my graduate students. On a whim, I proposed that we meet weekly for a virtual graduate workshop and present our work in progress. The response was overwhelming, and we set it up in a matter of hours. We are scattered across the country and around the globe. But, every week, we gather for an hour and half of intellectual engagement with each other's work. It didn't feel like much, but it was what I could do. And each week, it feels like a bit of an intellectual life-line for each of us.

One of my students presented their work through the lens of the current state of emergency. It was a breathtaking presentation, filled with critical insights and affects of both hope and despair at the future that we cannot yet know. It got me thinking. Well, it got us all thinking and the discussion was electric. Another student made an eloquent defense of the importance of critical thinking about law in the midst of the pandemic. I realized that they were absolutely right. We know stuff about law; about how it works, and how it doesn't work. We know about the hazards of legal naivety and the dangers of arbitrary power. I may not be an expert on privacy law and the new level of threat of surveillance capitalism (other than to know that it's a problem). But I do know that the world is changing before our eyes and we need to bring our critical skills to bear.

And I was reminded that I am a role model. There are many days, when the hot water tank breaks, and my kids need all the things, and I hate every word I wrote...I forget. My graduate students look to me for intellectual guidance, but also for personal and professional leadership. My intellectual legacy such as it is lies with them, not with anything I have ever written. They are the next generation of intellectual leaders. My role is to be the wind at their backs, to help them build their professional futures. And these futures suddenly felt that much more precarious. From the challenges of focusing on work, to differential care obligations at home, to a potentially terrible job market, the pandemic presents some unique challenges to graduate students. While I was trying to inspire them, keep them connected, affirm the importance of their projects and the possibilities of their futures, a funny thing happened. They inspired me.

So, no I won't be discovering a vaccine for the virus and I won't be discovering a new galaxy. But I have things to do. And I don't just mean cleaning out the garage and the Tupperware cupboard, which I have

already done. I have articles to write about the family law disasters coming in the wake of the pandemic, and the challenge of the rise of authoritarianism for gender and sexual rights, and yes, I need to finish my book on #MeToo and the regulation of sexual harm. I have doctoral chapters to read and letters of reference to write and workshops to organize. I shouldn't need to remind myself that ideas matter, but it seems as if in the midst of the pandemic, I had to. And now I can keep focusing on my little part of the world and keep trying to imagine ways to make it better.

RESILIENCE WAS A BRIDGE TOO FAR: WONDER, ENDURANCE AND EXHAUSTION

Anna Lund¹

By any measure, March is a difficult month in Edmonton. The days are getting longer. Spring equinox comes and goes. Friends from temperate locales post pictures of blossoms. In Edmonton, spring remains aspirational. The ground is covered in snow and toques are essential. For those of us in post-secondary education, March can feel like the last sprint in the marathon of the academic year: adrenaline with an undertone of exhaustion. Papers are due. Exams are on the horizon. And in my civil procedure course, we still need to sort through the differences between a summary judgment application and a summary trial.

This March posed new challenges. On a Thursday morning, after spending 80 minutes running a mock questioning with my civil procedure students, I come upstairs to find a group of my colleagues clustered in the hallway by their offices. University administration has sent us an email asking us to be ready to move to remote delivery of our courses on 48 hours notice. The Faculty is abuzz. Will we have to? We speculate. Surely not! *Hopefully* not. Somebody cracks a joke about how we should be standing further apart, but we don't move. The heightened awareness of proximity to others will set in later. For now, we mingle.

That afternoon passes slowly. I can't concentrate. I scroll through Twitter looking for guidance or comfort. Maybe both. I refresh the page. I scroll more. At 2pm I teach bankruptcy and insolvency law. I tell my students that this might be our last in-person class. A student asks about what remote learning would mean for the exam. "I don't know. Please be patient. We're figuring this out as we go." In the coming days, I'll repeat this exchange a lot. Will we move to pass/fail? Will there still be a Dean's list? How will we prevent students from cheating on exams? I'll say: "It's a fluid situation. We'll figure it out. Please be patient."

Friday morning, I get in the car to drive my 20 month old to his daycare. I cry sad, scared tears. I wonder, "if university students aren't supposed to

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be congregating, why are daycares still open?" My toddler loves sticking his fingers in mouths: his, mine, anyone else who will let him. And hand washing at this stage looks more like a wrestling match than a hygienic practice. I decide to keep him home for the day. I think, maybe he's old enough now that he'll play by himself and let me get some work done. I am wrong.

We go grocery shopping. In another scene that I will repeat in the coming weeks, I push my cart past empty shelves where toilet paper, pasta, canned beans and flour would usually be stocked. I feel a rising sense of panic. Will there be enough? Are we to go hungry? But there's still a row of canned lima beans, untouched in the madness, so the situation can't be that bad, yet. Later, I find myself wondering about my students and how they are managing. When I was in law school, I didn't have room in my budget for panic buying groceries. How are they taming the threat of scarcity if not by carefully stocking their pantry with non-perishables?

By Saturday, the University decides to move all classes online. I send an email to my students outlining how I plan to deliver content remotely – we'll have live, online lectures during our regular time with recorded versions available afterwards. Hours later, the Chief Medical Officer closes daycares across the province. My 20 month old is going to be at home with me, indefinitely. I draft a new email to my students: "There's been a change of plans..." We move to pre-recorded lectures with abbreviated meetings during our regular class time. Children and pets welcome, mine included.

The next week poses a series of challenges: learning how to use new technology, letting go of my old schedule, adjusting to the growing list of restrictions on what we can do and where we can go. I spend my days chasing my son around our apartment and venturing out for bracing walks in the still-frigid river valley. In the evenings, I prepare for classes and record my lectures. I find myself wondering about my students. Am I doing them a service by trying to maintain some sense of normalcy and continuity? Or is it unreasonable to expect them to care about the difference between a summary judgment application and a summary trial given the global pandemic?

The Faculty grapples with whether or not to move to a pass/fail system for the semester. I invite my students to provide me with feedback and they

accept the invitation. I hear from parents juggling childcare with their schoolwork. I hear from children who are worried about their ill parents. I hear from people with depression and anxiety problems who are struggling with the pervading isolation and uncertainty. I hear from workers who have been laid off and aren't sure how they are going to pay for their groceries. My students play many roles outside of the classroom. These roles can always impact their ability to perform at school, but especially now. Their stories are heavy. I find myself wondering if they are going to be okay.

The first days of lockdown are distinctly memorable, but then they start to blur. I settle into a routine of sorts. Walking the neighbourhood with my son and dog. Trading off parenting duties with my spouse. Late nights prepping and delivering lectures. The unending monotony of cooking all our own meals: 21 breakfasts, lunches and dinners one week followed by 21 more the next. I start to think more about what I'm not doing. The Law Review fundraiser is cancelled. A conference in Toronto is cancelled. I cancel lunch plans with some former students. Last time I taught civil procedure, I took my students out for nachos and beers following our last class. Not this year. I cancel my book launch. My summer conferences are all – one after the other – cancelled. Our Faculty teaching workshop is cancelled. June convocation is moved online. I mourn these moments of community and togetherness.

I wonder about how to hold space for the grief of what's been lost while still recognizing my position of privilege. This theme – of grappling with loss but feeling almost guilty for being sad – becomes another common refrain in my conversations with students and colleagues. Over and over again I hear some version of: "I am not doing great, but I can hardly complain: others have it so much worse." This is true. The news is filled with stories of sacrifice and misery that dwarf my own. I listen to a radio story about medical providers, who isolate themselves from their families indefinitely to protect their children from the virus. I turn off the radio and hug my son. I read about children saying goodbye to parents over the phone, because they cannot be with them when they pass. I visit my parents in their backyard and smile at them across a 6-foot gap. As outbreaks race through two meat packing plants in the south of my province, my own relative privilege is brought into stark relief. Can a person both recognize the unfairness of a system that allows powerless workers to toil in unsafe conditions for meagre pay and also feel sad that

they missed the chance to drink cocktails with old students at a University fundraiser? The latter loss – my loss – seems trivial. I wonder if there is space enough in my heart to properly grieve all the losses, or if the trivial ones should be pruned to make room for more weighty concerns.

March turns into April. Snow melts. New snow falls. I deliver online review classes for my students. I answer emails filled with questions about an insolvency trustee's impeachment powers and the applicability of non-party disclosure rules to the Provincial Crown. I draft exams. I mark exams. I submit grades. And then suddenly, it's May. Tree buds appear. A few precocious tulips unfurl their cheerful blossoms. We unpack our shorts from a box at the back of our closet. We fish the sunscreen out from underneath the sink.

I reflect on the semester that was. I survived it. My students survived it. But did we grow during the process? Did we develop new skills and gain new insights? Resilience is the thing we are told to strive for. It is the thing we are to impart onto our students. This past semester gave us plenty of chances to show how well we can thrive during challenging times. I find myself wondering if I did enough to transform my Covid-19 lemons into pandemic lemonade. I'm unsure. As the semester unfolded, I was reminded about the things I value because of their absence: community, routine, sleep. I developed a deeper appreciation for the richness and complexity of my students' lives outside the classroom. I was impressed at how engaged they remained with the material, pandemic notwithstanding. I was touched by their patience and buoyed by the humour. At the same time, the semester posed many questions for which I have no answers. I am too tired right now to formulate answers. I am too tired right now to be resilient. And I wonder if we do ourselves a disservice by measuring ourselves against the high bar of resilience. Perhaps the most important thing about this past semester is that we endured it. Change arrived; we endured. Uncertainty took hold; we endured. It wasn't always pretty, but we endured. Maybe that's enough.

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LOOKING BACK, LOOKING FORWARD

Angela Campbell¹

Over the past five years, my work as a professor has moved away from traditional law teaching in the classroom to contemplating and learning about normativity in the context of university administration. Five years ago, I became an associate provost charged with equity and academic policies at my university. Through this work, I have the privilege of engaging with issues I care about with students and colleagues who are both passionate and smart. But many of these issues are divisive and fraught, lend themselves to no easy answers, and can recall incredibly personal and painful experiences among those affected. Conflict – whether between individuals, interest groups, or ideologies – is common. In my efforts to negotiate it, I have found it helpful to draw on my experiences as a law teacher wherein I have learned that the path toward resolution is both more complex and more promising if we are willing to interrogate how norms evolve and shift over time, the inherent frailties and imperfections of the human condition, the distinct contribution of process to results, and the objectivity of concepts like “justice” and “fairness”. Relatedly, as jurists, we deploy contextual analysis of past conflicts and decisions that have engendered harm and loss to imagine and implement measures that aim to heal, repair, and restore with a view to moving forward.

While these lessons and principles tacitly drive much of my work – both as a teacher and administrator – they were thrown into sharp relief for me during the COVID-19 pandemic. This occurred, in particular, through some interactions I had with my children as we spent much more time together in closed quarters, working and learning from our home. One interaction in particular stands out as a key lesson for me as a jurist, teacher, and university administrator about how we might look back and look forward at difficult watershed moments in a manner that instills humility and hope.

Once Montreal’s public schools resumed learning activities during the COVID-19 confinement, my 12-year-old son’s seventh grade teacher took

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to assigning her students important works of North American literature. In our discussions about these readings, I invited my preteen to think about how they connected to life for young people today, especially during this period of global crisis. These discussions became especially challenging as our current social context called upon all of us to think beyond the pandemic to issues of systemic racism. The swell of activism around #BlackLivesMatter has been powerful, moving, and inspiring. It also has prompted anxiety: What if real change does not come this time? As non-racialized people, how complicit are we and have we been? As many traditionally lauded symbols of western history are dismantled, how can we earnestly and honestly engage with stories of the past as we try to move forward?

These are incredibly tough questions. My own “tween” – who is just on the cusp of adolescence and slowly loosening his grip on an idealized understanding of the world – grappled with them at the same time as many of us. I did not have ready answers for him. Yet I was grateful to Robert Frost and Langston Hughes for facilitating our conversations, and for providing critical insights to my own work as a law teacher and university administrator charged with oversight of equity and academic policies in my home institution.

Two of the most beautiful pieces my son’s English teacher assigned her students last spring were Robert Frost’s poem, *The Road Not Taken* and Langston Hughes’ short story, *Thank You, Ma’am*. At first blush, these two works appear to have little in common except that both were written by American authors whose lives overlapped in time (although Frost was older and lived longer: he was born and died in 1874 and 1963 respectively, whereas Hughes lived 1902 to 1967). Frost was white and Hughes was Black. Frost’s work is marked by a focus on rural Americana whereas Hughes’ foregrounds African-Americans’ resilience and strength in the advancement of civil rights largely in urban centres, mostly New York, especially Harlem.

While seemingly distinct, Frost and Hughes’ works help us – especially those of us interested in working through complex social questions with young people – answer two key questions about humanity and human relationships. The first is “What and how do we remember?” The second, is “How do we keep going after we are hurt?”. *The Road Not Taken* provides

us with insight about the first, retrospective question and *Thank You, Ma'am* about the second, which is forward-looking.

The protagonist in *The Road Not Taken*, a hiker in the woods, is forced to choose a way forward when he reaches a fork in his path. He takes a while to make up his mind about which road to take ("long I stood"), ultimately realizing that, in fact, both paths have equally been worn by prior hikers. Just the same, he realizes that, later on when he recounts this moment, he'll tell a tale of having elected for "the road not taken", which actually did not exist except in the story that his future self will tell.

Frost is brutally frank about how we tell stories about the past; his poem forces us to recognize the mythical elements of the histories we recount. Actual historical facts can be mundane or even maligning. So, our narratives about the past tend to celebrate and glorify. Frost does not indict the storyteller, though. He suggests instead that there is something innately human about wanting to valorize the past.

Understanding our social propensity to "tell stories" rather than "recount historic truths" can be helpful to conversations about present realities with children. We are watching – some of us with turbulent emotions and thoughts – the denouncement and dismantling of icons long known to have participated in harmful practices. Seeing this, young people might ask: "Why did those statues get put up in the first place?" Mine did. It's a fair question and Frost helped me answer it. When we look back, we tell our best stories using a lens of courage and wisdom. This can help us explain and celebrate the present. Our stories about the past might not be perfectly accurate or honest. Sometimes they tell us more about today than yesterday.

Frost's poem thus provides important insights for thinking about how we remember, understand, and recount the past. Yet perhaps an even tougher question is about how we look forward, specifically following conflict. Hughes' *Thank You, Ma'am* suggests an answer.

This short story, published in 1958, begins with a late-night mugging attempt by one young and clumsy Roger of Mrs. Luella Bates Washington Jones. Washington Jones is a "large woman with a large purse" whereas Roger is "frail and willow wild". Not surprisingly, the encounter ends badly for the latter. He tumbles to the ground before he can run away with

Washington Jones' pocketbook. She delivers a swift kick to his backside then pulls him upright, giving him a good shake "until his teeth rattled", and instructing him to square with her: "What did you want to do it for?" When he replies that he didn't "aim to," the woman calls him out as untruthful ("You a lie!"). Yet she knows his motivation without having heard it.

Mrs. Washington Jones' tough façade fades over the balance of the story. She forces Roger to accompany her to her rooming house where she instructs him to wash his face and provides him with a clean towel, supper, and conversation. Throughout, she makes a point of showing trust in the teen – turning her back to him as she prepares dinner with her purse unattended and the front door left wide open. Roger seems well aware and is careful to avoid a misstep. Ultimately the late-night ends with Mrs. Washington Jones giving Roger ten dollars for new shoes, bidding the adolescent good night while signaling her "wish" that he behave himself going forward, and Roger wanting, but unable, to reply with a "Thank you, Ma'am."

Langston Hughes' story is marked by time and place, and by features of identity tied to race and class. Yet every reader, especially a young reader, draws something special from this story of incredible generosity, compassion and empathy. Why do we harm others, and how do we look forward after we are harmed? These two questions at the core of *Thank you, Ma'am* anchor some of the most important conversations we have with children.

Hughes reminds us that each of us has the capacity to inflict harm. 'Offenders' will not all be as sympathetic or even as innocent as Roger. Still, Hughes' point is about the transformative power of accepting responsibility and gestures of grace even from those whom we've hurt.

Simultaneously, in Mrs. Washington Jones, Hughes personifies the process of reconciliation. Upon being accosted by a would-be thief, the woman exhibits anger ("kicked him right square in his blue-jeaned sitter") and reclaims what is hers ("Pick up my pocketbook, boy, and give it here."). Her fury is unleashed through a series of questions: "Now, ain't you ashamed of yourself?" "What did you want to do it for?" "If I turn you loose, will you run?" Finally, she warns that repairing harm requires time

and work: “[y]ou put yourself in contact with me...If you think that that contact is not going to last a while, you got another thing coming.”

Then, the story pivots. Mrs. Washington Jones’ outrage recedes and is overtaken by engagement. Through dialogue, Mrs. Washington Jones at once humanizes Roger and compels him to see her own humanity – where and how she lives, and the parallels in their life trajectories. This engagement does not last long – one evening – but there is depth and dignity to it in that, Roger must listen to and learn from Mrs. Washington Jones who, throughout, takes steps to show her confidence and the promise she sees in him to know and do better.

In setting all of this out I do not suggest that the conflicts and dilemmas central to *The Road Not Taken* and *Thank You, Ma’am* – whether in nature or scope – track the challenges of confronting systemic race-based discrimination and violence. It is also an oversimplification to position Robert Frost and Langston Hughes as furnishing solutions to current social strife we are living, which call for discussion with young people including our own children and students. Just the same, these two beautiful works of literature give us something to anchor our thoughts and conversations about our past and about how we can move forward. If we understand, as Frost did, that we look back in a flawed and imperfect way, we can appreciate the importance of the current call to remember and recount with a sharper commitment to humility, humanity, and honesty. And, if we consider the promise, illustrated by Hughes, of learning through the extension and acceptance of grace and through engagement in relationship and dialogue, the hope of reconciliation with an eye to the future becomes apparent.

COVID CARING: CONNECTIONS COUNT

Lorna A. Turnbull¹

While sitting with my mother over lunch, two days before the deadline, talking about the invisible work of caring, I finally committed myself to writing this essay.

Mum and I wondered where the week had gone; we observed that many hours had been spent communicating with those caring for us (Mum's husband died 10 days prior, in long-term care from COVID 19), and for whom we are caring (my children and partner back in Winnipeg, the children and other relatives of Mum's husband, our friends and neighbours, isolated in the pandemic). Mum has always been a carer, by profession (as a nurse and midwife) and beyond. For more than 20 years, my research has focused on equality and care: the work of care, the work of mothers, and more recently the impacts of care on children, especially when the "care" is provided by the State. Teaching through the pandemic and preparing for the fall online has brought into focus how care is also the guiding force in my teaching.

Caring is based in relationships, and this "naturalness" has made it invisible. Feminists recognize that care is gendered and racialized, and within the market, is underpaid, undervalued and marginalized. Caring requires an emotional investment in an individual or group's well-being accompanied by a willingness to act for their benefit. Caring relationships are the means by which we encounter our students as human beings, as individuals with their own reasons to be in our classrooms, and as future lawyers who need to learn the law and the values of our profession.

In my conversation with Mum, I realized I had experienced the same feeling in March and April, wondering where my time had gone. I looked back through all the emails I had sent to my students in one "lecture" course with a reputation for being difficult and found the thread of care throughout. As we moved online, I found much more of my time was devoted to connecting directly with my students than to the particulars of the remaining content we had to cover. At first, I berated

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myself for the time I “wasted” thinking about the word choice, tone and content of every email.

The course in question was Income Tax Law and Policy (ITLP), which until 2 years ago, was a mandatory course. I thought a great deal over the first weeks of COVID about what we teach and why, how we measure learning and why, and most essentially, how to go forward in a way that is as fair as possible and upholds our basic human values and professional integrity. I care very much about my students, about learning, about our profession and about our values. I thought about what I hoped my students would learn. I always include a variety of assessments in every course to allow students a range of ways to demonstrate their learning, and to engage knowledge, skills and values.

I could not have known, as I planned the assignments in late 2019, how winter 2020 would unfold. How fortuitous that the mid-term assignment, due in mid-February, invited students, in groups of four, to reflect on an article from the Canadian Lawyer magazine about basic income within the theoretical framework for income tax laid out in the first chapter of our text. COVID later allowed me to share with them, “When someone has being a teacher as an integral part of their identity, they see “teachable moments” everywhere. At the risk of being guilty of TMI, I thought I would share a couple of news items that speak to issues in this course. A CBC story suggests that the coronavirus may have created a situation where a Basic Income could provide a fair and equitable way of supporting everyone in Canada in this time of social distancing and self-isolation. Taking it a step further, Whitzman (2020) argues that “Canada needs to rebuild its collective social welfare net frayed through three decades of neoliberal ideology. Funding should come from a return to progressive taxation of wealthy individuals and corporations.”

An optional assignment, helping clients of the local food bank, Winnipeg Harvest, file their income taxes was scheduled throughout March. To the students doing the Harvest assignment, I wrote, “Given the position taken by the University, and because we all have both an individual and a collective responsibility to help stop the spread of COVID-19, the remaining tax clinics will be postponed. As one of you wisely observed last week, we have the ‘privilege of choice’ and this is not true for many of the clients Harvest serves.” I offered students the option to complete the assignment in modified form and commit to a shift at Harvest in the

summer. Many accepted, and as one observed, “Our Winnipeg Harvest experience and reflection will stick with me forever.”

Our faculty decided to move to a mandatory P/F system. Initially, I hesitated, thinking that students in my courses would be “penalized” because of all the work they completed early in the term. I knew that COVID 19 had adverse impacts on students’ ability to learn that were not evenly distributed (depending on care responsibilities, work obligations, internet access, finances). The consequences were unrelated to anyone’s academic ability, raised issues of equality and fairness, and made it unreasonable to expect to accurately evaluate learning and academic performance using standard assessment approaches. So, I reminded myself that the midterm and optional assignments created opportunities to learn important skills and professional values and to consolidate and demonstrate important knowledge. One student wrote, “I am not concerned that we put in work earlier in the term ... I learnt so much from both exercises. I can assure you that they were not a waste of time and allowed me to apply knowledge in the course, which is often not done in law school classes.”

As I reviewed the extent and content of my communication with my students, which had felt invisible and unproductive, I saw that it flowed directly from my relationship with them, and my commitment to caring for them as an integral part of my teaching. I had not wasted my time. I had lived my commitment. These communications with the class as a whole (beyond countless individual emails and phone calls) spanned more than a dozen emails and nearly 4500 words between March 13 and May 1. My purpose, I realized, was to reassure, encourage and inspire, and thus to foster learning.

My emails covered a range of themes. In the beginning, many practical issues needed attention. On March 16, I wrote

Dear ITLP

When I was talking to you last week about when we might wrap up the lectures for this course, I did not imagine how quickly circumstances would change. ...

I have reviewed the syllabus, considered the learning still to be achieved and the learning that you have already demonstrated

and have determined that we can easily wrap up the course in a way that will leave you all knowledgeable in the “broad strokes of Canadian income tax law”. What I propose is that I will cover the material remaining for Chapters 7 and 8 in recorded “lectures” which I will post. ... Obviously we will not be gathering for an exam review, but I will create a “Discussion” online where people can ask their questions and everyone can see/participate. ... Given the position taken by the University, and because we all have both an individual and a collective responsibility to help stop the spread of COVID-19, we are all learning to operate in new ways, and supporting each other will be an important foundation of our success. ... we are each called upon to do and be our best in these very uncertain times. Take care of yourselves, your dear ones and each other, and “keep your distance”. I look forward to seeing you all again soon.

I quickly decided that recorded “lectures” would add little to the readings. More importantly, they would not be easily accessible by everyone. Some students would have a hard time listening to such lectures and taking notes. Instead, I created “study notes” to accompany each chapter, with specific references to excerpts from the text I would have highlighted, and discussion questions I would have posed, had we been in the classroom. I also put an enormous amount of time into structuring the final exam, and invited students to make suggestions to help create a suitable one. As I wrote to thank them on March 20, I was “particularly impressed at how many of you offered your thoughts about what would work well for yourselves, but also drew my attention to the situation of fellow students who may have other needs, especially students with care responsibilities (for children or parents or others) or who have limited access to internet...”

Once the exam period started, I checked in: “I hope that you are managing to stay well, in body and spirit and I want to wish you well for your upcoming exams. I also wanted to share with you some [mental health] resources that I received from a guest speaker in my seminar course this term. [a series of links followed] ... Please feel free to be in touch with me at any time if I can be of assistance to you. I know that we are strong, even if we do not feel it all the time, and we will emerge even stronger as a result of the opportunity this situation has provided us to take stock and

reevaluate our priorities. Wishing you all the best for the end of term. Stay well."

My final email, on May 1, read as follows:

Hello, for the last time (at least officially within the framework of this course),

You will be able to see by now that you have passed the "dreaded" ITLP! I just wanted to thank you all for a great class, even through these strange pandemic times, and for the remarkable exams you all wrote, despite the times and the many varied challenges each of us has faced. I was never left with the impression that anyone wrote their exam just to "get the pass". ... I hope that you can go forward from this moment, confident in your adaptability, resilience and care for your fellow humans, as well as in the knowledge that our tax system plays a vital role in shaping the society we wish to live in and your role in that, as future lawyers. ...PS: Attached for your reading pleasure, a call for a basic income by nearly half of the members of the Senate of Canada, including several of our Manitoba Senators.

I received a surprising number of responses from students, to particular emails and in general. Most of these expressions of appreciation spoke to *how* I engaged with my students, *how* they felt and *how* they understood themselves in the face of the COVID challenges. They expressed thanks "for being flexible and accommodating during a difficult year in a course that many people (including myself) were intimidated by." They appreciated my "compassion to all in the face of this pandemic" and "the time I devoted to continued communication, compassion and care during this time." Another wrote: "Thank you for communicating with us and thinking through so many situations to accommodate everyone. I appreciate the care and consideration you are providing for us students very much and putting our needs first." Perhaps most importantly, "Your empathy is what I think will stick with everyone as they enter the profession - it is a reminder that law doesn't have to be cut throat. It can and should be a caring space as well."

As I think about September, and the 100+ first year students I will teach online (which can provide a powerful space for student-centred learning (Thomas and Sedell)), I want to remember that caring and connecting are not a waste of time. They allow me to create an environment for learning that will frame and engage students' understandings of themselves and law.

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LAW SCHOOLS, CLINICAL LEGAL EDUCATION, AND THE PANDEMIC PORTAL

Sarah Buhler¹

Introduction

In an article published on April 3rd, 2020, writer and activist Arundhati Roy argues that the Covid-19 pandemic has created a “rupture” – a break between the past and the future. Roy explains that although many of us long for a return to “normal”, past pandemics teach us that our world will be forever altered – that we will never go back to how things were. Besides, Roy argues, “[n]othing could be worse than a return to normality.” This is because the pandemic has exposed the deep injustices of our former world, like a “chemical experiment that suddenly illuminated hidden things.” Roy writes that instead of fighting to return to the way things were, we have a chance now to imagine and build the world we want to see on the other side – a chance to “rethink the doomsday machine we have built for ourselves”. In this way, she says, the pandemic is a “a portal, a gateway between one world and the next.” It is up to us to choose how we walk through it to the other side, what we want to leave behind and what we want to take with us. In this essay, I argue that law schools should hang on to clinical legal education as they walk through the pandemic portal. I will focus on three main reasons why we need clinical legal education in this time. First, in the age of Zoom and online learning, clinics remind us that law must centrally concern itself with living, breathing human beings. Second, clinics have local and deep expertise about what Roy calls the “doomsday machine” and law’s complicity with it: in other words, clinics have important knowledge about the relationship between law and injustice. Finally, clinical legal education is a vital site to imagine and build legal practice for a more just world after the pandemic.

The Pandemic’s Impact on Clinical Law Programs

The pandemic entered the reality of the University of Saskatchewan College of Law’s Intensive Clinical Law Program on the evening of Friday

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March 13th, 2020, two days after the World Health Organization declared a global pandemic. Twelve students were enrolled in the program, which is hosted by Community Legal Assistance for Saskatoon Inner City (CLASSIC), a community legal clinic located in the heart of Saskatoon. Our program, like many other Canadian clinical law programs, is centred on a social justice mandate. Since January, the students had been spending four days a week at CLASSIC, working with clients in a broad range of areas including prison law, social assistance appeals, housing law, human rights, criminal law, and refugee law. On Fridays, students attended my clinical law seminar. On the morning of Friday March 13th, our seminar discussion focussed on a theme we had discussed earlier in the term – trauma and self-care. We reflected on the unequal distribution of suffering in our world and the ways that the law produces, maintains, and sometimes mitigates injustice experienced by our clients. Students talked about how much they learned from their clients and how motivated they were to challenge unjust systems in their work as lawyers. We talked about how this work and learning is hard and exhausting.

That evening, the university sent an announcement about its shut-down plan. Courts, tribunals, and law offices across the country were also closing their doors and moving online. CLASSIC needed to transform its practices in order to maintain its obligations to clients while physical distancing. The students rose to the challenge – working from home, meeting clients by phone, appearing remotely at hearings, and working with clinic staff to triage matters and create new protocols and systems. CLASSIC immediately began focussing its systemic advocacy work on issues relating to the pandemic, including advocating for an eviction freeze and the release of prisoners, producing pandemic-related legal information, and joining with community partners in Covid-response planning.

The experience at CLASSIC is similar to what is happening in other clinical programs in Canada and beyond, where programs are adapting their pedagogies and practices, and responding to the intersecting legal, social, and economic challenges faced by clients and communities in the Covid-19 era. The legal troubles of clients have carried on, and indeed in many cases have been exacerbated by the pandemic. Physical distancing, telephone or Zoom instead of in-person client meetings, and navigating courts and tribunals remotely are all challenges that are compounded when clients are struggling with health problems, trauma, precarious

housing, insecure incomes, and scarce access to technology. CLASSIC made the decision to operate in the summer without students, and we are currently considering what our program will look like in the fall term and beyond. As noted, many other Canadian law schools appear to be continuing with their clinical programs during the pandemic. However, social-justice focussed clinical legal education has never had a central place in Canadian legal education, and it is possible that law schools will be assessing its continuing existence going forward. Clinical legal education is resource-intensive, messy, complicated, and exhausting at the best of times, but even more so now.

Why We Need Clinical Legal Education

a. Centrality of human experience with law

The messy, complicated and exhausting nature of clinical legal education is one key reason why we need to hang on to it. Clinical legal education is about learning skills in legal research, drafting, and advocacy, but at its heart it is about learning about how legal problems are experienced by human beings, and how to respond ethically and with humility and self-reflection. In clinics, we witness that too often, justice institutions unleash pain and harm on marginalized people. Listening to clients and building relationships is how those without lived experience of these realities can begin to understand. We may not be in a situation where students can work physically side by side with their clients any time soon. But clinical legal education insists on the centrality of living, breathing, human beings and their experiences - an antidote to the “cardboard clients” that often appear in law schools (Kruse, 2008). As Jenny Odell (2019, p.24) argues, digital platforms tend to disconnect us with the realities of human bodies: the “matter-of-fact presence of the body in front of me.” As legal education moves online, this reminder that we need to stay focussed on the law’s impacts on human beings is more important than ever. In clinical work, even in the world of social distancing, it is impossible to forget that law and legal practice should be concerned first and foremost with human beings.

b. Insights into law’s relationship with the “doomsday machine”

Arundhati Roy writes that the pandemic has made visible the pre-existing entrenched structural inequities and injustices in our society – the “

doomsday machine we have built for ourselves". Similarly, the Global Health Justice Partnership observes that "the pandemic is throwing into stark relief the deep failures and inequities in our current economic, social, legal and political orders." Howard Ramos, Alan Walks and Jill Grant write that the pandemic "shows cracks in the current system and points a glaring spotlight on the inequities that were overlooked before" (2020). Of course, these injustices have always been visible to oppressed and marginalized communities. This calls to mind Leanne Betasmosake Simpson's observation that "[t]he monster has arrived, and the monster was always here" (2018). Indeed, as Lawrence Gross points out, Indigenous communities are already living as "postapocalypse people" (2014, p.33). In this way, the pandemic and its fallout are "precedented times" (Waterfall, 2020).

Through their relationships with oppressed and marginalized clients, legal clinics gain expertise about how law and legal processes are too often complicit with injustices experienced by these clients and their communities. This close attention to the connections between law and injustice has been a feature of clinical legal education from the beginning. William Pincus, one of the early American founders of clinical legal education, said that clinical legal education teaches students to "recognize what is wrong with the society around them – particularly what is wrong with the machinery of justice in which they are participating and for which they have a special responsibility" (Wizner, 2002, p.1934). At CLASSIC, students witness that law and legal processes routinely sanction the evictions of single mothers, the locking up of prisoners into solitary confinement, and the criminalization of people who fail to report small amounts of income to social assistance authorities. Students witness and learn how, for their clients, legal process is all too often "a means by which the powerful are able to legitimize the system's outcomes, violent as they may be" (Ashar & Lai, 2019, p.83). While critical perspectives can be, and are, developed in non-clinical law school classes and seminars, Sameer Ashar argues that they "cannot replicate the experience of an immersive confrontation with an intractable social problem and close work with clients and organizers on that problem" (2016, p.219).

c. Legal practice for Justice

Janet Mosher has argued that dominant methods of legal education tend to produce "anti-critical" approaches to legal practice, where students

are “unlikely to search for systemic patterns of oppression, are unlikely to attempt to understand the structural roots of client problems, and are even less likely to challenge those structures” (1997, p.626). Moshier notes that law students learn in law school that the role of lawyers is to “work within the existing order, marginally, incrementally modifying it through litigation” (p.626). While many law professors seek to introduce critical perspectives on lawyering and the roles of lawyers in their classes, lawyering and legal practice remain undertheorized and understudied in legal education.

Because theory and practice are fully intertwined in clinical legal education, clinics are vital places to imagine, enact, critique, and refine lawyering in furtherance of justice, and there is a long history of this in clinical law scholarship and practice. As Wendy Bach and Sameer Ashar write, “Our job, most days, is to act and to react. So we wield theory when it is accurate and we revise it when it is not, but in either case we wield it for our clients and for ourselves” (2019, p.92). Clinics have long histories of encountering injustice, and (with their clients) critically assessing and building strategies for responding. Clinics can continue to be vital sites for theorizing justice and legal practice for our post-pandemic world. The Global Health Justice Partnership has stated that our goal for the world after the pandemic should be to “build a new infrastructure of care that supports our collective wellbeing in the long-term.” Surely, law schools should contribute to an infrastructure of care and justice on the other side of the pandemic portal: clinical legal education has the relationships, pedagogies, and practices to be a leader in this work.

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LES PERSONNES ÂGÉES EN TEMPS DE PANDÉMIE, ET APRÈS?

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En cette période de pandémie, les prises de parole et les textes d'opinion à propos des personnes âgées se multiplient. Seulement au Québec, on a notamment pu lire :

À quoi bon s'intéresser aux vieux? (Le Soleil, 9 mai 2020, Réjean Hébert)

Il faut protéger les plus vulnérables (Le Devoir, 6 mai 2020, Janet Cleveland et als.)

S'estimant lésés, des aînés portent plainte (Le Devoir, 6 mai 2020, Mylène Crête)

Le virus de l'âgisme (Le Devoir, 20 avril 2020, Stéphane Baillargeon)

Est-ce ainsi que nous voulons vieillir? (La Presse, 20 avril 2020, Nathalie Collard)

Le Québec malade de ses aînés (Le Devoir, 20 avril 2020, Guilhème Pérodeau)

Les « vieux » et la COVID-19, de mauvais messages (Le Devoir, 20 avril 2020, Pierre Sormany)

Indignés d'être infantilisés (Le Soleil, 19 avril 2020, Jean-Marc Salvét)

Il faut mettre fin à l'âgisme (Le Devoir, 18 avril 2020, texte collectif)

Vive les vieux! (La Presse, 18 avril 2020, Stéphane Laporte)

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On les a oubliés totalement (La Presse, 16 avril 2020, Yves Boisvert)

Les maisons de nos aînés sont-elles notre angle mort? (Le Devoir, 9 avril 2020, Quoc Dinh Nguyen)

Au moment où commençait à sévir la crise sanitaire dans les centres d'hébergement et de soins de longue durée (CHSLD) et que toutes les personnes âgées de 70 ans et plus étaient confinées à domicile, j'ai préféré ne pas publier de texte sur les droits des personnes âgées. J'ai refusé de le faire principalement pour deux motifs. D'une part, parce qu'en temps de crise, il m'apparaissait inutile qu'une autre personne du milieu universitaire « ajoute de l'huile sur le feu ». Il faut d'abord l'éteindre. D'autre part, j'ignorais la teneur du texte que je devais écrire dans les circonstances. Un texte pour discuter de la maltraitance organisationnelle (ou systémique) présente dans certains milieux d'hébergement pour les personnes âgées? Un texte sur la nécessité de remettre en question les structures et le fonctionnement des CHSLD publics et privés (incluant la question sur la nationalisation des CHSLD privés)? Un texte sur l'allocation des ressources gouvernementales destinées aux soins et à l'hébergement des aînés? Un texte pour décrier l'âgisme ambiant? Un texte pour plaider en faveur du droit à l'autodétermination des personnes de tout âge? Un texte sur l'inclusion sociale des personnes âgées?

Nul besoin d'être un grand juriste pour comprendre que les droits de plusieurs personnes âgées sont actuellement bafoués. Choisir *l'angle* de la rédaction d'un texte sur les droits des personnes âgées en temps de pandémie n'est pas simple. L'une des difficultés majeures qui se présentent lorsqu'il est question des aînés, c'est qu'il ne s'agit pas d'un groupe homogène et qu'il faut avancer avec précaution pour ne pas être accusé d'âgisme.

C'est une évidence : les personnes âgées sont des personnes comme toutes les autres. La plupart des personnes âgées ne sont pas vulnérables et leur implication sociale est une source de richesse pour la société. Certaines d'entre elles sont toujours en emploi, d'autres font du bénévolat, que ce soit dans des organismes communautaires, pour aider leurs enfants ou leurs petits-enfants ou encore comme proches aidants. Elles sont actives, elles ont des loisirs, elles font du sport, elles voyagent,

elles consomment, elles ont leur propre domicile... Elles sont comme nous tous. Elles sont cependant plus nombreuses à être infectées par le coronavirus et à en mourir. Des experts de la santé expliquent qu'en raison de leur système immunitaire plus faible, le risque de complications et de décès est plus important pour les personnes âgées. La société dit vouloir les garder à la maison pour les garder en santé, pour les protéger, pour leur propre bien... Pour combien de temps?

La direction de la santé publique doit, bien entendu, prendre en compte les nombreux risques d'ordre individuel et collectif associés au confinement ou au déconfinement des personnes âgées. Elle doit également considérer les impacts négatifs sur les plans physique et psychologique d'un confinement prolongé. Les décisions sont difficiles et les opinions des experts, notamment en santé publique, sont fondamentales. Les personnes âgées doivent cependant aussi faire partie de la discussion. On entend souvent parler d'elles, mais on les entend encore assez peu.

Pourtant, une majorité de personnes âgées sont capables de comprendre et d'apprécier les risques de la pandémie. Si le coronavirus devait circuler dans la population pendant plusieurs mois, voire plusieurs années, les personnes âgées sont en mesure de respecter les prescriptions en matière de lavage des mains, de distanciation physique et de port d'un couvre-visage (masque), mais surtout de prendre leurs propres décisions. À nouveau, comme nous tous.

Ce n'est cependant pas le cas de toutes les personnes âgées. On ne peut nier que certaines d'entre elles sont malades, en situation de vulnérabilité ou inaptes à comprendre la situation actuelle de pandémie. Ce sont ces personnes âgées qui ont besoin d'être « protégées ». Lorsqu'on apprend la façon dont elles sont traitées dans certains CHSLD depuis le début de la pandémie et parfois même avant son apparition, on ne peut s'empêcher de penser à de la maltraitance organisationnelle.

La maltraitance est définie comme « un geste singulier ou répétitif ou un défaut d'action appropriée qui se produit dans une relation où il devrait y avoir de la confiance et qui cause, intentionnellement ou non, du tort ou de la détresse à une personne » (*Loi visant à lutter contre la maltraitance envers les aînés et toute autre personne majeure en situation de vulnérabilité*, art. 2 (3^o)). La maltraitance envers les personnes âgées – et leur

exploitation (*Charte des droits et libertés de la personne*, art. 48) – est un problème social dénoncé depuis plusieurs années au Québec. Des situations impliquant un ou plusieurs aînés maltraités financièrement, psychologiquement ou physiquement sont régulièrement révélées dans les médias. Les tribunaux rendent des décisions qui font état de personnes âgées qui ont été exploitées par des membres de leur famille, des proches, des vendeurs, des prestataires de services, des professionnels, des fraudeurs sur Internet, etc.

En ces temps de pandémie, on réalise que tout le système peut maltraiter. Le gouvernement du Québec définit la maltraitance organisationnelle comme : « Toute situation préjudiciable créée ou tolérée par les procédures d'organisations privées, publiques ou communautaires responsables d'offrir des soins ou des services de tous types, qui compromet l'exercice des droits et des libertés de la personne aînée. » (<https://www.quebec.ca/famille-et-soutien-aux-personnes/aide-et-soutien/maltraitance-aines/#c18014>) À titre d'exemples, il mentionne des services donnés brusquement ou inadaptés aux besoins des personnes, un manque de directives claires au personnel, une capacité organisationnelle réduite, du personnel mal formé, etc. On reconnaît plusieurs caractéristiques des services offerts dans différents centres d'hébergement actuellement. **On constate également les limites de la *Loi visant à lutter contre la maltraitance envers les aînés et toute autre personne en situation de vulnérabilité* adoptée en 2017.**

Dans certains centres d'hébergement, les problèmes sont exacerbés en raison d'employeurs qui cherchent à maximiser les profits et qui offrent le salaire minimum aux membres du personnel, entraînant une pénurie de travailleurs de la santé dans ce type de résidences. Cette pénurie de personnel existait déjà avant la pandémie dans plusieurs CHSLD publics et privés, mais elle s'est accrue de façon dramatique pendant la crise sanitaire.

Ce constat devra amener le gouvernement à s'interroger, entre autres, sur l'opportunité de nationaliser les CHSLD privés et de mettre en place des mécanismes plus efficaces pour mettre fin à toutes formes de maltraitance. Le gouvernement doit entreprendre rapidement un vaste chantier pour revoir les structures et le fonctionnement des CHSLD publics et privés. Il doit aussi s'interroger sur l'accessibilité des soins à domicile. Il est nécessaire qu'il réfléchisse aux priorités dans l'allocation

des budgets entre les différents secteurs d'activités : santé, éducation, transport, etc.

Le problème de la maltraitance envers les personnes âgées dans certains CHSLD – comme celui de toute forme de maltraitance – est complexe et multifactoriel. Protéger les personnes âgées qui sont en situation de vulnérabilité tout en veillant à respecter leurs droits et à préserver leur autonomie résiduelle amènera assurément son lot de défis.

Comme le souligne le Secrétaire général des Nations Unies, António Guterres :

« Our response to COVID-19 must respect the rights and dignity of older people. [...] As we look to recover better, we will need ambition and vision to build more inclusive, sustainable and age-friendly societies that are fit for the future. » (<https://www.un.org/en/coronavirus/our-response-covid-19-must-respect-rights-and-dignity-older-people>)

À l'aube de l'adoption de la *Loi visant à lutter contre la maltraitance envers les aînés et toute autre personne majeure en situation de vulnérabilité* par le gouvernement du Québec, je posais la question : « **Le Québec fait-il semblant d'aimer les personnes aînées?** » (Christine Morin, *Le Soleil*, 26 décembre 2016). **La question demeure.** Le confinement de certaines personnes âgées avait commencé bien avant le début de la pandémie. Certaines d'entre elles vivaient déjà seules, isolées, en situation de vulnérabilité, maltraitées ou exploitées.

Les droits des personnes âgées sont au cœur de l'actualité en ces temps de pandémie, mais pour encore combien de temps? Chacun doit se sentir réellement concerné par la situation des aînés pour que les choses changent. Si nous ne nous soucions des droits des personnes âgées qu'en temps de pandémie, les mêmes questions resurgiront inmanquablement lors de la prochaine crise.

THAT TIME OF YEAR

Lisa Silver¹

“That time of year thou mayest in me behold” is from Sonnet 73, one of Shakespeare’s best-known sonnets. A metaphor for aging and death. It is not the most uplifting metaphor to be referencing during the time of COVID-19. Despite this seemingly bleak message, there is an alternate interpretation of the sonnet that is decidedly uplifting and hopeful. The sonnet, instead of presaging death, can symbolize life. As the author strides through the seasons, we can sense in that journey the cycle of life in all of its vagaries of beauty. We gain a deeper appreciation of life as we stroll through the “boughs which shake against the cold.” It is not such an ominous thought.

Shakespeare sonnets, quantum mechanics, British history, daily puzzles, Star Trek, colleagues, friends and family, and, best of all, teaching and learning are my life cycle events, neatly compressed into this strange time of COVID-19. The list is not exhaustive. There is in the background the ever-present fear of infection and the ever-present shadow of the news; all too easily accessible in the digital age. It is ironic that the virus has gone viral in cyberspace. It is difficult to pull oneself from the daily graphs, statistics and descriptions of what we are all enduring as we sit patiently inside, waiting for something to happen outside. We are not waiting for a miracle perhaps but a sign, no matter how small, that we are all going to come out of this okay.

The sign may be spring. I hear the “sweet birds” of Shakespeare singing. During Shakespeare’s time, as we incessantly read in the media, they too suffered from contagion and death. For two years the playhouses lay empty, banned from opening to control the outbreak of plague. Yet, life went on, and eventually it returned to full force. That is something to remember.

A sign of these times may also be the social mantra to “help prevent the spread.” I went into a form of self-isolation early into this “new normal.” My husband, who is in treatment for stage four lung cancer, needed the

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Lisa Silver
That Time of Year

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protection of home to stay healthy and safe. Quickly, we found strength in isolation as it became abundantly clear that being alone in our home did not mean being home alone. Text chat groups (which one friend labelled Corona Boredom), telephone calls, Zoom meetings, and online streaming of religious services became the social outing we all craved. That first week was a blur of a new kind of activity. It wasn't physical because the physicality of our space shrunk so rapidly. Rather it was of the mental kind; neurons firing at rapid speed and emotions careening from highs to lows.

Work became the sign of consistency; the anchor to both the new and old reality. Quickly pivoting from in-class teaching, where I was physically present, to remote teaching, where I was digitally presented, was a welcome challenge. I am constantly amazed at the adaptability of human beings; how quickly we can revise our path and lay down a new one. From the "ashes" of Shakespeare's sonnet, we can become stronger. That strength of character can only be created through the support of others. A quote from Thomas Paine is apt; "It is not in numbers, but in unity, that our great strength lies." My faculty colleagues provided exceptional outreach and support during this tentative time. Immediately, one colleague started a Slack App chat where we could post our ideas and questions on how we were approaching this online transition. This opportunity provided the support we needed to forge ahead as we created a new rendition of our courses. Most helpful was reading the experiences of colleagues after their first foray into online learning. To finish that Paine quote, "yet our present numbers are sufficient to repel the force of all the world." Although the first week was stressful, it was powerful too.

To my pleasant surprise, remote learning was energizing. The ability to be creative and provide a teaching and learning platform that each student could tailor to their own learning needs was an incredibly positive experience. I implemented some pedagogical practices that I previously promoted in varying degrees but had not implemented fully. For instance, I "flipped" the entire classroom, in the classical meaning of that term, by creating audio PowerPoints, accessible anytime and anywhere, through the course website. I continued with the scheduled classes via Zoom but re-envisioned the classes as an enhanced learning space for quick review, deep discussion and break out room problem solving.

I injected some much-needed fun into this newly imagined learning space by starting a Spotify music playlist with my students. Now for the big reveal – I teach criminal law to first year law students. This musical interlude allowed me to integrate course themes with music. One playlist, for instance was entitled justifications and excuses to highlight musically the defences of duress, necessity, self-defence and defence of property. Students added to the playlist as the days stretched into weeks. I invited other faculty members to provide suggestions. To lend a human touch to the criminal justice system, I invited my special Zoom guest, a local judge, to do the same.

Although this musical project represented the “fun” in the “fundamentals” of criminal law, it was also meaningful. One student suggested the Tragically Hip song called “Wheat Kings,” which told the story of David Milgard, who spent twenty-three years in prison before being exonerated. Earlier in the year, David Milgard was at our law school to speak of the plight of the wrongfully convicted. The song was a poignant reminder of what really matters and why we were all sticking to the law school plan even in this time of adversity. The playlist, which started as a fun addition to a stressful situation, brought us together in a way that a traditional class could not; to misquote the words and meaning of Shakespeare, if “music be the food of learning, play on.” In the time of COVID-19, play we must.

Another hopeful sign of renewal is the nearing end of the term. Wrapping up the semester brings a sense of closure. It marks not just the end of a specific period of time but celebrates our accomplishments. We have endured much but we have also triumphed, ready to take on the next challenge. For the students, however, instead of a joyful look toward the future, the term end brings uncertainty. Many students have lost their anchor as they lost their summer placements. They feel adrift; cut off from human contact and career prospects. But this is where we, faculty members, can make a difference. A colleague at another law school generously gave his time and effort to raise money to fund student summer internships. Our faculty is poised to hire a number of extra students to do research. In this COVID-19 time of scarcity, we have found more. Now, that, truly is something to celebrate.

The last sign of the times of COVID-19 is the sure knowledge that all of these new learnings, from teaching to friendship, will last. We must hold

onto these experiences, learn from them and integrate them into our “new” lives. This means doing what I am doing right now, which is writing, reflecting and engaging in the individual, collective and systemic impact of COVID-19. Without this, our isolation will be for naught. Instead of permitting the pandemic to define our lives, we can define our lives through the unique perspective COVID-19 has given us. This includes thinking about teaching and learning in a different way. We all, as knowledge sharers, can share more than our knowledge; we can share, at this fragile period in our lives, our wisdom as calibrated through the lens of new experiences and fresh approaches.

Sonnet 73 was written by William Shakespeare in 1609. We are now in 2020, some 411 years later. Over that stretch of time we have changed and grown in ways unimaginable even to the best playwright of all ages. Being alive in the time of COVID-19 is an experience unlike any other. The most vulnerable in our society – the elderly, the sick, the homeless and the institutionalized – are all at risk of harm. We see these vulnerabilities very clearly now and perceive how societal change can make meaningful differences in all of our lives.

I started this reflective piece with a slice of Shakespeare, and with a sonnet that suggests the end as opposed to the beginning. I end now with a Shakespearean beginning – not the beginning of a sonnet or play but the popular notion that Shakespeare was delightfully productive during what is known jarringly as the plague years. In fact, he may have written some of his most enduring plays, such as Antony and Cleopatra, King Lear and McBeth during that grim period. COVID-19 may be a barrier to the full enjoyment of our lives but we can also look at it in a different, more positive light; life in the time of COVID-19 can be a time of creative renewal when we stretch our imagination and look beyond those barriers.

THE VIRTUAL MIRROR: REFLECTIONS AND REFRACTIONS OF MY PEDAGOGICAL IDENTITY

David Sandomierski¹

As we move from the emergency nature of this pandemic into its longer term, I ask myself: What is learning? What are the conditions for learning? Do I really believe what I've told myself I believe in – or am I working on a decades-old script? Are the ideas and ideals I have had about education, citing Frye, citing my own great educators, lionizing them, quoting them repeatedly so that their own flashes of inspiration become slogans, emblems, calling cards – are they still mine? Where am I in all this?

Nothing like an emergency to test the mettle of my convictions. How much of my teaching has been implicit reliance on old patterns and habits? How much – to quote Matthew Arnold, via James Milner, am I really committed to “turning a fresh stream of thought upon stock notions and habits”? How much am I committed to re-imagining what I think about law, and what I think about learning? What does it mean to be a “partner” in education with one's students?

The advertised need to parcel teaching into online segments drives us to think content first, critique second. Or does it? Does the parceling off free us to make educating, teaching, something I propositionally believe in? I wrote a dissertation and a book about the predilection for doctrinal based teaching among what are now my colleagues. It was, in a sense, critical. But what is critique if not looking honestly in the mirror or, in Richard Devlin's words, critical affirmation? Do I affirm that teaching law is teaching content? Propositionally, no – but, honestly, what can I say?

Who am I to say: “Here is content”? Is that content mine? Or am I a vessel for some other accretion of certainty, certainty which no one really believes in, but we all believe needs to exist, if at least as a foil, or as a peg? How can I, who has only hypothesized about problem-solving in law, really teach it? Is it enough to quote the giants before me, who have articulated the virtues so well – to stand on their articulations of philosophical truth, and to teach from there? How much of teaching is

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David Sandomierski
The Virtual Mirror:
Reflections and Refractions of my Pedagogical Identity

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aspirational? How much is the propulsion of ideals that we wish to be truths? How much is proclaiming a world we want, even if the world stares us in the face as different?

If educating is drawing out, the drawing out of what? If it is the drawing out of our students' inner selves, of their inner confidence and creativity, how does this relate to "content"? If it is the drawing out of what I believe in, then what of my students? What does it really mean to be in conversation with one's students? How does one listen and learn and speak and proclaim all at the same time?

Fear. Fear of failing. Fear that the magic of the classroom will not return. More than that: did it ever exist? Did the questions cause more anxiety and consternation than edification and self-learning? Was it all ego? Was it all a bath of uncertainty, trying to turn uncertainty into a virtue?

How can uncertainty be a virtue in the online environment? When students are stressed, paying high fees, clinging to some refuge of knowledge, certainty, truth, in a world and in lives that are now unstable? Can the online classroom be a refuge from all this instability? In normal times, the classroom is a place to revel in uncertainty: Laughter and doubt, as someone wise once told me. In normal times the classroom is a foil for the stability and fixity and taken-for-grantedness of the world. When the world is certain, however pathological, the classroom is a place to disrupt our stock notions and habits. What about when the world is unraveling? Private worlds, social worlds, collective worlds, even the idea of a world, of fixity. What then is the classroom? Foil to what?

Imagined communities. Constructed communities. Social network. Curated space. What is this online classroom? Vessel for content delivery? A homeroom? A chat board? A canvas? A conversation? Was it ever possible, that the law is a conversation, that learning is a conversation, that these two mysteries of human connection: law and education – reunite around this word?

In normal times, learning law, especially for first years, should be destabilizing: it should disrupt the idea that law is certain, definitive, determinative, predictive. Or, learning law should show the converse: that the world can be governed by principles that evolve organically, are internally consistent, that repel arbitrariness. The eternal

tension between rule-of-law formalism and the contingency of legal forms and knowledge surely is not affected by the pandemic. If anything, profound social changes test and stretch our understanding of law, deepening the claims on either side of this heuristic polarity (the polarity is a heuristic, a device for better understanding – the ideal types are not end points, pursuit of knowledge is not teleological). If anything, the tensions between certainty and contingency are even more acute now – the need for principle, the need for skepticism even stronger. So, what posture to take?

One directive so far has been to “do less.” How even to make sense of this? As a guidance for psychological health – yes. As a disciplining device for those who may be predisposed to overly complicate things – yes. But – how to maintain the mystery and the majesty of law’s profound puzzles, by doing less? By delivering the pre-packaged philosophical end point, like a cherry on top of the sundae? By abandoning the philosophical point, hoping it emerges as an “unplanned by-product” (to quote Fuller out of context, who once said knowledge of the *rules* should emerge as unplanned by-products of the focus on legal processes)? By abandoning the philosophical “message” altogether and retreating to content? Would that last option be, to quote Irwin Cotler (third hand, via Rod Macdonald), a capitulation to the “conspiracy of mediocrity”? Or would it be pragmatic survival? A compassionate sacrifice?

If law is a conversation, it is also a story of relationships – human relations, contractual relations, relationships with neighbours and strangers, between the individual and the state. Ideas in relation. The student-teacher relationship. The legal *community*. In a physical classroom, these relationships are self-evident, naturally occurring, and if anything the challenge is to see them, name them, and articulate their relevance to the material studied. Online, the relationships must be deliberately constructed – or, rather, the conditions must be deliberately constructed so that the relationships can grow.

Now there is a need for a prior exercise, and doing this work will force me to think deliberately about the conditions necessary for relationships. This can only force me to articulate what my real (as in, what I really believe in today, now, in the current context of real circumstances) beliefs are about the learning relationship. It can only help me hone how much of what I believe about law is fresh and true, and how much is lip-service to old

stock notions and habits (however iconoclastic their origins might have been).

A screen capture of my own talking head is not quite a mirror: it's flipped along an axis; I can minimize it, hide it, pin it if I like. It doesn't look at all like what I think I look like, and if I look too closely, I lose all confidence in myself. But then, I've never had a mirror in my classroom either. This perversion of my inner image of myself might be accurate: I do not know. But the sudden awareness of my external projection (I've never been one for mirrors) is on balance good for me. I'm just starting this career, but I think I know so much. I've immersed myself in the wisdom of those who have gone before me; I can cite their epithets chapter and verse; their eureka moments distilled and, now, jumbled in my mind. The accretion and synthesis of lives lived, of surprise self-discoveries. How lucky am I. But while the giants in my mind enrich me, they are not me. I don't know it all. I barely know anything. In every crisis an opportunity, and above all, for me, as someone who's always said he cares about teaching, for whom learning has always been a joy, and for whom the discovery of law was a revelation – an opportunity to get to know myself. Or, at very least, for a glimpse of honesty.

