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Some Reflections on the Role of Legal History in Legal Education

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SOME REFLECTIONS ON THE ROLE OF LEGAL HISTORY IN LEGAL EDUCATION

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INTRODUCTION

Daniel Boorstin, noted historian and Librarian of Congress Emeritus, once described legal history in this country as a "Dark Continent," stating that, "we are ignoramuses about America's legal past." In 1958 he predicted that this state of ignorance was likely to continue for the next half-century, since even the best law schools paid little attention to legal history.[1] His prediction, happily, has proved erroneous. In recent years, legal history has become much more popular with law schools and legal scholars. Almost all law schools now offer a course or seminar on the subject; some offer more than one.[2] An increasing number of articles on various aspects of the history of law have been appearing in leading law reviews, and there are two journals devoted exclusively to this field.[3] As a scholarly discipline, legal history now has a certain status, and one result of this is that America's legal past is no longer completely shrouded in darkness.

Despite its increased popularity, however, some doubts linger as to the value of legal history. As one commentator has written, "There are many who view legal historical studies as peripheral at best."[4] They see scant value in legal history and would not be disturbed if it were to be relegated to relative unimportance. Perhaps this is an

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1. DANIEL J. BOORSTIN, THE AMERICANS: THE COLONIAL EXPERIENCE 399 (New York, 1958).

2. Presser, *'Legal History' or the History of Law: A Primer on Bringing Law's Past into the Present*, 35 VAND. L. REV. 849, 850 (1982).

3. Those journals are *The American Journal of Legal History* and the *Law and History Review*.

4. Hoeflich, *A Renaissance in Legal History?*, (1984) U. ILL. L. REV. 507, 508.

appropriate time—when legal history is riding a wave of support—to examine the arguments of its detractors, to assess its proper place in legal education, and to gauge the value or benefit of its study. This may help prevent legal history from lapsing into insignificance if its popularity begins to ebb.

This article's discussion of legal history is in three sections. The first will look at changes in legal history in the last two or three decades, including what legal history was, what it has become, and why it is more popular now. This section will discuss legal history both as a scholarly discipline and as a part of the law school curriculum. The second section will examine the potential value or benefit of teaching legal history in law school, and will consider arguments that legal history does not merit a serious place in the curriculum. The third, and final, section will address some pedagogical concerns of teaching legal history—such as specifically the point in law school when it should be taught, and the content, coverage, and approach of a separate course on the subject.

I. CHANGES IN LEGAL HISTORY

In the past twenty to thirty years, the study of legal history, in addition to becoming more popular, has changed considerably. This change is apparent in both legal history as a scholarly field and as a law school course. The alteration in legal history can be seen advantageously by contrasting what legal history was, two or three decades ago, with what it has become more recently. Although legal history is now a moderately popular law school course, such popularity is relatively recent. In the 1950's and 1960's, the subject was not highly regarded by most law students or faculty, and even by the early 1970's, it had not generated much enthusiasm. Not until the mid 1970's did legal history begin to achieve a position of some popularity and respectability in American law schools.

In 1957, one observer wrote that, "With a few exceptions, legal history as a separate course is not taught."[5] Daniel Boorstin explained in 1958 that law schools largely ignored this subject.[6] This notion

5. Murphy, *Legal History as a Course*, 10 J. LEGAL EDUC. 79, 79 (1957).

6. *See* BOORSTIN, *supra* note 1 and accompanying text. *See also* Friedman, *American Legal History: Past and Present*, 34 J. LEGAL EDUC. 563 (1984). Friedman said of American legal history, "A generation ago only a handful of schools even taught the subject—probably two or three law schools at most, in 1950. . . ." *Id.* at 563.

was generally confirmed several years later by an article which set forth the results of a survey concerning legal history in the law schools.[7] In 1961-62, a survey was sent to the 132 ABA-approved law schools, asking a series of questions about their teaching of legal history. One hundred and fifteen, or 85.8% of the schools responded. Of these law schools, only thirty-one had legal history courses, and at ten of these thirty-one schools, the course was mandatory for first-year law students.[8] Furthermore, at nine of the thirty-one schools the course was not taught every year. These figures, which indicated that legal history was offered at less than one-third of the law schools, revealed the lowly estate of legal history in 1961 and gave little encouragement to those who believed in the importance of the subject.[9]

In the decade that followed, legal history began attracting some attention in the law schools. In an excellent article published in 1967, Clavin Woodard wrote that, notwithstanding the recent interest being accorded the subject, "few would deny that the significance of Legal History to legal education is, to put it bluntly, marginal."[10]

However, another survey, a few years after Woodard's article, revealed that legal history was becoming more popular. In 1973 Professor Joseph Smith of Columbia University Law School, then Chairman of the A.A.L.S. (Association of American Law Schools) Section on Legal History, sent a questionnaire concerning the teaching of legal history to all members of that Section. Professor Smith then prepared a report which included the questionnaire and a summary of the responses he received.[11] The Report does not, unfortunately, indicate the number of questionnaires sent out, the number returned, or the percentage of law schools that responded, but it does contain some revealing information about legal history in American law schools in 1973. For example, of the ninety-nine schools that responded to the question concerning the existence of current legal history courses, approximately twenty-eight, or slightly less than one-third, indicated that they did not, at that time, offer a course on

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7. Re, *Legal History Courses in American Law Schools*, 13 AM. U.L. REV. 45 (1963).

8. *Id.* at 48-49.

9. *Id.* at 64-65.

10. Woodard, *History, Legal History and Legal Education*, 53 VA. L. REV. 89, 89 (1967).

11. Joseph H. Smith, REPORT ON THE TEACHING OF LEGAL HISTORY IN THE LAW SCHOOL (Washington D.C.: A.A.L.S., 1973). (hereinafter REPORT).

legal history.[12] This is a reversal of the survey results a decade earlier, when only one-third of the schools offered legal history. In addition, the course descriptions furnished by the respondents to the 1973 survey permit some general observations to be made concerning the types of legal history courses offered.[13] General legal history courses (those that included both English and American) and English legal history courses were the two largest individual categories. It is also interesting to note that the total number of American legal history courses (made up of several categories) exceeded the total number of English legal history courses.

One survey question asked what percentage of the law students at each school took legal history courses. Seventy-three percent of the schools responded that twenty percent or fewer of their students took legal history, and in fact, one-half of the schools stated that ten percent or fewer of their students took the subject.[14] Clearly, then,

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12. *Id.*, Part I, at 1-34.

13. *Id.* This breakdown is admittedly imprecise, both because some courses defy exact categorization and because the course descriptions may differ somewhat from the courses actually taught. It should be noted that a number of schools offered more than one legal history course.

The course descriptions in the Report have been used to divide the courses into the following categories:

G—a general course, including both English and American legal history, and sometimes Roman law.

E—a course only on English, not American, legal history

A—a general course in American legal history, including both the Colonial and Post-Revolutionary periods

A1—includes only American Colonial legal history

A2—covers only American Post-Revolutionary legal history

L—local legal history, covering only a state or region

R—Roman law

P—Primitive law

C—Constitutional history in America

A-Recent—covers recent (post W.W. I) American legal history

European—European legal history

The number of courses in each of these categories were as follows:

G—37 courses	R—10
E—24	P—2
A—22	C—7
A1—2	A-Recent—4
A2—16	European—1
L—5	

14. REPORT, *supra* note 11, at 41A. The question was asked what percentage of the student body was estimated to take at least one course in legal history. Smith

in 1973, legal history was not overwhelmingly popular among law students. Another statistic revealed that only five of the law schools responding made legal history a mandatory course; six made it one of a number of "perspective" courses, of which students must elect one; and at all other schools it was strictly optional.[15] These survey results show that legal history, by the early 1970's, had generated increased interest since the 1950's but that it still, as one scholar commented, was not taken seriously and had no place in the law school curriculum.[16]

In addition to examining legal history's popularity or status in the law schools, we should also look at its focus and content as a scholarly discipline. Calvin Woodward has written an insightful account of what was traditionally the major concentration of legal history.[17] He described how the formative influences of two of the great early legal historians—Henry Sumner Maine and Frederic W. Maitland—had shaped the discipline of legal history into the study of "the development of medieval English legal institutions,"[18] such as the system of writs and the jury trial. The brilliance of the work of these two early scholars had created the impression that legal history *must be* a study of these early English legal developments. This focus had endured since the time of Maine and Maitland; Woodard was endeavoring to show why this focus was neither inevitable nor even particularly desirable.[19] There is corroboration

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listed the responses as follows:

percentage of students	*percentage of responding law schools*
1 to 5%	37%
6 to 10%	13%
11 to 20%	23%
21 to 30%	9%
31 to 50%	9%
51 to 100%	9%

15. *Id.* at 41A.

16. Presser, *supra* note 2, at 849. *See also* G. Edward White, PATTERNS OF AMERICAN LEGAL THOUGHT 2 (Indianapolis, 1978): "American legal history has been one of the most unfortunate step-children of the academic profession, disdained by historians and lawyers alike. . . ."

17. Woodard, *supra* note 10, at 99-108.

18. *Id.* at 107-08.

19. *Id.* at 105. This focus was not inevitable since it was simply due to the areas of interest of Maine and Maitland, not to any inherent limitations in the nature of the field. It was undesirable, as it made legal history consist of a rather dull survey of origins and developments "too remote from contemporary conceptions of law to be pertinent." *Id.*

for Woodard's depiction of traditional legal history in the Report of the 1961-62 survey results, which (quoting from course descriptions) revealed that "origins and developments" of medieval English legal institutions were the primary focus of many legal history courses.[20]

This medieval concentration was largely undisputed as the correct focus, since there was, in the two decades before 1970, insufficient interest in the field of *American* legal history to counteract the traditional English medieval emphasis. Few schools, it seems, had a separate course on American legal history,[21] and only a handful of scholars considered it a respectable field for serious research.

Lawrence Friedman describes the early work (before the 1960's and 1970's) in American legal history as *doctrinal* history: it stressed legal doctrines and rules, especially their origins and growth.[22] One of the main characteristics of this type of legal history was that it treated law as autonomous, as a field whose developments and changes could be explained without recourse to outside factors. As Friedman stated, "[T]he outside world, with its messy politics and economics, was definitely shut out."[23] The investigation was limited to topics and concepts strictly within the legal realm. Morton Horwitz has characterized most of the work in legal history before the 1970's as "lawyers' legal history," which, he says, while ostensibly neutral and objective, has tended to embody conservative political preferences, and being largely written by lawyers, it usually concentrated on lawyers' concerns.[24] Another scholar, Robert Gordon, has discussed the propensity of many earlier historians of American law to assume that there was a discrete sphere of strictly legal phenomena—such as pleadings, courts, maxims, and rules—and to write about only these things.[25] Such historians usually did not explore the interaction between law and broader social trends. They did not, Gordon says, examine the social context of law or the social effects of law.

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20. Re, *supra* note 7, at 53-56. The course descriptions in the 1973 survey show some continuation of this focus, but with a significant number of courses covering more recent periods. *See* REPORT, *supra* notes 11 and 13.

21. Friedman, *supra* note 6, at 563.

22. *Id.*

23. *Id.* at 563-64.

24. Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 AM J. LEGAL HIST. 275, 275-76 (1973).

25. Gordon, *J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW & SOC'Y. REV. 9 (1975).

There were some significant exceptions to the narrow doctrinal or institutional legal history that Friedman and Gordon describe. The most notable exception was J. Willard Hurst and the "Wisconsin School" of legal history which explored law's relation to the more general values and processes of society, particularly by looking at the legal work of administrative agencies, trial courts, and legislatures.[26] But a great deal, perhaps the majority, of scholarship in American legal history before the 1970's was not as broad-gauged as the Wisconsin School.

In the not-too-distant past, then, legal history was not particularly popular, either in law schools or among legal scholars; and the general focus of the courses and scholarship that did exist was on the origin and development of legal doctrines and legal institutions.

The "New Legal History"

Legal history has become, by all accounts, considerably more popular. There has been no recent survey concerning legal history, but it appears the course is now offered in more law schools, engaging more of the efforts of legal scholars, and even attracting more students. Friedman says that American legal history is "booming."[27] Other writers have echoed this sentiment; one, with perhaps undue optimism, asserted that it is no longer necessary to attempt to "sell" legal history.[28]

To say that legal history has become more popular is not to say that law students are embracing the course in great numbers nor that they believe it to be an indispensible element of their legal education. This has not happened, and is not likely to, for at least two reasons. One is that there is a kind of anti-historical bias among students.[29] Neither American education in general nor American legal education

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26. Friedman, *supra* note 6, at 565-66.

27. *Id.* at 563.

28. Corr, *Legal History Symposium: Introduction,* 23 WM. & MARY L. REV. 567 (1982).

29. *See* Murphy, *supra* note 5, at 79. Murphy quotes the description one foreign scholar student gave of his experiences with American students at Yale:

> The naivete of my American students sometimes suggested to me that they thought . . . the history of the law [started] on the day they entered law school. They seemed to be blissfully oblivious of the power established patterns of thought and behavior, of the formative influence of traditional ideologies, in the law more than anywhere else.

Id. at 79-80. *Quoting* from Kahn-Freund, *My Year at Yale, An Exhilarating Intellectual Experience*, 2 Yale Law Report #3, 18,19.

in particular generate and inculcate in students an interest in matters historical. The second factor is related to this lack of interest in the historical—it is the obsession of most law students with the training they think will be useful to them as practitioners.[30] Courses that do not have a practical focus are usually accorded a secondary place, at best, in students' priorities. Legal history, which seems irrelevant to the modern practice of law, will probably always have a reputation as an impractical course. (Perhaps this is not entirely unfortunate if it means that students who *do* elect to take the course will be interested in topics not directly applicable to the practice of law.)

Even if not all students are whole-heartedly enthusiastic about legal history, it remains true that among some students, and certainly within the legal academic community, legal history has achieved a level of popularity and prestige far above that which it possessed twenty to thirty years ago. American legal history, for example, had become more popular and more interesting. Its popularity has resulted in a work of general scope, Friedman's *History of American Law;*[31] a work that offers an alternative to the traditional view, Horwitz's *Transformation of American Law*;[32] and articles and volumes[33] treating of American legal historiography. These books and articles are examples of the high quality of scholarship that is making legal history a vibrant and exciting field.

Having discussed legal history's recent popularity, let us now look at its present content and how this differs from its former orientation. Since *American* legal history has experienced major changes and a substantial increase in popularity, the following discussion will focus on the changes in this area of legal history.

It is possible to attempt to list the "schools" in American legal history. Friedman describes what he sees as three "schools": the pre-

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30. *See* Halpern, *On the Politics and Pathology of Legal Education*, 32 J. LEGAL EDUC. 383 (1982).

> Most students view law school quite pragmatically. It is a place to receive the initial training and credentials required to be a practitioner. Almost by definition, then, intellectual inquiry of a broad-gauged character takes a back seat to a concern for the nuts-and-bolts preparation required to pass the bar, obtain a good job, and become a successful practitioner.

Id. at 390.

31. This book has proved so popular that Friedman has brought out a second edition. Lawrence M. Friedman, A HISTORY OF AMERICAN LAW (2nd ed., 1985).

32. Morton J. Horwitz, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977).

33. *See, e.g.*, William E. Nelson and John Philip Reid, THE LITERATURE OF AMERICAN LEGAL HISTORY (1985).

1950 doctrinal school, the Wisconsin School, and the Critical School.[34] But what is more to the point, for our purposes, is the general difference between legal history now and legal history earlier. The characterization Friedman and Gordon make, which was noted above,[35] is helpful here. Most early work in American legal history was doctrinal or institutional. It concentrated on legal concepts and institutions, to the exclusion of developments in society that affected the law or were affected by it. This differs sharply from what has been called the New Legal History. "The New Legal History insists that the evolution of American law cannot be studied in isolation from attending social, political and especially economic circumstances. . . ."[36] There is, in short, an emphasis on the social context in which legal events occurred. Some of the work deals with the effects of economic forces: J. Willard Hurst and the "Wisconsin School" of legal historians, for example, have paid particular attention to these forces. Other work concentrates on restructuring past consciousness—the ideas and values existing in the historical period under investigation—and has been called "legal intellectual history."[37]

As a general description, it can be said that legal history is broader than before; it uses a greater variety of sources, including a healthy dose of the social sciences.[38] Some recent trends in this legal history include emphasizing private law instead of constitutional law, limiting the geographical scope to one county or state, and linking legal behavior with social change.[39] But these observations only hint at the variety of rich and diverse work in current legal history; and this variety makes it impossible to categorize this field accurately. Certainly one trend that is observable is that the focus has shifted to more recent periods, especially to American legal history. At the same time, a "cultural" approach has been increasingly utilized, one

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34. Friedman, *supra* note 6, at 563-69. "Friedman says that critical legal historians try to show how the law was manipulated by economic interests. *Id.* at 567." Friedman admits that these three "schools" are something of an oversimplification, and that many scholars cannot be neatly or fairly placed into one of them. *Id.* at 568.

35. *See supra* notes 22, 23, and 25 and accompanying text.

36. Astorino, *History and Legal Discourse: The Language of the New Legal History*, 23 DUQ. L. REV. 363, 364-65 (1985).

37. Fuller, *Some Contemporary Approaches to the Study of Legal History and Jurisprudence*, 10 TULSA L.J. 576, 579 (1975).

38. Friedman, *supra* note 6, at 574-75.

39. Zainaldin, *The New Legal History: A Review Essay*, 73 N.W. L. REV. 205, 206 n.5 (1978).

that studies the effect of social context and broader societal trends and patterns on the law.[40]

Having noted the changes in legal history, we are now in position to speculate upon the causes of its increased popularity. One cause seems to be that legal history has benefitted from the movement to introduce interdisciplinary courses into the law curriculum. While a thorough exploration of the cause of the interdisciplinary movement is beyond the scope of this article, it does seem part of a concern that legal education needed to be expanded to include more of the societal and cultural forces than those traditionally encompassed by the casebooks. There was, it seems, a recognition that to continue to treat law in isolation was unacceptable. Law faculties responded to this concern, introducing numerous interdisciplinary "law and . . ." courses. While there were, of course, law schools that offered legal history before this time, the interdisciplinary movement appears to have contributed to the proliferation of legal history courses. Whether law students share this commitment to broadening legal education is debatable, given the inclination of law students, as mentioned above, to prefer the vocational aspects of legal education. There may, however, be some law students who believe that their undergraduate major gave them an insufficiently "liberal" education, and see courses such as legal history as "the last chance to obtain a dose of humanistic learning."[41]

Friedman suggests another reason for legal history's recent popularity. Traditional doctrinal research, he says, is out of fashion; and since law professors must have a field for their scholarly endeavors, some, he believes, have turned to legal history as an interesting way to fill this void.[42] If doctrinal research were truly out of fashion, one would expect to see little of it being produced; however, a glance at lists of recent publications shows a large and steady stream of articles on traditional doctrinal topics. (Admittedly these topics can be explored in ways that are not doctrinal, but that does not seem to be the approach of most articles.) Perhaps doctrinal research is out of fashion among the *leading* legal thinkers, although one wonders if these thinkers were really committed to doctrinal research. While research and writing in legal history is clearly more fashionable than

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40. *See* White, *Some Observations on a Course in Legal History*, 23 J. LEGAL EDUC. 440, 445 (1971).

41. Presser, *supra* note 2, at 850.

42. Friedman, *supra* note 6, at 569.

formerly, it does not appear that traditional doctrinal research is actually "out of fashion."

The most interesting point for speculation is whether there is some relationship between the change in the content of legal history and its recent popularity. We have seen (to simplify somewhat) that legal history has undergone two major changes: (1) its general focus is no longer on medieval English law but instead on the law of more recent periods, especially America's legal history; and, (2) its emphasis has shifted away from narrow doctrinal and institutional topics and toward the study of the interaction of larger societal forces and the law. These two points constitute the type of changes that would enliven what was perhaps a dry and esoteric branch of learning. It is probably impossible to *prove* that these changes caused the increased interest in legal history, but it seems likely that they have served, in some way, to bolster rather than detract from its popularity.

There is one aspect of this question that can be addressed more readily—the reasons why *American* legal history has gained prominence as a field of study. Before the work of scholars such as J. Willard Hurst became commonly known, American legal history was often overlooked as a separate discipline. Hurst and other early laborers in this field showed that there was much new ground here to be tilled, many interesting and fruitful areas awaited investigation. These scholars demonstrated that American legal history could be a serious area for research; their efforts made it respectable. A second reason for the rise in prominence was the appearance, in the 1970's and 1980's, of a number of general works of high quality. Friedman's and Horwitz's influential books, and a solid casebook,[43] for example, made legal history more accessible and earned it acceptability as a scholarly discipline and as a legitimate course for the law curriculum.[44]

II. Value of Legal History to the Law Curriculum

On initial reflection it might seem that legal history would not offer much of value to the law schools, since the basic purpose of legal education is to train competent and proficient future lawyers and judges. Legal history appears almost antithetical to this purpose; it decidedly does not concentrate on the technical and practical skills

43. Stephen B. Presser and Jamil S. Zainaldin, Law and American History: Cases and Materials (1980).

44. Presser, *supra* note 2, at 850.

needed to be a lawyer. There is, indeed, a reasonable argument that legal history deserves no place, or at best a minor place, in the law school. Our assessment of the value of legal history will begin with a detailed examination of this position which would minimize the role of legal history or eliminate it altogether from legal education.

This argument can be summed up largely as it has been set forth above: since the business of law schools is to train practicing lawyers, and since legal history has little relevance for this purpose, legal history should play, at most, an insignificant part in legal education. To give legal history any greater prominence would be to misallocate the intellectual resources of law students and faculty.[45] This argument rests upon several propositions which need to be examined in detail.

First, this argument presupposes that the essential purpose of legal education is to prepare future lawyers and judges for their legal careers.[46] Next, this argument contends that law school courses should have some practical or professional value, in order to help produce competent practitioners. Finally, the argument concludes that if law school subjects should have some practical or professional value, then legal history can properly be excluded or de-emphasized because it lacks such value. It lacks practical or professional value in both its content and its method of analysis. In its content—in the subject and topics it treats—it is far removed from the concerns and problems that face present lawyers.[47] Indeed, we noted above that the traditional focus of legal history has been on the origins and development of medieval English legal institutions—a field that seems extraordinarily remote from current legal practice; and one wonders if even the recent emphasis on American legal history has made the field a great deal more pertinent to legal issues in the 1980's and 1990's.

Legal history is said to be lacking in practical or professional value in a second respect—its method of analysis. Legal history generally takes a *historical* approach to its material; it usually uses techniques of historical analysis. Maitland noted long ago that lawyers and historians make different use of the legal past, they approach and analyze it differently: historians look for evidence that will allow

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45. White, *supra* note 40, at 440. White does not accept this argument but does discuss it. *Id.*

46. *Id.* at 443. White states that it is possible to maintain that a law school need not have professional preparation as its focus but can exist to offer its students a variety of intellectual experiences. However, White characterizes this as a "distinct minority position." *Id.* at 443 n.7.

47. *Id.* at 441.

them to understand the past on its own terms, while lawyers look to the past for authorities that can be used, or adapted to be used, to solve *present* legal problems and cases.[48] White explains that,

> [H]istorians are not as vitally concerned with resolving past conflicts and solving past problems, stressing contradiction and paradox to a greater extent than do lawyers. . . . Historians, in short, strive to ask the questions of their material that would have been asked by contemporaries of the time period they are examining, whereas the questions asked by lawyers of that same material are confessedly present minded.[49]

Others have also noted this tension, this inherent difference in method and approach, between law and history.[50] This is not simply an academic dispute between the methodologies of two disciplines; it has a significant bearing on legal education. If lawyers and judges use history "in a manipulative sense, to help them with present tasks," then it can be argued that it would be a mistake to teach law students to study legal history for its own sake, for its own intrinsic merit.[51] This does, however, seem to be the approach a course in legal history often takes—a concentration on the past for its own sake, not as a way to win legal arguments or cases.

There is an additional argument against legal history, one that claims that the study of legal history might be not merely a misuse of time and resources but might also be actually detrimental. The more attention law students pay to the legal past, this argument says, the more likely they are to glorify it, to defer to it, and to become its victims. This preoccupation and deference will cause them to be reluctant to eliminate older, outmoded laws and legal forms. They will tend to perpetuate obsolete rules and practices, and not use the law to solve present and future problems.[52] One is reminded here of a danger Holmes warned about: "It is revolting to have no better

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48. Woodard, *supra* note 10, at 91, *quoting* from 1 FREDERIC W. MAITLAND, COLLECTED LEGAL PAPERS 490-91 (H.A.L. Fisher ed., Vol. 1 1911). Woodard says that "it is very difficult to deny that the 'logic' of law and the 'logic' of history are intrinsically antithetical." Woodard, *supra* note 10, at 91-92.

49. White, *supra* note 40, at 443.

50. *See* Orth, *Doing Legal History*, 14 IRISH JURIST 114 (1979), at 114, where Orth explains that law and history threaten to pull apart since law focuses on analysis, regardless of time, while history focuses on narrative and time.

See also Corr, *supra* note 28, at 569, where Corr states that the natures of legal training and historical training are almost antithetical, and that legal history is something of a hybrid of the two.

51. White, *supra* note 40, at 441.

52. Woodard, *supra* note 10, at 94. Woodard does not accept this argument he simply discusses it. *Id.*

reason for a rule of law than so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[53] The study of legal history, this argument contends, might lead to blind imitation of the past. If this is true, it would mean that legal history is inimical to the training of bright and able future lawyers.

The foregoing arguments, offered to demonstrate that legal history has nothing of real value to contribute to legal education, have a certain cogency and persuasiveness. They require cogent responses if we are to conclude that legal history is an important subject for law schools.

The argument above began with the assertion that the essential function of legal education is to train students to be competent practicing lawyers, and, therefore, that law school courses should have some practical or professional value. Legal history is said to lack this value for several reasons: in content, it is exceedingly remote from present problems and practice; in analytical approach and methodology, it is fundamentally different from the way lawyers and judges use legal history. The argument also maintained that extensive study of legal history may foster undue deference to the law of the past.

There are two major responses to this position, both of which admit that law courses should have some practical or professional value, and which then demonstrate that legal history does fulfill this requirement. It is possible to argue that law school need not be limited to courses of practical or professional value, but this rejects the most tenable standard for determining which courses are appropriate for the law curriculum. It is easier, and comports better with current attitudes in legal education, to concede this standard and then to explain how legal history meets it.

The first response addresses the requirement of practical or professional value by concentrating not on the content of legal history but on its merit as a *method of analysis*. We have discussed the differences between historical analysis and legal analysis; and while differences do exist, they are not fatal, particularly in legal history. In this field, there is more overlap between these two methods of analysis than might first appear.[54] For example, legal history uses

53. Address by Oliver Wendell Holmes, (January 8, 1897), *reprinted in, The Path of Law*, 10 HARV. L. REV. 457, 469 (1897).

54. White, *supra* note 40, at 44.

traditional legal analysis when examining such significant and standard legal materials as older cases and statutes: these yield their meaning only through the type of analysis that lawyers and judges commonly employ. Furthermore, traditional legal analysis does involve historical analysis, whether it admits it or not. This is shown by the fact that, "[G]losses on statutes and interpretations of precedents require an understanding of past legal phenomena."[55] When judges and lawyers strive to discover the "intent of the framers" of a constitution, the intent of the legislature concerning a particular statute, or the circumstances leading to a notable court decision, they are using techniques of historical analysis. Thus legal history does provide some training in methods of analysis useful to future lawyers and judges. To the extent that legal history *also* teaches students a methodology and approach that differ from ordinary legal analysis, that, too, may be beneficial: it can expose students to another way of thinking, both for comparison and to complement the training they receive in traditional legal analysis.[56] This can give students a different perspective, and perhaps suggest insights and solutions that would not otherwise occur to students exposed to a single, exclusive approach. Therefore, one major justification for legal history is its practical value in teaching methods of analysis similar to, or complementing, those that students will use after law school.

The second major response to the argument against legal history takes a decidedly different tack; it focuses on another aspect of legal education as professional preparation. Legal education should provide students not only with skills of immediate practical application, but also with a thorough *understanding* of legal processes and legal institutions. Although it is difficult to demonstrate that lawyers who receive this kind of instruction will be more successful in the practice of law, it nevertheless seems important to provide a broad understanding of the legal system and the forces at work in it to those

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55. *Id.*

56. *Id.* White says on this point: "These [historical] methods of approach, I am suggesting, need not be antithetical to those characteristically employed by the lawyer; rather, they can be complementary."

See also Corr, *supra* note 28, at 569-70. Corr maintains that perhaps the main purpose of a course in legal history is "teaching law students to think—but this time as historians." He admits that lawyers and historians employ different methods, but he asserts that, "Exposure to a different approach, a different mode of analysis, can only be beneficial to students whose legal training is indoctrination in a particular method of thought, almost to the exclusion of other, non-lawyerly ways of thinking." *Id.*

who will be members of the bar, judges, and legislators. The value of this broad understanding consists not only in making them more aware of their legal environment generally but also in making them more reflective about their work and their role in the legal system.

If legal history eschews its traditional emphasis (as it appears to have done) on the development of medieval English legal institutions, and continues its more recent focus on areas of legal history closer in time to contemporary society, it can effectively aid students in understanding the present legal system.[57] There are several ways legal history can do this. One way is by illustrating the forces, interests, and traditions in our legal system, such as the "free enterprise ideal of the maximum protection and promotion of private enterprise and initiatives",[58] which are of enduring force and vitality. Although often unnoticed, these forces remain potent influences in the law today. By highlighting these enduring forces, legal history helps to show which aspects of the law are transitory and which are more permanent.

A second and related way legal history can improve students' understandings of the legal system is by indicating the limitations of legal change. Legal history demonstrates that it is foolish to offer solutions or propose utopian remedies that neglect the force of history and tradition in the legal system.[59] These factors are especially important in the law, where the "power of established patterns of thought and behavior" is particularly strong.[60]

Legal history can also deepen students' knowledge of the legal system by showing the inadequacy of a current conception of law. Calvin Woodard argues that legal education tends to present a conception of law that neglects history—a view he terms "a-historical." "[L]egal education, like our whole legal system, is focusing increasingly on the present, both in defining, and in seeking the remedy for, current legal (and other) problems."[61] In Woodard's opinion, this a-historical view has two causes: the Legal Realists' legacy of weakening of the force of precedent, and the growth of an "instrumental" conception of law that portrays the law as simply an instrument or tool to be used for social engineering. This instru-

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57. Woodard, *supra* note 10, at 120.

58. Presser, *supra* note 2, at 856. Presser concedes that this ideal has lost considerable force since the New Deal. *Id.*

59. Woodard, *supra* note 10, at 105-06.

60. *See* Kahn-Freund, *supra* note 29.

61. Woodard, *supra* note 10 at 109.

mental conception is a-historical because it asserts that the past neither restrains judges nor aids them in determining how to wield this awesome tool of the law.[62] Legal history can be used to combat this insidious view, Woodard explains, by imparting "an intelligent, sensitive awareness and appreciation of the past as a part of the legal process."[63]

These points, then constitute the second major response to the arguments set forth above. Legal history can have an important role in professional training by enriching students' understanding of, and knowledge about, the legal system, the forces at work in it, the limitations on legal change, and the impact of the past on the law of the present.

The last argument against legal history we noted was that study of the law's past may cause students to imitate it blindly and to be reluctant to advance or improve the law. This argument is based on the mistaken notion that study of the past induces a slavish adherence to it. Study of the law's past, rather than producing unreflective acceptance of archaic practices and ideas, is more likely to enhance one's view of the present law and its possibilities.

Other Benefits of Legal History

The points just discussed—responses to the arguments that legal history is largely irrelevant to legal education—describe benefits that could flow from teaching legal history. In addition to those benefits, there are other ways that legal history could improve legal education, although it must be admitted that these benefits do not always attend a legal history course, for reasons which will be discussed later.

Legal history, we have said, may be of value in improving students' understandings of the legal system. We have already seen some of the ways it can do this; let us examine several more. First, legal history, by showing the problems and issues of the past, can reveal a great deal about the nature of the legal system. No subject or field can be mastered without some knowledge of its history and development. Just as one cannot thoroughly understand the shape of modern science without knowing the historical developments of science, the same is true of law: knowledge of its past gives a special and valuable insight into its present circumstances and controversies.

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62. *Id.* at 111-12.
63. *Id.* at 113.

Secondly, legal history provides a view of our legal system from the perspective of another place and time, which can also enrich and deepen students' understandings of law. This different perspective is obtained by studying what is in effect another legal system, our legal system in the past. In this sense, legal history is similar to comparative law for the perspective it affords.[64] Indeed, one writer has claimed that legal history is superior to comparative law, since legal history has a closer connection with our legal system—it is a study of our own system at an earlier stage of development—and it shows the meaning and origin of some of our legal rules.[65] But this may be offset by the fact that the study of our legal past does not give the uniquely new perspective afforded by the study of a foreign legal system.

Third, to elaborate on an earlier point, legal history improves our understanding of the law by illuminating enduring forces and ideas—traditional and historical legal concepts and notions, and established patterns of legal thought and behavior—that still exert a powerful influence on our legal system. An awareness of these influences is indispensable for comprehending the way the legal system works and understanding how it can be changed and shaped in the future. Moreover, by improving our awareness of the legal system (again to elaborate on an earlier point) legal history can help us avoid the pitfall of thinking that the past places no constraints on our freedom of action, or believing that it is possible to eradicate long-standing historical traditions with a stroke of the pen. "To think that it is possible for a new system to begin at zero seems to be an unhistoric misconception."[66] A legal historian has written that one value of legal history for students is "to make them appreciate that the nature of what has gone before facilitates and circumscribes what happens in the law today."[67] In this connection one is reminded of an aphorism of Holmes' that continuity with the past is not a duty, it is only a necessity. The enduring forces in the law often pass unnoticed, so that the study of current law alone might overlook them. Legal history, by dealing with change and development over

64. *See* Murphy, *supra* note 5, at 81: "[L]egal history is like a comparative study—a way of deepening the study of particular subjects through the revelation of other means, other attempts, other failures."

65. REINHARD ZIMMERMAN, LEGAL HISTORY: DOES IT STILL DESERVE ITS PLACE IN THE CURRICULUM? 5 (Cape Town, 1981).

66. *Id.* at 6.

67. Presser, *supra* note 2, at 851.

a longer period of time, can more easily highlight these enduring legal forces and thus enrich students' understanding of the law.

Fourth, legal history can reveal the relativity or historical contingency of the present legal order.[68] By this is meant the fact that the present form of our legal system is neither inevitable nor immutable, as is sometimes supposed, but is constantly influenced by historical and cultural forces. This notion is not inconsistent with the previous point that there are enduring elements in the law; these two points simply refer to different aspects of the legal system. A historical approach to law reveals that the present law contains enduring elements *and* new aspects that reflect social conditions. The law has continuity and yet it also undergoes continual change, growth and development.[69] Legal history can serve to show that the present system should not be viewed with undue veneration; its present form should not be considered sacrosanct. Such unhealthy reverence is often accompanied by intolerance of other ways of regulating human conduct or intolerance of change.[70] Legal history may make students more tolerant of change and more aware that, since the law is historically contingent, it must perforce change to keep pace with developments in society.

Legal history can also expose the fact that although the law must change, there is a perennial tension between change and stability in the legal system.[71] Change is manifested by new statutes and by the extension of common-law concepts to cover new types of cases, while stability is exemplified by the system of precedent and *stare decisis*. There are changes in society which exert pressure for change in the law, and yet at the same time there are enduring forces which exert pressure for continuity and stability in the law. Legal history can help to reveal this tension between change and stability.

Fifth, legal history can also highlight an important point mentioned earlier: that law is, to some extent, significantly affected by social, political, economic, intellectual, and moral forces normally considered "outside" the legal system. Law students are not always made aware, in their other courses, of the connections between legal change and non-legal societal developments. Legal history, if it is taught in a way that incorporates cultural factors and their impact on the legal

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68. *See* Gordon, *Historicism in Legal Scholarship,* 90 YALE L.J. 1017 (1981).

69. *See* ROBERT V. DANIELS, STUDYING HISTORY: HOW AND WHY 8 (1966) for a similar point about the value of studying history generally.

70. ZIMMERMAN, *supra* note 65, at 4.

71. Kempin, *Why Legal History*? 15 AM. BUS. L.J. 88, 97 (1977).

system, can serve to correct the misleading impression that law is an independent entity, pursuing its own course unaffected by the world around it.

These five points reveal ways that the study of legal history can deepen and enrich students' knowledge and understanding of the present legal order. A course in legal history also has the potential to offer other educational benefits.

One benefit that is sometimes claimed for legal history is that it, like history generally, can teach lessons and show us how to solve the problems of the present and future. This claim is, unfortunately, exaggerated. Legal history cannot, by itself, solve our problems; it is not a panecea. It can, however, shed light on trends and processes that have been and still are at work, and thus help explain how the present has grown out of the past. Armed with this knowledge we may (but not necessarily will) be better prepared to anticipate the future.[72] But to help us anticipate the future is decidedly different from solving the problems of the future.

One writer has suggested that legal history might serve as a source of ideas and principles—"constructive material"—to use in formulating solutions to current legal problems.[73] This would entail a judicious gleaning of the legal past for concepts and ideas that could be revived or refurbished to serve present legal tasks. This seems to be a reasonable suggestion. It does not assume that there is a continuity in legal conditions, or that the present is so similar to the past that ideas which have worked before will work now; it simply involves using the past as a source of possibilities and suggestions.

Another potential benefit of legal history is suggested by Benedetto Croce's views on the value of history:

> The impetus to historical writing, Croce asserted, arose from a need felt in practical life to understand the past. But historical study was connected with action only as *preparation* for it: it did not dictate solutions to practical problems; it simply served to make action more rational by clarifying the historical origin of contemporary dilemmas and the range through which realistic choice could operate.[74]

Can legal history make action "more rational" by clarifying the origin of a legal dilemma and the realistic range of solutions? Legal

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72. *See* DANIELS, *supra* note 69, discussing this notion in reference to history generally, not simply legal history.

73. Murphy, *supra* note 5, at 86.

74. H. STUART HIGHES, CONSCIOUSNESS AND SOCIETY: THE REORIENTATION OF EUROPEAN SOCIAL THOUGHT 1890-1930, at 219 (rev. ed. 1977) (emphasis in original).

history often can illuminate the origin of a legal problem, but has more difficulty specifying the "realistic range" of solutions, since that entails an assessment of present circumstances and future needs. It can, however, indicate possible *limitations* on the range of solutions by showing some of the long-term forces, interests, and influences that must be accounted for by any effective solution. (Perhaps this is what Croce meant by the range of "realistic choice.") This, in turn, suggests that legal history can perform a related function, referred to earlier: to illustrate the dangers of pursuing legal quests for utopian solutions or instantaneous transformations.[75] Legal history can make clear that proposed solutions which do not recognize the vitality of historical forces and enduring trends are indeed chimerical. It can help to make us "meaningfully aware of the past as a healthy check on our often overly-optimistic and unfounded hope."[76]

It has also been said that legal history, by showing the background of a rule of law and the reason for its creation, can help us decide whether to keep the rule.[77] But this claim needs to be qualified. Even if history illustrates the original reason for a rule, it cannot establish to what extent some departure from the original reason, or some change in circumstances, should lead to the abolition of the rule. History also cannot answer the question of whether a new rationale, which arose after the creation of the rule, is sufficient to justify maintaining the rule. Still, when deciding whether to keep a rule, it is better to know the reason for its creation than to be ignorant on this point; legal history can be helpful if it reveals this reason. There is, however, one further drawback here: to the extent that legal history focuses on rules and their origins, it is *doctrinal* legal history, which, for reasons discussed above, has fallen into disfavor.

Another attribute of legal history is that it can supply an essential need of the legal profession. The legal profession, in order to realize and fulfill its proper role, needs a tradition. It needs to be aware of its past, to understand what it has been and what it has done, its successes and its failures. Legal history can supply this tradition. But it should not fabricate a sanitized past that distorts the historical record; it should not give the legal profession a tradition that exaggerates the accomplishments and ignores the failures. To be true to the profession, and to its own standards as a scholarly discipline,

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75. Presser, *supra* note 2, at 852.
76. Woodard, *supra* note 10, at 105.
77. ZIMMERMAN, *supra* note 65, at 5.

legal history should provide a heritage as faithful to historical reality as possible.

Related to the topic of the potential benefits of legal history is the question of whether it can help address some of the complaints voiced by critics of legal education. It is not possible to discuss all the recent criticisms of legal education, but it is possible to examine a few of them on which legal history might offer some assistance.

One criticism is that law school's excessive, almost exclusive, focus on legal analysis tends to give students a very limited perspective, producing narrow legal specialists. If legal history is taught so as to attempt a synthesis between law and the non-legal elements of society—politics, economics, intellectual trends—it can have a beneficial broadening effect on students' mental horizons, and can help to combat the phenomenon of students becoming so accustomed to analysis that they give up any attempt at synthesis.[78] This is not to say that law school should endeavor to provide a liberal education, but rather (and more modestly) to say that legal history can help to indicate the relation between law and other aspects of society.

Legal education has also been reproached for failing to examine questions of justice and of the social effect of laws and legal rules. "Students learn, as they read and discuss the 'issues' in the cases, that questions of social justice are largely irrelevant to the study or the practice of law. This is beyond peradventure one of the most notable, if dubious, achievements of American legal education."[79] Another scholar (who left law school after one year to study history) wrote poignantly of his early experiences in law school:

> Never was there a whisper of a suggestion that law related to choice, to history, to society, to justice. . . . The experience was paradoxical: the more I learned to think like a lawyer the less I wanted to become one. Legal education was designed to evade precisely those questions which, in my naivete, I believed that lawyers should contemplate: Is it just? Is it fair? If not, how can law be utilized to make it so?[80]

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78. Fuller, *supra* note 37, at 578-79.

79. Halpern, *supra* note 30, at 387. Halpern believes that questions of the social justice of laws ought to be central, not peripheral, to legal study. *Id.* at 392.

80. JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA, at viii, ix (1976). It is ironic that, with the publication of this book and his later work, JUSTICE WITHOUT LAW? (1983), Auerbach has achieved a certain reputation and status in legal circles.

See also Auerbach, *What Has the Teaching of Law to do with Justice?*, 53 N.Y.U. L. REV. 457 (1978). In this article, Auerbach says, "[L]egal education and professional training have been largely divorced from the social impact of lawyering. This is, however, a specious separation that should have lost its power to persuade." *Id.* at 474.

Roger Crampton, a past president of the A.A.L.S., has made similar observations, urging that law students should be given more exposure to social issues. He condemns the tendency to gloss over questions of the justice of law, stating: "[T]he quest for justice, or some attempt to define various conceptions of justice, does not lie at the head or heart of law school but in appendages tacked on as upperclass, elective offerings."[81]

The question, then, is whether legal history can help remedy this deficiency in legal education. Perhaps it can if legal history is taught with an emphasis on examining selected legal rules in the past, assessing their social cost, and asking whether they were just. But one wonders if legal history is superior to other law school courses in probing the social justice of law and legal rules. It seems that these issues could be examined, at least to some extent, in a traditional course such as Torts by questioning, for example, the justice of strict products liability. Legal history, however, might be able to spend more time than other courses studying the social consequences of legal rules and practices, since it can examine the impact of various laws on society. One drawback is that legal history usually deals with *historical* rules and practices, not those of the present. Its analysis of the justice of rules may, therefore, be largely limited to the justice of past legal rules. When discussing issues of justice, it is important to note the distinction between the justice of an individual rule, such as strict liability, and the justice of the entire legal system. Since legal history can look at the legal system as a whole at a given point in time, perhaps the issue of what constitutes a just legal system can be dealt with more easily in a legal history class than in a Torts class. Most legal history teachers, though, would, with some justification, defer this issue to a course in Jurisprudence.

Legal history, then, can help improve legal education. It can delineate connections between law and other aspects of society, connections that case analysis tends to wear away. In doing so, it may help counteract the corrosive and cynical effects of continual

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81. Crampton, *The Current State of the Law Curriculum*, 32 J. LEGAL EDUC. 321, 329, 331 (1982).

See also Horwitz, *Are Law Schools Fifty Years Out of Date?*, 54 U.M.K.C. L. REV. 385, 392 (1986), where Horwitz states that an implicit message in law classes often is that the law should be sharply distinguished from questions of equity and justice.

On this topic, *see also* Hellman, *Considering the Future of Legal Education: Law Schools and Social Justice*, 29 J. LEGAL EDUC. 170 (1978).

analysis. And it can draw some attention to issues of justice, although it cannot do this alone: teachers in other courses must endeavor to make students aware of these issues if this defect in legal education is to be remedied.

Legal History's Value: Some Reservations?

At this point, the reader probably will be tempted to ask: If a course in legal history can actually accomplish all that our discussion has claimed? We have said that it can deepen our knowledge and understanding of the legal system in a number of respects. It can illuminate some of the enduring forces that exist in the law, and it can combat the a-historical instrumentalism in legal education by revealing the past as influential in present law-making. It shows what law has been, its successes and failures, and thus makes us more knowledgeable about the present. It provides a different perspective from which to view the legal system; it demonstrates the historical contingency of law and the fact that legal change is inevitable. Also, it points out the continual tension between stability and change, and it indicates the influence of non-legal factors on law. In addition, by showing the origins of problems and some limits on the possible solutions and by furnishing some useful ideas and principles, it can help us resolve legal conflicts. It can also provide the legal profession with a history and a tradition.

If all of these claims are true, why have law schools usually accorded legal history a minor role in legal education? They should, it would seem, have made the course a centerpiece of the curriculum. There are several reasons why law schools have not done so, and an assessment of the importance of legal history is incomplete without an examination of these reasons.

The above claims for the value of legal history only set forth the *potential* benefits; it is not asserted that any legal history course does in fact offer all of these advantages. Even under ideal circumstances, no single legal history course could. The teacher, in choosing the course materials, coverage, and approach, will inevitably stress certain aspects of legal history and downplay others. Nor is it asserted that all the students in a legal history course will receive the benefits described. Some students, by reason of temperament, or lack of interest or motivation, will not obtain as much from the course as others.

Furthermore, even if all the benefits mentioned could be realized, they are nonetheless of a kind that is often undervalued, consisting largely of intangible improvements in students' understandings of the

nature and working of the legal system. This knowledge will not be tested directly on the bar exam and is not of immediate application in legal practice.[82] Many law students and law professors fail to see these intangible benefits, and some law teachers seem to think that the purpose of a legal history course is simply to acquaint students with the law's past. Given these perceptions of legal history, it is not surprising that the subject often is deemed of minor importance.[83]

Another reason its value is frequently unrecognized is that many courses in legal history fail to develop the subject's potential benefits to any significant degree. The precise causes of this are difficult to pinpoint, but they would seem to consist mainly of either: (1) selection of materials or course coverage that insufficiently develop the deeper aspects of legal history; or (2) excessive emphasis, in class, on factual detail, and a failure to discuss broader questions— for example, the relationship between societal developments and legal change, or the long-term forces at work in both law and society. When these failings occur, and a legal history course falls far short of its potential, it only confirms the prevailing opinion that legal history is an inconsequential subject which deserves its peripheral place in curriculum.

III. Pedagogical Aspects of Legal History in Law Schools

Let us now consider some of the practical and pedagogical aspects of teaching legal history in law school. Assuming that the course belongs in the curriculum, two questions arise: (1) Should legal history be taught in a separate course or be integrated into other courses? and, (2) Should legal history be a mandatory first-year course or should it be an upper-class offering?

The answer to the first question is that legal history deserves a place in a separate course *and* in other courses, for reasons that have been alluded to already. Some legal history in a Torts course, for example, can enhance the students' appreciation of the present state of tort law by illustrating some of the major developments of its past.[84] However, these segments of legal history within another course

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82. Report, *supra* note 11. In responding to the 1973 questionnaire, discussed above, several legal history teachers noted that the legal history classes are often confronted with the pressure to have law school courses be practical. *Id.* at 58-59.

83. *Id.* at 58, where a respondent wrote that one of legal history's principal problems was the "resistance of law professors who see legal history as irrelevant and of secondary importance."

84. For an example of one possible use of legal history in a Property course, *see* Alexander, *History as Ideology in the Basic Property Course*, 36 J. Legal Educ. 381 (1986).

usually can be no more than brief digressions, given the amount of other material to be covered. Therefore, if legal history is to impart the benefits discussed above, there needs to be a separate course.

The second question is: Should this be a first-year course or an upper-level course? Even though it is likely to prove difficult for legal history to secure a place in the first-year curriculum at most law schools[85] (given the vigorous competition for first-year slots), there are compelling reasons for teaching it in the first year. One is that the history of a body of knowledge should come early in the learning process, not only to make students aware of the notable events and developments of the past, but also to allow them to place the knowledge they acquire later from individual courses in its proper position in the development of each area of law. And, as mentioned earlier, any field of study is understood more easily and more deeply when it is preceded by some knowledge of its history.

Second, putting legal history in the first year sends an implicit message to students that its subject matter and educational value are considered indispensable, that the study of the legal system as a whole, its history, and its relation to non-legal influences, are essential to legal education. The first-year course in legal history should be mandatory, as most first-year courses are, to give students the several benefits of legal history. All students should be shown, for example, the influence of societal forces on law, and the effect of long-term legal processes and trends. For these reasons, legal history should be a mandatory first-year subject.[86]

Other pedagogical issues that deserve consideration are the *content* of a legal history course and the merits of different general approaches to teaching it. Of course, content and approach are usually and properly left to the preferences of the teacher; and yet among those preferences it is possible to consider whether one type of content or approach may be superior to another. Beginning with content, we may ask: What area of legal history should be covered—Roman law, English legal history, American legal history, or a

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85. There are a few schools that currently offer a first-year course largely devoted to legal history, but these schools seem to constitute a distinct minority.

86. *See* Wythe Holt, *Now and Then: The Uncertain State of Nineteenth Century American Legal History* in ESSAYS IN NINETEENTH-CENTURY AMERICAN LEGAL HISTORY 4 (Wythe Holt ed., 1976). Holt argues that legal history should be taught in the first year of law school, "as it is of the first importance in giving students some grasp of the social and ethical context of judicial decision-making, legislative activity, and counseling." *Id.* at 30.

combination of these? If a law school has the luxury of being able to offer several legal history courses, a choice may be unnecessary: Roman, English, and American legal history could all be taught. But if a law school is only able to offer one legal history course, as is common, some choice is inevitable.

We noted earlier that the New Legal History tends to focus on more recent legal history, and we mentioned several reasons why this focus may be preferable. G. Edward White has explained some of the drawbacks of Roman and Medieval legal history as follows: the language and the concepts are largely unfamiliar to students, and the knowledge of the existing societal conditions of those periods is difficult for both teacher and student to master.[87] Woodard asserted that the traditional medieval focus of legal history probably will prove unsuccessful with students, since they are suspicious of and unsympathetic to topics so alien to their experience and so archaic. "[W]e may be certain that if history is ever to play an important part in training those many lawyers who do not possess an antecedent interest in things medieval, it must put much more emphasis on subjects less remote in time from current experience."[88] The fields of Roman and English legal history, however, do have their advocates,[89] but these areas have to contend with the obstacles that White and Woodard describe. To make legal history more popular,[90] Anglo-American or American legal history will probably be more effective.[91]

The ideal arrangement might be to have two legal history courses: one, an Anglo-American course, covering developments in England and America in the sixteenth, seventeenth, and eighteenth centuries; the second devoted to American legal history since 1800.[92] To attempt to cover, in one course, both of these periods, or both the Colonial

87. White, *supra* note 40, at 447.

88. Woodard, *supra* note 10, at 108. Woodard goes on to say that, "To do this is quite possible. It simply requires getting out from under the shadow of Maitland and examining other ages of the past as intelligently as he did medieval England." *Id.*

89. *See, e.g.*, Barnes, *The Teaching of English Legal History in America: Past, Present, and Future*, 26 J. LEGAL EDUC. 326 (1974).

90. If, indeed, this is a goal. It is quite plausible to argue that popularity with students should not be an objective of a legal history course.

91. *See* Murphy, *supra* note 5, at 83: "For the beginning student in legal history . . . the best content revolves about the study of Anglo-American law. This concerns him immediately; this features terminology with which he is already familiar; this can be understood with knowledge he already possesses. In short, it is no stranger to him on first appearance."

92. White, *supra* note 40, at 448.

and Post-Revolutionary eras in America, could result in a survey format too superficial to do justice to any particular period.

If we accept the view of White and Woodard that a course in legal history should have a more recent focus, then covering the period in American legal history from the Revolutionary War to the early twentieth century seems desirable.[93] Although the Colonial period enormously influenced America's legal development, it is a somewhat remote era; treating the post-Revolutionary period, since it is more recent, is likely to prove more helpful to students in understanding the present legal system. The nineteenth century is near enough in time for a non-specialist, such as a law student, to understand.[94] In addition, it has the advantage of being sufficiently different from contemporary society to afford a suggestive basis for comparison and of being a period that witnessed momentous "extra-legal developments", such as the growth of railroads and other innovations in technology and industry, that were "reflected in the state of legal institutions and legal doctrine" in the nineteenth century.[95] And the variety of transformations in American law itself during this period—for example, the growth of corporation law and the changes in tort liability rules—make it a most instructive era to cover in class. The reason that the early twentieth century is a suitable place to end the course is that, after this time, the law began to take on a relatively modern form. Many of the cases, statutes, and legal issues appearing after this period are quite familiar and part of our present legal culture. While there is certainly some value in the study of more recent legal developments, the fact that legal history should offer a different perspective than that of the present legal system, and the need to be selective in course coverage to permit detailed examination of a period, suggest that the course should not attempt to encompass more recent twentieth century legal history.

Once the period of legal history to be covered has been chosen, there remains the question of the appropriate approach for the course. We have alluded to three general approaches to legal history: institutional, doctrinal, and cultural. These approaches can be used individually or in combination. The institutional approach to legal history is the traditional one a study of the development of major legal institutions and concepts. The doctrinal approach stresses the

93. White, *id.*, suggests this period.
94. Woodard, *supra* note 10, at 119.
95. White, *supra* note 40, at 449.

history of legal doctrine and rules, especially their origins and development. The cultural approach has a broader goal to examine the relationship between law and its social and historical context.[96] The New Legal History, as we have seen, inclines toward the cultural approach; the exclusively institutional and doctrinal approaches are generally considered outmoded. But the New Legal History also devotes considerable attention to the development of common law doctrine, often with the aim of elaborating the non-legal forces that influenced or caused the changes in legal doctrine. This shows one way that the cultural and doctrinal approaches can be combined.

The institutional and doctrinal approaches have shortcomings that have contributed to the relative popularity of the cultural approach. The institutional approach, particularly in its traditional form of the development of medieval English legal institutions, has been described as too remote for students, and lacking relevance to present concerns.[97] Even if the institutional approach were applied to nineteenth century American legal history, it could still be faulted for being too narrowly technical, too specialized,[98] because it remains within the strictly legal materials, ignoring the social or cultural influences on law. The doctrinal approach has been similarly criticized for excluding those influences.[99] The cultural approach, with its attention to the political, economic, intellectual, social, and moral factors that affect law and legal institutions, has been praised for connecting law with societal developments, and advocated as essential for at least part of a legal history course.[100] Therefore, a legal history course should include the cultural approach and examine the societal forces that influence law and the social consequences of the law.[101]

CONCLUSION

Our assessment of legal history's place in the law school curriculum should make some mention of the relative importance of legal history

96. *Id.* at 445.
97. *See* Woodard, *supra* note 10, at 108.
98. White, *supra* note 40, at 445.
99. Friedman, *supra* note 6, at 563-64.
100. Smith, *The Teaching of Legal History—Materials, Objectives, Problems, and Directions*, 26 J. LEGAL EDUC. 318, 324 (1974).
101. *See* LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW (1957): "The ultimate question of legal history is, how does the law of a given time and place meaningfully connect with the society of which it is a part?" *Id.* at 303.

compared to other subjects. We have discussed the potential benefits of legal history and explained why it deserves a significant place in legal education. However, it must be observed that if legal history is valuable, so are other courses that might be called non-vocational, that is, courses whose focus is not primarily on bodies of legal doctrine that can or will be used in practice. This category would include such courses as Comparative Law and Jurisprudence. They can offer some of the same benefits as legal history, and it has not been the intention of this article to claim that legal history is superior to these courses.

Nor has it been the intention of this article to denigrate or belittle the courses that traditionally form the core of legal education. Law schools have a responsibility to instruct students in subjects that constitute the basis of our law; schools can hardly claim to provide a legal education if they do not. The core courses are indispensable and are likely to remain so. However, there is a need to balance legal education, to supplement the traditional doctrinal courses with courses such as legal history.

Legal history offers a number of benefits that are well-suited to supplement doctrinal instruction: it can serve to deepen and enrich students' understandings of the current legal system through the perspective it affords and through its illumination of some of the long term historical forces that are still influential. Legal history may also help address some of the recent complaints about legal education. Its detractors have not succeeded in demonstrating that legal history is too remote or too different from the present legal system to deserve an important place in the curriculum.

We have examined some reasons in favor of teaching legal history by covering more recent periods and by using an approach that attempts to relate law to developments in other areas of society. Yet if every law school were to teach legal history this way, with identical coverage and approach, it would be a loss to the diversity of American legal education. English and American Colonial legal history are legitimate and valuable fields, and they, too, can contribute to legal education. This article has simply attempted to point out some advantages of covering more recent periods in legal history.

In reflecting upon the role legal history can play in legal education, we must be careful not to demand too much of the course. As one perspicacious observer has written: "[L]egal history in a law school curriculum is a fragile, delicate vehicle for broadening the horizons of law students. If it carries too heavy a burden of expectations . . . a legal history course may break down under the weight of such an

ambitious goal."[102] Let us endeavor to be realistic in our expectations of legal history's potential benefits.

There is one worthwhile pedagogical recommendation that is well within realistic expectations: that legal history be taught in a way that shows it to be more than a search for points and authorities to help win lawsuits. "Constant guard must be maintained . . . against those who look upon legal history as nothing but a stock of weapons to be used in current battles, to support one side or the other."[103] This view of legal history is pernicious, not only because it reduces the past to mere fodder for present disputes, but also because it ignores the value of legal history for understanding the present legal system.

Legal history, we have seen, has changed from the exclusively institutional and doctrinal approaches to encompass the larger currents of law and society, a change exemplified by the New Legal History. It is interesting to speculate on the reasons for this. Perhaps it simply represents a shift in the professionally shared imperatives of the community of legal historians, which imperatives may emerge or disappear by some mysterious process that seems incapable of precise or rigorous analysis.[104]

Whatever the reason, it is clear that legal history has, in the last two decades, gained considerable prominence and popularity. Of American legal history, Lawrence Friedman has written, "The field is no longer immature. American legal history has a secure place in historical study, and the law school world takes it seriously at last."[105] Legal education would be well served if law schools were to recognize the potential benefits of the course and accord legal history a serious place in the curriculum.

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102. Corr, *supra* note 28, at 570.

103. Murphy, *supra* note 5, at 85.

104. White, *Truth and Interpretation in Legal History*, 79 MICH. L. REV. 594, 605 (1981).

105. Friedman, *supra* note 6, at 576.