

BRUCE ZIFF'S PROPERTY PEDAGOGY

MALCOLM LAVOIE*

This essay discusses Bruce Ziff's contributions to property law pedagogy, highlighting four aspects of his teaching: (1) the breadth of the course materials used in his classes; (2) the ways in which he sought to place property law in its social, political, historical, and economic context; (3) his collaborative approach to property law teaching; and (4) his continual commitment to innovation in the classroom. The author concludes by thanking Professor Ziff for his many contributions.

TABLE OF CONTENTS

I. INTRODUCTION	123
II. COURSE MATERIALS	123
III. PROPERTY IN CONTEXT	124
IV. COLLABORATIVE TEACHING	125
V. INNOVATION	126
VI. CONCLUSION	126

I. INTRODUCTION

My contribution to the symposium is about Bruce Ziff's property law pedagogy. I should say at the outset that I was never a property law student of Professor Ziff's (though I am married to someone who was, and she had plenty to say about the experience). My own familiarity with Ziff's property law pedagogy comes primarily from other sources: first and foremost, teaching property law alongside him and being the beneficiary of his mentorship and the team approach to instruction that he encouraged; and second, using the resources he created to teach my property classes, including both his property casebook and the *Principles of Property Law* textbook.¹ In this brief article, I would like to highlight four different aspects of Ziff's property pedagogy that I find notable, and that I think all property law instructors can learn from.

II. COURSE MATERIALS

The first point concerns the breadth of the course materials that Ziff used to structure his courses. A traditional approach to property law views it essentially as a product of the common law. Students read key judicial decisions and discuss them in class, with the instructor guiding them through a series of questions that seek to illuminate the legal

* Professor, University of Alberta Faculty of Law. The author wishes to thank Talia Wilson for research assistance, as well as the editors of the *Alberta Law Review* for their work in publishing the articles from the Ziff Symposium.

¹ See Bruce Ziff et al, *A Property Law Reader: Cases, Questions, and Commentary*, 4th ed (Toronto: Thomson Reuters, 2016); Bruce Ziff, *Principles of Property Law*, 7th ed (Toronto: Thomson Reuters, 2018).



reasoning process.² On the traditional approach, the steady diet of case law is only rarely supplemented by statutes and secondary materials. The point is to study the common law in its pristine form. Ziff departed from this approach in a few key respects. While case law was regularly assigned and discussed, the materials were broader, reflecting a more realistic assessment of what property law looks like today. Secondary materials, including works outlining the historical, social, and economic context of the law, were commonly assigned.³ The occasional film raising property themes was also featured. Staples included *The Castle*, *Up for Grabs*, and the rule against perpetuities scene from *Body Heat*.⁴

Statutory materials also occupied a significant place in the curriculum. This reflects the reality today that statutory interventions are not to be understood as some strange and exotic alteration of the common law of property. Rather, statutory reform of property law has been so significant for so long that statutes are at the core of what we should be teaching. From co-ownership, to family property, to mortgages and title registration, to that one-time exemplar of judge-made law, the rule against perpetuities: you simply cannot understand modern property law if you do not appreciate how it has been formed through legislation.⁵ And that is connected to a deeper point about the sources of property law in the democratic era: property is no longer the preserve of elite judges. It has been significantly molded by the elected representatives of the people, and their contributions are as much a part of property law as the common law.

Ziff's encyclopedic knowledge of property statutes could sometimes be a little intimidating for a junior property law teacher. I remember one time, in my first year teaching property, Ziff looked over an exam question I had drafted dealing with competing claims to an object of archaeological significance that was found in the ground. He looked at me and said simply that he assumed I must have taught my students the *Historical Resources Act*, which vests property in archaeological resources in the Crown.⁶ That gentle query led to some quiet revisions of my exam question.

III. PROPERTY IN CONTEXT

The second, related point concerns the breadth of ideas that informed Ziff's teaching. To complement the wide range of course materials, his teaching drew on a wide range of intellectual sources, beyond a narrow analytic approach to legal doctrine. Discussion of the economic and social implications of a decision or rule was common. However, he was perhaps most famous for taking deep dives into the cases, penetrating beyond the arid summary of the facts and reasons for decision provided by the appellate court, to situate a decision in a broader historical context. In discussing the Leonard Foundation Trust case,⁷

² On the traditional case method approach to law teaching, see generally Russell L Weaver, "Langdell's Legacy: Living with the Case Method" (1991) 36:2 Vill L Rev 517.

³ In some cases, Ziff's own scholarship filled a gap in the literature in order to provide context for a case. See e.g. Bruce Ziff, "The Great Onyx Cave Cases: A Micro-History" (2013) 40:1 N Ky L Rev 1 [Ziff, "Great Onyx Cave Cases"].

⁴ *The Castle*, 1997 (Australia: Working Dog, Frontline Television, Village Roadshow Pictures); *Up for Grabs*, 2004 (US: Crooked Line Productions); *Body Heat*, 1981 (US: The Ladd Company).

⁵ See e.g. *Law of Property Act*, RSA 2000, c L-7; *Mines and Minerals Act*, RSA 2000, c M-17; *Perpetuities Act*, RSA 2000, c P-5; *Land Titles Act*, RSA 2000, c L-4.

⁶ RSA 2000, c H-9, s 32.

⁷ *Canada Trust Co v Ontario (Human Rights Commission)*, (1990) 74 OR (2d) 481.

students learned, from Ziff's own research, just who Reuben Wells Leonard was and how deeply enmeshed his racist scholarship trust was with the Canadian establishment.⁸ And when it came to *Edwards v. Sims*, the Kentucky caves case dealing with subsurface ownership rights, students were treated to a magisterial exposition of the competing currents of Kentucky politics, which helped explain Justice Logan's unconventional and passionate dissent in favour of the interests of pioneering spelunkers.⁹

Here as well there is a deeper point to Ziff's pedagogical choices. Ziff did not eschew traditional sources of formal law. Far from it.¹⁰ Cases and statutes formed the backbone of his courses. Yet his approach defied the idea that an understanding of those formal sources of law alone was enough to truly appreciate how property law operates. Formal property doctrine is connected in complex ways with a range of social forces, including: customary norms and values,¹¹ the structure of the economic relations,¹² as well as power relations within society.¹³ I am personally someone who values formal legal doctrine and understanding law on its own terms, but I also think legal realists had important insights and that it would be a great mistake to simply carry on as if twentieth century legal thought had not happened.¹⁴ In that respect, I have been influenced by Bruce's qualified legal realism in approaching my own classes.

IV. COLLABORATIVE TEACHING

The third distinctive feature of Ziff's approach to teaching is his collaborative work with other property instructors. I have taught a few different courses at the University of Alberta Faculty of Law, but I have never experienced anything quite like teaching property alongside Bruce Ziff. He made it feel like a team endeavour. As an instructor, you were never on your own. We would have meetings discussing our approaches to the course, and we would have an ongoing dialogue about what we were doing, what was working, and what needed to be changed. We each had our own approaches, and we each had the last word on how we taught our separate sections, but you could expect to have to discuss and explain what you were doing, which I think raised the bar for all of us.

One manifestation of this collaborative approach has been the now-entrenched tradition of offering Property law plenary sessions. Each instructor chooses one or two topics that the instructor knows well, and for those classes, the instructor teaches all of the Property sections

⁸ Bruce Ziff, *Unforeseen Legacies: Reuben Wells Leonard and the Leonard Foundation Trust* (Toronto: University of Toronto Press, 2000); *Canada Trust Co v Ontario Human Rights Commission* (1990), 69 DLR (4th) 321 (Ont CA).

⁹ 24 SW (2d) 619 (Ky CA, 1929). Ziff's teaching on this case was informed by his own scholarship on it. See Ziff, "Great Onyx Cave Cases," *supra* note 3.

¹⁰ Indeed, Ziff's contributions to *doctrinal* scholarship about Canadian property law are arguably unmatched. See Ziff, *Principles of Property Law*, *supra* note 1; Bruce Ziff & Ken Jiang, "Scorched Earth: The Use of Restrictive Covenants to Stifle Competition" (2012) 30:2 Windsor YB Access Just 79; Bruce Ziff, "'Taking' Liberties: Protections for Private Property in Canada" in Elizabeth Cooke, ed, *Modern Studies in Property Law*, vol 3 (Oxford: Hart, 2005); Bruce Ziff, "Positive Covenants Running with Land: A Castaway on Ocean Island" (1989) 27:3 Alta L Rev 354; Bruce Ziff & MM Litman, "Shelley's Rule in a Modern Context: Clearing the 'Heir'" (1984) 34:2 UTLJ 170.

¹¹ See Bruce Ziff, "The Law of Capture, Newfoundland-Style" (2013) 63:1 UTLJ 53.

¹² Ziff & Jiang, *supra* note 10.

¹³ Ziff, "Great Onyx Cave Cases," *supra* note 3.

¹⁴ See generally, John CP Goldberg, "Introduction: Pragmatism and Private Law" (2012) 125:7 Harv L Rev 1640.

together. This approach gives students an opportunity to hear from other voices, generally on topics they know quite well. And it also, incidentally, gives the other instructors the opportunity to see how their colleague teaches. And Ziff's plenaries were a sight to behold. The freewheeling discussion that seemed to end up just where he wanted it to. The expert weaving of law, history, and politics, into a coherent narrative about a given topic. And yes, the songs. Ziff wrote and performed at least two songs that I am aware of on topics related to property law, including one for the banjo called "Logan's Dissent," which deals with *Edwards v. Sims*, the Kentucky caves case.¹⁵ I can say with confidence that "Logan's Dissent" is the best property law banjo song I have ever heard, hands down.

V. INNOVATION

The fourth, and final, point that I want to make about Ziff's property pedagogy is perhaps the most important. He loved teaching and he was always innovating, always thinking of how he could do things a little differently, and perhaps a little better. I only witnessed the tail end of his long career as a property instructor. It would have been natural for him to have been a little worn down, a little jaded, a little stuck in his ways. But that was far from the case. I saw a Bruce Ziff who loved teaching and who had an infectious enthusiasm for the subject of property. And rather than just doing the same thing, year in and year out, he was always looking for new ways to approach the material.

I understand that one year, he attempted an experiment of teaching the entire course through the lens of the Kentucky caves case, showing how the layers of that case relate to different areas of property doctrine.¹⁶ I actually only know about this experiment because my wife was one of the test subjects in that cohort of first-year property students. She mostly had good things to say about the experience, though she did say it occasionally took a bit of stretching to fit all the different property law doctrines into the case of *Edwards v. Sims*. She also said she learned more about early twentieth century Kentucky law than she had expected to when she enrolled at our law school. But what she remembers most about the experience was the energy, enthusiasm, and deep knowledge that Ziff brought to every class.

VI. CONCLUSION

I noted at the outset that I, myself, was not one of Ziff's students. But I wish I had been. He was an innovative and ground-breaking instructor whose legacy will live on in the textbooks and casebooks he authored, in the guidance and mentorship he offered to colleagues, but most importantly, in the thousands of law students who had the privilege of learning from him.

Thank you, Professor Ziff.

¹⁵ Bruce Ziff, *Logan's Dissent* (2012) (a song about *Edwards v Sims*, *supra* note 9).
¹⁶ *Edwards v Sims*, *ibid*.