

Expect the Unexpected from Professor Emily Kadens



In the rare book collection at Northwestern Law: Professor Emily Kadens.

Being in the same room with Professor Emily Kadens is not unlike hanging out with a friendly, informed tiger. Her interlocutors had best be at the top of their game to acquit themselves respectably in the face of the convivial yet inevitable intellectual pounce. When this pre-modern European legal history specialist, who has taught at Northwestern University School of Law since 2012, levels her keen focus on an issue, look out.

At Northwestern, Professor Kadens teaches Contracts, Advanced Contracts, and Legal History (notably, her Western Legal Tradition course). She creates her own materials for all the classes she teaches. She is experienced in researching in archives and special collections, and knows in detail the rare book collections of a number of the country's most notable libraries. In her repertoire is an imaginatively-conceived and captivating presentation on the development of the law, told through the evolution of law books and the lawyers' role in writing them, using either actual rare law books or a PowerPoint to illustrate her talk. One iteration of this presentation was "Law's Story: The Development of Law and Lawyers as Revealed Through Early Law Books" delivered to a rapt audience in 2013 at GW Law.

Preparing for what has turned out to be "the best job in the world" (as she characterized law teaching and scholarship in a 2012 interview with the Library of Congress) included a broad-based education in the humanities and law, the pieces of which all support her current work. She inaugurated and finished her education at the University of

Chicago, beginning with a B.A. and M.A. in General Studies in the Humanities, and ending with her J.D. with honors in 2004. In between, Professor Kadens garnered a *Diplôme d'études médiévales* from the Université Catholique de Louvain-la-Neuve (Belgium), and a M.A. and Ph.D. in history from Princeton. Before teaching law, she clerked for then-Chief Judge Danny J. Boggs of the Sixth Circuit Court of Appeals after gaining practice experience as a summer associate with White & Case LLP. She joined the faculty at the University of Texas School of Law in 2005, becoming the Baker & Botts Professor in Law in 2010. In 2012, Professor Kadens moved to Northwestern as a visitor, and joined its faculty in 2013.

Her substantial body of writing demonstrates a longstanding focus on customary law. Among her recent writings on the subject are "Custom's Past" (in Curtis Bradley's *Custom's Future: International Law in a Changing World* (Cambridge, 2016)), "Introduction: Lessons from the History of Custom" (48 *Texas International Law Journal* 349 (2013)), "Custom's Two Bodies" (in *Center and Periphery: Studies on Power in the Medieval World in Honor of William Chester Jordan* 239 (2013)), and "How Customary is Customary International Law?" (in 54 *William & Mary Law Review* 885 (2013), with Ernest A. Young), and "The Myth of the Customary Law Merchant" (in 90 *Texas Law Review* 1153 (2012)). Her current research involves the role of reputation in pre-modern commercial relationships and a study of the first hundred years of statutory English bankruptcy.

Professor Kadens has been the recipient of a number of honors and fellowships, including Outstanding First-Year Course Professor at Northwestern (2013), the Richard & Diane Cummins Legal History Research Grant for the use of Special Collections at the GW Law Library (2013), the Library of Congress Kluge Fellowship (2012), the Editors' Prize (2011) awarded by the *American Bankruptcy Law Journal* for her article "The Pitkin Affair: A Study of Fraud in Early English Bankruptcy" (84 *American Bankruptcy Law Journal* 483 (2010)), and the Sutherland Prize (2010) for her article "The Puzzle of Judicial Education" (75 *Brooklyn Law Review* 143 (2009)). Her academic distinctions include election to Phi Beta Kappa, and honors awarded every step of the way, starting at the B.A. level.

Her impressive scholarship harmonizes with a love for teaching law students, and much of Professor Kadens's substantial inventory of service to the university, such as her work as Judicial Clerkship Advisor, relates to students and student life at Northwestern Law.

And she is fluent in Dutch.

For more of the unexpected from Professor Emily Kadens, please continue to her thoughtful responses to our interview questions, below. And for a dash of levity:

http://www.greenbag.org/v17n4/v17n4_articles_rosenthal_and_westbrook.pdf



A Legal Miscellanea: *If one were to design an education to prepare for a career in legal history scholarship and teaching, yours would be the model. At what point did you begin to prepare consciously for your career and plan your education accordingly?*

Emily Kadens: My path would in fact not be the model. I did not study legal history in graduate school, nor, for that matter formally in law school. I thought I was going to be a medieval historian in a history department until about halfway through working on my dissertation. So I never had the advantage of doing a doctoral exam field in legal history and being forced to read all the basic literature. I just picked it up during law school as I could. It was all rather ad hoc. That said, I am very happy I made the transition. While I hated pretty much the entirety of my law school experience, I love teaching law students (both legal history and law courses), and I love studying the history of the law.

It seems that many new scholars entering the legal history field today sport both a law degree and a history

doctorate. If one chooses to complete both as “credentials” for entering the field, do you think it makes a difference which is completed first? Or which is more valuable? Or are they both necessary in today’s academic environment?

EK: I feel that legal historians, at least those in law schools, should have the J.D. (and the Ph.D.) on the theory that I had to suffer through law school so everyone else wanting to enter the field should, too. I am not certain whether it makes a difference which is completed first. I like the way I did it: learn the history, then learn to think like a lawyer. It might be difficult to get back into the law mindset when one steps away from the law for five or six years while doing the Ph.D. The training one receives in the two fields is so different. A lot of being an historian is having the right instincts for the questions to ask, both the big analytical questions and the little questions one asks of pieces of evidence. Lawyers have to learn to ask questions, of course, but a lot of being a lawyer is about thinking in a certain analytical fashion. Because the lawyers who created the documents many of us use as evidence had their thinking shaped by their legal training, being able to think like a lawyer helps the historian understand what the creators of the documents were doing.

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For your Western Legal Tradition course, why did you choose to author your own materials? And why do you not permit computers in this class?

EK: I wrote my own material (and have actually now put together my own material for every class I teach) because I could not find a book or books that I felt did what I needed. When I was a student, one thing that always bothered me about general surveys of European legal history is that they talk about highly technical and foreign things, such as the Ordinary Gloss, yet the newbie reader has no understanding of what the Gloss is. I can describe the Gloss in as much detail as I want, but until a student actually reads some of the Gloss and has to look at the texts of the cross references (*allegationes*) and try to make sense of it all, the concept of the Gloss remains meaningless. So I wrote a text in which for each chapter the students get the general historical background, the legal historical background, and, embedded in the narrative, translated primary sources. We spend most of class time talking about the sources. I translated a piece of the Gloss, for example. It is one page plus the proof texts, and it takes us a full class to work through and discuss it. But then the students have a better idea of how medieval lawyers thought about law and how they worked with it.

I never permit computers in any of my classes. Human brains are not made to multitask. If students are playing games, as they were when I was in law school, or e-mailing or shopping or whatever, then they are not listening and participating. And if they are taking notes, they still might not be listening, because computers allow one to take dictation, and it is very hard to resist that. But then the students become like court reporters and do not think about what they are writing. I get good participation in my classes, and I attribute a lot of that to the fact that the students have nothing else to do besides pay attention.

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You have designed and taught undergraduate courses which examine aspects of legal history. Why do you think it is important to teach legal history or law-related courses at the undergraduate level?

EK: I know this is not the answer you want, but I do not think it is important to teach legal history to undergraduates. In fact, the genesis of the second undergraduate course I taught, on the history of criminal procedure, arose out of my first experience teaching a European legal history survey to undergraduates. While they were great students who did the work, they had no frame of reference to understand why legal developments were important. This is why it is so

much fun to teach legal history to law students – they get the importance. Instead of teaching the survey again to the undergrads, I reverse engineered the problem: I wanted the students to talk. They liked to talk about crime, so that got me to the history of criminal procedure. I wanted them to understand the relevance of what we were studying. So that led me to design the course so that for every topic we studied (ordeals, judicial torture, witch trials, etc.) I gave them a modern parallel. When we studied torture, for instance, we also read a recent judicial opinion about torture, and they saw that legal systems hundreds of years apart were still struggling with the same fundamental questions about rights versus the safety of the community.



Researching sixteenth-century cases in manuscript at the National Archives, Kew, London (2015).

Your recent research foci include the historical problem of how custom functioned as law, the history of bankruptcy, and early modern commercial law. How do you see these foci changing in the future, if at all? Have you already struck out into new territory?

EK: My research topics will likely always continue to evolve. I do not have the patience to stick with one thing for more than a few years. Right now I am interested in the role of reputation in commercial relationships, which, it turns out, happens to dovetail with another interest: the early history of bankruptcy. I have been working lately in the archives of the early modern Court of Requests and Court of Star Chamber at the National Archives in London, and I have found some wonderful cases that suggest how easy it was to manipulate people's judgments about reputation.

If a law student stopped you in the corridor between classes and asked “What is custom?”, how would you answer?

EK: I would say that I am not sure I know what custom is, and I am not sure it even exists, but I am pretty sure it is not law in the way we conceive of law today. I think custom operated in a completely different manner from formal law and that it was the medieval jurists, trying to force custom into the Roman paradigm of law, who got lawyers started thinking of custom as a form of formal law.

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What do you believe is the genesis of the recent intense interest in customary law? Is it as simple as the growing prominence of international law, or is it attached to a perhaps romantic populist notion of law “from the bottom up”?

EK: I think in general it has something to do with the libertarian law & economics dislike of legislation. It might also be a general sense that we have reached the point of having too much law and maybe people could be left to regulate their own communities a little bit. In international law, custom is the handy catch-all to use to create (in my view imaginary) binding rules when legislation cannot exist because no international legislature exists.

In your 2012 presentation as a Kluge Fellow at the Library of Congress, “The Continuing Problem of Custom,” you ended with “Custom is not formal law. And thus in the international world of divergent interests and the need for rules, custom has very little place.” Have the world’s communities grown too large, too complex, and too “sophisticated” to support custom as a viable source of law? And did you receive feedback on your parting remark?

EK: Custom, essentially by definition, grows up in communities in which people can mimic and police each other’s behavior. Custom is repeat behavior, over time, that people have tacitly come to believe they are supposed to follow because they believe everyone else is doing it and have always done it. How does that translate to the community of nations? Who are the relevant actors? What are the relevant behaviors? How often are the behaviors being repeated? How much are the nations observing each other’s behaviors and copying them? My view is not popular amongst most international public law scholars, which is fair. I am not an expert in their field. I am just translating concepts from my own field.

Can you talk a little about your 2014 appearance in The Green Bag, An Entertaining Journal of Law?

EK: I teach Contracts and Article II of the UCC. So does my husband. We are both kind of UCC geeks. We thought it would be funny to do a reading at our wedding about what Article II says about love. We assumed only the lawyers in the audience would get it, but even my mother enjoyed it. Unfortunately, the two friends who participated in the wedding thought it would be hilarious to publish the reading in the *Green Bag*. I just wish they had corrected the citation errors. We kind of had other things to do before the wedding than bluebook the citations.

Do you collect rare law books?

EK: Yes, my collection includes mostly standard medieval Roman and canon law volumes, with a few volumes on early modern commercial law.

You are expert in immersing yourself in rare book collections. How would you instruct a new legal historian in the art of fully exploiting a rare book collection's capabilities?

EK: I had the good fortune of doing a book history seminar with Anthony Grafton during graduate school and studying medieval codicology in Belgium. Learning the technical parts of book history are important first steps so that you know what you are looking at. After that, it is a matter of getting the books in your hands and exploring them. One of the attractive things for me about Northwestern Law is its wonderful rare law book collection. The early dean and comparativist John Henry Wigmore was instrumental in building the collection because he believed in the importance for comparativists of having the foundational books of the different legal systems. I enjoy spending time in the rare book room aimlessly pulling books off the shelf to see what I can find.

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We know from your 2012 interview with the Law Library of Congress that you were the starting pitcher in your college's NCAA Division III fastpitch softball team. What other little-known extra-legal facts about yourself would you like to share with us?

EK: I am an avid bread baker. I mill my own flour from various sorts of wheat varieties and rye berries, and I have a wild yeast starter that I brought back from a bakery in London. Its name is Bruce, which happens to be my husband's name, too, although the starter is named after the Bishop of Southwark who blessed the bakery's starter when the bakery opened. It took my husband about a week to realize that when I said, "I have to feed Bruce," I was not talking about him.

What advice would you offer to a student who plans an academic career in legal history?

EK: Mostly, I think, it would be to try to get interested in law, and not just in history or in law & history. Anyone who wants to do a Ph.D. in history is probably already in love with that field, and it is easy, I suspect, to view real law, getting your hands dirty in law, as somehow insufficiently intellectual or just not what I, the history scholar, am really about. But law is a wonderfully complex field, and loving and understanding the law can only make one's legal history work richer and more nuanced.

Why is legal history important?

EK: The best answer is one John Langbein at Yale gave me: legal history is the handmaiden of law reform. This is a point William Blackstone made in his inaugural lecture as the Vinerian Professor at Oxford—before you reform the law, you need to know where it came from and why it was created. Otherwise, once you start changing things you might find that you are affecting areas of the law that you had no intention of changing. On a less elevated plane, one of the greatest joys of teaching legal history to law students is that it provides a vehicle for getting them to think about fundamental assumptions in law. Why do we write law? What happens to an oral legal system when it is written down? What social and economic structures need to be in place before a society can have a robust legislative tradition? Why

do civil and common law lawyers think so differently? Why is legal education so consistent in certain ways across time and place? Why does the Roman law of, say, delict, talk about the same situations, such as the eggshell plaintiff, that we all studied in torts? Why have lawyer jokes been so popular whenever lawyers are powerful members of society? Plus the fact, this is the profession's past, and in entering this profession, the students should know something about that past.

Professor Kadens with Sir William Blackstone at the Codrington Library, All Souls College, Oxford.

To view a webcast of Emily Kadens's 2012 presentation at the Library of Congress, *The Continuing Problem of Custom: From the Medieval Jurists to the Supreme Court*, please visit http://www.loc.gov/today/cyberlc/feature_wdesc.php?rec=5621

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