

Local Experiences in (In)Effective Teaching

“Over- and Under- Tolerance in U.S. Law Teaching”

by

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I.

Ideological convictions in the circumscribed environment of U.S. law schools should stand aside. Insularity and disfigured truths hinder the advancement of American legal education and deprive it of its potential for leadership and achievement. The work of academic lawyers should consist principally in the examination of decisional determinations and their interpretation. Despite the popularity and facile appeal of clinical legal education, the law’s content and mission will always be shaped by the discipline of analysis and the rigorous doctrinal evaluation of case law.

II.

Despite their attempt to adjust to evolving political pressures and to remake their image, law schools in the United States appear unable to engage in real change. They are reluctant to integrate the multijurisdictional phenomenon of globalism and privatized justice into the core value system that animates their operation. Such developments are either ignored or greeted with token acknowledgements by both faculty members and administrators. Foreign law has been, traditionally and to this day, relegated to an esoteric standing in U.S. law programs. U.S. law schools have also resisted mightily the critique of judicial litigation by pandering to “soft,”

more clinically-oriented, “talking-therapy” approaches to dispute resolution. It is always more politic to disparage the true competitor and enhance the standing of misguided pretenders. Administrative policies have excised arbitration from the ethos of U.S. law schools. The power structure believes arbitration is a but a trend that will fade away and eventually disappear. In any event, it is a poor and inconsequential reflection of constitutional due process. The message from law practice and courts, however, is unequivocal and contradistinctive: Arbitration is firmly established, growing, and an increasingly dominant form of civil and commercial adjudication.

III.

Two aspects of contemporary U.S. law teaching simultaneously contribute to the negativity and inhospitable reception. First, activist political ideology—predominantly left-wing in character—has come to have a substantial influence in both U.S. universities and law schools. Many law professors are dedicated to a cause and its values. Their dedication is rarely modest. Humility is not emblazoned on the law professor coat of arms. The cause often absorbs their writing and infiltrates their teaching. Moreover, these law professors are ordinarily refugees from the arts and sciences who escaped under-employment or worse by migrating to law school. Their academic talents allowed them to succeed well enough to compete for academic positions in law teaching—the original purpose of their migration.

In some respects, this preoccupation with ideological objectives has an impact upon future hiring practices and pedagogical decision-making. As a consequence, analytical methodologies, professional instruction, and the importance of the bar become subordinated to academic policies that are founded upon political conviction. Were it not for the talent of admitted students and the professional discipline of large U.S. law firms, U.S. lawyering might be in considerable decline. U.S. law schools, in fact, gain in the all-important rankings by

sequestering themselves in “off-beat” endeavors like the intersection of ancient Icelandic literature and the law.

To some degree, the academic mission of professional schools is being expropriated by an increasingly rarified sense of academic quality and rigid belief systems. The law teaching academy is overly tolerant of eccentricities, individual agendas, and arts and sciences approaches. It erroneously believes that these scattered elements constitute a grand design. From a professional vantage point, these narrow concentrations yield arcane and inconsequential thinking. They are hardly an intelligent and effective means of responding to the multi-dimensional challenges of global lawyering. Those fixated by domestic diversity and cultural integrity do not even recognize the substantial diversity questions posed by the transborder clash of legal systems and national traditions.

Second, there is another, equally vital and defining, characteristic of contemporary U.S. law teaching that fosters the institutional myopia of U.S. law schools. A significant number of U.S. law teachers share a long-standing sectarianism and staunch traditionalism. Unlike the activist, special interest group, these law professors do not make dilute the formula. These academics are not bent on converting their environments into a mirror-image of their experience and interests. They are the true students of American law. Their goal is to preserve and protect that law’s established dominant values. Those values have always resided (at least, in the modern era) in civil procedure, complex litigation, federal jurisdiction, adversarial advocacy, and constitutional law. The under-tolerance of deviation and change among these teaching lawyers has made them less open to and understanding of change and its necessity in the U.S. legal process. The conservative group converges with its ideological opposite in rejecting views other than those of the admitted religion. Arbitration, in both its international and domestic

manifestation, provides a good example of how these differing perspectives both distort the character and value of transformations in the American legal process.

IV.

The rise of arbitration to the left-wing activist professor represents a majoritarian conspiracy to oppress undefended minority groups and deprive them of their entitlement to due process rights. In disparate-party circumstances, the contract of arbitration should be outlawed because it embodies the economic unfairness of society itself. Private adjudication, like arbitration, also robs the polity of the opportunity to debate and develop significant rights protection frameworks. To the conservative element in the U.S. law teaching profession, the recourse to arbitration violates the most fundamental strictures of the U.S. Constitution. It substitutes the frivolity of private adjudication for the fiduciary responsibilities and authority of courts. Rights determinations are reached in the shadows and public jurisdictional mandates are subverted. International arbitration in particular encroaches upon and eventually dismantles the integrity and legitimacy of the domestic legal system. Transborder arbitrators should not alter or define the rule of law in American society.

Both camps, despite the sincerity of their convictions and their intractable sense of rectitude, misunderstand arbitration and its necessary role in furthering the civilization of justice. These opposing ideological groups agree, each in their own way, to blind themselves to the profound dysfunctionality of unrestrained due process and the costs of courts. The enormous success of arbitration in the last forty years, in the United States and elsewhere, is directly attributable to the equally enormous failures of the judicial process. Arbitration can and does make effective adjudicatory services available to the general citizenry. In contrast, the courts do not. Moreover, the groups—because each believes equally in the myths and mysteries that

surround judicial robes—misassesses the spectacular achievements of transborder arbitration in establishing an international rule of law. Private international law has been a well-recognized aspect of the science of law. Arbitration, in effect, has made that area of law more than theory—in a word, useful and workable. Global commerce would not be possible without the system of international arbitration. The U.S. Supreme Court has given arbitration its contemporary destiny. In the Court’s view, arbitration does not undermine, but rather accomplishes and furthers U.S. justice. It is astonishing that both academic groups should condemn the work of the oracle of American law.

V.

It is undoubtedly necessary and productive to have dissenting and traditional values represented in U.S. law curricular. The ideological tendencies within U.S. law teaching, however, have made it difficult to appreciate both the new (and perhaps revolutionary) and the global. Neither development threatens to extinguish established values, but rather seeks to adapt them to changing exigencies and needs. Although ideological distortions may permit counterproductive conclusions, it is difficult to argue with effectiveness and palpably positive results. U.S. law students should be and are entitled to receive a firm, objective grounding in unaccustomed alterations in the fabric of domestic justice such as alternative adjudication and global developments. At least a few law faculties elsewhere attribute strategic significance to these trends in their academic programs. The McGill law faculty, for instance, seeking to accommodate competing cultures within a mixed legal jurisdiction, promotes the study of comparative law on a curricular-wide basis by underscoring the variegated procedural requirements of international arbitral proceedings. This methodology applies both to transborder

commercial and diplomatic disputes. U.S. law schools should draw inspiration and guidance from their northern neighbor.