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Lawrence M. Friedman

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# HISTORY AND THE FUTURE LAW SCHOOL CURRICULUM

BY LAWRENCE M. FRIEDMAN\*

THERE are generally two approaches to the teaching of history in law schools today. In some schools it is taught as a separate subject. The emphasis is on English legal history, and the teaching matter is dominated by the English tradition of legal historiography. This tradition stresses the medieval period of English law, and to a lesser extent the Renaissance. The modern period is almost wholly neglected. Partly this is so because some of the greatest English legal historians were medievalists. Maitland is the best known example. But there is more to the story. Plucknett's *Concise History of the Common Law*,<sup>1</sup> the leading textbook on the subject, devotes more than 90 percent of its pages to the period ending with the enactment of the Statute of Uses. The book runs to some 750 pages. It is doubtful if fifty pages deal with the last three centuries of British legal life. The discussion of real property devotes 83 pages to medieval times, ending with the passage of the Statute of Uses, in the sixteenth century. After this, the treatment dribbles away into a mere sketch. Not a word on twentieth century developments appears.

Plucknett's allocation of space would be most peculiar for a book which purported to treat generally the history of English law. If one read a history of England, or China, or the United States, one would find a very different sort of organization. Typically, the author would rush through the early parts and slow down the closer he got to the present. He would do so for two general reasons: first, because more is known about more recent times; and second, because the more recent is usually more relevant.

Now it is clear that Plucknett — and teachers of English legal history in general — have some other, very different theory of relevance. This theory of relevance is revealed in Plucknett's title. He has written a concise history not of *English law* but of *the common law*, which is by no means coextensive with the whole of English law. The common law, he assumes, is an entity that was fully formed by the time of Henry VIII. Accordingly, most of that which has gone on since then is not part of the core history of the common law. It is in some ways a further unfolding of common law or a further

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\*Professor, University of Wisconsin Law School; B.A. 1948, J.D. 1951, LL.M. 1953, University of Chicago.

<sup>1</sup> T. PLUCKNETT, *CONCISE HISTORY OF THE COMMON LAW* (5th ed. 1956).

emanation from its principles; perhaps it is even decay. But the important thing was the development of the common law, and this was a medieval job.

Under this view, American legal history has nothing much to contribute to the story. And sure enough, very little is taught in American schools. The teaching of American legal history seems even less to American tastes than the teaching of English legal history. Relatively few schools offer a course in legal history at all; even fewer offer courses in American legal history.<sup>2</sup> American legal history is distinctly an academic backwater.

The second approach to the teaching of legal history is to insert it piecemeal in non-history courses. Particularly in real property courses rather large chunks of old law are inserted into the regular course work. It is an apparent advantage of this approach that these chunks come to the attention of all students, not just the few who might elect legal history. This approach, one might argue, makes up for the lack of a separate course in history. The argument is specious, however. The people who teach the courses by and large have no competence in legal history. Their history has been pulled out of its social and economic context. It is totally meaningless to the student and to the professor. Moreover, it is exceedingly technical and boring.

This approach, too, is heavily dependent upon medieval English legal history. The case books purporting to deal with real property and with the formation of the law of tenure and estates are American books by Americans and used in American schools; but their historical aspect is exclusively English. These books devote time to the Statute of Quia Emptores; but they are unlikely even to mention the Homestead Act of 1862. The development of American land tenure is a colorful and relevant story. But no one teaches it or gives it its due. The pseudo-history of the second approach is useless under any theory. The sooner it is eliminated the better. Professors and students are embarrassed by it. Perhaps it even poisons the general taste for legal history.

One of the causes of the low state of teaching in this subject is the low state of the art. In America, the most distinguished historians of law were concerned, like their English contemporaries, primarily with English law in the medieval period. Oliver Wendell Holmes' *The Common Law* is a case in point. Holmes seems far more concerned with the ancient origins of bailment than with the cutting edge of American law in the nineteenth century. In part,

<sup>2</sup> See Re, *Legal History Courses in American Law Schools*, 13 AM. U.L. REV. 45 (1965). In general, on the state of legal history in law schools, and the reasons why, see Woodward, *History, Legal History and Legal Education*, 53 VA. L. REV. 89 (1967).

American scholars emphasized English antecedents because they shared the view that the common law was the proper field of study and that the common law was an English development adopted without essential change in this country. This theory of course is no longer tenable. Moreover, English legal history has ceased largely to be practiced and to be written in this country, with some notable exceptions, such as Samuel Thorne.

American legal history has never fully gained the prestige that English legal history has lost. It has, however, shown a good deal of life in recent years. *The American Journal of Legal History*, founded about 12 years ago, devotes more than half its space to American legal history. There is a society devoted to the cause. A number of excellent legal historians are at work in the law schools. A disproportionate amount of energy, however, is still going into legal antiquities. The only major legal historian who works on the nineteenth century or later is Wisconsin's Willard Hurst. Other fine American historians — George Haskins of Pennsylvania and Joseph Smith of Columbia, for example — specialize in the colonial period. There is no such thing as medieval times in the United States. The closest one can get is early Massachusetts.

There are those who love legal history, for its own sake. Naturally, they decry its lowly state. But for the rest of the world of legal education, the tough-minded question has to be asked: how harmful *is* the current neglect? Is there any real need for legal history in the law school curriculum? I have no hesitation in saying that conventional legal history is unnecessary. The piecemeal approach is positively harmful. Conventional whole courses are fine; they may be superb. For those who want to teach them, and those who want to study these courses, they are or can be rich, stimulating experiences. They are to be encouraged because we wish to encourage intellect, variety, and humanity in legal education. But no school need despair if it lacks *this* kind of history. If the school has limited funds and its history incumbent gets a better job or dies or tires of history, the school might as well consider a sociologist or an African law specialist as another historian of law.

On the other hand, there is a sense in which legal history, particularly American legal history, could serve a vital role — almost an indispensable role — in the curriculum. And that is if the course concerns itself with the legal past not as history, not for the sake of history, not for any interest in origins or any antiquarian interest, but simply because of the need, if law is to be integrated with the social sciences, to understand the temporal and developmental aspects of institutions. This means looking at how they respond to specific

economic and social problems in the course of their experience. Any history can be used for this purpose — ancient history, the history of Greek law or Roman law, or Chinese law for that matter. But the job can most easily be done with American materials. The history of American law in the nineteenth and early twentieth centuries presents to the student the fewest technical barriers. The language is English. The books are at hand. Here the data is the fullest. Here the relevance to current problems is the greatest, and student interest is likely to be at the highest.

In a course on American legal history, many social problems might be illuminated. The confrontation of the races is one such problem. There is fascinating material on the history of the law of slavery. There is the dark chapter of race law in the reconstruction period and thereafter. It is all one story, from the introduction of slave labor up to and even past *Brown v. Board of Education*,<sup>3</sup> with important interconnections and ramifications. The present state and future prospects of tort law can be made much clearer, I think, by considering what past experience shows to be the influence of technological and economic change on tort law.<sup>4</sup> Similarly, the progression from the poor laws through Social Security to the OEO is all of one piece. The laws of behavior that produce one program are the same as those which produce another. What changes are circumstances; and these should be studied in context. I would like students of land use problems in modern urban and suburban settings to bear in mind the tangled story of the growth of their system of control from nuisance law through the restrictive covenant to zoning and subdivision ordinance. But I would like each phase considered not as an interesting curio, but as a piece of data, as a point to be used on a social scientist's curves, charts, and graphs. I would like history to be treated as the record of past experiments, conducted by men and by the invisible hand.

In other words, history might be used not to show how much strength or continuity stems from tradition, from the history of the legal system, but in a sense to show exactly the opposite. It could be used to show how, in any particular period, the new emerges from the mixture of that which is historically given, and the social and economic currents of the time. Precisely this problem — of adjustment — faces every historical period. History as the story of that eternal confrontation is the very opposite of antiquarianism. And it is in the highest degree relevant to the needs of current legal education.

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<sup>3</sup> 347 U.S. 483 (1954).

<sup>4</sup> A notably successful attempt at making such a correlation is Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1946).

I have described what I consider the ideal role of American legal history in the law school. The problems it faces are enormous. There is a critical shortage of personnel. This leads to a vicious circle. No one is training American legal historians. The demand is small, the number trained is small. The number trained is small, the demand is small. Only a handful of people are working in this field. It is not heavily supported by foundations or by government. There is a shortage of teaching materials. What is sorely needed are materials which would serve as a sociological and economic history of American law, a history of American law which would infuse the subject with whatever we know (or can guess) on the basis of social science data. Nothing of the sort is available. Something has to happen to break the cycle, if there is going to be any kind of vital legal history offered in our law schools. Social scientists themselves must bear some small part of the blame. They have shied away from historic data. They have preferred, in recent years, to approach behavior through controlled experiment, survey research techniques, and the statistical analysis of current data. But there are still some who look on history with respect. And lately history itself has become much more interested in the social sciences. American legal history — particularly the last hundred years of it — would lend itself admirably to the use of social science techniques. In general, data *is* available. The data is not as full as one would like; but it is much fuller than in the remote past; and far more accessible. Good historical studies have been done using such mundane bits of information as are supplied by building permits or census reports.<sup>5</sup> An excellent doctoral thesis used Philadelphia bankruptcy statistics in a study of the history of the mortgage.<sup>6</sup>

Enormous data banks are available in county courts. Court records are sometimes difficult to work with, but they are there. For those interested in property systems, there are real estate records in (comparatively speaking) marvelous preservation. Unbroken series of will records go back in some communities to the seventeenth century. The use of these might enable us to trace very precisely the connection between changes in legal institutions and changes in family structure, the economics of family property, family settlements, land tenure, and a whole host of other subjects.<sup>7</sup>

This kind of work is beginning to be done by historians, and if it develops in any bulk, a relevant American legal history becomes more and more likely. This would be the kind of legal history which

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<sup>5</sup> See S. WARNER, JR., *STREETCAR SUBURBS, THE PROCESS OF GROWTH IN BOSTON 1870-1900* (1962).

<sup>6</sup> See Skilton, *Developments in Mortgage Law and Practice*, 17 TEMP. L.Q. 315 (1943).

<sup>7</sup> See Friedman, *Patterns of Testation in the 19th Century: a Study of Essex County (New Jersey) Wills*, 8 AM. J. LEGAL HIST. 34 (1964).

is developmental in its approach; it would be sociologically, economically, and politically oriented. Courses of this kind are already taught in a few schools. It is the kind of history that is associated with the work of Willard Hurst.<sup>8</sup> It is not, in my view, the only valid or even useful approach; but it is the most relevant approach, and the one which has the most legitimate claim on the scarce resources and time available in American law schools.

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<sup>8</sup> See especially W. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956), *LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY* (1960), and *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN 1836-1915* (1964).