# LEGAL EDUCATION FOR THE 21ST CENTURY

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*[As recipient of the Law Faculty Teaching Award, Dr. McCallum was asked to give a talk on teaching, which she delivered to colleagues and students during Speakers' Hour on 17 February 2011. Below is the text of the talk, revised to incorporate some of the comments from those present. Sources referred to are listed in the Suggestions for Further Reading, below.]*

Thank you to all of you who were part of naming me as the first recipient of the Law Faculty Teaching Award. I feel privileged to have the job that I have and I am glad that you think that I do it well enough to deserve a teaching award. What follows are some of my observations about first year law. These are my observations but they are not uniquely mine, nor are they new. Duncan Kennedy, for example, offered similar observations in an article entitled "Legal Education as Training for Hierarchy". First published in 1982, this article is still a depressingly accurate and apt critique of the law school enterprise. (See the Appendix, below.)

Most Anglophone common law degree programs in the USA and Canada offer a compulsory first year curriculum that has changed very little since universities began offering a professional law degree program. The courses offered in first year deal primarily with private law. At UNB, three of the five full-year courses in first year -- property, contracts, and torts -- are private law courses which have been part of the first year curriculum since the school was established in Saint John in 1892. Currently, we allocate more class hours to these three courses than do most other Canadian law schools, but property, contracts, and torts are a substantial part of the required first year curriculum in all of the common law degree programs in Canada. Windsor offers a slight variation, with torts a compulsory course in second year. At the new law schools to be established at Thompson Rivers and at Lakehead, property, contracts, and torts will be a major element of the compulsory first year curriculum.

There is considerable agreement, too, about how to organize the first year private law courses. For the property course, instructors in Canadian law faculties have a choice of three national casebooks. Each presents property law primarily as a mechanism for facilitating individual decisions about the use of assets, and for resolving disputes between individuals about which of them has a better claim to the use of a particular asset. In the make-believe world of property law, all the players

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own property and all property owners are treated as juridical equals by the court -- equally able to acquire property and equally able to defend their property rights.

Property law does not concern itself with those who do not own property, and are therefore excluded from participation in decisions about the allocation and exercise of private property rights. Thus, property law can ignore the grossly unequal distribution of wealth in Canada. It can also ignore uses of property that damage the environment or waste natural resources, unless these uses can be challenged within the narrow confines of common law protection of individual property rights, such as the rights of riparian owners.

Contracts is also about juridical equals making choices about how to use assets, and making agreements with others in order to implement those choices. Law will enforce these agreements but will not regulate their content. Occasionally, equity may intervene in individual cases where one party takes undue advantage of the other. Remember Old Herbert Bundy of Yew Tree Farm in Broadchalke, "one of the most pleasing villages in England"? Lord Denning intervened to prevent Lloyds Bank from evicting Mr. Bundy, because in the circumstances it would be "unconscionable" for the Bank to exercise its legal rights. But cases that merit intervention are treated as anomalies. As Lord Denning observed: "No bargain will be upset which is the result of the ordinary interplay of forces. . . . Take the case of a poor man who is homeless. He agrees to pay a high rent to a landlord just to get a roof over his head. The common law will not interfere. It is left to Parliament. Next take the case of a borrower in urgent need of money. He borrows it from the bank at high interest and it is guaranteed by a friend. The guarantor gives his bond and gets nothing in return. The common law will not interfere." (*Lloyd's Bank v Bundy*, [1975] QB 326 (CA) at 334).

Contracts courses do not pay much attention to statutory limitations on freedom of contract, such as minimum wage legislation or consumer protection legislation, that challenge the idea that the world is inhabited by juridical equals with the freedom to make the bargain that best suits them. In the make-believe world of contracts cases, there are no structural inequalities between, for example, employer and employee, manufacturer and consumer, or lender and necessitous borrower.

Torts courses, too, focus on disputes between juridical equals, but in non-contractual, non-consensual relationships, and on the common law remedies for loss or damage suffered in these relationships. In torts as in contracts, students learn that the law does not impose liability in the absence of an intentional act (the intentional torts). Even when the cause of action is negligence, the underlying theory is that actors are presumed to intend the reasonable consequences of not acting with the care that is appropriate in the circumstances. First year torts courses pay little attention to areas of law where these basic principles have proved inadequate as a

mechanism for dealing with harm inflicted on others. There is little attention, for example, to statutory compensation schemes, such as compensation for workplace injuries, or no-fault auto insurance, where legislatures have intervened when the divergence between popular understandings of justice and common law tort principles became too great to be ignored.

In giving so much weight to property, contracts, and torts in first year, we give the message that law exists to enforce those obligations that people choose for themselves, but not to impose obligations. Thus, if workers want to work in unsafe factories, they should be free to make that choice, and the owner of the factory should not be liable to them if their choice turns out badly. We give the message, too, that individuals all have the same freedom to choose, and that law should not intervene to regulate the choices except in rare cases of unconscionability. We behave like some kind of peculiar anarchists, who, like other anarchists, are suspicious of the state, but who, unlike other anarchists, celebrate private property and the freedom of individuals to use it as they choose. This suspicion of the state also informs the public law courses that are often offered in first year: in both constitutional and criminal law, the state is the adversary.

Common law faculties not only offer much the same curriculum in first year; they also use the same basic teaching method -- the case method. In the case method, most of the assigned readings are extracts from judges' reasons for decision, primarily at the appellate level, and most of the class time, whether the instructor lectures or directs a class discussion, is dedicated to extracting the legal principles from the cases. In theory, in the back and forth of a good class, students engage in the same sort of reasoning by analogy that is modelled for them in well-written reasons for decision. Students state the facts of the dispute under consideration, and then make an argument in support of a particular outcome, equating the facts under consideration to, or distinguishing them from, prior authoritative cases.

The invention of the case method is usually attributed to Christopher Columbus Langdell, who introduced it at Harvard Law School shortly after the end of the American Civil War. Thus, here we are, in the words of Edward Rubin, former Dean of Vanderbilt School of Law, ". . . at the beginning of the twenty-first century, using a model of legal education that . . . treats the entire twentieth century as little more than a passing annoyance."

What accounts for the longevity of the case method? First, for Langdell, the case method was an inexpensive way to create reading materials for students in the absence of the shelves of weighty treatises and texts on American law available to today's instructors. This practical consideration remains pertinent. It is easier to create casebooks than to write texts, and cheaper, too; instructors can compile

collections of cases from public sources without having to pay significant copyright fees.

Secondly, the focus on reading cases is an important part of student immersion (some might say indoctrination) in the culture of the law. Reading cases is different from what most law students did as undergraduates, although those who read Chaucer's *Canterbury Tales* or Dickens' novels may experience occasional flashbacks. Thus, the case method confirms law students in their sense that they are joining an exclusive and elite profession, and that they are being introduced into the "mysteries of the law".

Thirdly, the case method is an effective way to teach students to reason and argue in ways that are distinctive to legal profession. At least that is the conclusion of a 2007 study on legal education in the United States funded by the Carnegie Foundation for the Advancement of Learning -- a conclusion that seems plausible, notwithstanding faculty despair during moot season over written and oral arguments organized around a few cases that popped up when students typed a word or two from their case facts into the search engine for a case database.

Why, then, would I criticize a method of instruction that accomplishes what my colleagues and I regard as one of the main goals of the first year program -- teaching students the much-mentioned but seldom-explained technique of thinking like a lawyer? In my view, over-reliance on the case method of instruction, combined with the curricular emphasis on private law, fosters a narrow and circumscribed understanding of what lawyers do, and discourages any awkward questions about the connection between law and justice.

Students who come to law school thinking that they will acquire knowledge and skills that might help them to change the world are not wrong to think that, but they are likely to be disheartened by the first year program. Diligent students invest a great deal of time and anxious effort in learning how to read cases and how to think like a lawyer, only to grapple with questions such as the difference, if any, between a gift of Blackacre to A & B so long as they supports their parents, a gift of Blackacre to A & B providing that they support their parents, and a gift of Blackacre to A & B in the hope that they will support their parents.

Let me be clear. I am proud to teach in a faculty that defines our mission as preparing students for the practice of law -- and woe betide students who do not sort out the legal meaning of the various arcane terms used to create interests in property. We need to prepare our graduates for the practice of law in all of its variety, on Bay Street, Wall Street or in "The City" as London calls itself, in small firms serving the local community, in legal aid clinics, government, business, non-governmental

organizations (NGOS), unions, and elsewhere. The first year emphasis on the case method and private law is the wrong introduction to legal learning, not just for those who want to make a better world, but also for those who want a world where markets rule.

Reading appellate decisions to find legal principles reinforces the erroneous perception that real law (the law that matters) is found in judges' decisions on the common law, with equity and legislation appearing in minor roles supporting, supplementing and occasionally perfecting the common law, that is, making it more perfect -- an interesting concept. Reading cases does not adequately prepare students to advise clients on rights that are created by statutes and interpreted by administrative tribunals. Instructors may remind students that the legislature is supreme, but when the assigned reading material is predominantly cases, students tend to look to case law, not statutes, for first principles. The focus on identifying and understanding leading cases reinforces students' inclination to look to the common law for solutions for their clients, and does not help students to imagine new ways of thinking about clients' questions and concerns.

Even when the first year courses deal with principles embodied in legislation, such as the Criminal Code, limitations of actions acts, or the Charter, instructors use case analysis as the method of instruction, with the alarming consequence that, for example, students who might know the ratio of cases that explicate s. 35 of the Constitution Act, 1982 may not know what s. 35 says, and students taking statute-based courses in upper years complain to the instructor about having to read legislation rather than cases.

In the past few years, the Federation of Law Societies of Canada has looked at various aspects of professional legal training. A FLSC Task Force on the Common Law Degree recommended that by 2015, applicants applying for bar admission anywhere in Canada must be able to demonstrate certain competencies, which include having the ability to "identify and evaluate the appropriateness of alternatives for resolution of the issue or dispute". (See the Appendix, below). The case method suggests that law is about appellate adjudication, rather than about alternatives to adjudication.

In the process of extracting abstract principles from case narratives of individual disputes, students learn three important lessons about how to simplify the world. They learn to transform plaintiffs and defendants, whatever the power relations between them, into juridical equals, and to transform multifaceted disputes into limited legal questions to be resolved by a judge. They learn, too, to transform individual judges, whatever their strengths and weaknesses, into the anonymous, neutral and authoritative "court". In this simplified world, where case outcomes are the result of the application of neutral legal principles by neutral decision-makers,

there is no basis for complaining if the outcome seems unjust, as long as it comports with sound legal reasoning. If you ask a judge to answer a narrow legal question, it does not lie in your mouth (as an equity lawyer might say) to complain if you get, not justice, but an answer to the question that you asked.

A judge may feel that the outcome is not entirely satisfactory, as evaluated against standards of efficiency, rationality, justice, or some other ideal that the judge holds dear, and may conclude the reasons for decision by calling on the legislature for a solution. That may be appropriate; if judges violate principles of legal reasoning to achieve a just outcome for subjectively deserving parties in individual cases, there will be no pressure on the legislature to enact legislation to deal with what is likely a more pervasive problem. Law schools, though, should not be in the business of encouraging law students to check their sense of justice at the door.

I am not suggesting that we jettison the trinity of property, contracts, and torts. I agree with the FLSC Task Force that law students need to understand the "foundational legal principles that apply to private relationships, including contracts, torts and property law". But students also need to understand how the world in which they will earn their living differs from the world of property, contracts, and torts casebooks. They need to develop proficiency in oral and written communication, and in listening empathetically and thinking creatively. They need skills in research, synthesis, and problem-solving. Surely we can teach students to think like lawyers without leaving them, in the words of one student, silent, frustrated and "disenfranchised by our sheer lack of knowledge."

In 2009, Harvard Law School, home of the case method, introduced two new courses for the compulsory first year program, one in legislation and regulation, and the other chosen from among several foundational courses on international or comparative law. Future Harvard students will also take a problem-solving course in which they will learn to think creatively and to draw from a variety of resources in dealing with questions a lawyer might encounter in practice. To make room in the schedule for these additions, Harvard cut one credit hour from each of its traditional first year courses -- property, contracts, torts, criminal law and civil procedure -- which are now offered as four-credit hour courses, as they are at many Canadian law schools. We, too, should consider whether we have made the best choices about what we offer in first year.

In the 21st century, human beings face unprecedented challenges, including climate change, the so-called war on terror, the growing gap between rich and poor, the claims of indigenous peoples worldwide for recognition of their rights to land and self-government, the transfer of power from democratic governments to privately-owned corporations through multilateral trade agreements, and a myriad others. Lawyers will be in the forefront of responding to these challenges. To

adequately prepare our graduates for their responsibilities in the 21st century, we need to free the first year curriculum from the constraints of the case method and the hegemony of private law principles.

**SUGGESTIONS FOR FURTHER READING**

Arthurs, Harry W, "The State We're In: Legal Education in Canada's New Political Economy", (2001) 20 *Windsor Yearbook of Access to Justice* 35-54.

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Menkel-Meadow, Carrie "Taking Law and _____ Really Seriously: Before, During and after 'The Law'", (2007) 60 *Vanderbilt Law Review* 555-95.

Mertz, Elizabeth, "Inside the Law School Classroom: Toward a New Legal Realist Pedagogy" (2007) 60 *Vanderbilt Law Review* 483-513.

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Rose, Carol M, "Canons of Property Talk, or Blackstone's Anxiety", in J M Balkin and Sanford Levinson, eds., *Legal Canons* (New York and London: New York University Press, 2000), 66-103.

Rubin, Edward, "What's Wrong with Langdell's Method, and What to Do About It" (2007) 60 *Vanderbilt Law Review* 609-65.

Sullivan, W M, Anne Colby, Judith Welch Wegner, Lloyd Bond, and Lee S Shulman, *Educating Lawyers* (San Francisco: Jossey-Bass for the Carnegie Foundation for the Advancement of Learning, 2007).

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Appendix: "Recommendations", Federation of Law Societies of Canada: Task Force on the Canadian Common Law Degree, *Final Report*, October 2009, 7-12, <http://www.flsc.ca/en/pdf/CommonLawDegreeReport.pdf>.

1. The Task Force recommends that the law societies in common law jurisdictions in Canada adopt forthwith a uniform national requirement for entry to their bar admission programs ("national requirement").

. . .

4. The Task Force recommends that the following constitute the national requirement:

*An applicant for entry to a bar admission program ("the applicant") must satisfy the competency requirements by either,*
*a. successful completion of an LL.B. or J.D. degree that has been accepted by the Federation of Law Societies of Canada ("the Federation"); or*
*b. possessing a Certificate of Qualification from the Federation's National Committee on Accreditation.*

*B. Competency Requirements*

*1. Skills Competencies*
*The applicant must have demonstrated the following competencies:*

*1.1 Problem-Solving*
*In solving legal problems, the applicant must have demonstrated the ability to,*
*a. identify relevant facts;*
*b. identify legal, practical, and policy issues and conduct the necessary research arising from those issues;*
*c. analyze the results of research;*
*d. apply the law to the facts; and*
*e. identify and evaluate the appropriateness of alternatives for resolution of the issue or dispute.*

*1.2 Legal Research*
*The applicant must have demonstrated the ability to,*
*a. identify legal issues;*
*b. select sources and methods and conduct legal research relevant to Canadian law;*
*c. use techniques of legal reasoning and argument, such as case analysis and statutory interpretation, to analyze legal issues;*
*d. identify, interpret and apply results of research; and*
*e. effectively communicate the results of research.*

*1.3 Oral and Written Legal Communication*
*The applicant must have demonstrated the ability to,*
*a. communicate clearly in the English or French language;*
*b. identify the purpose of the proposed communication;*
*c. use correct grammar, spelling and language suitable to the purpose of the communication and for its intended audience; and*
*d. effectively formulate and present well reasoned and accurate legal argument, analysis, advice or submissions.*

*2. Ethics and Professionalism*
*The applicant must have demonstrated an awareness and understanding of the ethical requirements for the practice of law in Canada, including,*
*a. the duty to communicate with civility;*
*b. the ability to identify and address ethical dilemmas in a legal context;*
*c. familiarity with the general principles of ethics and professionalism applying to the practice of law in Canada, including those related to,*
*i. circumstances that give rise to ethical problems;*
*ii. the fiduciary nature of the lawyer's relationship with the client;*
*iii. conflicts of interest;*
*iv. duties to the administration of justice;*
*v. duties relating to confidentiality and disclosure;*
*vi. an awareness of the importance of professionalism in dealing with clients, other counsel, judges, court staff and members of the public; and*
*vii. the importance and value of serving and promoting the public interest in the administration of justice.*

*3. Substantive Legal Knowledge*
*The applicant must have undertaken a sufficiently comprehensive program of study to obtain an understanding of the complexity of the law and the interrelationship between different areas of legal knowledge. In the course of this program of study the applicant must have demonstrated a general understanding of the core legal concepts applicable to the practice of law in Canada, including as a minimum the following areas:*

*3.1 Foundations of Law*
*The applicant must have an understanding of the foundations of law, including,*
*a. principles of common law and equity;*
*b. the process of statutory construction and analysis; and*
*c. the administration of the law in Canada.*

*3.2 Public Law of Canada*
*The applicant must have an understanding of the core principles of public law in Canada, including,*
*a. the constitutional law of Canada, including federalism and the distribution of legislative powers, the Charter of Rights and Freedoms, human rights principles and the rights of Aboriginal peoples of Canada;*
*b. Canadian criminal law; and*
*c. the principles of Canadian administrative law.*

*3.3 Private Law Principles*
*The applicant must demonstrate an understanding of the foundational legal principles that apply to private relationships, including,*
*a. contracts, torts and property law; and*
*b. legal and fiduciary concepts in commercial relationships.*