2013

Teaching American Legal History Through Storytelling

Michael S. Ariens
St. Mary's University School of Law, mariens@stmarytx.edu

Teaching American Legal History Through Storytelling

by MICHAEL ARIENS*

I
INTRODUCTION

Tell me a fact and I'll learn. Tell me the truth and I'll believe. But tell me a story and it will live forever in my heart. I view my American Legal History course as a lopsided triptych, an effort to tell several stories as well as one overarching story. These stories include: (1) giving students a better understanding of law in American political history; (2) the ideological and instrumental claims for the development of particular legal doctrines; and (3) how different approaches to legal thought rose and fell over time, and how the waxing and waning of ideas about law affects the education of today's law students and may affect the future of the American legal profession. The overarching story discusses whether the reach of the American profession (judges, lawyers, and law professors) has exceeded its grasp. That is, has the contested idea of the rule of law been the rule, or exception, in the history of American law?

II
COURSE BASICS

American Legal History is taught to second and third year students. Our students must take one course from the "Philosophy of Law and Lawyers" rubric to graduate, and American Legal History is one of the options. In general, somewhere between 50 and 90 students will take the class.

The materials for the class include my two-volume text, *Cases and Materials on American Legal History* (currently in its fifth edi-

* Professor of Law, St. Mary's University (mariens@stmarytx.edu). B.A., St. Norbert College; J.D., Marquette University; LL.M., Harvard University.

tion). It totals more than 1,300 pages. In addition, I assign my 2011 book *Lone Star Law: A Legal History of Texas* as well as Neil Duxbury's *Patterns of American Jurisprudence* (1995). The structure of the course is lecture and question and answer (with a 20-question "pop quiz" given to students on the history of the American legal profession, which is ungraded). Students are given the ability to opt-in to writing a research paper on some aspect of law and history (but not legal policy). Those who do not opt-in take an essay examination consisting of two broadly-written questions.

III
COURSE CONTENTS

The first half of the course is a chronological overview of the political and legal history of the United States, with some forays into social and cultural history, as well as a very modest amount of military history (largely some study of a few battles during the Civil War). I begin by discussing how history (and legal history) is made, looking at several instances of widely divergent interpretations of some event.

After a modest discussion of colonial legal history, I spend a fair amount of time discussing the U.S. Supreme Court. For example, I focus on John Marshall's nationalizing efforts, particularly in light of the shift in political power from the Federalists to the Jeffersonian Republicans and their successors (the Democrats). I also discuss how the Taney Court's decision in the *Charles River Bridge Case*[1] may have served as a catalyst to the initial rise of the corporation, and link that development to technological developments (such as the railroad) occurring at the same time.

I then shift to a discussion of the law of slavery, which includes discussion of *Dred Scott v. Sandford*.[2] The rise of laissez-faire constitutionalism and the neutral state, and responses to those efforts, particularly progressivism, take the class through World War II. The course then returns to the issue of race (I discuss Jim Crow and the rise of lynching as a tool of racial oppression as part of a discussion of Reconstruction and its aftermath). The first half ends with a dis-

[1] 36 U.S. (11 Pet.) 421 (1837).

[2] 60 U.S. (19 How.) 393 (1857).

cussion of the "republic of choice" in Lawrence Friedman's apt phrase.[3]

The third quarter of the course discusses the history of discrete areas of legal doctrine, from property, torts, and contracts to criminal law, evidence, and procedure. This panel is completed with classes on the history of American legal education and the American legal profession.

One focus of these classes is the transmission of common law doctrine. Nineteenth century judges were promiscuous in adopting doctrinal rules from other jurisdictions, though often in ways that led to changes in such doctrine. For example, in 1840 the Republic of Texas statutorily adopted the system of community property largely as written in the Louisiana Civil Code of 1825, which took the subject from the civil law system extant in Spanish Texas until the Texas Revolution in 1836. The Congress of the Republic also adopted community property, apparently in part in response to a law adopted by Mississippi "for the protection and preservation of the rights and property of Married Women."[4] When Texas entered the United States in 1845, it constitutionalized its community property system, which it fleshed out in the Texas Community Property Act of 1848.

The first legislature of California adopted, in identical terms, Texas's Community Property Act. But though the two states enjoyed the same law, their courts interpreted some provisions differently. The most important was the issue of rental income. Was rental income from separate property income better classified as separate property or as community property? In Texas, rental income was generally categorized as community property, except that children borne to slaves owned separately were also separate property.[5] This largely followed the rule in Spanish civil law. In California, all income from separate property remained separate property. This interpretation was called the American rule. When the Texas

---

[3] LAWRENCE M. FRIEDMAN, THE CULTURE OF CHOICE: LAW, AUTHORITY, AND CULTURE (1990).

[4] *See* Ray August, *The Spread of Community-Property Law to the Far West*, 3 W. LEGAL HIST. 35, 50 (1990); Joseph W. McKnight, *Texas Community Property Law—Its Course of Development and Reform*, 8 CAL. W. L. REV. 117, 121 (1971). *See also* MICHAEL ARIENS, CASES AND MATERIALS ON AMERICAN LEGAL HISTORY 168 (5th ed. 2007) (summarizing developments).

[5] *See* Cartwright v. Cartwright, 18 Tex. 626 (1857).

legislature attempted by legislation to adopt the American rule by acts in 1917 and 1921, the Supreme Court of Texas held the laws unconstitutional as beyond the legislature's power. It possessed the authority to restate rules of management of the community, but not the definitions of community and separate property.[6]

Through this example and others, students better understand that nineteenth century state courts and legislatures regularly borrowed ideas about law from others, and did so largely without limiting themselves to nearby or "like-minded" states. By the time the National Conference of Commissioners on Uniform State Laws was created early in the twentieth century, and most certainly by the time the American Law Institute began proposing its Restatements of the Law beginning in the 1930s, states were quite comfortable using the ideas of others, though often those ideas were molded by the state's (or region's) legal and political culture.

A second focus of this segment of the course is to provide students with a better sense of the interplay between the judiciary and legislature in adopting and adapting doctrines. The statutory interpretation aphorism that "statutes in derogation of the common law shall be strictly construed" was followed on occasion, but on more occasions the legislature was able to alter the common law as it saw fit. That lesson, finally learned by the U.S. Supreme Court in the Constitutional Crisis of 1937, allows students to understand where power lies, and how it shifts over time.

The final quarter of the course is a survey of the history of American legal thought. My goal is to give students the tools to understand both what different types of legal thought have been and why those very different approaches to law have flourished at different times. It requires students to consider possibly conflicting understandings and definitions of the "rule of law," and a reminder that "if men were angels, no government would be necessary." This last panel also may allow students to gain some perspective on why legal thought appeared to run aground in the post-civil rights era, and to develop some ideas about where legal thought may go from here.

---

[6] *See, e.g.*, Arnold v. Leonard, 273 S.W. 799 (Tex. 1925).

IV
CONCLUSION

I often tell my students that I have a difficult time deciding how to conclude the course. Over the years, I have quoted from Arthur Allan Leff's *Unspeakable Ethics, Unnatural Law*; both versions of W.H. Auden's poem *September 1, 1939*, which initially ended, "We must love one another or die," but which he changed in 1955 to "We must love one another and die"; the statement of the English legal historian Frederic W. Maitland, "The only direct utility of legal history . . . lies in the lesson that each generation has an enormous power of shaping its own law"; and even Abraham Lincoln's story of the king who demanded his wise men find a single sentence that was always true. After thinking about it for a long time, their solution, Lincoln concluded, was both "chastening" and "consoling." The sentence was, "And this, too, shall pass away." I've read Carl Sandburg's poem, *The Lawyers Know Too Much*, in which the "hearse horse snickers hauling a lawyer's bones." But the quote I most often end class with is from the philosopher and historian Leszek Kolakowski: "We learn history not in order to know how to behave or how to succeed, but to know who we are."

It is likely unfashionable to learn history "to know who we are," but I persist in thinking that, if just a few students use this course to think more consciously about our society, this may pass away just a bit more slowly.