Teaching 'Public Interest Vocationalism': Law as a Case Study

Richard Devlin
Jocelyn Downie, Dalhousie University Schulich School of Law

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RICHARD DEVLIN and JOCELYN DOWNIE, Schulich School of Law, Dalhousie University

Introduction
In this short essay, we present law as a case study of teaching professionalism in the public interest. Our hope is that the accountancy profession, as well as other professions (including law), will be prompted to reflect on the potential for the concept of public-interest vocationalism to at least inform, if not transform, education in their domains. The argument proceeds in three stages.

- In Part I, we set the context by identifying a number of profound challenges now facing Canadian legal education.
- In Part II, we introduce the concept of, and provide a justification for, public-interest vocationalism.
- In Part III, we provide a model of how legal education could be reformed in order to reflect, accommodate, and engender public-interest vocationalism.

I Setting the Context Legal Education in Transition
It is 2014 and there is a widespread sentiment that legal education in Canada is experiencing a transition—perhaps even turmoil—the likes of which has not been seen since the 1950s. The drivers for this transition are all fundamentally connected to the economics of legal education and law practice. These drivers

* Special thanks to Brent Cotter and Sheila Wildeman, who have helped us to develop the ideas outlined in this paper
are having (or have the potential to have) a significant impact on legal education, directly and also indirectly, through their impact on the practice of law (which in turn has an impact on legal education).

D Increased Number of Seats in Canadian Law Schools

In the last five years, there has been a significant increase in the number of seats available in Canadian law schools. This has come about for two reasons. First, several law schools have expanded their class enrolments significantly—most notably the University of Ottawa and Queen's University. Secondly, two new law schools have been accredited (Lakehead University and Thompson Rivers University), and several more may be on the horizon (Trinity Western University, Memorial University, and the University of Waterloo). More potential lawyers might help resolve the access-to-justice problem, by increasing competition and driving down prices. However, more potential lawyers might result in an oversaturation of the legal-services marketplace, with the consequence that the practice of law becomes increasingly focused on commercial efficiency rather than the public good.

ii) Increase in the Number of Foreign-Trained Lawyers

In addition to the increase in the number of Canadian law school graduates, there has been a dramatic increase in the number of foreign-trained lawyers. There are two streams in this regard. First, there are a large number of Canadians who choose to go abroad to seek their legal education—usually to Australia or the U.K. (either because they did not get admitted to a Canadian law school or for other reasons). Second, there are increasing numbers of trained lawyers from other countries who, after immigrating to Canada and passing through the National Committee on Accreditation (NCAC) process, get admitted to the practice of law in Canada. This increase in the number of lawyers could enhance access to justice. However, once again, these increasing numbers of entrants into the legal profession might instead increase the commercialization of the practice of law.

iii) Increased Law School Fees

In the last 10 years, there has been a dramatic inflation of law school fees. Broadly speaking, the national average is approximately $15,000 per year with some schools approaching $30,000. Law students increasingly perceive legal education as a commodity which they are purchasing, rather than as preparation for entry into a profession. In addition, many students graduate with a very large debt load, which causes them to seek forms of legal employment that are highly personally remunerative, but not necessarily tailored to service of the public interest.

iv) The Diminution of Articling Opportunities and Emergence of the Legal Practice Programmes

At the same time that there has been an increase in the number of law school graduates seeking to join the profession, because of the economic downturn, there has been a significant decline in the number of articling opportunities available. Solo practitioners and small firms cannot afford to take on any articling students and the big firms (who have historically hired the most articling students) have also been cutting back significantly. Until this year, the rule across Canada has been that articling is a prerequisite for admission to the practice of law.

In response to the articling crisis, the Law Society of Upper Canada approved three Legal Practice Programmes (LPPs)—one at the University of Ottawa (French), one at Ryerson University and one at Lakehead University. These programmes will function as alternatives to articling for those seeking admission to the legal profession. On the one hand, this recent development may help to alleviate the articling crisis by providing an alternative path. However, it generates a whole new set of problems. First, it creates a hierarchy of entrants—the perceived “good ones” who get articles, and the perceived “not so good ones,” who have to take the LPP route. Second, articling students are paid by their firms (albeit very unevenly), but LPP students will have to pay for their course, thereby increasing their debt load even further (with the consequential impact on their areas of practice, as noted previously). Third, some law firms have historically offered articles out of a sense of professional obligation. With the emergence of LPPs, they may feel that they are off the hook and decide to no longer absorb the expense of having articling students. This, then, could exacerbate the articling crisis, drive more students to the LPP programs and greater debt and consequently a greater focus on highly personally remunerative areas of practice.

v) Increasing Number of Sole Practitioners

There are now more than 100,000 lawyers in Canada (the largest number in our history) and it is becoming increasingly difficult for newly minted lawyers to get hired by law firms that will provide them with the opportunity to develop their skills within a context of (relative) financial security. This may result in an increasing number of junior lawyers setting themselves up as sole practitioners right out of law school. This creates
economic pressures to focus one’s efforts on making one’s business commercially viable (and, upstream, pressures to focus legal education on preparing students to be shovel-ready, particularly for this kind of legal practice).

vi) Increased Licensing Fees
A radical spike in licensing fees in Ontario is exacerbating the preceding economic challenges facing those entering the practice of law. It was recently announced that for the 2014-2015 year the fees will jump from $2,600 to almost $5,000. Again, this could have a negative impact on the practice of law in the public interest and the upstream curriculum aimed at such an orientation to legal practice.

vii) Globalization of the Legal Services Marketplace
Many of the foregoing factors are essentially local in nature—they are made-in-Canada challenges. However, the legal profession in Canada is also influenced by larger global forces. Here we will mention just two. First, in the last 20 years there have emerged a number of global law firms. In the last five years, several of these firms have begun to penetrate the Canadian legal services marketplace, thereby intensifying the competition for indigenous Canadian law firms.

Second, alternative business structures (ABS) may arrive on our shores. In the last decade, both Australia and the U.K. have begun to permit non-lawyer-owned economic enterprises to deliver legal services. There are two principal justifications offered for these ABSs: they are more economically efficient and responsive than traditional lawyer-owned law firms; and they will drive down the cost of legal services, thereby increasing access to justice. Whether or not these justifications hold true, ABS’s will be potential competition for current lawyers, with the consequential impact on the public interest of increased competition already discussed.

viii) Imploding Law Firms
Finally, in addition to all the foregoing economic drivers, the collapse of two significant Canadian firms is generating great concern. The first, the collapse of Goodman and Carr in 2009, was seen by some as a canary in a coalmine, but by others as an unproblematic aberration. However, the second, the collapse of Heenan Blaikie in the first few months of 2014, has been variously described as a “catastrophe,” a “tragedy,” and a harbinger of things to come for other large and highly respected firms. If a giant like Heenan Blaikie is so vulnerable, what does this say about the viability of business models of other Canadian firms? And what will this mean for the construction of the purpose and orientation of legal practice in Canada (and the curricula designed to train students for that practice)?

Summary
The foregoing drivers make it clear that all is not well, and there is a strong sense of dis-ease, even despair, about the future of the practice of law in Canada. In response, many in the profession and the academy may be tempted to focus their attention on how to fix the economics of the practice of law. This would be understandable. But succumbing to this temptation could even further reduce any legitimacy for the claim that the legal profession is a profession that serves the public interest. In the following sections, we will argue for an alternative (or at least additional) response. While we cannot ignore the economic challenges, we should not allow them to blind us to the imperative that Canadian law students and practicing lawyers serve the public interest.

II Public Interest Vocationalism: Its Meaning and Justification
If the (admittedly gloomy) first part of this essay is a relatively accurate account of the current environment, then it has potential ramifications for how current and future lawyers understand the practice of law. When the focus is on the economics of practice—indeed economic survival in practice—then the practice of law understandably becomes narrowly instrumental...it becomes a job...it becomes the pursuit of individual wealth maximization. This, in turn, tends to suggest that the function of legal education should follow the same track—we should be providing law students with the substantive knowledge and practical skills so that they are shovel ready for the job.

We argue that this is both an emaciated and dangerous conception of legal education. It is emaciated in that, while substantive knowledge and practical skills are necessary prerequisites for the ethical and competent practice of law, they are not sufficient. It is dangerous, because it fails to prepare future lawyers for their responsibilities to exercise their power and authority in the public interest. Indeed our core claim is that it is precisely because the current practice of law in Canada is so focused on its material concerns, that now more than ever it is crucial to articulate, justify, and substantiate an alternative

26 This section is a condensed version of a larger argument that we have developed in “Public Interest Vocationalism: A Path Forward for Legal Education in Canada”, in Fiona Westwood ed., The Callings of Law (Uitgeheer, 2014).
normative vision for the practice of law. Such a vision emphasizes understanding the practice of law as requiring the development of an ethical identity. Hence our embrace of "public interest vocationalism."

Now we acknowledge that this concept, at first blush, may appear a little clunky, but it is no more clunky than many other legal concepts—promissory estoppel, the corporate veil, the rule against perpetuities. Like a good tea, it needs to steep for a while. We invite the reader to review the following text and then let it steep in your mind a while.

Public interest vocationalism is based upon two constitutive components: "vocationalism" and the "public interest." Consider each in turn.

i) Vocationalism

The concept of vocationalism has had a significant influence on a number of professions, especially the health professions. The extensive modern interdisciplinary literature on vocationalism has identified two variations that are relevant to legal education—the aspirational and the technical. The aspirational conception of "vocation" is often used in contradistinction to a "job" or a "career." Thus deployed, it is aligned with goals, values and norms. The technical conception of vocation takes a different tack. It is used in contradistinction to "the academic," which is often characterized as abstract, conceptual, and theoretical. Thus deployed, it is often aligned with skills, competencies and proficiencies.

In the context of the legal profession, and legal education in particular, we argue that these two conceptions of vocationalism can be understood as complementary rather than contradictory, they can exist in a symbiotic tension. One can be seen to be the means (the technical—the substantive knowledge and skills necessary for the practice of law) and the other as the end (the aspirational—the pursuit of the public interest).

ii) The Public Interest

The ability to practice law in Canada operates within a regime of delegated self-regulation. Each of the thirteen provinces and territories in Canada has passed legislation making it clear that the practice of law is a privilege not a right. Each province and territory has delegated to its respective law societies the authority to regulate the practice of law. Of crucial importance, this delegating legislation outlines the core function of each law society. For example, section 4(1) of Nova Scotia's Legal Profession Act is explicit that the primary function of the Nova Scotia Barristers' Society is "to promote the public interest in the practice of law." Given this statutory mandate of law societies, those who are regulated by the law societies must practice law in the public interest. In other words, there is a social contract: in exchange for the individual privilege to practice and the collective privilege to self-regulate, lawyers are obliged to act in the public interest. In short, lawyers are stewards of the public interest.

iii) Public Interest Vocationalism

It is sometimes said that the concept of "the public interest" is indeterminate, that it is analytically anaemic and normatively vacuous. We would counter that, in the Canadian context, the public interest in the practice of law can be given substantive content by reference to Canada's constitutional principles and values. In the course of the last three decades, the Supreme Court of Canada has outlined a number of Canada's written and unwritten constitutional values and principles including:

- Federalism
- Democracy
- Constitutionalism and the Rule of Law
- Respect for Minorities
- The Honour of the Crown and the Duty of Reconciliation with Aboriginal Peoples
- Respect for the Inherent Dignity of the Human Person
- Commitment to Social Justice and Equality
- Accommodation of a Wide Variety of Beliefs
- Respect for Cultural and Group Identity
- Faith in Social and Political Institutions which Enhance the Participation of Individuals and Groups in Our Society

The Supreme Court of Canada has also made it clear that these principles and values should inform all areas of law—private and public. These constitutional principles and values give content to the aspirational dimension of public interest vocationalism. They provide the jurisgenerative foundation for legal education tailored to the unique history and current context of Canadian society.

The technical aspects of vocationalism can be grounded in the foregoing aspirational constitutional principles. The goal of legal education should be to develop the knowledge, skills and attitudes of law students so that they can competently and effectively pursue the public interest, so that they can develop their ethical identity as stewards of the public interest.
III Embedding Public Interest Vocationalism in the Law School Curriculum
Having set the scene in Part I and outlined our normative vision in Part II, we will, in this section, identify a programme for the instantiation of public interest vocationalism in Canadian legal education.

Possible Programme Framework
The following is a brief overview of what an integrated, and pedagogically progressive, three-year law degree programme, grounded in public interest vocationalism, might look like. While the totality of this programme does not yet exist anywhere, for ease of reading, we use the unconditional present tense to describe it.

All years
The ethics programme throughout all three years of law school seeks to:
• enhance cognitive knowledge
• develop practical analytical skills
• encourage critical thinking
• facilitate reflexive practice
• engage with experiential learning
• engender emotional intelligence
• deploy both free-standing and pervasive pedagogical methodologies
• maximize small group learning opportunities

Each year is structured around both standalone courses and pervasive instruction.

Year One
The central theme for the first year is “Raising the Antennae: Foundations of Legal Ethics and Regulation of the Legal Profession.” In order to enable students to understand public interest vocationalism, it is important to have them come to terms with a number of key insights:
• The practice of law is a privilege not a right.
• Lawyers exercise significant personal, professional, social, cultural and political power.
• Ethical dilemmas are pervasive in the practice of law.
• Role-modelling and learning by osmosis are vital mechanisms by which ethics are transmitted and learned.
• Lawyers have a great deal of ethical discretion.
• Ethical judgment is a skill that needs to be developed and nurtured.

In terms of standalone courses, the first-year programme is designed around two modules—one offered in the fall term, the other in the winter term.

Module One—Two to Three Days (Fall Term)
• Introduction to Ethics and Professionalism—The foundation includes some preliminary readings on ethics, the regulation of professionalism, and access to justice
• Small group meetings with lawyers and judges to discuss matters of ethics and professionalism (groups of five students)
• Small group feedback sessions facilitated by faculty members (groups of 20–25 students)
• Viewing of legal ethics videos followed by a facilitated critical analysis/discussion
• A Reflection Paper on Module 1

Module Two—Three Days (Winter Term)
• Introduction to Models of Lawyering (selected essays from Why Good Lawyers Matter or Canadian Legal Ethics Stories)
• Small group meetings with lawyers and judges revisited
• Viewing of cautionary tales (videos with lawyers who have found themselves in trouble)
• Small group exercises (e.g. on negotiation and lying)
• An analytical essay on the challenges of modern lawyering

Public interest vocationalism also needs to be woven into the fabric of all of the other first-year courses. The following are issues that can be raised in such courses:
• Contracts: conflicts of interest, the duty of loyalty in negotiation
• Criminal: the adversarial system, the limits of resolute advocacy, conflicts of interest representing joint defendants, prosecutor’s/defence lawyer’s ethics
• Torts: solicitation, settlements and lying, confidentiality, sharp practices, candour with court in facta, civility, and competence
• Property: Aboriginal conceptions of property and cultural competency, choice of client in intellectual property
• Public Law: the different ethical obligations of government lawyers, self-represented litigants and judicial accountability/bias

A heuristic that we have developed for teaching public interest vocationalism (and that can underpin both the freestanding modules and the pervasive introduction of legal ethics) is the following Venn diagram. This shows that, broadly speaking, there are three core responsibilities for lawyers: a duty of loyalty to one’s client; a duty to uphold the administration of justice; and a duty of integrity. At times, all three will overlap, generating an ethical sweet spot:
Year Two
The central theme for the second year is “Developing Basic Capabilities: Legal Ethics and the Professional Responsibilities of Lawyers and the Legal Profession.” Again there is a mandatory standalone course and pervasive education.

- Mandatory course: first term, small groups of 20 students
- Core text: Lawyers' Ethics and Professional Regulation (2nd ed.)
- Delivery method: blended learning—online and face-to-face
  - 10 x 50 min. pre-recorded lectures (by assigned faculty and guests), available online
  - 13 x 1.5 hour small group seminars, focused on problem-based, experiential learning
- Evaluation
  - Mini tests online (20%)
  - Three journals/reflection papers (45%)
  - In-class presentations (groups of two or four) (20%)
  - Final exam (one hour) (15%)

For this mandatory course, we have developed two heuristics that assist students to develop their capacity for ethical reasoning. One heuristic is a pair of drawings that make manifest the fact that lawyers inevitably exist in a complex web of relationships and that these relationships generate a complex set of obligations. We begin with a simple graphic that will seem familiar to the students inasmuch as they have thought about their obligations as lawyers already.

FIGURE 3—A LAWYER'S WEB OF RELATIONSHIPS—SIMPLE VIEW
We then move to a more complicated graphic that, we argue, is more representative of the complex reality within which lawyers exist and which should form the backdrop for their analysis of ethical issues.

**FIGURE 4—A LAWYER'S WEB OF RELATIONSHIPS—COMPLEX VIEW**

The key messages are that lawyers' ethical obligations are complex and variegated, that discretion is pervasive, and that it is essential to develop the skill set of ethical judgment.

The second key heuristic is a Framework for Ethical Analysis that can serve as a template for working through ethical challenges, to assist students to learn how to engage in ethical judgment.

**FRAMEWORK FOR ETHICAL ANALYSIS**

1. Get the facts
2. Investigate the governing "rules"
   - Act
   - Regulations
   - case law
   - codes of ethics
   - disciplinary decisions of Bar societies
3. Reflect on the underlying spirit and philosophy of "the rules"
   - theories, principles, norms, values, virtues
4. Ascertain the client's interests, wishes, rights, and obligations
   (where there is a client involved)
5. Reflect on the interests of other affected parties
6. Reflect on one's duties (to the public, the court, the profession, colleagues, one's family)
7. Identify one's own personal theories, principles, norms, values, and virtues that are implicated in the situation
   - family, culture, community, religion
   - philosophy
8. Identify the choices available
9. Assess the possible consequences of each of the choices
   - probability and nature (severity) or possible harms and benefits
10. Identify the constraints on particular choices
    - e.g., illegal, contrary to Code of Ethics, contrary to personal ethics
11. Discuss with others
    - more senior colleagues
    - Bar Society
    - external ethics experts
12. Engage in self-reflection
13. Identify priorities
14. Choose and implement a course of action/inaction
15. Review choice
    - the result
    - the processes
    - the need for change (personal, professional, institutional)
In this compulsory second-year course there are also opportunities for some more experiential learning. We use the following:

- role-playing
- interviewing lawyers about real-life ethical challenges
- an "ethics fair," where lawyers from different areas of practice visit the law school to discuss ethical dilemmas specific to their area of practice (e.g. family, tax, criminal)
- video simulations: a set of videos that present scenarios raising the issues of cultural competency, confidentiality, conflicts of interest, civility, and access to justice

Again, however, it is important to emphasize that a standalone course, while necessary, is not sufficient. It is equally important to include modules on ethical issues in the other mandatory and quasi-mandatory courses that are offered in the second (or sometimes third) year. The following are some possible examples:

- **Civil Procedure**: negotiation, access to justice, disclosure obligations, and self-represented litigants
- **Constitutional**: identifying who the client is for government lawyers, access to justice
- **Compulsory Moot**: decorum and professionalism in court
- **Business Associations**: identifying who the client is for in-house counsel, whistleblowing, gatekeeping, and fiduciary obligations
- **Evidence**: limits of cross-examination in sexual assault cases
- **Family**: self-represented litigants, negotiation/mediation, independence of lawyer from client, withdrawal, litigation abuse, duty to report and confidentiality
- **Administrative Law**: government lawyers and the rule of law, disciplinary procedures for lawyers
- **Tax**: hyper-aggressive planning
- **Civil Trial Practice**: preparation of witnesses and perjury

**Year Three**

The central theme for the third year is "Transitioning: Where and What Next." Yet again, there is a compulsory aspect and an optional aspect to the third-year engagement with public interest vocationalism.

### Optional—Current Issues in Ethics and Professionalism

On the optional side, third-year students have the opportunity to take a seminar course entitled "Current Issues in Ethics and Professionalism." This course provides students with an opportunity to build upon what they have encountered in their first two years, by producing essays that are of potentially publishable quality. The course emphasizes the importance of both individual responsibility and the benefits of group collaboration. The course outline is as follows:

<table>
<thead>
<tr>
<th>Week 1</th>
<th>Introduction to the Course</th>
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<tbody>
<tr>
<td><strong>Week 2</strong></td>
<td>Brainstorming the Issues</td>
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<tr>
<td>Each student identifies three possible paper topics</td>
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<tr>
<td>✧ Must include popular media sources and academic sources</td>
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<tr>
<td><strong>Week 3</strong></td>
<td>Meetings with individual students</td>
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<td><strong>Week 4</strong></td>
<td>1. Proposed topic and preliminary bibliography due</td>
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<tr>
<td>2. &quot;What is good scholarship?&quot;</td>
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<tr>
<td>(A particular topic is selected and three published academic commentaries on that topic are analyzed for their substantive and methodological strengths and weaknesses)</td>
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<tr>
<td><strong>Week 5</strong></td>
<td>Meetings with individual students</td>
</tr>
<tr>
<td><strong>Weeks 6 and 7</strong></td>
<td>Outline: Students present thesis, arguments and counterarguments and receive feedback from classmates</td>
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<tr>
<td><strong>Week 8</strong></td>
<td>Meetings with individual students</td>
</tr>
<tr>
<td><strong>Week 9</strong></td>
<td>1. Draft paper due</td>
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<tr>
<td>2. W.I.P. Session: an academic shares a work-in-progress and students provide feedback</td>
<td></td>
</tr>
<tr>
<td><strong>Week 10</strong></td>
<td>Peer-Review Class: each student receives feedback from two classmates</td>
</tr>
<tr>
<td><strong>Weeks 11/12</strong></td>
<td>One-day Mini Conference: Presentations</td>
</tr>
<tr>
<td><strong>End of Classes</strong></td>
<td>Paper Due</td>
</tr>
</tbody>
</table>
Conclusion

We live in an era in which there is an increasing valourization of instrumental rationality, technical proficiency, specialization, and personal wealth maximization. In the legal profession, this is frequently reflected in the increasingly widespread embrace of the business model of legal practice arising from the current context of economic pressures.

We are not so naïve as to believe that public interest vocationalism is some sort of time machine that can take us back to some golden age of professionalism. Indeed, given the sexist, racist and classist history of our profession, we doubt that any such golden era ever existed. Rather we believe that there is a yearning in our students—indeed a yearning in many members of the legal profession—to practice law as a public service, and to be stewards of the larger public interest. The problem is that this yearning has remained inchoate, it has been difficult to articulate, and it is being eclipsed by economically driven anxiety. The introduction of the concept of public interest vocationalism is our attempt to give voice to that yearning and our (admittedly resource-intensive) recommendations for curriculum reform are our attempt to convert that yearning into a professional priority, an institutional form and an organizational practice. We hope that our suggestions might give the accountancy profession (and others) some food for thought.