More Fresh Judgment! How Law Privileges the University

William McLean

Follow this and additional works at: https://digitalcommons.schulichlaw.dal.ca/djls

Recommended Citation


This Article is brought to you for free and open access by the Journals at Schulich Scholars. It has been accepted for inclusion in Dalhousie Journal of Legal Studies by an authorized editor of Schulich Scholars. For more information, please contact hannah.steeves@dal.ca.
MORE FRESH JUDGMENT! HOW LAW PRIVILEGES THE UNIVERSITY

WILLIAM MCLEAN†

Court-enhanced academic independence is closely related to judicial independence. Discussion of this relationship, however, is absent from most legal discourse. The absence of this discussion amounts to a privilege for the university in its relationship to the court. Three indicia of this absent discussion are canvassed. First, the legal academy's virtual self-ignorance of its influence on the judiciary. Second, the common law’s tendency to non-construct the university through judicial non-interference. Third, the judiciary's constitutional reaffirmation of university independence under the Charter. This non-construction of the university and the absent discussion around it point to the stake that judicial independence has in ensuring that it can rely on an uncontaminated source of academic authority for support.

L'indépendance académique est étroitement liée à l'indépendance des juges. Il n'y a pas beaucoup de discussion de ce lien dans le discours juridique. L'absence de cette discussion constitue un privilège pour l'université par rapport à ses relations avec les tribunaux. Trois indices de l'absence de cette discussion sont examinés. Premièrement, l'académie juridique ignore son influence sur les juges. Ensuite, le droit a tendance à déconstruire l'université en ne se mêlant pas à ses affaires. Finalement, les juges ont réaffirmé l'indépendance de l'université en se servant de la Charte. Cette déconstruction de l'université accompagnée par la discussion absente qui l'entoure indiquent que l'indépendance judiciaire a besoin d'assurer qu'elle peut se fier à une source pure d'autorité académique.

A quick survey around legal society reveals a landscape peopled with various supplicants willing to advise and temper the sovereign’s dispensing of mercy. Naturalists, positivists, crits, feminists, economists, marxists, social critics, liberals, conservatives, deconstructionists, and presumably anarchists, all write and speak to one another proposing changes, modifications, and criticisms of

† B.A. (Hons.) (McMaster), M.A. (Waterloo), LL.B. (Dalhousie) anticipated 1996. This paper received a J.S.D. Tory Writing award for 1995.
the "good life," if it does not offend one's neo-platonic sensibilities to call it so; and if it does offend, then one might say the various efforts are plainly and simply directed toward the "just." At least, one assumes these people direct their various energies towards the "just" through the media of discourse and instruction. One also assumes they direct a fair share of this energy to the one present at the adversarial moment; or, if the discourse is broader, the one at the point of conflict; or, broader still, the one at the point of legitimization where one's "rights" begin at the same time as another's "rights" begin.

One might assume this direction of energies is a fair explanation of the juridical-legal critical act unless one has good reason not to. But failing good reason, descending into a world where reason has to compete with context, one might remark at the absent presence of the above players and indeed, the sovereign, at certain key points just prior to the justiciable moment. Indeed, such a remark this paper embarks on.

A commentator on the law, generally referred to as an authority, speaks to and is occasionally sought out by the one present at the adversarial moment, also generally referred to as the authority. The site from which the commentator seeks out the law and where the adjudicator seeks out the commentator is rarely examined as a seat of authorizing authority. This seat is the University, a place where legal commentators "authorize" their work and where adjudicators look to use such work to bolster their authority—a process of "authorizing authority." This seat of authorizing authority is the site of a vast industry whose proximity to the justiciable moment relegates it to the status of a prior medium. This site is often pushed back from view by the desire for the presence of justice at the justiciable moment: it is almost like the vast industry is not there at all. The Derridean lexicon\(^1\) provides a label for that which is not there; it is called the 'absent presence:' "Rather than the absence of full presence, absence is the prior medium in which the desire for presence can become aware of itself."\(^2\) I believe the characterization of the University as a seat of authorizing authority is rarely examined because the courts and the


\(^2\) Ibid.
academy have constructed academic privilege to push this site back from view.

This absent presence in the juridical–academic debate on justice is one which needs exposing, if not for the titillation of doing so in its own right, then for the sake of preventing theoretical gridlock. So first, I begin with some background on the need for exposing absence. The theoretical–critical revolution which swept the North American academies beginning in the 1970’s and which provided new ways to challenge the legitimizing metanarratives of society in general, eventually found their way to the door of the legal academy in the form of Critical Legal Studies (CLS). For a profession whose embrace of *stare decisis* and 17th-century scientific method has just recovered from the project of assimilating 18th-century liberalism, it is hardly surprising to note the critical revolution was at first met with a cold, and perhaps indignant, reception. Indeed, as late as 1988 the party line stated the legal academy was not about to become anybody’s sandbox:

The gravest problem is that Hutchinson’s impatience with and intolerance of our cultural traditions leads him to misrepresent them and to deny their potential. In the end, political theory has little in common with rock music.... Political theory has more rigorous standards.

The critical response to this closure intensified. There were accusations of “privilege” and the identification of a kind of truce between two poles:

Critical legal studies, in an ironic sort of way, continues to reaffirm the centrality of liberalism because so much of liberalism remains at the core of the critical agenda. The only difference is that it is no longer portrayed in its best light. In short, crits admit it is dominant ideology.

---

3 E.g., the Yale School of deconstruction.
The risk of such a truce is the risk of polarization between dominant liberal ideology on the one hand and the proponents of alternative ideologies on the other hand. The risk is perhaps better stated as the installment of yet another dialectical process at the expense of true polyvocality. The risk, and hence the need for exposure, is that synthetic agreement in the prior medium will again be overshadowed by the tensions inherent in the justiciable moment. This brings us back to the issue of the absent presence of the University in the juridical–academic debate on justice.

The absent presence is, quite simply, the role of the University itself in the juridical–academic debate on justice. While the “law” provides the ground upon which the interpretive debate takes place, the University and the courtroom assert their presence as the ‘authorized’ sites at which these debates take place. The absence of the University, however, is made conspicuous by the fact that its presence, or its role, is rarely mentioned or acknowledged. My project, then, attempts to problematize the very site at which the interpretive debate takes place (whether by the liberal establishment or the crits) by challenging the University as a place which amounts to an academic and judicial non-construct. I submit that the non-construction of the University is a function of the fact that the legal academy ignores it. The academy is protected, not by the presence of law, but by the law’s conspicuous absence via the courts’ reluctance to allow the contamination of the University environment by the state. I assert that the non-construction of the University bears a symbiotic relationship to the courts’ own independence as the courts look to the University as one uncontaminated source of judicial input.

**THE UNIVERSITY IGNORES ITS OWN INFLUENCE**

The first indicia of how law privileges the University arises from the proposition that the legal academy virtually ignores its own influence. Here, I use the word “law” not to designate the emanations of statutes or judgments, but to designate discursive legal society, the academic legal discourse which fills in the blanks the court will not, or cannot, fill in itself. Hence, in this section I call this “law.” This is the activity of law which privileges the University by allowing it to ignore key aspects of itself.
In this section of the inquiry, I look at a narrow range of academic input into the law. This narrow range concerns the collective legal-academic realization about the nature of law that we see taking place in the almost decade and a half since the introduction of the *Charter of Rights and Freedoms*. Narrower still, I am going to perform a modest archaeology upon a single aspect of this collective realization: the legal-academic focus upon the composition of the judiciary. The introduction of the *Charter* brought greater academic focus on the increased prominence of the role of the judiciary itself. But while an archaeology of the collective thought on the composition of the judiciary is important in itself, I wish to narrow my dig further still. I am not digging for the relics of opinion on who makes up the judiciary. I am digging for the spaces between the relics: I am looking for signs of those who do not make up the judiciary, precisely because these same people often are not identified as making up or influencing the judiciary.

Academics have generated quite a bit of analysis on the composition of the judiciary. They have identified various components of the judicial composite which I classify into two broad categories: a) reflections on who is the judge; and b) reflections on what or who influences the judge. Generally, the academic deconstruction of judicial composition begins with an elaborate construction of who is the judge. The construction of this category usually includes identifying judges’ gender (usually male); identifying their race (usually “white,” with few Aboriginal or minority groups represented); identifying their culture; identifying their religion; and identifying the region of Canada they represent. Following upon who the judges are, is the construction of the what or the who which influences them. This category often includes identifying the judges’ legal background (with usually 10 years experience to be appointed to the bench);


10 See MacKay, *supra* note 8 at 168.

identifying their social class; identifying their political or economic background (banking, commerce, or politics); and, some limited acknowledgment of their legal education. Each of the above subcategories of judicial composition provides an entry point for analyzing, deconstructing and reforming various aspects of judicial character and influence.

Such analysis, deconstruction, and reform, however, does not exist in a vacuum. One question is, who is the audience of this close examination of the judiciary? The obvious answer: the audience is the judiciary themselves, legislators and reformers, and other members of the academic community. Certainly, such work informs judges, raising awareness of the homogeneity of the bench and the accompanying danger of inherent bias due to singularity of perspective. Legislators and reformers benefit from such work because it raises public awareness of the need for debate on increasing heterogeneity of the bench and gives legislators clear options for increasing diversity through choosing judges whose character, background and influences may be different from the present norm. Such debate informs the academic community and introduces it to new tools and avenues of legal scholarship. While it does a good job exploring the composition of the judiciary, this academic work on the composition of the judiciary surprisingly lacks a comprehensive analysis of the composition of its own audience.

Such unreflected construction of the judiciary presents us with a gap. The academic analysis glosses over a disturbing aporia in its rush to challenge the composition of the judiciary and expose this to the judge, legislator, and academic. Upon examining such work, one becomes troubled by the regular aporias, the gaps between an individual’s origin and her judicial belief; between an individual’s influences and her judicial act: these gaps are complex and worthy of in-depth study in their own right. My project, however, is much

14 See V. Black and N. Richter, “Did She Mention My Name?: Citation of Academic Authority by the Supreme Court of Canada, 1985-1990” (1993) 16 Dalhousie L.J. 377.
more simplistic. My question is why does the group which creates and receives legal commentary not include itself as an influence on the judiciary? Why does the construction of the who and the what, the character and the influence, not acknowledge all of the characters, influences, and ultimately, audiences? Put simply, despite the overwhelming presence of the academic in the construction and audience of work on judicial composition, why is the academic and the academy so blatantly absent when it comes to tallying up the who's and the what's, the characters and influences which compose the judiciary?

The above review of how the legal academy treats the question of the composition of the judiciary reveals the conspicuous absence of the University as a site of authorizing authority. When the subject of the role of legal education does come up, however, academics tend to understate the influence of the University on the composition of the judiciary. While mention of a judge's legal education often makes it to the list of influences on the judiciary, the emphasis on education often mingles with other issues. Petter notes one influence on the judiciary is "the legal system in which they were schooled and to what they owe their livelihood." While acknowledging the role of legal education, Petter subsumes it under a larger system which includes livelihood. This is not quite an outright admission of the role of academic influence on the judiciary, rather, it appears to be an influence a judge brings with himself or herself. MacKay also comes close to acknowledging the role of the University by demonstrating the role of law school in destroying emotion and feeling.

Bakan also refers to the law school as an influence on judicial composition: "The homogeneity of the judiciary is also closely tied to that of law school student populations." At a later point, MacKay comes a little closer to acknowledging the role of the University by saying that judges will make choices as a result of competing values and one of the sources of these values is "legal society". The definition of legal society, however, does not clearly

15 Supra note 13 at 861.
17 Supra note 12 at 450.
18 Supra note 8 at 514.
indicate whether it includes the legal academy. One could assume it does. The above observations of potential influences are student-oriented, however, and do not focus on the academic’s role in maintaining a program of emotional homogeneity and legal socializing in its activities aimed at the judiciary.

Perhaps one finds the clearest admission of the role of the University’s influence on the judiciary in Black’s work on the use of academic authority in the Supreme Court of Canada.19 This work makes substantial inroads into examining the relationship between the court and the university and the role of the academy in contributing towards and constituting judgments. For example, a bottom-line fact coming out of the work shows the Supreme Court of Canada used academic authority in 48 percent of the decisions it rendered during a certain period.20 Black describes the critical value of the work, however, in understated terms as “an initial attempt at an empirical examination of forensic citation....”21 Perhaps initial attempts are necessarily quantitative, empirical, and forensic, but this does not relieve it of an implicit critical theoretical perspective. Indeed, Black’s study embraces a critical theoretical approach when it adopts as a “citation” the distinction “between a judge’s simply mentioning an authority and a judge’s actually relying on one.”22 This distinction was widened to count as citations those judicial references which were less than clear how much substance of the authority was used in writing the judgment. I agree with this approach, but would point out it reflects a critical stance whose underlying theory says such use of citation must have some degree of influence on the judge, so it cannot be simply explained away as a forensic choice (i.e. a choice to cite an author’s name because of a concern for plagiarism).

Despite the inroads this research makes for a theory of the role of the University, it still contains additional small doses of familiar understatement of the influence of the University on the judiciary. For example, Black mentions three Supreme Court of Canada justices were full-time academics before their appointment to the bench. He draws from this a tentative conclusion based on his

19 Supra note 14.  
20 Ibid. at 382.  
21 Ibid. at 378.  
22 Ibid. at 380.
research that this group of justices tend to write decisions containing academic references more than their colleagues who did not have such a pre-bench position. Framing the observation this way understates the potential influence of the academy on those judges who were not full-time academics prior to their appointment to the bench. Presumably, all the justices have, in addition to their law degrees, undergraduate and possibly graduate degrees from the academy. This should be presented as a reason why this group of judges cite authority at all, rather than solely as a comparison with the citation habits of their “academic” colleagues. The academic connection with the University is too strong to understate in such a way.

These points demonstrate that other influences and compositional factors may contribute to the process of the judge’s role of making choices. The legal academy, as demonstrated above, through its relative silence about its own involvement and participation in the process, exposes an example of how “law” privileges the University. In a backward kind of way, the legal academy privileges itself through an apparently self-denigrating non-acknowledgment of its own influence.

THE CONSTRUCTION OF UNIVERSITY PRIVILEGE

We move now from academic “law” and its self-privilege of the University to a second indicia which looks at how the judiciary’s common-law treatment of the University works in some respects to create a privileged site. In keeping with the theme of the non-construction of the University by law I have dug up examples which show the tendency of the courts not to interfere with the operation and structure of the University. I relate this tendency to the Derridean absence of force:

‘to enforce the law,’ which always reminds us that if justice is not necessarily law (droit) or the law, it cannot become justice legitimately or de jure except by

---

23 See Black, 47% vs. 40.1%, Ibid. at 387.
withholding force or rather by appealing to force from its first moment, from its first word. 24

The net effect of the law on the site of authorizing authority withholds force from the realm of the University, hence allowing it the privilege, not to be threatened, but to be non-constructed by the law.

One example concerns the legal non-construct of membership within the University. In *Paine v. The University of Toronto* 25 an unsuccessful candidate for tenure appealed the rejection of his application for tenure, suggesting that the presence on the Tenure Committee of a person who previously wrote an unfavourable review of him constituted an unfair proceeding. After exhausting internal appeal procedures, the candidate appealed to the courts. In dismissing the appeal, the Ontario Court of Appeal took the opportunity to reiterate the court's traditional position in regard to the University: "I cite the *Harelkin* case only for the proposition that the courts should be reluctant to intervene in University affairs." 26 Indeed, the Ontario Court of Appeal acknowledged it was merely upholding the position of the Supreme Court of Canada in *Harelkin*:

> the incorporation of a university by statute does not alter the traditional nature of such an institution as a community of scholars and students enjoying substantial internal autonomy.... The courts should use restraint and be slow to intervene in university affairs by means of discretionary writs whenever it is still possible for the University to correct its errors with its own institutional means. 27

The courts' reluctance to intervene in University affairs because they regard the University as autonomous amounts to a non-application of the law to its functions and allows the University constructive freedom to constitute its membership as it sees fit.

26 Ibid. at 774.
27 Ibid. at 774.
The court's reluctance to interfere in the University extends further to certain types of communication within the University. Communications which concern the tenure process are uniquely protected by the courts if they are confidential in nature. In *Slavutych v. Baker*\(^2\) the court granted evidentiary privilege to a communication concerning a candidate's tenure appointment. Here, the court created a new category of privileged confidential relationships because it was unwilling to interfere in the administration of the University. The uniqueness of this development was the subject of comment by Justice Sopinka in his text: "the reality is that apart from the rather rare relationship in the *Slavutych* case, no communications within any other class of identifiable relationship have been explicitly sheltered."\(^3\) This development in the law of evidence also has the effect of making the law 'absent' in this type of University situation by not subjecting such evidence to the process of adjudication, which would, necessarily, invoke the presence of the court.

These cases appear to illustrate a reinforcement of the public-private distinction when it comes to Universities. The court will protect its private nature at common law, but will also go much further to make some of the private activities of the University non-justiciable.

**THE DISJOINTED METANARRATIVE OF MCKINNEY**

A third indicia of how law privileges the University arises out of the operation of the *Charter*. One finds a good example of the ultimate disjointed metanarrative in *McKinney v. University of Guelph*\(^4\) with its sweeping review of *Charter* application, early retirement, and the University. I wish to focus on this latter part to demonstrate how *McKinney* non-constructs the University.

The *McKinney* story begins at the question: Does a University professor have to retire at 65? Along the way, the court cites the law's familiar hands-off approach to the University from *Harelkin*.

The story then reaches the disjointed conclusion to the retirement question: Yes, the professor has to retire because a University is not a government actor, but if it was a government actor, then most certainly a *Charter* violation would be involved, and she might not have to retire. The Supreme Court of Canada constructs its own metanarrative over the basic question of early retirement with a long examination of the relation of University to government (in the process, leaving the issue of mandatory retirement far behind). *McKinney* reaffirms the University’s privilege of autonomy which La Forest J. describes as follows:

The legal autonomy of the universities is fully buttressed by their traditional position in society. Any attempt by government to influence university decisions, especially decisions regarding appointment, tenure and dismissal of academic staff, would be strenuously resisted by the universities on the basis that this could lead to breaches of academic freedom.31

The University’s core functions regarding decisions on appointments, tenure and dismissal go to the heart of academic freedom and help explain the rationale behind *Paine* and *Slavutych*.

What makes this case remarkable is the strain it puts on the traditional judicial project of preserving the independence, and thus the privilege, of the University under (or in the absence of) the law and the postmodern flourish with which it does this. The strain is evident through La Forest J.’s use of the curious technique of proceeding with the examination of the University’s policy based on a hypothetical situation of what would happen under the *Charter* if the University were a government actor. Under the hypothetical, La Forest J. finds that the core Canadian document of rights and freedoms would be violated. The magnitude of the constitutional violation is further enlarged by the tenuous connection of how close the University came to being considered a government actor. So tenuous, in fact, that La Forest J.’s ‘core functions’ of a University have recently come under governmental attack.32 Indeed, as if La Forest J.’s tenuous hypothetical was not enough, Wilson J., in

---


32 Under Alberta government cutbacks, the inference is that the University is still free from government interference, but tenure obligations will not longer be a way to justify resistance to provincial budget cuts.
dissent, finds not one, but three indicia by which she could construe the University as a government actor, thereby drawing further attention to the magnitude of La Forest J.'s decision on the status of a University.

As mentioned, McKinney carried on the law's tradition of privileging the University. The difference here, however, is how strongly the context of constitutional rights draws attention to the court's privileging of the University. This context places the Supreme Court of Canada squarely within the postmodern context of revealing the structural composition of things. Here, the Supreme Court of Canada is exposed making distinctions about what is in and out of Charter scrutiny based on a very fine line. This exposure is like playing what one might describe as a type of game of 'chicken' by seeing how close they can come to finding the University's connection to government with a potential violation of the supreme law of Canada at stake, but nevertheless still finding that a University is not a government actor. Indeed, as if the point was not made adequately enough about the lengths to which the court will go to protect the independence of the University, this project was carried on in subsequent cases. In Harrison v. UBC, La Forest J. again found the University was a government actor despite the fact that the government appointed a majority of board members and required various reports. Indeed, to further articulate and define the privileged place of the University, the poor cousin of the University, the Canadian college, was held to be a government actor, thereby delimiting the University's role further in Douglas/Kwantlen Faculty Association v. Douglas College. The poor cousin community colleges were found to have aspects which amounted to government actions or "law." Indeed in Lavigne v. Ontario Public Service Employees Union La Forest J. goes quite far in defining the extent of government involvement to include efforts to "stimulate and preserve the community's economic and social welfare." This, however, does not extend to

---

34 D. Jones and A. de Villars, Principles of Administrative Law, 2d. ed. (Scarborough: Carswell, 1994) at 44.
37 Ibid. at 374.
the community's intellectual underpinnings, which are safe from Charter scrutiny while confined to the site of the University. Overall, the result is that the Supreme Court of Canada has 'constitutionalized' the privileged place of the University within the law. Indeed, the constitutional analysis fundamentally relies on the court not finding law to which the Charter can apply! This allows the site an authorizing authority, a freedom to develop because of the absence of law or force.

JUDICIAL INDEPENDENCE AND ACADEMIC INDEPENDENCE

Bringing together the threads of how "law" privileges the University we see three main indicia: academic self-ignorance, common law non-construction via non-interference, and a constitutional reaffirmation of independence. One "hurdle" we have to get over in trying to infer a relationship between these indicia and their tendency to construct a privileged place in "law" for the University is the substantive topics which these indicia relate to and stand for. For in the legal "scheme" of things, the decisions and academic commentaries discussed earlier are usually considered elaborations of the law, designed to stand as broad principles which may apply to other situations. The fact that the decisions and academic commentary concern or emanate from universities may be considered by some to be incidental (obiter!) to a strictly positivist or naturalist elaboration of law.

Indeed, some prominent members of the academy are still working out the repercussions of the 18th-century debate between the perspectives of natural law and positive law.38 Hogg sees judicial decision-making in terms of a "positivist vs. naturalist" debate. For him, the positivist side is favoured in approaching such topics as the Charter due to the danger and failure of Blackstone's type of natural law.39 The pursuit of this agenda hardly seems to leave space for consideration of deconstruction or other modes of criticism. The fact that the "positivist vs. natural law" debate is still so vibrant, so dialectical, creates a neutral space between the two well known and well worn poles which serves to privilege the University further.

39 Ibid. at 417.
My purpose is to enlarge the University-Law relationship, or the positivist-natural law debate, by examining and challenging the ability of critical-legal theory to mount a credible challenge to this ‘neutral’ space. So on to the next phase of the discussion.

Black’s statistics on the use of academic authority by the Supreme Court of Canada suggest that the University marketplace is well frequented by the judiciary. Indeed, while liberalism may be a “cottage industry,” academic citation is industrial sprawl. Black found that 48 percent of the decisions the Supreme Court of Canada rendered during the period studied used academic authority. 40 Although the weight of academic authority in each judgment is unknown, the frequency of citation is known. 48% is quite a high number. It makes us immediately want to look at the source of supply.

But what difference does it make to the “law” whether a University is a site which it either non-constructs or constructs and therefore privileges? We find one answer in the realm of judicial independence and the stake this independence has in ensuring that, when needed, it can rely on an uncontaminated source of academic authority for support. But first, let us examine the nature of judicial independence. The role and function of judicial independence is well summarized by MacKay:

The function of the judiciary is to adjudicate and resolve conflicts between individuals and between individuals and public authorities. Judicial independence from the legislative and executive branches of the government ensures that the process of adjudication is uninfluenced by external political pressures. Preservation of judicial independence ensures that the public perception of judicial impartiality is maintained and hence secures public confidence in the administration of justice.41

The fact that the courts are seen to be free from external political influence is key to public confidence in the court and is fundamental to its authority. MacKay notes that the realm of judicial independence extends to the court’s methods of administration and deliberation as well as judgment:

40 Supra note 14 at 382.
41 Supra note 8 at 165.
In *R. v. Valente* it was established that judicial independence required "judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function." It was held in *MacKeigan v. Hickman* that it was a violation of the principle of judicial independence to require judges to disclose information about their deliberations.42

The above examples of the rationale for judicial independence and the court's efforts at achieving judicial independence bear a striking resemblance to the type of independence we postulate the "law" non-constructs for the University.

The non-construction and construction of judicial and academic independence are strikingly similar. Valente's assertion of judicial control over administrative decisions strongly resembles McKinney's reluctance to interfere with the "core" administrative functions of the University. Hickman's reluctance to provide information on judicial deliberations strongly reminds us of Slavutych's finding of evidential privilege between parties at a University in certain confidential situations. The similarities reflect the privileges both institutions enjoy in terms of preserving their independence. This independence is the main ingredient in fostering public confidence.

Judicial independence and academic independence have more than just procedural privileges in common. This is not surprising, since they both depend on public confidence. This may have always been the case, but we now clearly see that the absolute need for public confidence in the administration of justice is constitutionally mandated.43 Hence, there can be no hint of contamination of the material that judges canvass in coming to a decision. Confidence is maintained and contamination is reduced via a variety of legal methods. For example, where judicial "fact-making" relies on the testimony of a witness, the court ensures the public's confidence in the administration of justice through applying established rules of evidence. Further, substantive law governs the material issues in a case with the weight of judicial precedent to back the judge up. Therefore, where the judge feels the need to do his or her own research, or where the elaboration of the law will be helped significantly from the use of academic authority, the judge must

---

42 Ibid. at 165.
43 See ss. 7 and 24 of the Charter.
also feel she can draw her research from a pure and similarly uncontaminated source. This source is the legal academy. This source would not be available to the court if the legal academy was merely another government department because this could introduce bias and subsequently bring the administration of justice into disrepute when academic work is used by the judiciary. Hence, the judiciary has a vested interest in creating the privileged place of the university because it helps shore up the perception of the independence of the judiciary and thereby preserve public confidence.

THE USE-VALUE OF KNOWLEDGE

But how can the court be sure the academic source is unbiased? Why do the courts so desperately need this source that they have to take the kind of metanarrative-destroying risks they needed to take in McKinney? The answer to the first question is that bias (in the source of academic commentary) can be eliminated by assigning a use-value to knowledge. With such a use-value, the consumer of knowledge is better positioned to make known the specifications for his needs. Lyotard describes the trend towards knowledge as a use-value thus:

The relationship of the suppliers and users of knowledge to the knowledge they supply and use is now tending, and will increasingly tend, to assume the form already taken by the relationship of commodity producers and consumers to the commodities they produce and consume—that is, the form of value. 44

As we have seen, the current specifications of academic produce have served the courts adequately as evidenced by their reluctance to interfere. In essence, the non-interference of the courts nonconstructs an environment similar to the liberal notion of the free marketplace of ideas. The net result protects the University from judicial and government interference. But how is this achieved?

The environment of non judicial-government interference allows the community of scholars to discuss, debate and draw out

ideas on various subjects of interest to the law. While there is a risk that some ideas may be subsumed under others, self-governance and the freedom of inquiry ensure an environment of free proof, an environment where demonstration of the merits of one's argument has few limits. The protection of the courts ensures this environment will not be constrained by outside political pressures which may unduly warp the course and perhaps even the outcome of free inquiry. In essence, the lack of judicial–government involvement ensures a type of free marketplace of ideas, but with the difference that even if no one is buying one's intellectual product, there is still a stall for one to sell, test, and develop one's wares.

Next, we explore an answer to the second question, why do the courts so desperately need this source that they have to risk the kind of disjointed metanarrative as they needed to risk in McKinney? One answer may lie in the court's need for a reliable pipeline of authoritative knowledge. Derrida describes justice's supply-side needs:

But justice, however unpresentable it may be, doesn't wait. It is that which must not wait. To be direct, simple and brief, let us say this: a just decision is always required immediately, "right away." It cannot furnish itself with infinite information and the unlimited knowledge of conditions, rules or hypothetical imperatives that could justify it.\(^{45}\)

The use-value of academic commentary finds value as a source of instant, peer-tested and uncontaminated ideas suitably independent for the grist mill of the judicial decision-making process. The value of academic knowledge to the Supreme Court of Canada is not so much what it is, but that its source of supply is guaranteed to be pure and immediately accessible through texts or articles without infinite debate. The stake judicial independence has in academic independence is high and this makes the need for our inquiry all the more urgent.

Indeed, the need for our inquiry results from a marked rise in the use of academic authority. Black notes:

\(^{45}\) Supra note 24 at 26.
Regardless of whether one considers the rate of citation in this six-year period to be high or low, it represents a notable increase over the rate that prevailed a generation earlier, a period when, as the *Arthurs Report* noted, ‘[l]egal treatises and articles were seldom cited in argument or referred to in judgments.’

The advent of computer databases, fax machines, and photocopierns allows for the instantaneous transmission of the use-value of knowledge and the dissemination of living, ready-made academic authority to satisfy the Derridean need for quick judgment. This state of affairs alone makes this paper necessary as an examination of the shape of these new players at the adversarial moment. The absence or silence or unawareness of academic indicia point to a gap in the awareness on the part of the Academy of its enormous influence. The proposition that it does not presently count itself as an influence calls for greater scrutiny of its role.

The danger, always, is the re-cloaking of the narrative into a metanarrative. The danger is noting the influences and then synthesizing them into objective influences. Derrida sketches this objectifying process as one which appeals to the idea that the freedom of the individual is the basis for a just decision. He starts as follows:

> But this freedom or this decision of the just, if it is one, must follow a law or a prescription, a rule. In this sense, in its very autonomy, in its freedom to follow or to give itself laws, it must have the power to be of the calculable or programmable order, for example as an act of fairness. But if the act simply consists of applying a rule, of enacting a program or effecting a calculation, we might say that it is legal, that it conforms to law, and perhaps, by metaphor, that it is just, but we would be wrong to say that the decision was just.

To be just, the decision of a judge, for example, must not only follow a rule of law or a general law but must also assume it, approve it, confirm its value, be a reinstituting act of interpretation, as if ultimately nothing previously

---

46 *Supra* note 14 at 383.
47 See *Ibid*. Black notes the prevailing view in the past was that living authors could not be cited in court.
Derrida describes the dominant paradigm of how justice appears to arise individually and objectively from the use of mere legal rules or programs predicated on an individual's freedom to adopt or reject the rule. The judgment is "fresh" because the judge could have adopted or rejected the rule or program. By adopting either, the judge re-presents or re-invents the law. The risk we face here is allowing the problematized site of the University and academic authority to slip back into the dominant paradigm of justice. In other words, the risk consists in taking the view that academic citation is a "forensic" activity where judges select from among ready-made objects of truth presented by academic authority in order to render fresh judgment. To avoid this risk, we should watch for the indicia of the social construction of judgments and expose moves denying this.

The tendency for slippage into objectivity in critical theory is all too familiar. One always has to watch for the "move" back to the law when the range of possibilities opens too far. The "move" sometimes involves a grappling with CLS criticism, but in the end making a strategic move to back privilege the law itself. An excellent example of the move, provided by MacKay, illustrates what to look for:

While I do not accept the CLS. argument that judging is just another form of politics, there is an important element of choice in Charter adjudication that should not be obscured. Courts should not assess the wisdom of the legislation on a purely subjective basis, but they must assess its wisdom in relation to the standards of the Charter. If we accept the view that there are as many versions of the Constitution as there are of Hamlet, the Charter may not add much in the way of objective criteria. Without going that far, the Court should acknowledge that the Charter does take it into the political realm of measuring the wisdom of a law.49

48 Supra note 24 at 22–23.
49 Supra note 16 at 95.
Note the striking similarity between this passage about the Charter and Hogg's positivist take on the Charter. Hogg has no doubt the Charter is a positivist institution: "a judge...should apply the positive law, which is the Charter as written." Both MacKay and Hogg take the positivist approach of placing their confidence in the institution of the Charter as the source of law and its own interpretation. Both close out the possibility of the alternative form of influence which is the University itself.

Indeed, this move is well recognized by the crits. For example, Bakan notes: "In short, Langille and Beatty prescribe that legal analysts think within law, and avoid thinking about law as a historical and political phenomenon." But, incredibly, theorists still advance ways for the system to work within itself. For example, Beatty, has a theory of constitutional interpretation where "judges play a role, akin to that of a social critic, evaluating the integrity—the morality—of the decisions made by those in control of the legal powers of the state." But nowhere to be seen, in all its glorious absent presence, is the role of the academy at the prior moment to the adversarial moment, urging on these new roles for judges.

This then points us back to the ever-present question, "the deeper issue of who controls the discursive agenda, who gets to determine what is important...". I believe this ground will never be held by any group if one holds of any value the Derridean line that deconstruction is justice. Take, for example, Jean-François Lyotard's statement: "Postmodern knowledge is not simply a tool of the authorities...." Lyotard's perspective portrays postmodernism as a state of affairs constituted by and practised by the establishment. The nascent CLS movement, therefore, should not be viewed as something outside of the mainstream. Rather, given our example of the ultimate mainstream judiciary, the Supreme Court of Canada, and its use of the postmodern framework of drawing attention to the privilege of the University, we should be able to see that postmodern approaches are

---

50 Supra note 38 at 417.
51 Supra note 12 at 452.
52 D. Beatty, "The End of Law: At Least as We Have Known It" in Devlin, ed., supra note 4, 391 at 392.
53 Devlin, supra note 6 at 195.
54 Supra note 44 at xxv.
undoubtedly tools of the authorities as well. The fact that the same tools should be picked up by others, including the CLS, should not be a surprise. The delegitimizing of the metanarrative quite clearly is the role of the authorities. Their work at the replacement of the metanarrative with structural islands of order and non-order, sense and non-sense, actors and non-actors is now the principle task of the day.

The revelation and pruning of structure is the principle project of the day. But sometimes we see the authorities go too far in the search for legitimization by exposing too many disjointed structures. We risk right now the danger of being satisfied or content with the revelation of this disjointed structure: the greater challenge is probing and usurping the powers which the efficient structural pruning of the authorities has left behind.

Why does the Supreme Court of Canada need to risk the postmodern exposure of the privileged place of the University? The risk is in keeping with the liberal notion of preserving and enhancing the theory of the marketplace of ideas. Lyotard sees a corresponding, liberally ‘necessary’, retreat from the role of the state in the marketplace of ideas:

The notion that learning falls within the purview of the state, as the brain or mind of society, will become more and more outdated with the increasing strength of the opposing principle, according to which society exists and progresses only if the messages circulating within it are rich in information and easy to decode.55

This “opposing principle” basically ousts the State from involvement in the knowledge industry. The Supreme Court of Canada agrees. The messages coming from the University need to be rich in meaning, easy to decode, and free from the contaminating influences of the State. In response, all we can say is that we have just added another institution we need to scrutinize. This institution, simply put, is the absent presence of the site of authorizing authority prior to the justiciable moment.

55 Ibid. at 5.