School of Law
UNIVERSITY OF GEORGIA

Digital Commons @ University of Georgia School of Law

Scholarly Works

Faculty Scholarship

1-1-2001

Legal Education Reform: Modest Suggestions

Alan Watson
University of Georgia School of Law, wawatson@uga.edu

Repository Citation
Alan Watson, *Legal Education Reform: Modest Suggestions* (2001),
Available at: https://digitalcommons.law.uga.edu/fac_artchop/465

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ University of Georgia School of Law. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ University of Georgia School of Law. Please share how you have benefited from this access
For more information, please contact tstriepe@uga.edu.

Legal Education Reform: Modest Suggestions

Alan Watson

In 1999 and again in 2000 I taught an upper-level course in my law school titled The Western Legal Tradition—a course intended more to explain than to describe the patterns of development of private law. As is my habit, I examined by an essay selected from a small list of possible titles. One student in 1999 asked if I would add legal education as a topic. The subject would fit, because I had said something about the impact of education on legal development. The student chose the added title, "American Legal Education Is Rubbish." More students chose to write on that topic than on any other. As they also did when I set a similar essay topic the following year.

I was horrified that none of the students had anything good—not one thing—to say about legal education (though they did recognize that some professors were good teachers). More to the point, their criticisms were always the same (though some women further argued that legal education was hostile to women). These criticisms were as follows.

1. First-year legal education was terrifying. Some teachers deliberately set out to intimidate students. More important, the almost universal so-called Socratic method left them with no guidance as to what they were supposed to be doing. They floundered, having no understanding, even after hours of study, of what was expected. The teachers' practice of "hiding the ball" was a poor way of imparting knowledge or expertise, and the students did not believe, despite what they had been told, that they were being taught "to think like lawyers."[1] All said that the first year in law school was a horrible experience.[2] More than one claimed it was the worst year of their lives.

Alan Watson is the Ernest P. Rogers professor of law and a distinguished research professor at the University of Georgia. He has taught in law schools in England, Scotland, Republic of South Africa, Dutch Antilles, and Italy.

I have received much helpful criticism from colleagues. They do not all agree with me, and I do not name them in case they are unfortunately associated with my views. I am grateful to Charles Smitherman for his enormous help with footnotes.

1. Some colleagues to whom I have shown this paper dispute this. I incline to agree with the students.
2. Much of this experience is attributable to the Socratic method, which has been characterized as "infantilizing, demeaning, dehumanizing, sadistic, a tactic for promoting hostility and competition among students, self-serving, and destructive of positive ideological values." Alan A. Stone, Legal Education on the Couch, 85 Harv. L. Rev. 392, 407 (1971).

   Ironically, the Socratic method was designed to stimulate class discussion and increase student interaction; instead it freezes students with fear and deters voluntary student participation.

Journal of Legal Education, Volume 51, Number 1 (March 2001)

HeinOnline -- 51 J. Legal Educ. 91 2001

2. During the semester they were given no indication of how well or how badly they were performing. Yet all felt that their first-year grades would have a determinative impact on their early professional careers. These grades would certainly have a marked impact on their summer jobs: they would be the grades most noted by law firms.[3]

3. Despite the availability of several clinics, law teaching was emphatically not geared to the practice of law. The students claimed to learn virtually nothing about being a lawyer. They had no experience of how a lawyer should interact with a client, or with a lawyer representing the other side. All felt that law school education should be much more geared towards a training for the practice of law.[4]

4. After the first year, and especially in the third year, law school was boring. The terror was gone, but most classes were nonetheless taught in the same way. Students knew what to expect and what was expected from them, but they still felt that relatively little knowledge or understanding was given them. They had learned the rules of the game of legal education. But so what?[5]

5. Many professors taught subjects outside of their specialty, with inadequate knowledge, and so relied even more heavily on the technique of mystification. Many seemed not to be committed to teaching.

6. Ethical issues were inadequately treated.

I recognize that the students who chose this essay topic were a self-selecting group. The subject was perhaps most attractive to the disgruntled. And it might have appealed most to those whose attendance at class was limited. If so, that confirms their boredom, and the number who chose the topic is significant.

My own intellectual—not emotional—response was to agree in part and disagree in part. Emotionally, and intellectually, I was most disturbed by the

3. The students' point is understandable. First-year grades tend to have a snowball impact on selections for law review, moot court, and other academic honors, all of which are weighed heavily by hiring law firms.

The effect of multiple testing in a first-year class was investigated in a 1981 study that determined that students given the opportunity to take more than one examination did better on the final examination than those who took only the final. See Gary A. Negin, The Effects of Test Frequency in a First-Year Torts Course, 31 J. Legal Educ. 673 (1981).

4. One former student wrote to me:

> I must be defensive and note that while I do believe law school offers little or no practical preparation for practitioners, I would fully support a more "liberal arts" approach to legal education. The problem is not that law students are unprepared, but rather that they are "flat" in their understanding of the law. There is no depth to their interpretation of the issues and concepts. I spend much of my time in practice reviewing basic concepts that I will more than likely never fully comprehend because of the neglect of my first-year teachers.

5. First-year grades often affect second- and third-year students as well. Those not selected for law review or moot court often lose interest in law school. As a result, the majority—students' stated opinion—of these upper-class students are barely able to generate motivation to attend class. Hence, "the only skill gained after the first year is the skill of feigning preparedness for class." Thomas F. Bergin, The Law Teacher: A Man Divided Against Himself, 54 Va. L. Rev. 637, 648 (1968).

HeinOnline -- 51 J. Legal Educ. 92 2001

unanimous verdict that the sole—or virtually sole—purpose of a law school should be to provide training for the practice of law. There is so much more to the law, even for the practice of law, than that: issues such as the social functions of law, the factors that influence legal development, patterns of change, the interaction of law with other forms of social control such as religion, and, of course, the relationship of law and ethics. Law students should be trained to have a greater awareness of their role in society. Law school is *the* obvious place and time for presenting the greater dimension of law. Law teachers should cater to the needs of the lawyer philosopher as well as the lawyer plumber. Both types of lawyer are necessary for a healthy society.

No approach to legal education will be perfect, given that (in my opinion) a law school should serve various purposes. But I should like to offer a few modest and practical suggestions. They are modest in that they do not require additional time for law studies. They are practical in that they will increase the exposure of students both to law as practice and to law as an intellectual discipline. In addition they involve no greater burden on law schools.

First, and this should not be controversial—but I fear will be the most controversial—would be the disappearance of casebooks. They are standard in the U.S. but virtually abhorred everywhere else. They are the biggest impediment to legal education. This I find also to be the view of many students.

I have set out elsewhere my basic views on casebooks and the method of teaching from them.[6] Casebooks present a few cases for discussion. But the law is not contained in a few cases, it is distilled from many. The results of this distillation are not stated. When only a few cases are studied, each appears out of context, cannot fully be understood or appreciated, and students are not given the framework of the law.[7] Students cannot tell whether a case reflects general propositions or stands at the very edges. What is going on in the case is very largely incomprehensible. There is an absence of theoretical underpinnings.[8] Moreover, I doubt if anyone would deny that the standard method of teaching from casebooks is very wasteful of time in failing to supply substantive information. Further, insofar as the method teaches analysis of cases, the same emphasis on analysis need not be repeated in class after class.

I should not be understood as denigrating the importance of case analysis. Of course, cases should be analyzed, but they should be analyzed in context. I

6. Introduction to Law for Second-Year Law Students? 46 J. Legal Educ. 430 (1996); Law Out of Context 140–62 (Athens, Ga., 2000).

7. The casebook method ignores important practicalities including the historical context of the case and other social, political, and economic issues. See Arthur D. Austin, Is the Casebook Method Obsolete? 6 Wm. & Mary L. Rev. 157, 164 (1965). The trend since 1950 is to concentrate on recent cases rather than on principal ones. For some the trend is not strong enough and needs to be encouraged. See Michael E. Closen, Teaching with Recent Decisions: A Survey of Past and Present Practices, 11 Fla. St. U. L. Rev. 289 (1983).

8. The case method tends to hide the forest by focusing on one tree at a time, causing students to complete courses and take final examinations without ever grasping the body of law that was the subject of the course.

HeinOnline -- 51 J. Legal Educ. 93 2001

would suggest a rather different teaching tool, a book that would be an amalgam of the standard British legal textbook and the American casebook. Each section of the book would contain an overview of the subject with citation of the important cases supporting each proposition. Then would come the presentation of the individual case with questions designed to improve students' analytical skills, and to show how and where the case fits in the overall context of the law. Teachers would both explain issues in the overview and test student skills in case analysis.[9]

Simply by abolishing the casebook method of teaching, we could present legal rules and doctrines in a much shorter time, allowing extra time both for courses of a purely practical and professional nature and for courses having wider societal goals.

Following on the disappearance of the casebook method would be a reform of the first-year curriculum, which would result in changes in the second and third years. Without casebooks there would be no problem in teaching basic subjects such as contract, property, and torts in three hours.[10] These first-year courses could then serve as the basis for clusters of upper-level courses for those students who might wish to specialize in a particular area.[11] A contract cluster might include aspects of corporations, international trade, commercial paper, white-collar crime, and so on.

With the time thus freed up I would suggest adding other first-year courses of a different sort. Because the first-year grades are so important for a future career, it is tragic for many students that in many law schools *all* of the first-year courses are taught and examined in the same way. Different students have different aptitudes. And some skills not tested in the first year may have equal validity for the subsequent development of lawyers and for their value to society.

I would like to suggest for the time freed up a personal preference for two compulsory subjects and one optional subject in the first year. The first compulsory subject would be an introduction to professional responsibility. No doubt the stress should be on the ABA rules. But personally I would like to have wider perspectives. Comparative law has much to teach about the perceived morality of contingent fees, preparation of witnesses, confidentiality, and so on. The other compulsory subject would be an introduction to law, covering topics not usually specifically treated: the authority of law, the nature of a holding, the effect of precedent, the value of legal authority from another jurisdiction, rules of interpretation, consideration of social priorities, other

9. Some books approaching the sort I envisage do exist—for instance, Ralph E. Boyer et al., The Law of Property: An Introductory Survey, 4th ed. (St. Paul, 1991). But they are not widely used.

10. I recognize that some, perhaps even many, schools teach these subjects in three hours.

11. The casebook method takes away from time better spent on specialization. Most students feel compelled in the second and third year to take courses relevant to the bar examination, which are almost universally taught with a casebook, leaving less and less time to specialize in a particular area or to take more practical classes.

approaches to law.[12] The possibilities for the optional subject need not be spelled out. My own preference would be for subjects like legal history, comparative law, or legal philosophy. But any subject that would introduce students to law beyond the here and now would satisfy me.

With the time saved from the disappearance of the casebook method even in the second- and third-year classes, there could be proliferation of new optional courses. I easily foresee three categories that could appeal to different groups of students: courses on supposedly esoteric subjects such as legal history; more courses on practical legal topics; and courses geared to actual practice, such as negotiation, office management, court rhetoric, and more clinical courses.[13]

My final suggestion, which concerns law review articles, may be regarded by some as largely irrelevant for this note because law review articles are largely irrelevant in American legal education. My contention is that legal education would be vastly improved if American law review articles of the typical sort were abolished.[14] Think of the time saved for other aspects of legal education if they were just got rid of! The scholar has a brilliant idea that could be expressed in twelve pages or fewer. Not allowed. She has to write fifty or sixty pages, most of which are fillers, require a great deal of irrelevant and boring work, cause her to lose enthusiasm, and keep her from having her next brilliant idea. And her main point is lost in a mass of trivia. The student editors drown in a sea of boring papers of great length, looking for the nugget. How much time they could save for serious legal pursuits without the imposed structure. They could even benefit from reading more articles that did not have the boring fillers, and have more time to understand law. All students would benefit from being exposed to professorial expertise rather than quite properly avoiding law review articles. Teachers would benefit by being able to expand their intellectual horizons and not having to waste time on the fillers in their field. Tenure committees would benefit by being able to judge candidates better, reaching the nuggets quickly, without getting lost in the trivia. Incidentally, it goes without saying that when an author cites an earlier piece, often neither he nor the law review editors have read it with any attempt at comprehension.[15] Time may be money, but it is also learning.

12. The former student already quoted, *supra* note 4, also wrote: "It seems rather odd that such a course is not already an integral part of the legal educational structure. Students walk into the first day at law school only to find that the objective of the faculty is not to lead them through a process of understanding, but rather to test their tolerance and 'weed them out.' It is extremely counter-productive."

13. The lack of training in these practical areas screams the message to legal clients to beware, for the "United States may be the only country claiming to be governed by law that turns an unskilled law graduate loose on some unsuspecting client whose life, liberty or property may be at risk." Jerome F. Kramer, Scholarship and Skills, 11 Nat'l L.J. 11 (1989).

14. For a general view of my position see Law Out of Context, *supra* note 6, at 140.

15. For one example, involving many writers, see Alan Watson, Trade Secrets and Roman Law: The Myth Exploded, 11 Tul. Eur. & Civ. L.F. 19 (1997).

HeinOnline -- 51 J. Legal Educ. 95 2001

These then are some modest suggestions for a reform of U.S. legal education. They are designed to be realistic: not to increase student time in law school, or place a greater financial burden on law schools; to make the first year a much less terrifying experience; to increase students' acquisition of legal knowledge while honing their analytical skills; to increase both training for the real practice of law and also a broader understanding of law in society, of foundations of legal change, and of the authority of law; to reduce student boredom by increasing variety.

Why does this appalling system continue? A partial but powerful explanation is that no beginning law teacher dare do otherwise: to do so would be to challenge the system and risk grave disapproval. And at a later stage of experience the system makes law teaching very easy. No great depth of knowledge is required. After all, one has the teacher's manual.

I do not wish to expand the scope of this note, but I should like to add a few words. American legal education suffers from a deep-seated, often unrecognized, malaise. Two symptoms may be specified. First, faculty achieve tenure and promotion mainly on the basis of publishing law review articles. But law teaching largely ignores law review articles. Most casebooks devote little—very little—space to scholarly articles. So for academic purposes most legal research is futile. Lip service is given to scholarship, but students and teachers alike are unacquainted with it. Second, most law teachers that I am acquainted with deny that law schools are "trade schools." But to some extent law schools should be, and must be trade schools. The result of the denial is that law schools are poor trade schools but seldom are intellectual centers, again largely because of reliance on casebooks.[16]

My suggestions for reform are modest but will be found unacceptable. They hinge on the disappearance of the absurd but entrenched casebook approach to law teaching.

A Response from a Colleague

I received much kind criticism from colleagues. One response—for which I am truly grateful—is worth sharing. My colleague made a number of points.

It would be more instructive to have the views on legal education from persons five years out of law school. As a student my colleague would have agreed with my students' views, but not now (as a young law teacher). Distance improves perspective.

My response is personal, not statistical. I find that graduates, a few years out of law school, do not reflect much on law school education overall. They talk of good experiences and bad experiences, good teachers and bad teachers. But the general approach of teachers is not much thought about. Distance blurs not only vision but interest.

16. A third symptom of malaise may have less—but still something—to do with casebooks, namely the poor quality of many law school deans. I will not expand. It is enough here to note the widespread opinion that it is easier to become a dean than to get a tenure-track position at a comparable institution. I have known a dean who, for salary increases and promotion, rates study guides more highly than scholarly monographs.

Some law teachers do give feedback on progress by having tests twice a semester, but students respond with hostility.

I understand the students' unhappiness. If first-year students are divided into three groups with different teachers, and one teacher, out of line with his colleagues, tests frequently, his students will feel victimized.

Case analysis is important, and is not learned all at once: repetition of the techniques is necessary.

I agree with the general proposition. But the casebook approach that takes the cases out of context, and pays little attention to the underpinnings, is not really valuable for case analysis.

Some classes do stress law as practice.

I agree. Still, the overall approach does not gear students to law practice. Nor does it reveal much of the wider nature of law.[17]

The casebook approach is the best possible for law teaching.

Most American law teachers would agree. It is what they know. It is entrenched. We are all bound by what we know, and we discount what we do not know.[18] I would urge a consideration already mentioned: the casebook method is not much respected elsewhere.

* * * * *

Can change occur? Not, in my opinion, in traditional law schools. Established professors are too set in their ways, assistant professors must not rock the boat. The way ahead lies in establishing either a new law school with a commitment to recruiting faculty who will be free to experiment or, more likely, legal studies departments that are not tied to law schools.

17. One of the original opponents to the casebook method, Wayne Morse, asserted this problem: under the case system the average student "tends to accept consciously or unconsciously the typical legalistic point of view that a sound system of law must be held together by formal logical reasoning, and applied with unfailing uniformity." Changing Trends in Legal Education, 10 Or. L. Rev. 39, 43 (1931).

18. I am well versed in self-seeking ignorance. When a few years ago I received a law book in Albanian, a language I do not know, I was able to shelve it unread in the happy awareness that it contained nothing of importance. Most Spanish legal historians do not read Arabic, so they know that Islamic law had no impact in medieval Spain. I know no Arabic, so I know that the Spanish scholars are correct.

HeinOnline -- 51 J. Legal Educ. 97 2001