

James M. Donovan
University of Georgia

***The Discipline of Law Schools: The Making of
Modern Lawyers***

Philip C. Kissam (Durham: Carolina Academic Press, 2003)

The Shame of American Legal Education

Alan Watson (Belgrade: PH-Dosije, 2004)

When needing to globally characterize today's law students, I often retreat to the image of them as intelligent people with little curiosity. Otherwise, they would direct that intelligence toward knowledge more permanent than a body of rules that could, with the stroke of one legislative act or even a political coup, be rendered utterly obsolete. It would be rather like spending years and tens of thousands of dollars to master the crossword puzzle: challenging, perhaps, but ultimately empty.

That characterization is of course easily rebutted, but it does capture some of the inner tensions within the study of law. For all its social prestige, academic legal studies remains ambivalent about whether it is a scholarly pursuit or a professional certification course. Whichever one prefers, the general consensus seems to be that it is failing on both counts. One would be hard pressed to find a law school graduate who remembers the experience fondly or who believes that the three-year process had even taught the essential skills for ordinary legal practice.

Communicating this profound resentment to those who have been spared the trauma of law school and who perhaps believe that law school resembles their own graduate school experiences can be especially challenging. What makes law school so much more painful, and less rewarding, than other graduate programs? At one level, this is the question these two books attempt to answer. While distinctive in their approach, they share an antipathy toward the traditional approach to American legal education. Both Philip Kissam and Alan Watson critique the current situation, identifying in large part the same weaknesses and then offering their proposed reforms. Beyond these similarities, however, the books are quite different, and anyone wishing to gain a deep understanding of the problem will want to read them both, as weaknesses of one are often compensated by the strengths of the other. Kissam's *The Discipline of Law Schools: The Making of Modern Lawyers* should be read first.

Kissam, a law professor at the University of Kansas, articulates his thesis by stating "we must study *the routines, habits and tacit knowledge* of law schools if we are to comprehend American legal education, its paradoxes, and the law and lawyers that American law schools produce" (5). His review of the literature

reveals that legal education rests upon an implicit disciplinary foundation that favors *analysis*, a “*rhetoric of authority, complexity, confidence and closure*,” “*instrumentalist habits of reading and writing*,” and, through the flawed method of the casebook, “generates *many unresolved contradictory messages* about law and lawyering.” Finally, the discipline favors conservative values such as the primacy of private property and contract law, as opposed to the public social values reflected in constitutional law (6–11). That Kissam overlooks Nader’s (1990) suggestion of sound anthropological reasons for the emphasis on property and contract law beyond political conservatism reflects the ideological, rather than intellectual, foundation for his thesis.

The majority of Kissam’s text attempts to describe the pervasive reach of this unspoken discipline that permeates every facet and dimension of legal education. Only the last few pages reveal his solutions to these identified shortcomings: law schools should adopt student-centered teaching priorities, and classroom instruction should foster critical reading and writing skills and emphasize the many contextualized settings of the appellate case law that forms the core of legal education (262–263). The professor should also devote herself to “non-teaching work that serves otherness or, in other words, work that serves persons and values which are subjugated by the discipline, the American legal system or our social institutions . . . [substituting] a new principle of *public service* or *the public good* for the principle of productive and prestigious scholarship” (264).

The potential value of *The Discipline of Law Schools* for anthropologists lies in its earnest attempt to describe in some detail the law school experience. The effort borders on the ethnographic without actually rising to that level. The frustration of his book arises rarely from what appears on the page but rather from what it leaves out.

By the book’s end, Kissam has constructed an adequate—if not particularly artful—description of the generic law school. For most audiences, that is a small accomplishment. The reader will want to know not only what law school is “like” but also how it differs from other forms of graduate study. Unfortunately, the author never tells us in what way the law school experience flows from its being *law school*, as opposed to *graduate school*, or for that matter, simply being *school*. (Missing, for example, are observations such as Watson’s that “law school is not graduate school . . . [because it] does not build on previous education” [173].)

The sections are full of examples of the general educational experience presented as specific to the law school environment. While it is certainly true from my own experience as a law student that relationships are “cool,” and that students are given to “careful note-taking,” this was also true during my time as a doctoral student in the anthropology department. It is similarly unlikely that the description of the layout of faculty offices (79) reveals anything unique. I could not help but suspect that the author’s lack of completed graduate training other than

law school played a factor in this failure to make the informative contrasts that his argument assumes but that he never actually argues.

While the book contains many generalizations, the author overlooks important specific details that would uniquely characterize the law school experience. Little consideration, for example, is given to the impact of accrediting bodies or published “rankings,” both of which exert extraordinary influence on the day-to-day organizations of the law school. Although he devotes some time to describing the faculty, he never touches on their most obvious sociological feature: in the environment of the university, where all other faculty have terminal doctorate degrees, law faculty—who are often paid more and have lighter teaching loads—are required to have only the educational equivalent of a master’s degree (the Juris Doctor). Few have obtained an L.L.M., and almost no faculty in American law schools hold the true Ph.D. equivalent in the field of law, the S.J.D.

Failure to discuss this disparity seems to be an incredible oversight, especially when it has so many potential ramifications for the tone within the law school itself. Whereas by definition Ph.D. faculty come to the university with at least one research project successfully completed, law faculty typically approach their very first professional writing project after their appointments. By consequence, they are arguably more insecure about their status as faculty relative to those outside the law school (heightening the impulse to segregate the school from other arms of the university) and more prone to developing an idiosyncratic approach to scholarship generally, such as allowing the discipline’s primary journals to be student-edited instead of peer-reviewed. (These are all themes that Watson’s book develops in more detail. In his view, “American law professors want and intend to be plumbers, not philosophers. Yet they want to be regarded as philosophers” [47]. This illusion can, he argues, be maintained only through deliberate image management and segregation from those who might see through the emperor’s new clothes. Watson’s chapter 8 is devoted to the example of “three celebrated American scholars [who] in their best known works write either nonsense or at best as if they have not read the sources on which they depend” [131].)

Given Kissam’s unrelenting criticism of the constricting discipline of legal education, it can be puzzling to observe how much his book itself reflects those same norms. The format of the book blatantly evokes that of the law review article: each page offers some text, followed by footnotes of considerable number and length. While the footnotes will undoubtedly be of bibliographic value to some readers, here they function much as they do in law reviews. Works are mentioned but rarely discussed or analyzed. The presence of the footnotes has the effect of absolving the author of the duty to fully argue his point. Instead, he is free to make sweeping generalizations followed by neither proof nor support, but rather by a superordinate that leads only to a bibliographic citation. The result gives the appearance of scholarly apparatus but in reality permits an evasion of the literature rather than an engagement with it. Thus, the format Kissam chose for his book

ironically mimics the peculiar scholarly style of the legal discipline of which he is so rightly critical. That he has been unable to free himself from the tentacles of that discipline offers unintended evidence of its deep influence.

No such stylistic limitations are on display in Watson's *The Shame of American Legal Education*. In contrast to Kissam's, Watson's book is casually conversational in its treatment of the question, arriving at the same negative conclusion about the state of American legal education. As evidenced by the forthright title, Watson attempts nothing resembling a detached, objective ethnography of the law school. His book is a self-conscious account of his frustrations with American law schools, as illustrated with numerous examples from his personal experience.

Writing from the perspective of a foreign trained lawyer from Glasgow, he is today one of the world's most distinguished scholars of legal history, particularly in areas of Roman and comparative law. Such incomparable expertise can be a double-edged sword, however. Although a source of rich illustrations, it can lead the author to forget that his reader lacks a similar background. While Kissam's audience could be any lay reader, Watson writes more for the informed insider.

For Watson, the primary failing of legal education is that students graduate knowing very little about law in any sophisticated sense. The students' ignorance (and he is not shy about using this term) in its turn affects how practitioners try to apply the law and how judges construe it. Of rules, they may know the *what* and the *how* but rarely the *when* and the *why*. Their unawareness of the context in which legal rules developed leads them to misunderstand what the rule means and how it was intended to function. Thus, graduates may at best become mundane mechanics of the law but not expert wielders of it, and much less so scholars: "law schools should be trade school, but they should be something more" (19). That they often fail even to be effective trade schools, though, presents a particular problem when these same students go on to become professors, thereby perpetuating the cycle of—to reuse his word—ignorance.

His three conclusions are that "1) Students enter their second-year unaware of fundamental elements and aspects of law and the broad sweep of principle behind them . . . 2) Teaching law through the study of a few (abridged) cases on each point, with no attempt to place them in a wider framework or to give any theoretical structure, presents a thoroughly misleading picture of the law [, and] 3) Teaching law through the study of a few cases gives only a limited understanding even of these cases and their significance" (42). Much of his book is given over to examples of how the received wisdom on issues of substantive law ignores the known facts of legal history, had any law professor cared to look. Here his unparalleled command of his subject matter shines. One wonders why, if the study of law could be made as interesting as this, the standard is often so much lower.

Like Kissam, Watson has his own, more radical list of suggested reforms to legal education. He would abolish the requirement of a college degree as a prerequisite

to legal study; abolish the use of casebooks; eliminate student-edited law reviews; reduce the class hours of the first-year compulsory subjects to three; require in their place the compulsory study of courses that introduce students to the wider social context of law; ban the use of students as research assistants; urge restraint in the regard of a judicial clerkship as a prerequisite for an academic career; and expand the practical training required of licensed attorneys (173–174).

The reform that both authors overlook is the need for a nonprofessional track for the study of law. This situation may be entirely unique among the professions. A student can study biology and anatomy without going to medical school, religion without attending a seminary. Why then is it necessary to attend law school to learn law? While there are many purposes to which a formal expertise in law would be useful (of which legal anthropology is only one), few scholars are willing to endure law school to obtain it. Consequently, non-lawyers tend to talk about law as though from a distance. At the very least, law schools should reduce their self-imposed segregation and allow more cross-registration. If the reviewed authors are correct, legal education could only benefit from these revisions.

To this point the reviewed books will appeal to those interested in educational institutions or the teaching professions. Legal anthropologists, however, should find particularly challenging the fact that both books speak disparagingly of the casebook. Ever since Llewellyn and Hoebel's *The Cheyenne Way* (1941), the anthropology of law has taken as its standard format the method of the casebook. The classic works of Gluckman (1955) and Bohannon (1957) proved the productivity of this approach in organizing ethnographic data.

Watson recounts how the casebook's originator, Christopher Columbus Langdell, then dean of Harvard Law, "believed that law was a science, and should be taught in a scientific method from cases" (79). "Langdell's case method," Kissam continues, "studied groups of judicial opinions on each issue to ascertain by means of a 'scientific' induction or logic a basic principle or rule that should govern the issue" (38). This approach was particularly useful in the context of jurisdictions such as the common law, where there was no all-encompassing code.

This approach would prove intuitively advantageous to Llewellyn (then professor of law at Columbia) because traditional societies likewise functioned without benefit of a written code. By concentrating on the "trouble-cases," one could inductively discern the operative rule of law for any studied group. This approach yielded more insightful results than the "treatise" approach taken by Schapera (1938), in which rules of law are solicited from informants, followed by illustrative cases. Although the case method has not been uncriticized (see, for example, Epstein 1967 and Gluckman 1973), it remains the standard for presentation of materials in the field of legal anthropology (see, for example, Nader 1990).

According to Kissam, the decline of casebooks in law schools began in "the beginning of the twentieth century [when] Langdell's disciples were emphasizing the procedural

rather than the substantive values of the method by using opinions more to study legal reasoning and legal argument than to search for substantive rules" (38). Today, claims Watson, "the casebook method [has become] an exercise in futility" (87).

It can be disheartening to learn that the case method has fallen into such disrepute in its original setting. Does this mean that we who practice legal anthropology should reevaluate its continued use? What would replace it? Alternatively, perhaps our practice of the method has remained more "pure" than that evolved in law school texts. In that case, we might have an intellectual responsibility to balance the scale by returning it to the lawyers, setting an example of the case method properly employed.

Continued use of the case method, in any event, can no longer be unreflectively taken for granted. If, as Watson and Kissam both argue, it has so deformed legal education, what steps are necessary to prevent a similar result in legal anthropology?

References Cited

Bohannon, Paul

1957 *Justice and Judgment Among the Tiv*. London: Oxford University Press.

Epstein, A. L.

1967 *The Case Method in the Field of Law*. In *The Craft of Social Anthropology*. A. L. Epstein, ed. London: Tavistock.

Gluckman, Max

1955 *The Judicial Process Among the Barotse of Northern Rhodesia*. Manchester: Manchester University Press.

1973 *Limitations of the Case-Method in the Study of Tribal Law*. *Law & Society Review* 7(4):611-642.

Llewellyn, Karl N., and E. Adamson Hoebel

1941 *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence*. Norman: University of Oklahoma Press.

Nader, Laura

1990 *Harmony Ideology: Justice and Control in a Zapotec Mountain Village*. Stanford: Stanford University Press.

Schapera, Isaac

1938 *A Handbook of Tswana Law and Custom*. London: Oxford University Press.