

Theory and Practice, Together At Last

A Heretical, Empirical Account of Canadian Legal Education

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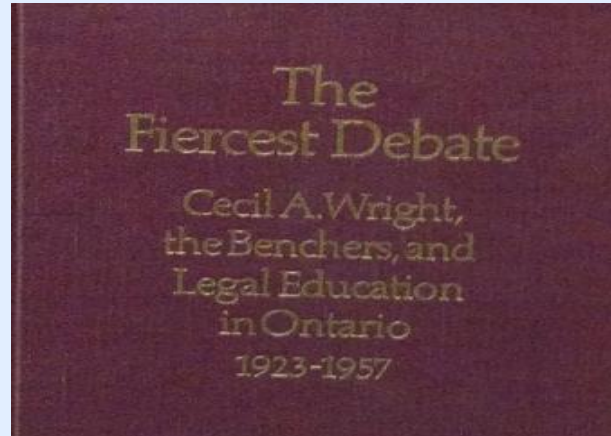
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Legal Education in Crisis? Bringing Researchers and Resources
Together to Generate New Scientific Insights

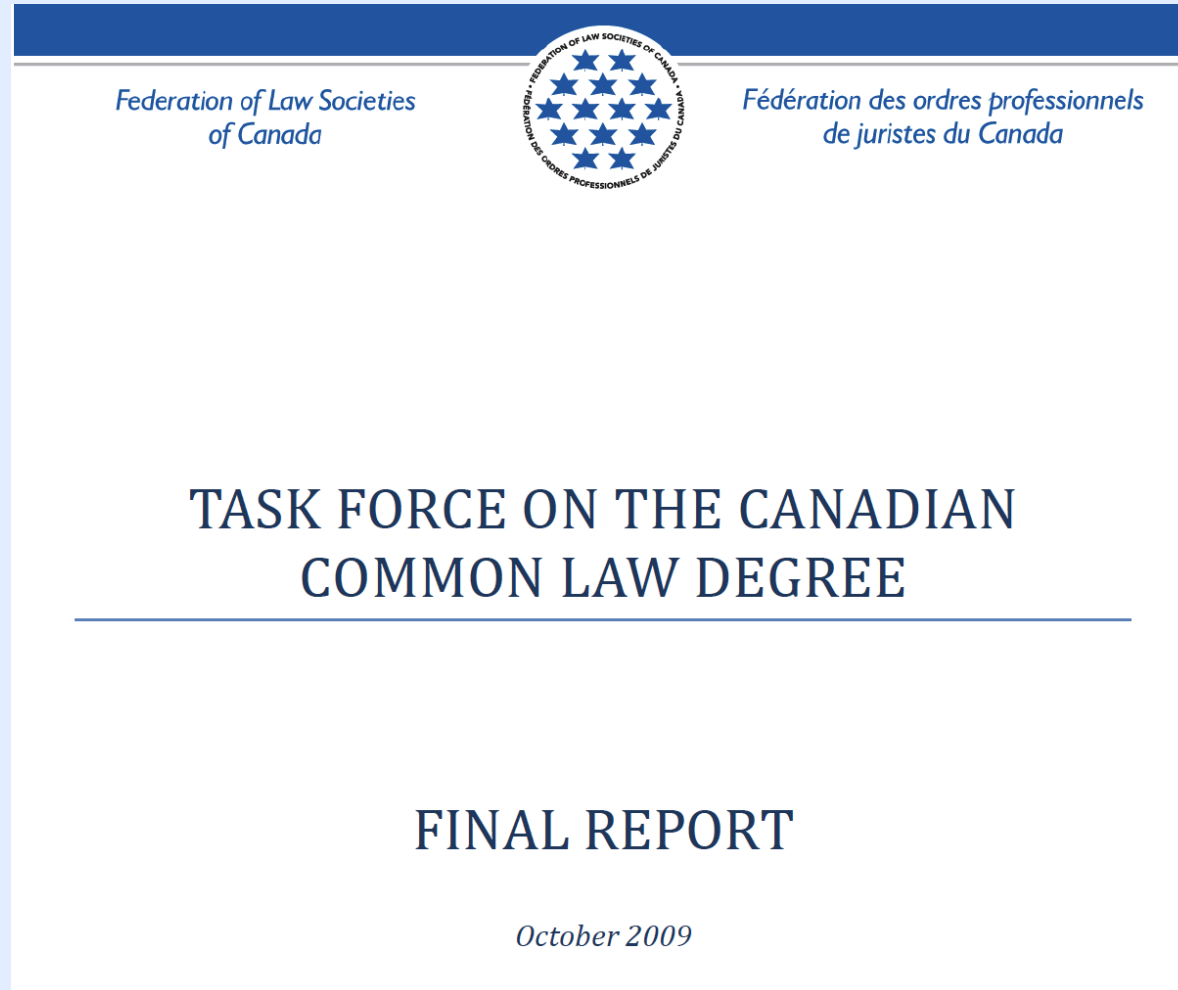
American Bar Foundation/ National Science Foundation

Chicago, 4 March 2017

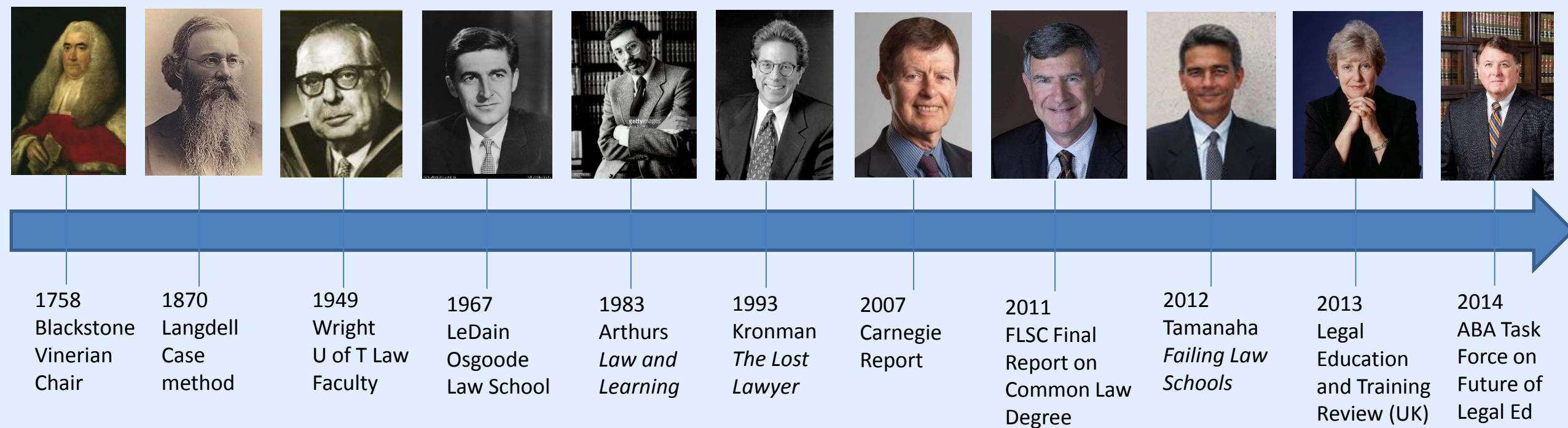
The Conventional Story: Canada



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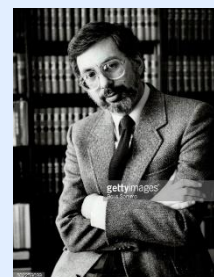
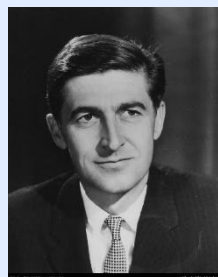
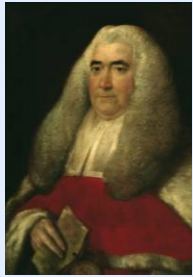


The Conventional Story: Transnational



The Conventional Story: Mostly Oppositional

Oppositional



Theory > Practice

Practice > Theory



Theory \approx Practice

Complementary

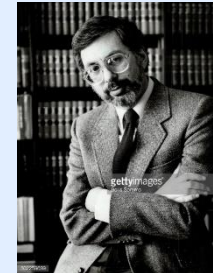


The Conventional Story: Macro Scale

Markets



Institutions



Curricula



Inquiry at the Individual Scale Tells a Different Story

Attitudes

Accounts

Practices

Semi-Structured
Interviews:
69 Canadian
Contract Law
Professors

Casebooks

Exams

Syllabi

Teaching
Materials

Observations (1)

Teaching



Theory & Practice = Complementary

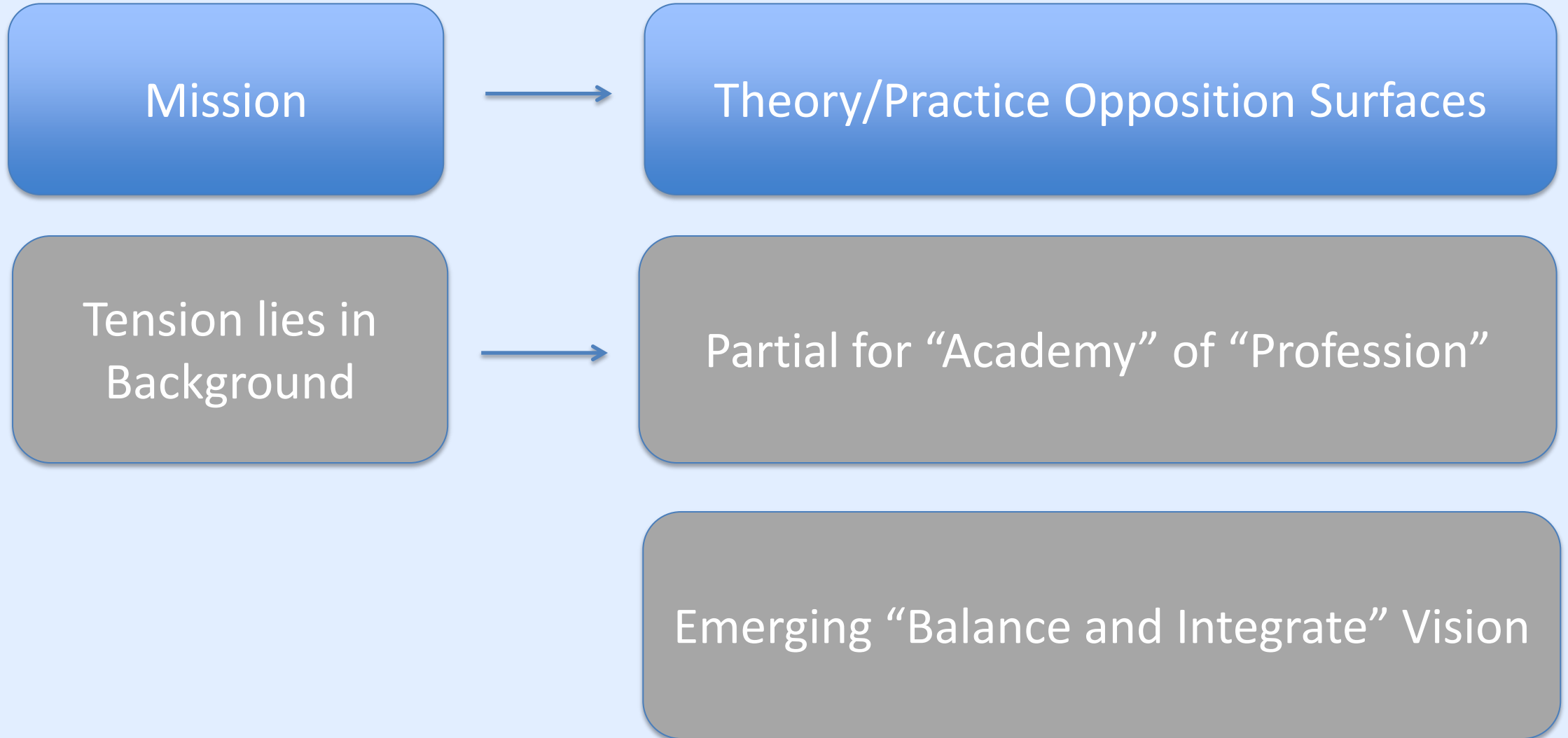
Theoretical &
Critical
Perspectives



Better Lawyers

Skeptical Minority

Observations (2)



Examples



(Teaching): The General Case

You do theory to help you with practice, right? I'm very theoretically inclined, but theory for the purpose of theory is silly ... We want to know how to act in life and ... do law in life and when we run into an obstacle, we have to analyze what's going on and that takes us to theory and philosophy.

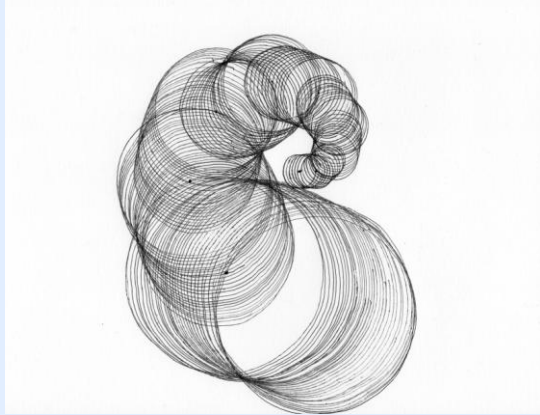
(Teaching): Different theories make “better lawyers”



I try to encourage students to see what I believe is the truth of law, which is it's a battleground of ideology. ... It's a conflict we play on personally between our sense of wanting our individual freedom unencumbered by social constraint, and wanting and needing communities to support us and help us understand who we are. It's— it's the human condition, laid out in contract law. ...

I tell them you're going to be much better lawyers if you understand that legal argument is about manipulating rhetorically and analytically, the grand arrogance of our collective culture. That's where you're going to be persuasive. That's where you're going to appeal.

(Teaching): Different theories make “better lawyers”



When they go into court, the judge wants to know, “Put these two cases together for me.” ... “Tell me why that I should follow this case as opposed to the other one?” ... Every now and then you’ll say, “Well, no—they’re contradictory.” ... That’s never the preferred answer. ... The judge will always prefer the answer that actually is able to reconcile the materials together.

(Teaching): Different theories make “better lawyers”



Pluralism

I try to persuade students that contract is a dynamic and forward-looking mode of social ordering and that therefore it's a course about lawyers' involvement in the construction of little legal systems, each time they negotiate a contract. And although it's a planning exercise, a dynamic forward-looking exercise, there are all kinds of really good skills that are grounded in law, but are nonetheless skills. So, negotiation, figuring out how much to say when and where, determining how many of a client's instructions should be acted upon, and later on, maybe, having to convert a deliberately ambiguous or informal arrangement into codified form.

(Teaching): “Better” Lawyers

But what do you mean by better lawyers? ... Are better lawyers ... lawyers who are better people and more likely to be ethical? ...The other way of being a better lawyer is they can manipulate the hell out of the law to win for their clients. ... And I think I’m doing both ...

I have a belief that a lot of people come into law school believing in justice. ... I want to vindicate that belief rather than destroy it. I want to tell them that they’re actually reflected in the law ... I try to say, “Actually, your intuition that law is about justice is absolutely right. And I’m going to show you that in the law, the struggle about what justice is is happening all the time, everywhere... So you cannot escape that moral role as a lawyer.”

(Mission): Opposition – Academy

A university is a place of reflection, a place of critique, a place of social change. ... A faculty of law is ... not a place where you learn a practice [une pratique], or technique. It's not a technical school ... [I]t's a place of reflection. ... I've worked in offices. I do practice, it's important, but it is easily learned. What you must learn [in a law faculty] is more the theoretical aspect of law, reflection and social critique. ... The day where faculties of law stop playing this role, they will no longer belong in a university.

(Mission): Opposition – Profession

[T]o the extent that the law schools repudiate the obligation to teach their students how to practice law, they're not doing what they should be doing. You would think it *monstrous* if the Faculty of Medicine said to its students, "We're not gonna teach you how to cure people. We're gonna teach you the *theory* of medicine." Medicine and law are professions, and the job of a profession is to *do things in the world*.

(Mission): Integrate

I find the distinction ... between theory and practice or skills and theory, an *inane*, untenable distinction. ...

[P]art of the reason I think I was hired is because I'm kind of a hybrid academic/practitioner to begin with ... This is what we do [at this law school]— we *explode* the distinction between theory and practice.

I'm not just trying to help students become *lawyers*, ... but rather ... how to ... lead a virtuous life as a lawyer ... We're not trying to foreground and emphasize skills to the detriment of theory or to the detriment of ideas. It's the opposite. It's trying to bring the two together. And it's trying to use skills and techniques as windows ... into the ideas underneath them and underlying them, and to challenge them, to remake law and legal practice from the inside out

Recap

Teaching



Theory & Practice = Complementary

Mission



Theory/Practice Opposition Surfaces

Possible Explanations



Split-identity-
Creative-non-victim



Possible Explanations

Dissonance



Ambivalence

