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Legal History in Context

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by LOGAN EVERETT SAWYER III*

I
INTRODUCTION

In both history and teaching, context is crucial. The core task of the historian is to situate events in their time. In teaching, context is equally fundamental. It shapes our goals, establishes the challenges and opportunities we face, and thus determines what and how we teach. As a recently-minted Ph.D., I learned to teach in one context: small seminars taught by established historians for aspiring historians. But I teach in a different context. I teach American legal history to law students in classes of about twenty-five. And that context requires a different approach.

II
FIVE QUESTIONS

That I teach history to law students has defined my pedagogic goals. My students are in school to develop skills that will give them a successful career. They want to learn to navigate the legal system, to think, write, and act like a lawyer. A legal history class may not help them develop those skills in the same way as more traditional courses, but it does offer something unique. By examining the connections between law and society, legal history can help students recognize that the skills they are developing will give them influence on legal institutions and thus on society more broadly. Recognizing their influence can help them see the responsibility that comes with it and even, perhaps, help prepare them to use it wisely.

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These considerations led me to focus my class on three central questions: How contingent is legal development? How much agency do lawyers have in shaping legal development? And how much influence does legal development have on social, economic, and political change? I ultimately hope these questions will lead my students to ask themselves two more: how much influence will I have and how do I want to use it?

III
STRUCTURE

That I teach law students in classes of about twenty-five has determined the way I pursue my goals. In a history department, I would address these questions in a historiographical seminar. Heavy reading loads, small classes, and intensive discussions would provide opportunities to compare different answers to the central questions the course raises. But I teach law students in classes of twenty-five. Classes of that size make intensive discussion difficult—though not impossible—and, more importantly, law students have different strengths and weaknesses than graduate students. By interest and training, law students have sharp analytical abilities and a strong interest in resolving arguments. But they also often know little history; some may not have taken an American history class since high school. And in comparison to graduate students, law school's focus on close reading can limit the volume of reading my students believe they can digest.

As a result of that context, I explicitly structure my course as series of nested arguments. On the first day I tell my students we will evaluate claims about the relative importance of structure, agency, and contingency to legal history, especially whether lawyers beyond U.S. Supreme Court justices have special agency in American history. At the start of each of the four sections of the course, I remind them of our goal and sketch out broad claims about how the subjects we are preparing to address might support—or discredit—answers to those questions. Each class is an opportunity to discuss how particular historical episodes support one side or the other. That structure, I hope, stimulates interest and provides a comfortable framework students can use to process the data I provide.

More specifically, each section of my course evaluates a traditional narrative students know from popular culture or their con-

stitutional law classes. Those traditional narratives are generally ahistorical stories that characterize U.S. Supreme Court justices as the primary agents of legal change. At the beginning of each section of the course, I lay out these narratives and the evidence that supports them. I then spend two-thirds of my class time using lecture to interrogate them. My goal in those lectures is not simply to reject the traditional narrative, but to give students the data they need to decide for themselves whether the traditional narrative or one of the alternatives I present better explains the historical record. Early in the course I admit I have my own views on these questions, but emphasize these are hard questions on which many scholars disagree and that I expect students to come to their own conclusions. I lecture because it allows me to provide the data my students need to do that while recognizing their uneven historical knowledge and their understanding of an appropriate reading load. Readings for lecture classes are usually short excerpts of cases or other primary sources of 20 pages or less per day.

IV
CONTENT

The first section of my course is representative. It stretches from Reconstruction to *Brown v. Board*, and interrogates the claim that the egalitarian and nationalist moment that occurred during Reconstruction was destroyed by the Waite and Fuller Courts only to be revived by the Warren Court. In my lectures I raise questions including: How egalitarian were the Reconstruction Amendments? To what extent do understandings of race and federalism help explain the Court's response to the Reconstruction Amendments? Was the Warren Court restoring those original commitments or was it expressing a different view of equality? And, to what extent did forces like the Cold War and individuals outside the Court like the lawyers for the NAACP contribute to *Brown v. Board*?

My lectures not only interrogate the traditional narratives, they also note how each narrative and its counter-arguments make implied or sometimes explicit claims about the contingency in legal development, the agency of lawyers, and the influence of legal development on society. Those issues, however, are fully engaged in the other third of my class time, in which the students and I discuss a historical monograph that both investigates the narrative we are

examining and addresses the larger themes of the course. These classes are something between a graduate seminar and an undergraduate discussion section. I assign books as short as possible, usually 200 pages or less, and have had success convincing my students that the light reading load of the lecture classes is a fair exchange for the volume of careful reading required for discussion classes.

In these discussion classes, we both evaluate the specific argument of each reading and explore the approach the author takes to the themes of structure, contingency, and agency. By making each author's implicit or explicit claims about these issues clear, I can, over the course of the semester, increasingly spark debate by putting those authors in opposition to one another. I often personify the authors, trying, when possible, to humanize them with personal stories so students feel more comfortable disagreeing with them.

Sparking engagement can be difficult in a class of twenty-five. Prohibiting laptops during discussion helps, as does a hefty dose of enthusiasm and what I think of as a fairly standard bag of teaching techniques. But watching students become partisans of different approaches and then change their minds when they encounter more evidence is remarkably rewarding.

V
EVALUATION

Context defines my approach to evaluation as well. Because law students are most comfortable with one year-end exam, I do that. But my focus on arguments has led me to use a take home exam with a long, eight hour time limit and short word limits. That approach prevents students from spending valuable time memorizing names and dates. Some of my questions ask them to evaluate one or more of the traditional narratives we have discussed by identifying the best evidence for the conventional narrative, the best evidence for the critique, and the reasons they support one approach or the other. Other questions ask them to describe and evaluate the approaches several of our readings have taken to contingency, structure, and agency. I often ask them to then use whatever approach they find most convincing to explain a historical development we have not studied.

VI
CONCLUSION

As an early career teacher with a healthy dose of passion for a subject that is also my primary area of scholarship, I am still working to shape my teaching to my new context. I have received occasional complaints about the amount of reading required for discussion and the level of historical detail in my lectures. But I have also received enough positive feedback to believe this approach has pushed my students to think about the influence they will have as lawyers and, most importantly, their responsibility to use it wisely. In this context, I'll call that a win.