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Howard Bromberg

University of Michigan Law School, hbromber@umich.edu

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Teaching Legal History Through Legal Skills

by HOWARD BROMBERG*

I INTRODUCTION

I revolve my legal history courses around one methodology: teaching legal history by means of legal skills. I draw on my experience teaching legal practice and clinical skills courses to assign briefs and oral arguments as a means for law students to immerse themselves in historical topics. Without detracting from other approaches, I frame this innovation as teaching legal history not to budding historians but to budding lawyers.

II LEGAL HISTORY THROUGH BRIEFS AND ORAL ARGUMENTS

Over the last ten years, I have taught legal history courses in three disparate law schools. I provide a range of topics for each student to write an appellant or respondent brief and conduct an in-class oral argument. As advocates, the students are required to follow the rules of legal practice and citation that they learn in their legal writing and clinical classes, and that will be expected of them as lawyers.

The topics from which the students choose are of both historical and legal interest. For example, in my American legal history courses, a pair of students writes opposing briefs on the justifiability of President Abraham Lincoln's suspension of the writ of habeas corpus during the Civil War. Although the students are not allowed to refer

* Clinical Assistant Professor of Law, University of Michigan (hbromber@umich.edu). B.A., J.D., Harvard University; J.S.M., Stanford University.

to subsequent events, I supply primary documents that serve as the court record, and students are allowed to use secondary sources from any period.

Each student brief, roughly fifteen pages, is distributed to the entire class; timed oral arguments take place in the second half of the course. I serve as the judge, and sometimes invite another professor or lawyer to serve on the bench. After the arguments, the entire class asks questions of the litigants, but only by assuming the role of judges. As is typical of moot court, critiques and a decision are issued from the bench. In commenting on and grading the briefs and arguments, I count both the strength of the historical and legal analysis and their expression in advocacy.

Not all of the topics lend themselves to court litigation. For example, I situate students as legislative counsel writing opposing briefs for a state legislative committee in 1859 on whether to codify the state common law, following the model of the Field Codes. Regardless of the scenario, the students must follow the rules of appellate practice, as dictated by the deciding authorities, for uniformity and clarity.

A common pedagogy in legal practice courses is to provide a model for each skill the students are asked to conduct. I provide the students with sample appellant, respondent, and reply briefs for a fictional congressional committee deciding whether to compensate victims of the House Un-American Activities Committee and the Senate Permanent Investigations Subcommittee for the "loss of livelihood" as a result of being questioned during the "Red Scare" of 1950-53. I find the issue of reparations an ideal historical topic for appellate advocacy in a host of contexts.

My use of advocacy in legal history differs from the use of debates common in history classes and the historical re-enactment trials such as whether William Shakespeare wrote his plays. By creating an appellate record, I find each topic can be illuminated by a lawyer's brief, even if the scenario occurs outside a formal courtroom. The students are forced to deal with historical questions in a manner similar to those confronted by lawyers. For example, in any simulation involving reparations for descendants of victims of injustice, the advocates address complex questions of jurisdiction, procedure, standing, and remedy.

I include a bold disclaimer that arguments made by students are not to be construed as necessarily reflecting that student's personal

judgment. Even so, students are not asked to argue imprudent positions. For example, it would be absurd to ask a student to argue in favor of maintaining slaveholding in the South or extending it into the territories. (Unfortunately, New York high school students have recently been compelled to argue in favor of Nazi anti-Jewish policies.) Rather, I set the slavery scenario in 1853 Massachusetts with the apprehension of an African-American, "Ezra," under the draconian Fugitive Slave Act of 1850. The "Antislavery Coalition" of Worcester has gathered in emergency meeting to decide on a course of action, asking its lawyers to brief opposing options: to provide legal representation for Ezra in the mandated hearing before the U.S. Marshal, or to attempt his forcible rescue and safe passage to Canada. This fictional scenario, reminiscent of such cases as the rescue of Shadrach in 1850 and the trial of Anthony Burns in 1854, both in Boston, Massachusetts, allows both sides to oppose slavery, while raising the perennial question of the best means to resist evil sanctioned by the state.

III

CONTENT AND CONTEXT

When I began teaching at the newly-founded Ave Maria School of Law in 2000, I was the first director of the legal writing program, eventually of the clinical programs, and taught property. Therefore, when I began teaching legal history, it was natural for me to make use of the legal skills training that I was employing elsewhere in the curriculum. As I had previously taught property to all of the students, the first topic that two students briefed was derived from their first property case, concerning sovereignty over Native American lands. As legal counsel for the Bureau of Indian Affairs, they briefed the pros and cons of the traditional legal bifurcation of vesting the right of land occupancy in Indian tribes but ultimate title in the federal government. As Ave Maria was a new law school, another topic allowed two students to play the role of experts in legal education, briefing the faculty on whether the century-old case method should be the dominant mode of instruction for a new American law school.

In my subsequent "Origins of the Constitution" course, the students briefed such topics as whether to make *Deuteronomy* the

criminal code of a recently-chartered New England colony; criminal appeals from the trials of colonists Anne Hutchinson, Jacob Leisler, and Peter Zenger; the influence of the Iroquois League on the U.S. Constitution; and early constitutional amendments that were proposed but not adopted.

Beginning in 2008, I had the opportunity to teach at another newly-established law school, the Peking University School of Transnational Law, the first American-style law school in China. In the course "Lawyers though History," the students conducted oral arguments on two issues: a bill in the U.S. Congress providing monetary reparations to the descendants of American slaves and the legitimacy of the International Military Tribunals at the Nuremberg Trials.

Now that I am back at the University of Michigan, I teach a mini-seminar (a less formal, ungraded, one-credit class) on legal issues in the lives of great musical composers. The students investigate three topics: whether the birth of jazz resulted from the creation of the first "legal" red-light district in the United States (Storyville, 1890); the "enforceable" marriage contracts in Wolfgang Mozart's proposal to Constanze Weber and in his opera *The Marriage of Figaro*; and the forensic debate over the death of Peter Tchaikovsky.

IV CONCLUSION

The very nature of legal advocacy can immerse law students deeply in historical issues. Students are excited to exercise their new skills of legal persuasion on a controversy in history. Although I provide lectures and readings that give an overview of legal history and the students write an additional research paper, I focus on the topics that will be briefed.

Unfortunately, because of the time-consuming nature of writing briefs and conducting oral arguments, much of the valuable discussion and perspectives that are offered in traditional legal history classes are omitted from my courses. Nevertheless, I find two valuable lessons are reinforced with students. First, they understand certain similarities in the methodologies of historians and lawyers. Both professions marshal evidence from past events to draw logical conclusions, to argue for theses, and to recreate compelling stories

that render human actions of yesterday meaningful for today. As the students improve their legal skills, they are perforce drawn deeper into the world of historical investigation.

Second, students recognize the rich trove of documentation that legal affairs offer the historian. Lawyers and courts deal with the recorded word, with transcripts, contracts, and governmental orders; and the primary sources of law offer a wealth of resources for students' appellate briefs in history.