

## MAKING SOMETHING NEW: LEGAL EDUCATION IN A PANDEMIC

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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.

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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.

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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.

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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.

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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?