



## REFLECTION

**Reading Early Colonial Legal History as  
Bob Gordon's Student**

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Commenting on Bob Gordon's early work is a humbling experience that might compare to a composer commenting on early Beethoven or a painter on early Michelangelo. The eloquence of Gordon's writing is unparalleled. It is an absolute delight to read and enjoy every turn of phrase. Gordon perfectly describes what others can only grasp at.

My comments focus on the first chapter of *Taming the Past*, which consists of a classic essay published in 1975 describing the dominant body of legal history as being overly "internal" in its perspective.<sup>1</sup> As Gordon highlighted, legal historians often presented the legal order as operating autonomously, in isolation from major social and economic events as well as from societal power dynamics, and were overly focused on "courts, equitable maxims, [and] motions for summary judgment."<sup>2</sup> The chapter presents a wonderful critique of an earlier historiography.

Much of the chapter appraises the state of colonial legal history, a main interest of the field of legal history at the time. Rather than analyzing the most extreme of the scholars taking the internal view, these comments focus on the work of a number of legal historians whom Gordon identifies as writing with an awareness that law was not primarily shaped by "the logic of an internal dynamic, independently of surrounding political, social, and economic conditions," but whose work, even so, "did not bring about any very substantial redefinition of the field of legal history."<sup>3</sup>

Herbert Johnson's historiographical essay, cited by Gordon, provides a useful frame for understanding the large questions motivating the legal

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1. ROBERT W. GORDON, *The Common Law Tradition in American Legal Historiography*, in *TAMING THE PAST: ESSAYS ON LAW IN HISTORY AND HISTORY IN LAW* 17, 17 (2017).

2. *See id.* at 19.

3. *See id.* at 32.

historians who were among the first to take an external view.<sup>4</sup> Johnson describes the field of legal history as divided according to an ideological debate between Frederick Jackson Turner and Perry Miller.<sup>5</sup> Turner's frontier thesis put forward the idea that democracy had its origins in the egalitarianism, the lack of high culture, and the violence of the frontier. Paul Samuel Reinsch, who followed Turner in his account of legal history, characterized the colonists as codifying law and as adopting "the essential elements of law for the guidance of the colonists who had taken up their abode in a wilderness without books or facilities for legal study" and who "establish[ed] rules dictated by their special polity or by the conditions of primitive and simple life in which they found themselves."<sup>6</sup> As Gordon and Johnson emphasize, Reinsch's conclusions were discredited, but Johnson views the Turnerian tradition in far more expansive terms and as having far greater impact on the field.<sup>7</sup> To Johnson, Turnerian scholarship recognized strong geographical factors, density of population, landholding patterns, and family structure as directly affecting law, in many ways anticipating more modern law and society approaches.<sup>8</sup>

The Turnerian approach might be said to be in conflict with a competing school, reflected in George Lee Haskins's *Law and Authority in Early Massachusetts*.<sup>9</sup> Haskins sees himself as a follower of Perry Miller.<sup>10</sup> In contrast to the frontier thesis, to Haskins, the colonial legal tradition began in religious, intellectual thought carried out by highly intelligent educated elites, people who were "persons of wealth and ability, brought together by the ties of marriage and friendship and by a sense of common purpose."<sup>11</sup> The book describes the colonial legal system, in its every detail, as the perfect

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4. Herbert Alan Johnson, *American Colonial Legal History: A Historiographical Interpretation*, in PERSPECTIVES ON EARLY AMERICAN HISTORY: ESSAYS IN HONOR OF RICHARD B. MORRIS 250 (Alden T. Vaughan & George Athan Billias eds., 1973); see also GORDON, *supra* note 1, at 20 n.6 (citing Johnson's essay).
  5. See Johnson, *supra* note 4, at 251, 273.
  6. Paul Samuel Reinsch, *The English Common Law in the Early American Colonies*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 367, 410, 414 (Ass'n of Am. Law Sch. ed., 1907).
  7. See GORDON, *supra* note 1, at 29-30, 30 n.34; Johnson, *supra* note 4, at 251-52.
  8. See Johnson, *supra* note 4, at 251-56.
  9. GEORGE LEE HASKINS, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS: A STUDY IN TRADITION AND DESIGN* (1960).
  10. See, e.g., *id.* at ix (referring to the early decades of the Massachusetts Bay Colony as "the formative years during which, under the pervasive influence of Puritan doctrine, and with virtually no outside interference, the structure of the civil government took shape and was completed"). This reference alludes to, among others, PERRY MILLER, *THE NEW ENGLAND MIND: THE SEVENTEENTH CENTURY* (1939), and PERRY MILLER, *ERRAND INTO THE WILDERNESS* (1956).
  11. See HASKINS, *supra* note 9, at 12.

manifestation of the elite Puritan leaders' divine mission.<sup>12</sup> Democracy sprung out of new immigrants' and a new generation's rebellion against the Puritan leaders' authoritarianism, leading to codification as a buffer against religious repression.

Reading these works after the passage of many decades, and after the field has been transformed by the tremendous impact of the scholarship of Gordon and other great scholars of our time, one becomes aware of a paradox in the critique of internal history. In 1975, Gordon suggested that the failure of people like Haskins "to develop an extensive external historiography" did not "stem from pragmatic thinking" but "from loss of nerve in the face of the implications of that thinking."<sup>13</sup> From the perspective of 2018, the greatest weakness of the works appears to be not a loss of nerve but that the scholars were operating according to ideological and political values that have subsequently been rejected. The works of Haskins that fall more closely to the "internal" typology might actually enjoy greater longevity because they include less jarring editorialization and more doctrinal "facts" that are still valuable.<sup>14</sup>

Haskins admits that the Puritan leaders were authoritarian, but he defends their worldview and their actions as consistent with an admirable goal of social stability. In one section Haskins seemingly endorses Puritan punishment and the social hierarchy. Under the Body of Liberties a "true gentleman" was generally not to be punished by whipping, unlike other members of the society.<sup>15</sup> Haskins provides some defense for the immunity of gentlemen when, in describing the "lower" class, Haskins notes that "[t]heir low standard of living tended to promote both criminality and civic irresponsibility."<sup>16</sup> Similarly, servants' "status and the degree of control exercised over them tended to encourage irresponsibility and criminality."<sup>17</sup> And again, with regard to servants in permanent bondage, Haskins states: "Most of them were household servants and farm hands, and, like bonded servants, they appear to have been prone to criminality."<sup>18</sup> Haskins's presumptions of criminality implicitly justify some degree of severity in the Puritan criminal code.

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12. *See id.* at 43-47.

13. *See GORDON, supra* note 1, at 35.

14. For two examples, see George L. Haskins, *The Beginnings of Partible Inheritance in the American Colonies*, 51 YALE L.J. 1280 (1942); and George L. Haskins, *The Beginnings of the Recording System in Massachusetts*, 21 B.U. L. REV. 281 (1941).

15. *See HASKINS, supra* note 9, at 99 (quoting MASS. BODY OF LIBERTIES of 1641, § 43).

16. *See id.* at 100.

17. *See id.* at 100-01.

18. *See id.*

In another notable example, Haskins writes that “the death penalty for adultery reflected not only biblical influence but the Puritan view that the family was the cornerstone of church and commonwealth.”<sup>19</sup> From a modern view, the death penalty seems a rather severe way to support families.

To offer a third example, Haskins's dogged insistence on interpreting all colonial law through the lens of a peaceable kingdom-like approach informs his analysis of Puritan debtor-creditor law. He notes that much of the law was pro-creditor, even making land attachable for debts.<sup>20</sup> Yet he also mentions that in the downturn of 1640, a law was enacted allowing debtors to repay their debts in goods.<sup>21</sup> Without inquiry into the possible economic inequalities at play, Haskins concludes that the debtor-creditor law reflected “the colonists' view of their mission as an undertaking that required the effort and cooperation of the whole community, committed to bearing one another's burdens.”<sup>22</sup>

Haskins later emphasizes that the Puritans did not actually impose their most draconian punishments, but the point is that Haskins's work fails to incorporate values accepted in the civil rights era that throw into doubt earlier justifications of class, race, and gender subjugation. By way of contrast, E.P. Thompson's analysis, in *Whigs and Hunters*, of England's late eighteenth century Black Act, which imposed the death penalty for certain property offenses, reveals the law to reflect deep power imbalances within the society and a desire for social control on the part of the elites.<sup>23</sup> Haskins is a far cry from Thompson and thus jarring to read. This relates to Gordon's essay in the following way: From the vantage point of 2018, the more narrow, doctrinally oriented scholarship of Haskins and the internalists may enjoy greater longevity due to the absence of commentary.

Which leads me to think that the internal-external divide may today—although not when Gordon wrote the chapter—ultimately be less important than a shared set of values, and particularly the legacy of the civil rights movement and that of scholars taking egalitarianism seriously. It is striking that as Haskins was writing, David Brion Davis was claiming a serious intellectual tradition for the study of slavery.<sup>24</sup> Miller's greatest student, Edmund Morgan, shattered existing conceptions of colonial society and

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19. *Id.* at 149.

20. *See id.* at 215-17.

21. *See id.* at 215, 218.

22. *Id.* at 219.

23. *See generally* E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* (1975).

24. *See, e.g.*, DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN WESTERN CULTURE*, at vii-viii (1966).

colonial legal history in *American Slavery, American Freedom*.<sup>25</sup> Their works reflect more modern values and are still foundational to the field of history.

The field of legal history has flourished since the 1970s because of the people who mentored Gordon and then because of Gordon himself. Gordon has a truly brilliant mind. Part of the brilliance stems from his sensitivity to details, nuances, and subtleties that escape even the most esteemed scholars. Gordon examines historical evidence as well as current scholarship with the bent of an anthropologist. He absorbs massive quantities of information and perfectly contextualizes the information with an understanding of the authors' assumptions, predispositions, and cultural frames. Works like *Critical Legal Histories* and *Historicism in Legal Scholarship* utterly transformed the field of legal history by laying bare the assumptions underlying the foundational works within legal history and related disciplines.<sup>26</sup>

In *Critical Legal Histories*, the dominant assumption Gordon critiques is functionalism, the idea that law and society are harmoniously intertwined in a process of development.<sup>27</sup> As Gordon explains, functionalism assumes that law responds to the inherent needs of a society.<sup>28</sup> Courts and legislatures fulfill an institutional role of ensuring that the law keeps pace with societal transformation.<sup>29</sup> Legal evolution occurs in response to changing social conditions.<sup>30</sup>

To a scholar writing legal history, a functional account is an easy way of dealing with the thorny issue of causation. Describing law and legal evolution as responses to societal needs is an easy crutch. Far harder is what Gordon seeks: to describe legal change through the lens of actual agents of change and their interests and to expose the interests served by legal rules and legal evolution.<sup>31</sup> Gordon's critique of functionalism is a call for historians to reach a higher plane of nuance, to focus more readily on individuals as actors in history with complex motivations, to examine more carefully who shapes law, and to understand law's social and economic effects.

Gordon's prowess is in the details. His work is riveting because each sentence, each turn of phrase, and each example from the sources holds a powerful gem of information within a strikingly brilliant manner of

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25. EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* (1975).

26. Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984) [hereinafter Gordon, *Critical Legal Histories*]; Robert W. Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017 (1981).

27. See Gordon, *Critical Legal Histories*, *supra* note 26, at 58-61.

28. See *id.* at 63-64.

29. See *id.* at 64-65.

30. See *id.*

31. See *id.* at 69-71.

expression. His prose exhibits an unmatched clarity of thought and command of language. This clarity, combined with his uncanny sensitivity and analytic rigor, makes his work timeless. He has truly written for the ages. Some of my favorite works in Gordon's scholarship are review essays such as *E.P. Thompson's Legacies* and *Hayek and Cooter on Custom and Reason*.<sup>32</sup> Gordon is always pitch-perfect in his ability to describe bodies of scholarship, their importance, and the animating questions that propel them forward. These works also reveal his preference for historical scholarship grounded in detail and focused on individuals as agents of change.

Gordon's own historical works are triumphant accomplishments. His methodology is as rigorous as it gets. His ability to present analytically cogent descriptions of highly complex people and events is unparalleled. *Paradoxical Property* provides the best description of the complex interface between property law and the industrializing economy of the eighteenth century, debunking the conception of absolute dominion in property law in the process.<sup>33</sup> His broader project on the history of the legal profession is already one of the great classics in legal history. His knowledge of the field is boundless and his writing masterful. Legal history simply does not get any better than at the hands of Bob Gordon.

But to his credit, Gordon has gone furthest in entirely transforming the field of legal history by his unfailingly generous mentoring of a generation of students. At Yale, Gordon spent hours every week talking to students about the students' interests, encouraging students to take new paths, allowing them the freedom to hunt for gems both within thick fields such as constitutional law and within thinner fields. Gordon is the best-read person I have ever met and therefore serves as an encyclopedic resource on practically any topic. Every one of us who became close to Gordon was inspired by him and revered him as a scholar and mentor. His sensitivity to nuance pushed us to be far better scholars than we would have been without his discerning gaze. Gordon showed us the way to be free of older traditional ideas and, in a defining moment for the field of legal history, taught us to ask our own questions. In one of the great contingencies of the legal academy, Gordon's inspiring presence and mentorship has been central to the turn toward legal history that is so apparent in the upper tier of law schools today.

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32. Robert W. Gordon, Tribute, *E.P. Thompson's Legacies*, 82 GEO. L.J. 2005 (1994); Robert W. Gordon, *Hayek and Cooter on Custom and Reason*, 23 SW. U.L. REV. 453 (1994).

33. See Robert W. Gordon, *Paradoxical Property*, in EARLY MODERN CONCEPTIONS OF PROPERTY 95, 95-96, 107-08 (John Brewer & Susan Staves eds., 1995).