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Recommended Citation

Douglas E. Abrams, Teaching Legal History in the Age of Practical Legal Education, 53 Am. J. Legal Hist. 482 (2013).

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Teaching Legal History in the Age of Practical Legal Education

by DOUGLAS E. ABRAMS*

I

INTRODUCTION

In today's tight legal job market, commentators advise law students to take skills courses and law schools scurry to expand externships and clinical offerings that provide first-hand legal experience. Doctrinal courses will likely continue as mainstays of the curriculum, but students can be expected to seek out electives whose relevance to what lawyers actually do can help attract employers' attention. Students carrying considerable debt loads, and law schools concerned for students' career prospects, have their work cut out for them. The U.S. Bureau of Labor Statistics reports that "[c]ompetition for law jobs should continue to be strong because more students are graduating from law school each year than there are jobs available."¹

II

FASCINATION, FUN, AND MORE

My four-hour American Legal History course is a one-semester elective. I teach it in two two-hour parts, covering in alternate years the period to the end of Reconstruction in 1876 and then the period since 1876. Students may elect one part or both, and the course does not presume prior study of history.

As an American history major whose pleasure reading has been heavy in the nation's heritage for the past 40 years since college, I

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¹ U.S. Bur. Lab. Stats., *Occupational Outlook Handbook: Lawyers*, at <http://bls.gov/ooh/Legal/Lawyers.htm>.

concur with historian Margaret MacMillan that studying history can “be fascinating, even fun.”² “How,” she asks, “can screenwriters create better action stories or human dramas than exist, thousand upon thousand, throughout the many centuries of recorded history?”³

The instructor’s pleasure, however, does not end the story. Responsible law schools shape the curriculum to serve primarily the needs and aspirations of students who anticipate lifelong practice in the private or public sectors, and not the needs and aspirations of faculty who have chosen a career path normally centered in the academy. This calibration means that, to the extent possible, doctrinal courses should deliver practical learning that students deserve in today’s challenging legal environment.

III MEETING THE CLASS

To help focus the semester’s inquiry, the first class session addresses the course’s relevance to life as a lawyer. I begin by telling the students, as a general matter, that few electives they choose for intellectual curiosity—for fascination and fun, as MacMillan puts it—will prove irrelevant to their professional lives. A student might enroll in an elective today because the subject matter appears interesting or consistent with personal background, but practicing lawyers have an uncanny way of using lessons learned in electives that engaged their passions years earlier. Veterans of my course, for example, tell me that historical analogies frequently punctuate arguments in their briefs and other court filings.

After this preliminary observation, I turn more specifically to the course’s relevance to careers in the practice of law. The starting point is the ABA Model Rules of Professional Conduct, whose Preamble I assign in advance. The Preamble’s first paragraph identifies three roles: “A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”⁴

² MARGARET MACMILLAN, *THE USES AND ABUSES OF HISTORY* 3 (2008).

³ *Id.*

⁴ ABA MODEL RULES OF PROF’L CONDUCT, Preamble [1] (“A Lawyer’s Responsibilities”).

Proceeding from the Preamble, I ask students to be prepared to discuss a basic question: "Can knowledge of American legal history help lawyers fulfill their professional obligations under the Model Rules?" For most of the first class session, I call on several students and take volunteers.

By the end of the hour, we usually pinpoint at least three tentative answers, which I discuss below. Knowledge of legal history: (1) can help lawyers argue legal issues that arise in client representation; (2) can help lawyers, as public citizens, to speak and write more knowledgeably about legal and social issues in a variety of public forums; and (3) can help shape lawyers' perceptions of legal institutions by balancing respect for the past, "enlightened skepticism"⁵ about the present, and the value of future change.

IV CLIENT REPRESENTATION

In my Missouri classroom, I illustrate legal history's relevance to client representation with the state supreme court's decision in *Thomas v. Siddiqui*,⁶ which concerned two common law torts. *Thomas* abolished the tort of criminal conversation and cast doubt on the viability of the tort of alienation of affection.

The majority concluded that under the common law, "when the reason for a rule fails, the rule fails."⁷ The dissenter acknowledged the court's authority to abolish a common law tort, but argued that "[t]he Court would be better served were we to exercise our discretion in favor of a political solution" through legislative action and gubernatorial approval.⁸ Disposition turned on the relationship of British and American common law decisionmaking to the separation of powers doctrine, a question that summoned historical analysis and argument because case law did not determine the outcome.

⁵ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

⁶ 869 S.W.2d 740 (Mo. 1994).

⁷ *Id.* at 741 (citation omitted).

⁸ *Id.* at 744.

V

SPEAKING AND WRITING ABOUT THE LAW

When war clouds hover, should the law jealously safeguard the right to dissent from even sometimes subtle encroachment, or should the law tolerate some (or much) encroachment in the name of national unity? Public policy debates over questions such as these are not the exclusive preserve of lawyers generally, or of lawyers trained in history.

National surveys demonstrate, however, that many Americans lack solid grounding in history and civics, a state of affairs that Justice Sandra Day O'Connor has called a national "crisis."⁹ Lawyers trained in legal history can illuminate sometimes emotional give-and-take about dissent by advancing analogies and distinctions drawn from such antecedents as the Alien and Sedition Acts of 1798, President Lincoln's suspension of the writ of habeas corpus during the Civil War, the World War I-era Espionage and Sedition Acts, the World War II flag salute cases, and the Vietnam-era draft resister cases.

Most of my students will likely never represent a client who personally challenges wartime constraints on dissent, but that is not the point. As a public citizen, any lawyer can speak or write about monumental constitutional issues, or about a host of other state and local issues that affect daily life. Editorial pages, op-ed pages, blogs, the broadcast media, and other public platforms remain eminently available to lawyers who sense the value of historical dialog.

The lawyer's speaking and writing might generate some law firm business from public exposure, but lawyers who enter the "market place of ideas" also meet a responsibility, recited in the Model Rules of Professional Conduct, to "cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law," and "further the public's understanding of and confidence in the rule of law and the justice system."¹⁰

⁹ Sam Dillon, *Civics Education Called National Crisis*, N.Y. TIMES, May 5, 2011, at 23 (quoting O'Connor).

¹⁰ ABA Model Rules, *supra* note 4, at Preamble [6].

Speaking and writing about history and civics, however, remain opportunities untapped by most lawyers. After thirty-five years as a nationally renowned editor and publisher of *The Tennessean* and *USA Today*, for example, John Siegenthaler reported that he could “count on one hand . . . the number of letters to the editor, the number of volunteered op-ed pieces that I have received from members of the bar.”¹¹ I hope that my students will play a more robust role throughout their professional careers, and I tell them so as we proceed through my course.

VI ASSESSING LEGAL INSTITUTIONS

Near the end of the first class, I posit questions about American legal institutions for exploration throughout the semester. For example, is the U.S. Supreme Court an “ongoing constitutional convention” whose decisionmaking helps overcome the difficulties of amending the organic document under Article V, a cumbersome process that has happened only 17 times since 1793? Should it be?

Do history’s uncertainties affect arguments favoring constitutional interpretation from “original intent,” or arguments favoring interpretation of a “living Constitution”? If Finley Peter Dunne’s Mr. Dooley was right that the Court tends to follow the election returns,¹² does history help illuminate what can happen when the justices get too far ahead of prevailing public opinion, or when the justices fall behind? When do constitutional guarantees counsel judicial vindication of individual rights, and when does restraint counsel allowing political processes to run their course?

VII CONCLUSION

Historian Henry Steele Commager said, “History is useful in the sense that art is useful—or music or poetry or flowers; perhaps even in the sense that religion and philosophy is useful. . . . For with-

¹¹ *Panel Discussion: Potential Strategies for Improving Public Trust and Confidence in the Courts*, 36 *COURT REV.* 63, 67-68 (Fall 1999).

¹² FINLEY PETER DUNNE, MR. DOOLEY’S OPINIONS 26 (1901).

out these things life would be poorer and meaner.”¹³ For law students who anticipate a career representing private and public clients and participating in public discussion, however, study of legal history carries rewards beyond intellectual stimulation and personal satisfaction.

Law students contemplating client representation should ponder Justice Holmes’s advice that “[h]istory must be a part of the study [of law], because without it we cannot know the precise scope of rules which it is our business to know.”¹⁴ Historian David McCullough set the compass for lawyers as public citizens: “You can’t be a full participant in our democracy if you don’t know our history.”¹⁵ Before a semester of collaborative exploration, the professor’s threshold mission is to stimulate students’ appreciation for legal history’s practical and doctrinal value to their professional careers.

¹³ Henry Steele Commager, *Why History*, 1 AM. EDUC. 26, 26 (1965).

¹⁴ Holmes, *supra* note 5, at 469.

¹⁵ Nat Hentoff, *Constitutional Ignorance: Better Civics Education Needed*, WASH. TIMES, Aug. 29, 2005, at A21 (quoting McCullough).