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Teaching American Legal History in a Law School

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Teaching American Legal History in a Law School

by **PETER D. GARLOCK***

I

INTRODUCTION

I did not start out to teach in a law school, let alone teach legal history. After obtaining an LL.B., I earned a Ph.D. in International Relations, with an emphasis on diplomatic history, intending to teach in a history department. When the job market dictated otherwise, I was able to redirect my career toward teaching law. I am grateful to Professor Morton Horwitz of Harvard Law School for suggesting that I combine my interests in law and history by teaching legal history in a law school. Although I had never taken a course in legal history (it was not offered when I was a student), I was fortunate to be able to audit a legal history course taught by Robert Cover and Robert Stevens at Yale. That course provided the template for the American Legal History course I have taught at Cleveland-Marshall College of Law almost every year since 1975.

II

WHY TEACH LEGAL HISTORY IN A LAW SCHOOL?

In the 1980s, my law school instituted a “perspective course” requirement, the purpose of which is to require students to take one course beyond the usual doctrinal, typically bar-tested, courses. We define the requirement broadly to include legal history; jurisprudence; the relation of law to other disciplines (e.g., economics, social science, psychology); theories of law that deal with race, gender, or religion; and comparative and international law. Many of our stu-

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dents come to us with deficient training in history, and, as every historian knows, one cannot understand the problems society confronts today without some understanding of the past. This is especially important at my school, where many graduates enter politics, take public sector jobs, or become judges.

Further, law students tend to be very “presentist”—they want to know only the latest case or the current “majority rule.” At the very least, studying legal history helps to disabuse them of this way of thinking by demonstrating that legal institutions and doctrines have always been in flux and they need to adapt to this condition of uncertainty. As my course syllabus states, “we want to see not only how law changes over time but . . . why it changes. . . . It is my hope that [this course] . . . will enable you to participate in policy debates over contemporary issues, the contours of which have been powerfully molded by history.”

I also want students to see that law is not simply a matter of deducing “black letter” rules from a priori principles and memorizing abstract doctrine. While on one level law surely has an internal logic of its own, and judges are influenced by precedent and their own values, I believe that courts are strongly influenced by political, economic, and social forces operating in the external world.¹

Perhaps because I also teach Torts, I am sensitive to what I see as policy factors that have explicitly or implicitly shaped the evolution of the common law. We study, for example, the fellow-servant doctrine that emerged in the early nineteenth century as a device to lessen the costs of industrial development, by inhibiting employees’ suits against employers for injuries incurred on the job, and the eventual demise of that doctrine under workers’ compensation schemes in the early twentieth century.²

Finally, I want students to see that in many cases judges have had difficult choices to make, and I prod them to ask why judges made the choices they did, how the judicial role may have constrained those choices, and what effects those choices may have had in the outside world. To some extent this involves entering the debate

¹ For a strong statement of this perspective, see LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE TWENTIETH CENTURY* ix (2002).

² See Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967).

over whether even famous U.S. Supreme Court cases have been causes of change in society.³

III WHAT TOPICS DO WE STUDY?

My course is a one-semester, three-credit survey course, treating both legal and constitutional history. Given severe time constraints, I must be selective in the subjects covered. In order not to be too superficial, I concentrate on the period 1790-1940, with a nod to developments before the American Revolution and after the New Deal. Within that time period I cover roughly nine topics, organized both topically and chronologically. I devote two to four classes to each topic at different points in time so that students can see how issues change over time. While some of the topics and subtopics are no doubt "canonical," others reflect my own particular interests. The nine topics covered are:

- (1) Freedom of speech and press (*Zenger* case, Sedition Act trials of 1790s, First Amendment, World War I speech cases);
- (2) Public law: Federalists vs. Republicans, 1790-1820 (federal common law of crimes, Sedition Act, judicial review);
- (3) Private law, 19th-20th centuries (contracts, property, torts, codification);
- (4) Criminal law and corrections, colonial period to early 20th century (shaming penalties, the penitentiary, "prison science," Progressive reforms);
- (5) African-Americans and law (slavery, post-Civil War segregation);
- (6) Women and law (common law disabilities, Married Women's Property Acts, suffrage, protective labor legislation);
- (7) Law and the economy (legislative franchises, regulation of railroads, protective legislation, New Deal);
- (8) Law and labor (labor conspiracy doctrine, labor radicalism and strikes, labor injunction, workers' compensation, New Deal);
- (9) Legal thought (codification, legal science, legal realism).

Overarching themes of the course include: federal-state relations; the relationship of courts and legislatures; rights of individuals against the state; the status of minorities under legislation, common law, and constitutional law; the power of federal and state

³ See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008).

government to legislate for the people's welfare; the role of common law courts in developing law.

IV HOW I TEACH THE COURSE

I teach the course as a combination of lecture and discussion. Lectures may provide historical background for the assigned readings, address issues not covered by the readings, or summarize controversies among historians about certain subjects.⁴ Students read selections in a standard casebook,⁵ supplemented by cases and articles I have assembled. (The casebook is very helpful on some subjects but deficient on others, such as law and jurisprudence in the Progressive period.) I also place on library reserve texts in general, constitutional, and legal history; monographs; and articles relating to the topics of the course.

In class, I ask students about the legal issues and reasoning in cases or about arguments offered by historians, and then encourage them to critique such reasoning and arguments. I prod students to argue the merits and flaws of majority and dissenting opinions in prominent U.S. Supreme Court cases, such as the *Charles River Bridge Case*, *Dred Scott*, *Munn v. Illinois*, *The Civil Rights Cases*, *Adkins v. Children's Hospital*, and *West Coast Hotel v. Parrish*. One pedagogical method I utilize is to e-mail students "Questions for Study" before each assignment, in order to focus their reading and stimulate class discussion.

Whenever possible I try to introduce contemporary topics and materials to make historical inquiry seem more relevant. For example, we examine the issue of jury nullification, first raised in the

⁴ We discuss, for example, the debate over whether there was a "transformation" of common law in the early nineteenth century, as argued in MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* (1977) and as critiqued in, among others, PETER KARSTEN, *HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH CENTURY AMERICA* (1997). We also discuss "internalist" versus "externalist" explanations of the "constitutional revolution" of the 1930s. See, e.g., Laura Kalman, *Law, Politics, and the New Deal*, 108 *YALE L.J.* 2165 (1999); Mark Tushnet, *The New Deal Constitutional Revolution: Law, Politics, or What?*, 66 *U. CHI. L. REV.* 1061 (1999) (reviewing BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* (1998)).

⁵ STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY: CASES AND MATERIALS* (8th ed. 2013).

1735 seditious libel trial of John Peter Zenger; whether criminal law can successfully deter crimes against morality; the recent rebirth of shaming penalties in criminal corrections; the ongoing debate over the need for imprisonment; the permissible extent of freedom of speech; and whether courts or legislatures should be primarily responsible for changing rules of civil liability.

V

CONCLUSION

Students' grades are based in part on an examination, which usually involves identification questions and thematic essay questions, and in part on class participation. Over the years I have had very positive responses to the course, as students have told me it not only puts in perspective their other coursework but also prepares them to be better informed citizens.



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