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BOOK REVIEW

THE EMPIRE STRIKES BACK: OUTSIDERS AND THE STRUGGLE OVER LEGAL EDUCATION, by Arthur Austin. New York: New York University Press. 213 pp. 1998.

Reviewed by Erik M. Jensen*

First, a disclaimer: Arthur Austin is my colleague, and I like him.

Of course, I'm one of very few who do. He's a crusty, craggy curmudgeon (any redundancy is justified in this case) who pulls few punches, and he steps on a lot of toes.¹

All of which means that Austin's new tome, *The Empire Strikes Back: Outsiders and the Struggle Over Legal Education*, is a bushel-basketful of fun to read. If you're connected with legal education at all, your ox will be gored by this book. But you'll probably smile during the goring,² even if your ox won't.

"The Empire" is the legal-education establishment, the old-line doctrinalists and vocationalists who are trying to protect academic turf against the encroachments of "the Outsiders." The Outsiders are the critics of tradition — the deconstructionists, postmodernists, critical legal scholars, critical race theorists, radical feminists, oppression theorists, etc. — who, by questioning the role of reason in the law, call into question the idea of law itself.³

The war — and to many participants it *is* a cultural war — is a difficult one for traditionalists who must fight on a university battlefield: law schools' place in the academy has always been suspect. Many university faculty don't take law schools seriously, except as cash cows. As a result, younger law faculty⁴ have increasingly tried to bring the language of more accepted academic fields into the law schools. A little literary theory or sociological posturing makes a law teacher seem more professorial to his humanities and social sciences colleagues down the street.⁵

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1. In short, he provides full body punishment. See *infra* notes 34-37 and accompanying text (tying criticism to wrestling).

2. Note the weasel word "probably."

3. Law-and-economics types were once seen as Outsiders too, but they pushed the door open by using reason and demonstrating the practical relevance of at least some of what they do. See ARTHUR AUSTIN, *THE EMPIRE STRIKES BACK: OUTSIDERS AND THE STRUGGLE OVER LEGAL EDUCATION* 60-62 (1998).

I don't want to characterize all critics of traditional legal reasoning as Outsiders. For instance, Paul Campos attacks the pervasive idea that legal reasoning can solve all social problems, but, even though he critically discusses the "rule of law," he uses reason — dead, white, European male reason — to make his points about reasoning's limitations. See generally PAUL F. CAMPOS, *JURISMANIA: THE MADNESS OF AMERICAN LAW* (1998).

4. That is, those under 55 (or whatever age I am when this appears in print).

5. The physicists, chemists, and engineers are generally indifferent to all these battles among

Whether academic theory (or anything else) is served by law professors' pretending to be literary theorists or social scientists, the fact remains that law schools are *professional* schools. For most students that means job training and for many faculty — whether they like it or not — that means focusing on nuts-and-bolts rules.⁶ Try to work too much Derrida into your corporations class, and the students, with justification, will be lined up outside the dean's office.⁷

Austin is an across-the-board contrarian, but his sympathies are generally with the Empire. On scholarship, Austin writes: "Objective and analytical scholarship that contributes to knowledge is a working description of the goal of the legal scholar."⁸ You can't get much more imperial than that. The best scholarship is devoted to "problem solving — the fundamental mission of lawyers. Consistent with this responsibility, the doctrinal model constitutes the most efficient way for law professors to advise judges and lawmakers."⁹

Nevertheless, the Outsiders have won many of the scholarly battles. It's not that they prevail on the merits; in fact, many Outsiders would deny that there's such a thing as "the merits" determinable through reason. The problem is that the Outsiders have occupied the field. Pick up almost any one of the twenty law reviews claiming to be in the top ten, and you'll see what I mean: whatever is going on in the classroom, the most prestigious law reviews ooze the entrails of postmodernism.

The curriculum also has succumbed to the Outsiders, if only in the proliferation of courses and the death of any sense that a coherent law school curriculum should or can exist. *What Do Law Schools Teach? Almost Anything*, reads a *New York Times* headline, and it's true.¹⁰ With the junior professoriate made up of "tenured radicals"¹¹ — would-be humanities scholars and social scientists who forsook graduate school for the better employment promises of law schools — catalogs are full of courses taught because of professorial vanity.¹² Writes Austin: "Seminars are the leukemia of legal education: they give these young people a forum to relive what they imagine the 1960s was like, a poor effort at Oliver Stone revisionism."¹³

nonscientific types.

6. We might still call it "theory" — we call everything "theory" — but, in our heart of hearts, we know better.

7. Which should give both the students and the dean something more interesting to discuss than normal.

8. AUSTIN, *supra* note 3, at 179.

9. *Id.*

10. Charles Rothfeld, *What Do Law Schools Teach? Almost Anything*, N.Y. TIMES, Dec. 23, 1988, at B8; see AUSTIN, *supra* note 3, at 69.

11. The term, which Austin uses, is taken from ROGER KIMBALL, *TENURED RADICALS: HOW POLITICS HAS CORRUPTED OUR HIGHER EDUCATION* (1990).

12. See DAVID DAMROSCH, *WE SCHOLARS* 32 (1995) ("[U]niversity and even college faculty let their teaching reflect the disparate imperatives of their individual research interests.").

13. AUSTIN, *supra* note 3, at 194. I agree with this criticism only up to a point. The occasional vanity course is necessary for professorial sanity. Doing nothing but teaching the same nuts-and-bolts courses year after year would be deadening. Cf. J. Peter Byrne, *Academic Freedom and Political Neutrality in Law Schools: An Essay on Structure and Ideology in Professional Education*, 43 J. LEGAL EDUC. 315, 328-29 (1993) ("Teaching law school would be unbearably puerile without the intellectual challenge and gravity of scholarship.").

Teaching has been dumbed down as the Outsiders have convinced their colleagues (or scared them into acting as if they believe) that any idea is potentially as valuable as any other.¹⁴ God forbid that a faculty member criticize the position a student takes in class or in a paper; it's not "nurturing" to tell a student he's wrong.¹⁵ It's all part of what Austin calls, somewhat hyperbolically, the "feminization of the law academy."¹⁶ But being soft and fuzzy does little to prepare students for the real world where clients don't necessarily want their lawyers to nurture their adversaries.¹⁷

Along the way, Austin makes many telling points, in vivid language. For example, try Austin's "deconstruction striptease" for a little titillation.¹⁸ Proponents of the positions under attack won't agree with me on this, but Austin has made herculean efforts to understand the Outsiders on their own terms. *The Empire Strikes Back* is polemical in tone, but it's reasoned — and the product of prodigious research. Austin has spent more time trying to understand obtuse postmodern tracts (arguably a redundancy) than I think any reasonable person should, but I admire his persistence.

I may be making Austin sound like a mouthpiece for imperialist propaganda, but that's hardly the case. Austin is an equal opportunity offender, and he's not at all gentle to his fellow citizens of the Empire. He may identify with the doctrinal scholars — those who take the idea of law seriously and who try to explain it, criticize it, and ultimately improve it — but he makes almost as much fun of destructive (and often lazy) imperialists as he does of the Outsiders.¹⁹ For example, I assume every faculty has at least one imperial proponent of grand theory, for whom others' work is never good enough and who, therefore, never writes anything himself.²⁰ For such people, "it's better not to do anything than to sink into the sewer of ignominious incrementalism."²¹

14. At least as long as it reflects a left-of-center political stance.

15. It may be okay to tell him he's insensitive. See *supra* note 14.

16. AUSTIN, *supra* note 3, at 154.

17. A *National Law Journal* piece that Austin wrote on this point, see Arthur Austin, *Womanly Approach Harms Future Lawyers*, NAT'L L.J., May 18, 1998, at A23 (not his title, by the way), attracted quite a few very negative letters. How dare he, some critics said, suggest that women think in a particular way and that that way is subject to criticism?! See NAT'L L.J., June 1, 1998, at A20; NAT'L L.J., July 6, 1998 at A22; NAT'L L.J. July 13, 1998 at A24. In fact, the idea that women think differently than men (an idea derived from some feminist literature) was among the ideas Austin was challenging. Austin actually thinks women can be good lawyers, measured by traditional standards. What an unusual idea!

18. AUSTIN, *supra* note 3, at 96. Austin's metaphors do sometimes get out of control. For example, he refers to the Association of American Law Schools "as the logical melting pot for the dissemination of change." *Id.* at 155. Try coming up with an image for that.

19. He also dumps on overbearing practitioners of the Socratic method: a user "knows he can go to class cold and put the burden on the students." *Id.* at 23.

20. See JULIUS GETMAN, *IN THE COMPANY OF SCHOLARS: THE STRUGGLE FOR THE SOUL OF HIGHER EDUCATION* 54 (1992) ("[Not believing] 'what he could do well and enjoyed was worthy of his scholarly focus . . . doomed him to be the type of academic who scattered his best ideas and deepest visions into the coffee cups of the faculty lounge.'"), quoted in DAMROSCH, *supra* note 12, at 94 (referring to the "coffee-hour virtuoso who specializes in puncturing every argument while writing nothing himself").

21. AUSTIN, *supra* note 3, at 35. As Austin notes, good academic work is almost always

Austin makes ample use of irony. While he criticizes the use of narratives as scholarship, he illustrates many points by using — yes! — stories.²²

He also picks on establishment icons. A reader who has been worked over by law review editors — which is to say any reader who has ever written a law review article — has to like Austin's digs at the reviews. He quotes the *Village Voice* (like the *National Enquirer*, among Austin's indispensable research sources): "As character builders, law reviews rank a cut above high-class bordellos."²³ Overall, Austin observes, law review quality control reflects neither quality nor control: "unlike other disciplines, which are dominated by a small cluster of journals, the large number of law journals virtually ensures publication, regardless of quality."²⁴

Who (except a dean) can object to Austin's making fun of law schools' emperors, the deans?²⁵ Among other things, Austin suggests, deans are unlikely to have been productive faculty members themselves.²⁶ They "have an affinity for shirking."²⁷ And they're almost always failures at increasing the productivity of their faculties: "there is . . . the possibility that, as former shirkers, deans are intrinsically sympathetic to the problem."²⁸

The personal reflections along the way can be touching. I love the image of young Arthur Austin following his dad, a Virginia lawyer, to religious revivals: "[h]e was a small-town lawyer who did a lot of litigation before God-fearing local juries, and to him the best instructors in persuasion, rhetoric, and ability to read an audience were God's litigators."²⁹ That background serves Austin well in understanding some Outsider "scholarship" today: "I can spot a sermon when I see one, and [Derrick] Bell's 'Final Report'³⁰ is a classic sermon."³¹

A reader can learn a great deal from this book, and it's engaging, especially if you're able, H.L. Mencken-like, to step back and dispassionately view the academy as a grand farce. Nevertheless, it's sad that a book like this had to be written. Unfortunately, Austin doesn't have to create straw men and women³² to make fun of a great deal of Outsider "scholarship": crazy stuff is already out there — lots of it. Much of what calls itself "critical theory" or something similar is hardly theory

incremental, with scholars batting propositions back and forth within a generally accepted framework of evaluation: "The purpose of scholarship is dialogue and debate." *Id.* at 182.

22. As have I, for which I expect full academic credit (citations available on request). Besides, when I read "stories" to my little girl, I like to think I'm engaging in scholarship. If only I could convince my dean . . .

23. AUSTIN, *supra* note 3, at 56. It's intriguing to imagine how law review editors would verify that proposition.

24. *Id.* at 27.

25. All deans except my current one, that is.

26. *But see supra* note 25.

27. Austin, *supra* note 3, at 58.

28. *Id.* at 59.

29. *Id.* at 126.

30. See Derrick Bell, *The Final Report: Harvard's Affirmative Action Allegory*, 87 MICH. L. REV. 2382 (1989).

31. AUSTIN, *supra* note 3, at 126.

32. "People of straw" is now the accepted term, I believe.

(although it certainly is critical),³³ and it shouldn't be necessary to challenge the worst of the absurdities. In fact, treating the excesses seriously can give the work more legitimacy than it deserves.³⁴

For example, it's crazy to argue that, because there has been discrimination, neutral rules ought to be discarded; or that, because reason doesn't answer all questions in a totally satisfactory way, we should subordinate logic to emotion; or that texts (including legal texts!) have no significance outside the mind of the reader of those texts. All of these things get said in print, and it's too bad that reasonable people even have to think about responding seriously.

Yes, I'm probably being unfair to the Outsiders. There is Outsider scholarship of value, and we shouldn't throw the baby out with the bath water.³⁵ But finding the good work can be hard, given the unwillingness of many Outsiders to be self-critical and to evaluate — really evaluate — works of their colleagues. They won't do it, and some Outsiders question whether nonbelievers are even entitled to try. Is a middle-aged white male (like me) permitted to comment on critical race theory or feminist theory? Apparently not. "You just don't get it" now passes as a dispositive argument in some circles. But if certain issues are out-of-bounds for general discussion, because potential participants are inherently unable to understand the propositions being advanced, then I question whether those issues should be subjects of academic discussion at all.

I can't help thinking that, at bottom, *The Empire Strikes Back* is part of what an observer from another planet (a *real* outsider) would see as a scam. The book is part of a series billed by the New York University Press as *Critical America*, the editor of which is Richard Delgado, an Outsider whose "outsiderness" has made him the quintessential insider. (Remove Delgado's work from the top ten law reviews in the last decade, and you'll solve your library's space problem.)

Delgado and Austin need each other, just like Miguel the Mauler needs the Masked Avenger. As with professional wrestling, Delgado and Austin go through the motions — entertaining motions though they may be — with each setting the other up, pursuant to an implicit script, for the next hammerlock. Empire vs. Outsider discussions and diatribes require that both sides hang around to serve as targets of attack. If Delgado didn't exist, Austin would have had to create him.

This isn't a discussion that can lead to any long-term resolution, nor is that the purpose of the exercise. As Austin notes at the end of *The Empire Strikes Back*, hostilities between the Empire and the Outsiders will endure because compromise is

33. In any event, much critical theory isn't framed in terms that lend themselves to reasoned discussion. How can one respond to general claims of oppression? What evidence could be mustered to disprove such contentions?

34. I have the same reservation about the craziness-legitimizing effects of Daniel Farber and Suzanna Sherry's often admirable book. See generally DANIEL FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT OF TRUTH IN AMERICAN LAW* (1997). But I've engaged in this unhappy process myself. See Erik M. Jensen, *Critical Theory and the Loneliness of the Tax Prof*, 76 N.C. L. REV. 1753 (1998).

35. Although that's permitted, I believe, after *Roe v. Wade*.

impossible: Outsider scholarship exists to be outside.³⁶ In short, the "debate" has become a series of wrestling matches, with the performance more important than the outcome.

That said, it's not really a game, of course, as the sometimes heated exchanges between imperialists and Outsiders demonstrate. There are merits to be evaluated in legal theory, and the outcome should matter. In my capacity as referee, I can report that Austin has body-slammed and then pinned Delgado and other Outsiders.³⁷ If you're interested at all in radical critiques of the law and of legal education, you need to read Austin's perspective.

But before Austin gets a big head and tries to use that last sentence as a marketing blurb, let me emphasize that there's no particular reason to *buy* this book. You can always check out *The Empire Strikes Back* from your library.

36. See AUSTIN, *supra* note 3, at 200.

37. I'm sure there's something racially, sexually, or ethnically insensitive in my use of the wrestling metaphor. Professional wrestling is the paradigm of political incorrectness — or so I'm told. (I'm certainly not going to research the point.) In any event, it's part of my no-holds-barred commentary.