UNIVERSITY OF PITTSBURGH LAW REVIEW
Vol. 85 ● Winter 2023

WHAT LAW STUDENTS LEARN

Bernhard Schlink

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.1009
http://lawreview.law.pitt.edu

WHAT LAW STUDENTS LEARN

Bernhard Schlink*

I.

An outsider looks at a social context in a different way than an insider. Much escapes him, for he is not fully familiar with the context. Sometimes he sees aspects that an insider would miss, finding them too familiar to notice. An outsider's perspective is always shaped by the social context he comes from and with which he draws comparisons—not just when he seeks to compare, but also when he does not. An outsider can never claim to know better than an insider; his observations can only be a proposition, food for thought.

While I have taught in the United States, I am German, I studied in Germany, and, for most of my life, I taught in Germany. My outlook on American legal education is an outsider's outlook. I enjoy looking comparatively at our different approaches, but I realize that my gaze ends up being comparative even when I direct it solely to American legal education. If sometimes I sound critical of American legal scholarship and education, it is simply because that is the topic here. I am no less critical of German legal scholarship and education, but that is a matter for Germany and is of no interest to an American audience.

Law students learn what they need to know. German students need to pass the First State Exam, and, subsequently, after two years of clerkships, the Second State Exam, and try to do so with at least ten out of eighteen points. Ten points are required to apply for a position within the judiciary, the prosecutor's office, or the administration, or to write a dissertation and to acquire an LLM abroad, which prestigious, high-paying law firms seek from applicants. Law students must be familiar with civil, criminal, and public law to pass the State Exams; depending on the federal state, they sit seven to eleven exams, each five to six hours long, and in each exam must solve a case, addressing topics that range from contracts to murder to constitutional law. In the Second State Exam, they must write papers in the form

* Bernhard Schlink is professor emeritus of public law and legal philosophy at Humboldt University of Berlin and has taught at Benjamin N. Cardozo School of Law in New York City. He served as justice on the constitutional court for the state of North Rhine-Westphalia.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.1009
http://lawreview.law.pitt.edu

of a statement of claim or of defense for a civil case, an indictment or a sentence in a criminal case, or an administrative ruling. Their knowledge must be as diverse as their career objectives, ranging from judge and prosecutor to administrator to practicing attorney.

In the United States, what law students need and learn depends first of all on which law school they are attending. If it is a high-profile law school, they learn what they need to excel so that they can join the editorial team for the law review and find prestigious clerkships; this helps them secure a place in a prestigious and high-paying law firm, where they are destined to obtain a place anyway, having attended a high-profile law school. If it is a lower- or low-profile law school, they learn to be good enough to find decent clerkships and pass the bar exam. In any case, most of them end up in a role that reflects their career ambitions: as practicing attorneys, hopefully in a large law firm, but a small law firm is okay, and becoming a solo practitioner must be okay or may even be preferred because it means not having to deal with business partners. The input students are offered and what they learn in law school focuses on this kind of career objective—even though a small percentage do study with the goal of entering public service.

Legal education is different in the United States and Germany because it has developed in different ways and towards different ends in the two countries. In the United States, becoming a lawyer originally meant becoming an apprentice with a practicing attorney, until one knew enough to practice oneself. This evolved into today's legal education at universities, firstly as the bar and the ABA had an interest in decently trained practicing attorneys; secondly, as the universities and the AALS had an interest in students who wanted to learn and were ready to pay; thirdly, due to the trend in society to make the professional world ever more scientific and academic. This evolution had different waystations. But both before and after 1870, before and after the Great Depression, and before and after the Second World War, the focus of legal education was always on preparing students to become practicing attorneys. In lower- and low-profile law schools, this meant preparing them for the bar exam. In more prestigious law schools, it meant preparing them to be hired by large law firms.

In Germany, legal education did not grow out of the bar's needs, but out of the state's need for well-trained administrators, justices, and prosecutors. Until the 1990s, these were the most prestigious positions that law students hoped and strived for, and those who attained them tended to look down a little on practicing attorneys and lawyers working in legal departments of businesses. Neoliberalism, the rise in mergers and acquisitions, the growth of national and international corporate law firms, and the absurd salaries that they pay have changed that. However, legal education has evolved into and remains oriented towards the type of legal expertise

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.1009
http://lawreview.law.pitt.edu

that makes lawyers usable in all areas of the administration, in the prosecutor's office, and the judiciary more than as practicing attorneys.

Legal education in the United States and Germany grew out of such different needs because the state and society developed so differently. In the United States, civil society came before the state, whereas in Germany, as everywhere else on the European continent, the state came before civil society. The civil societies that established democracy in France and, less easily, in Germany encountered the state, complete with its administration, judiciary, and military, and took it over. The state had been created by absolute monarchs who needed a loyal bureaucracy that, by following and enforcing their laws, would overcome the feudal powers and end conflicts between Protestants and Catholics in their territories. The monarchs were not concerned with the legal representation of individuals before their courts and administrative agencies; this was left to lawyers who were not good enough to join the bureaucracy. In the United States, local political structures did of course exist, but there was no state to be taken over; civil society organized itself into a judiciary and an administration, electing judges and officials based on their political reputation and trustworthiness, and counting on the jury to contribute common sense. Originally, this self-organization was not built on legal expertise, although it came to appreciate it. Legal expertise gives proficiency and legitimacy, it proves helpful when arguing before courts and administrative agencies—when representing individuals, one is well advised to have some legal expertise.

This is only a rough sketch of how the legal profession here and there has developed differently. But it is only by going back in history that one understands how legal education can still be so different.

II.

Law students learn what they need to know—with some exceptions. Be it in the United States or Germany, they attend a lecture class that they don't need because the professor is a celebrity or a prankster; they participate in a seminar on law and literature or jurisprudence or religion, law, and politics because they bring an interest in literature or philosophy or religion into their study of law. It takes that kind of interest for them to do so; indications from the law school or the faculty that engaging with these topics is fundamental for a deeper understanding of the law or crucial for a better, more responsible rapport with the community is not sufficient reason for them to turn to political science or the philosophy, history, and sociology of law.

More profound or more elevated topics, from philosophy to political science, become truly interesting for law students only if they become relevant to what they learn and what they need to know. That is another reason why American law students have a different perspective and a different orientation than their German fellow students. A German lawyer must be familiar with European Union law, because

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.1009
http://lawreview.law.pitt.edu

today every single area of German law is impacted by it, and European Union law cannot be understood or learned without a comparative glance at other European legal systems and some insight into European history and European legal history. A German lawyer must also be familiar with constitutional law; in light of German constitutional doctrine and the Federal Constitutional Court's jurisprudence, fundamental rights, conceived as values that govern all areas of law and have a third-party effect between citizens, penetrate the entire legal system in Germany. Again, this topic cannot be studied properly unless students gain some understanding of the essence and history of human rights, constitutional history, and the history of constitutional doctrine. A German lawyer must also be familiar with administrative law, the law that governs the administration when it interferes with citizens' affairs and supplies citizens with goods, and, again, this cannot be studied without attaining some insight into how the administration developed in the past and how it functions today. An American law student can be successful without a comparative glance at other legal systems, without a thorough engagement with constitutional law, and without an understanding of constitutional and administrative history and the related legal scholarship.

When comparative and historical insights are necessary to deal with black letter law, they trigger students' interest. Another trigger is when students discover that comparative, historical, and even philosophical knowledge can foster their legal imagination and creativity. There is a belief, even among lawyers or law students, that lawyers must know the law as it stands and have no need for imagination and creativity. That is simply wrong. A civil lawsuit can be won with arguments that were accepted legal doctrine decades ago, have been forgotten, and are now surprising and convincing; an anti-discrimination action can be won by arguments that go way back into the history of discrimination; a conscientious objection can be made plausible with philosophical grounding—indeed, how could it be made plausible without such an underpinning?; these realizations prove enlightening and stimulating for law students. When I was a justice at the Constitutional Court of North Rhine-Westphalia, I found that good attorneys know about history, philosophy and other fields that are neighbors of law.

III.

Constitutional law in particular demands and teaches a perspective that includes history, philosophy, public concerns, legal values, and social goals. The greater the role that constitutional law plays in legal education, the more attuned students are to public concerns and public discourse.

The minor role that constitutional law plays in American legal education is due to its minor role in the legal system. Fundamental rights here are not conceived as values that govern all areas of law and have a third-party effect on citizens. Could

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.1009
http://lawreview.law.pitt.edu

constitutional scholarship bring about a greater impact of the Constitution on the legal system? Not without a greater impact on the Supreme Court's jurisprudence, and—here again, I rely on my impressions and anecdotal evidence—neither legal scholars nor the court seem to be interested in this kind of impact.

The decisions handed down by the Supreme Court suggest that it has no interest in constitutional scholarship. Whether those decisions strive for political compromises or, as is the case today, advance a political agenda with resolute unilateralism, such rulings seem to an outsider to merely thinly veil their political character in a legal form. Certainly, every decision by a Supreme or Constitutional Court in a politically charged dispute has a political dimension. On the other hand, however, through cooperation between jurisprudence and scholarship, applying methodological standards for argumentation and reasoning, while requiring consistency in individual decisions and sequences of decisions, can establish such a robust tradition and develop such force that decisions may ultimately only be as political as these standards and requirements allow. The Supreme Court makes and changes its standards and requirements ad hoc and without regard to constitutional scholarship. This is not apparently solely in its decisions; I shall never forget the conversation between Stanley Fish and Antonio Scalia at Cardozo Law School some years ago, in which Scalia showed open contempt for constitutional scholarship and for intellectual standards in general.

Yet constitutional scholarship also displays little interest in exchange and cooperation with the jurisprudence of the Supreme Court. It does not try to develop standards and requirements for the jurisprudence of the Supreme Court and to bring decisions it has previously made into a coherent system that establishes requirements for future decisions. The Supreme Court's discussion of cases and criticism of decisions is often also more political than legal, and the theoretical concepts of constitutional scholars, for all their philosophical and sociological and even psychoanalytic and linguistic sophistication, often have little to do with the lived, practiced, enforced and adjudicated constitution. American constitutional scholarship enjoys a freedom to reason about these theoretical issues that young German constitutional scholars often envy. They must strive to attain a coherent system that reconciles rulings from the Federal Constitutional Court with the results of constitutional scholarship—and seek to achieve a body of scholarship, known as "*Dogmatik*" i.e., legal doctrine, that is close enough to the jurisprudence of the Federal Constitutional Court and of sufficient interest for its judges to be taken into account in future rulings. If they are so bold as to indulge in adding the freedom of philosophical or linguistic theorizing or opting entirely for such a stance, the freedom they enjoy is freedom within a niche, which comes at the price of irrelevance.

The outsider also perceives American constitutional scholarship as scholarship in a niche, without exchanges or cooperation with the Supreme Court's jurisprudence and any impact on it. Is there a way out of the niche? By developing something like

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.1009
http://lawreview.law.pitt.edu

a doctrine of constitutional law, even though the Supreme Court will not cooperate with constitutional scholarship in the way the German Federal Constitutional Court does? By teaching students to go beyond the status quo and to argue on the basis of fundamental rights in all areas of law? By encouraging them to use these arguments as practicing lawyers and judges? By setting out on a long march to change the legal institutions that over time and generations will even reach the Supreme Court? I don't know. I don't even know whether there is a wish to get out of the niche.

Another thing that I don't know is whether legal education must continue to focus on training practicing attorneys. I read that large law firms will, in the future, need fewer lawyers, and that small firms and solo practitioners will make less money. I also read that the happiest lawyers are government and public sector lawyers. I could not find any surveys on legal jobs outside of law firms and practices, addressing the types of work done, how many law school graduates are needed, what kind of knowledge, and which skills are required of applicants. Could legal education focus more on imparting this knowledge and these skills, and help students attune their career paths to public concerns?

Being disarmed, distracted, disconnected, and distressed—whether the focus is on German or American students and lawyers, the problem cannot be solved by offering what students do not need to succeed in law school and in life. There are only two ways to solve it: firstly, by making human values, social goals, and public concerns into elements of black letter law and ensuring students understand that focusing on these will make them better and more successful lawyers, and, secondly, by giving students occupational perspectives where this focus is crucial.

IV.

What about morality? Disarmed, distracted, disconnected, and distressed lawyers also readily become morally disoriented lawyers. They may comply with all the ethical standards set by the law and the American Bar Association. Yet they may find themselves in situations in which morality conflicts with what the law allows or requires them to do.

Again, there is not too much that classes and seminars can do. Dealing with the moral conflicts of judges under the Fugitive Slave Act or under National Socialist Law can help students understand what their options are vis-à-vis immoral laws: following the law as it stands; pretending to follow it but bending and turning it so that it yields morally acceptable results; leaving law, maybe after openly protesting its immorality.

Maybe more important is that law schools should frame legal education as a moral enterprise. That they should stop courting students even though for many potential students it is not worth attending law school with the current fees and debt loads. That they avoid grading their students primarily to ensure customer

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.1009
http://lawreview.law.pitt.edu

satisfaction rather than to acknowledge their accomplishments. That they stop glamorizing their employment statistics. That they do not raise tuition fees, faculty salaries, and perks in order to climb up the league tables and make money. That they do not emulate large law firms and lawyers bringing cases for plaintiffs, focusing on short-term profits with scant regard for their long-term reputation and little responsibility for the common good. Growing up in an environment run for maximum profit, students learn to do likewise.

I began by talking about how history has shaped today's legal education. It is, of course, also shaped by contemporary economic and social culture, in Germany no less than in the United States of America. Throughout the corporate world, the focus has shifted from long-term to short-term thinking and to increasing quarterly profits. Throughout academia, economical concerns have pushed aside scholarly and educational concerns. Throughout our societies, individualism has turned narcissistic, while becoming rich and balancing work and life is regarded as more satisfying than giving one's best in one's job and caring for the common good. Lawyers are not the only ones who are disarmed, distracted, disconnected, and distressed. The four Ds are a problem facing all those who are supposed to run and lead our countries. That is no consolation. It only makes us aware of what we are up against in our attempt to broaden young lawyers' horizons and strengthen their sense of responsibility.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.1009
http://lawreview.law.pitt.edu