

REVIEW

The Shame of American Legal Education

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The Shame of American Legal Education, by Alan Watson (Belgrade: University of Belgrade School of Law, 2005), 177pp.

Is university-based legal education in the United States shameful? One of its most successful scholars and teachers thinks so. He has issued a wake-up call, fearing that “the system from which the professors themselves terminally suffer” will keep law students on snooze-control.¹ The book had to be published outside the country, albeit where there are mixed views about anything American these days, including its lawyers. Whether this frontal assault will provoke any response, much less an open debate at the Association of American Law Schools (AALS) or American Bar Association (ABA), remains to be seen. Academics kill best with apathy.

But to ignore issues raised here, about curricular contents and teaching methods, even when Alan Watson is at his most polemical, will betray the motives that moved legal education out of law office apprenticeships into higher learning academies. That move called into existence the law professor; and this creature has had competence corrupted and narrowed by the casebook and law review cultures, according to Watson. He ends with blistering critiques of the works of “three celebrated American legal scholars”: A. Arthur Schiller, Morton Horwitz, and Duncan Kennedy.²

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1 Alan Watson, *The Shame of American Legal Education* (Belgrade: University of Belgrade School of Law, 2005) at 13.

2 *Ibid.* at 131–170.

The book begins with six anonymous law student reflections, all selectively sad, followed by Watson's own summing-up:

Of course, law schools should be trade school[s], but they should be something more. They should stretch the imagination. ... Other countries have different systems, and their practitioners are no less skilled. ... But often they have wider intellectual horizons.³

The persistent theme, then, is that U.S. law schools impose a mind-numbing, memorisation monotony. The counter-theme, Watson's alternative, comparative cures for this dismal diagnosis, is more implied than supplied. If he has one prescription it is that each law school course needs a large dose of legal history, deliberately taught as a law-and-society dynamic that locates present rules and reasons in contexts deeper than mere past rules and reasons.

So who is Alan Watson? What entitlement has he to the bully-pulpit? He has seven earned degrees in law and several honorary doctorates, from Stockholm to Pretoria, but none from North America. He learned Scots law at Glasgow fifty years ago, Roman law at Oxford with David Daube as his mentor, lectured law at Oxford for eight years, was professor of civil law at Glasgow and then Edinburgh before arriving at the University of Pennsylvania 1979–89, prior to his current, endowed chair at the University of Georgia. He has authored more than 150 juried books and articles. Of immediate relevance he has taught first year property and contracts, as well as third year 'Law in the Gospels.' If credentials command faith and authority, then Watson merits a full hearing.

His analysis begins with the product of the fixed first year formula: second year law students who "... don't know that they don't know."⁴ They have survived Property, Torts, Contracts, and Criminal Law courses without knowing how to recognise a judgment's "holding" or that there might be historically grounded rules for statutory interpretation, or that procedural precedents are available from other jurisdictions in other times and places. Watson despairs of a first year curriculum that does not teach the law as a whole, and instead isolates each subject, teaching it as if no other systems exist to offer comparable answers. He favours case-based teaching in which the case dynamic is located in settled legal doctrine rather than by only distinguishing "the facts" from a similar case.

The product, in his teaching encounters, is a second year law student for whom only an appellate judgment, rather than the case itself, is made to matter. The casebook, whether published or custom-made, cuts out each case's unique social context, its legal and developmental context as well as its theoretical under-pinnings. Will producing better casebooks assuage Watson's anger? No, be-

³ *Ibid.* at 19.

⁴ *Ibid.* at 27.

cause the casebook has become a prophylactic for “understanding principles,” reducing law to a pre-selected “limited number of cases studied in isolation.”⁵ Let *Armory v. Delamirie* (1722) be an example, with its chimney sweeper’s boy to charm students in every casebook. Dare we invite students to ask if it still has authority, and why? Can we know enough, from its two short paragraphs in the *English Reports*, about legal status, concepts of possession, roles of intention, and chattel rights at English law as they existed in 1722, to make it relevant to current North American law? Does anyone bother to know what that law was in 1722? “Did it establish [or extend] some principle?”⁶ Charming? Yes. Relevant without context? No.

The next chapter addresses consumers of casebooks: “Why do People Want to be Law Professors?” Watson’s short answers: “One reason can be excluded: love of scholarship.”⁷ Certainly not money-making! And one must give up the opportunity to serve clients and “to shine in a courtroom,” or the incentive “to impart knowledge and increase the students’ awareness of legal, moral and social implications of the existing law.”⁸ What motive does this leave? For Watson, it means mediocrity. It reduces to a job that offers a “safe haven,” a high status life of least resistance, “because it lacks stress” that is associated with having clients, contingency fees and conflicts of interest. Most academic lawyers, according to Watson, are in denial from lawyering, pursuing a life-style rather than a scholarly vocation. One look at their casebooks reveals the plagiarisms and heavy borrowings from each other, as Langdell’s twentieth-century progeny.

After a brief chapter on “Choosing a Law School,” which offers a cursory sampling of “catalogs” for a few public university law schools, Watson moves to “Chapter 4: The First Year Experience.” This expands the attack to how professors continue “Teaching by Terror.”⁹ This means the so-called Socratic method, alias the sarcastic inquisition, to which might be added a grading system based solely on 100% final exams. Watson then gives seven “digressions” of how historical traditions should dominate law studies in America but never get noticed because “the absurd casebook system”¹⁰ inhibits any attempt “to explain why law is as it is.”¹¹ Each “digression” gives a dazzling reminder of Watson’s scholarly expertise, whether explaining difficulties with teaching “the rule against

⁵ *Ibid.* at 44.

⁶ *Ibid.* at 35.

⁷ *Ibid.* at 46.

⁸ *Ibid.* at 48.

⁹ *Ibid.* at 63.

¹⁰ *Ibid.* at 79.

¹¹ *Ibid.* at 81.

perpetuities” or Homer’s role in the Roman law of sale or why English common law’s “benefit of clergy” matters and why England’s “absurd” distinction in defamation between libel and slander can still rule.

Watson provides painful examples of casebooks run amok (*Property* by Jesse Dukeminier and James E. Krier, or Richard A. Epstein’s *Cases and Materials on Torts*) and then shifts his attack to the role that a law review plays in U.S. law schools. His generic model is that a law review is edited by the best of his ill-educated survivors of first year casebook courses, few of whom have ever had their own research-writing skills supervised, as undergraduates or in 100% exam evaluated first year courses. Their “woeful ignorance” dictates criteria for selecting and rejecting submissions that have little to do with scholarly quality: for examples, fashionable topicality (“eye-catching title”), the author’s reputation, the author’s law school, timing of submission, and pressure from local faculty members. This in turn can determine professorial prospects for tenure and promotion, usually requiring only two such articles, each to a standardised length of at least forty pages and a hundred-plus footnotes. Since the majority of law professors have not had more research-writing exposure than a course-based LL.M. provides, one can see why the issue of quality sinks into a circularity of unreadable, irrelevant secondary legal literature.

Next there is a passing invective against Watson’s generic model for American law deans: they surround themselves with “an in-group,” they try to have no obvious successor, they crassly cultivate alumni socially, they threaten an “even worse” successor, and they suppress faculty involvement in disputes and policy decision-making. They also are notoriously opaque about budgets and where moneys come and go. One cannot resist thinking that Watson’s two American law school employers have much to answer for!

After five chapters of attack, there is hope, and it rests in “Nutshells.” The prototype is Gaius, *Institutes* (ca. 161 A.D.) and Watson identifies five basic themes for why they should replace casebook-based legal education. First, they demonstrate the easy transmissibility of legal rules, institutions, concepts and structures from one society to other, very different, ones. Secondly, they indicate the frequent longevity of such rules, institutions, concept and structures. Thirdly, their very success is attributable to the lack of interest by governments in law-making, or in inserting particular messages into their legislation. Fourthly, likewise, the importance of private Nutshells is evidence of the state’s lack of concern for communicating law to its subjects. Fifthly, they show that in large measure law does not emerge in any real sense from a society in which it operates.¹²

These are themes familiar to anyone who has read Watson on practically any topic. He defines Nutshells as “teaching manuals” for beginning students

¹² *Ibid.* at 104.

and non-lawyers; and "... what makes a Nutshell is its introductory nature, the generality of the treatment, and the overall absence of detail."¹³ Just the sort of textbook introduction to law that can never appear in law school curriculum so long as law is fragmented into isolated topics and taught out of casebooks. Blackstone's *Commentaries* (1765-9) qualifies for English law, as does Argou's *Institution au droit francais* (1692), for pre-Napoleonic French law. Like the modern Nutshells in the U.S. commissioned by West Publishing Co., they address law in systemic and principled terms, which is what Watson finds so wanting in American law curriculum.

All of this is prelude to Watson's final forty page dissection of "three celebrated American legal scholars" and their devoted followers. Presumably they are exemplars of the "shame of American legal education" but Watson never mentions them as teachers. It is their scholarship, not any failings in the classroom, that he hammers; in fact, knowing what subjects each has taught, Schiller at Columbia and Horwitz and Kennedy at Harvard, the despised casebook cannot be a factor in Watson's evaluations. Schiller's 1929 article, on the Roman law's *actio servi corrupti*, received critical analysis by Watson in 1996, whose main message there remains: do not rely on secondary, including law review, sources.

That leaves Harvard's two lawyer historians of American law, giving Watson his opening to reinforce the dictum to rely on primary, original, first evidence (as Wigmore emphasised a century ago). In these two scholars, the common source that each abuses, in Watson's reading, is Sir William Blackstone's *Commentaries* (i.e., England's Nutshell). Morton Horwitz on water rights and on contracts has been thoroughly discredited by John Barton, Brian Simpson and Watson elsewhere, so this is not news. What is new is the way Watson leads his reader through each American case to show how Horwitz mis-characterises, mis-directs, mis-understands and inaccurately analyses both facts and laws as the law reports themselves provide. So much for Watson on Horwitz's *Transformation of American Law 1780-1860* (1977).

With Duncan Kennedy the attack goes deeper than disputes about academic interpretations of case law. He writes law review articles, not books, and one in particular made his younger reputation: what Watson describes as "... obviously wrong on its face and its 128 pages are incomprehensible." The *Buffalo Law Review* (1979) published "The Structure of Blackstone's *Commentaries*" and this has commendably provoked a broader secondary literature on point, notably by John Cairns, Michael Lobban and Richard Ross, among others. Watson's purpose "... is to reveal the true foundations of Blackstone's structure," thereby offering readers an excellent model for measuring "influences" on

¹³ *Ibid.* at 115.

Blackstone, from Justinian onwards.¹⁴ At each step, Kennedy fails; and yet the American system of legal education has elevated this “exceptionally nice and charming man” with “lavish approval” and without having read, much less understood, his foundational scholarly masterpiece!

In his Epilogue, Watson recounts his law student experiences in the 1950s at Glasgow University. Like postwar Canadian law schools, the full-time law professor was barely invented and almost every subject was taught by part-timers who were full-time downtown solicitors. The lecture notes yellowed with repetition and without updating, often as hand-me-downs. Watson apprenticed for three years and “... was given no word of instruction from my masters or their assistants.”¹⁵ Anyone familiar with Canadian articling culture can cringe that this “cheapest form of labor” syndrome too often remains.

Finally we get seven suggested changes for this “shameful” system:

- (1) “abolish the requirement of a college degree”;
- (2) “abolish the use of casebooks”, to be replaced by Nutshells;
- (3) “abolish student-edited law reviews”;
- (4) “reduce the class hours of the first-year compulsory subjects ... to three” and “deepen” second and third year curriculum;
- (5) “make compulsory first-year courses that introduce students to wider aspects of law,” especially historical and comparative methodologies;
- (6) “ban the use of students as research assistants” so that everyone does their own primary research and writing; and,
- (7) “expand training for the profession... [with] a practice certificate,” that is not a law degree requirement.

Each recommendation is worth researching for its history and its alternatives, but that is beyond Watson’s self-defined mission. This assumes, of course, that a law faculty, and especially its dean, is willing to strip legal curriculum to a blank slate and then construct courses from principled and purposive debates within each faculty that include inputs from students, practitioners and judges. Professor Watson’s answer is probably ‘Dream on!’

What about Canada, structured between British and American traditions? Are the diagnoses and debatable cures less astringent and appropriate? Canadian legal education has always constructed its curriculum and pedagogy in the shadows of U.S. law schools. Indeed, the University of Toronto now trumpets such ambitions. The Canadian first-year set of required subjects may also be sanctified by ennui and standardised for inter-provincial transferability. Watson’s cynicism about the American professoriate, and its undisciplined, enfee-

¹⁴ *Ibid.* at 159.

¹⁵ *Ibid.* at 172.

bled commitment to research-writing, may also apply to many safely tenured Canadians. What does the 100% final exam course, where the case that counts is hypothetical, tell us about faculty commitment to creating an understanding of legal principles, not just a listing of stale-dated precedents? What skills, aside from exam-taking, will such a course give the would-be lawyer? How pervasive is the casebook in Canada—and how pernicious? Canada does have a sort of Nutshell literature, in the Irwin Publishing series; and the so-called Socratic classroom has all but disappeared, perhaps for better and worse. Should student-run law reviews, also copied from the Americans, continue whatever role Canadians currently allow? Unlike the U.S., Canadian law schools are blessed with bar associations, especially the Canadian Bar Association, which could not care less about their inside goings-on. Each school autonomously accredits itself for curriculum, yet each is like every other, with no national standardisation system in sight (like the AALS or ABA). We at least need to determine how Americanised we should be and how much of Watson's stinging critique already applies here.

If Canadian legal academics are courageous enough to go back-to-basics and self-examine what they do and do not do, to whom, for whom, in their three year degree programs, then we have several ways of proceeding. We can leave all diagnosis and debate to that semi-annual social club of law deans. We can continue to have law school curriculum 'grewed like Topsy,' with transplanted exchanges from one faculty to the next, often based on who's moving where (*i.e.*, individual autonomy over subject-matter). We can dedicate an entire annual meeting of the Canadian Association of Law Teachers (CALT/ACPD), for starters. We can convene a new Harry Arthurs-style commission to research and report on law curriculum reform. Or, Canadian law faculties can hope to keep their students on snooze-control, their alumni limited to deep-pocket fundraising, and colleagues sated with the *status quo*, in order to deny Watson with apathy.

