



REFLECTION

The Diversity of the Common Law Tradition

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Bob Gordon's pathbreaking essay *The Common Law Tradition in American Legal Historiography*,¹ initially published in 1975,² was the first significant overview of the history of the field of U.S. legal history. In it, he defines the common law tradition as "the fictional continuity that each generation of common lawyers imposes, in its own fashion and for its own ends, on the development of judicial doctrine."³ Unsurprisingly, in an essay written as an introduction to a Festschrift in honor of J. Willard Hurst, Gordon emphasizes that the common law tradition examined the internal development of legal doctrine as an autonomous field of study, in great contrast to Hurst's pioneering shift to the study of "external legal history" as a way to understand the role of legal institutions in society.⁴ Gordon stresses that "the common law

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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 (2017).

2. See Robert W. Gordon, Essay, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW & SOC'Y REV. 9 (1975).

3. GORDON, *supra* note 1, at 24-25.

4. See ROBERT W. GORDON, *Social-Legal History's Pioneer: The Work of James Willard Hurst*, in TAMING THE PAST, *supra* note 1, at 77, 77.

tradition was a source of normative authority,” a way to rationalize current law and make it seem independent from social forces by documenting an unbroken connection to an ancient tradition.⁵ In the context of the title of the book we are celebrating, *Taming the Past*, he views it as one of the “strategies that lawyers use to tame the past in order to normalize the present.”⁶

In contrast to the constant ridicule of late nineteenth century U.S. legal scholarship largely initiated by Roscoe Pound in the decade before World War I and continued throughout the twentieth century,⁷ Gordon makes one of his most original and important contributions by identifying and treating with great respect the American legal scholars who from the 1870s through the 1890s adhered to the common law tradition while initiating the study of legal history in the United States.⁸ He maintains that these legal historians, like professional historians generally during this period, believed that societies continuously progress from the simple and primitive to the complex and civilized and that historians can help uncover laws governing this evolution by locating the origins of civilized societies and tracing developments to the present.⁹ Gordon convincingly observes that the value of the work by Americans Oliver Wendell Holmes, Melville Madison Bigelow, James Bradley Thayer, and James Barr Ames was underlined by the fact that F.W. Maitland, the great English legal historian, corresponded with them about their shared interests in the history of early English law.¹⁰ Gordon emphasizes that his critique of the assumptions of the common law tradition is not intended “to depreciate the achievement” of this first generation of American legal historians.¹¹ Rather, he bemoans that these assumptions persisted in U.S. law schools well after professional historians had repudiated them, particularly as manifested in simplistic “theories of a unilinear evolutionary development and of the Teutonic origins of Anglo-Saxon civilization.”¹²

My own reading of late nineteenth century American legal scholars, itself stimulated by Gordon’s essay, reveals that they had much more diverse views about the common law tradition than Gordon indicates. Legal historians of the common law, as well as the larger group of legal scholars who studied substantive areas of the common law without making original contributions to

5. See GORDON, *supra* note 1, at 24-25, 27, 42.

6. See ROBERT W. GORDON, *Introduction to TAMING THE PAST*, *supra* note 1, at 7.

7. See DAVID M. RABBAN, *LAW’S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY* 149, 448-51, 472, 524-26 (2013).

8. See GORDON, *supra* note 1, at 22-23.

9. See *id.*

10. *Id.* at 23.

11. *Id.*

12. *Id.*

legal history, took different positions on various themes Gordon identifies with the common law tradition.¹³ While virtually all focused on the internal evolution of the common law, many did not view it as a source of normative authority to “tame the past.”¹⁴ In these respects, they resembled Maitland, whose approach to legal history most modern legal scholars, including Gordon, praise as rejecting the common law tradition, in impressive contrast to Maitland’s predecessors and contemporaries.¹⁵

As Gordon maintains, late nineteenth century American legal scholars overwhelmingly sought to identify the origins of the common law and trace its evolution to the present.¹⁶ More specifically, like scholars in English and U.S. history and in the emerging field of political science, they endorsed the “Teutonic-germ theory,” which identified the Teutonic sources of democratic laws and institutions that subsequently developed in England and the United States.¹⁷ Yet many rejected other historiographical assumptions of the common law tradition as portrayed by Gordon and sometimes criticized English and European scholars for accepting them.¹⁸ They denied that laws governing legal evolution could be derived from historical study; they found that the course of legal history could be reactionary, discontinuous, and contingent; and they argued that current law need not be constrained by its evolution from past law.¹⁹ They often warned against the anachronistic assumption that resemblances between present and past law are evidence of influence and continuity.²⁰ Many studied the history of the common law to identify and eliminate dysfunctional survivals in current law, which Gordon recognizes as a “critical-historicist mode of argument.”²¹ Within the confines of this short Reflection, I will give a few examples.

Henry Adams, whom Gordon recognizes as initiating professional legal historiography in the United States,²² blamed the inferiority of English to German legal scholarship on the English adherence to the common law

13. See RABBAN, *supra* note 7, at 327-29, 339-40, 361-64, 514-16.

14. See *id.* at 328-29, 380.

15. See *id.* at 383-84, 401-03; see also GORDON, *supra* note 1, at 24, 34; ROBERT W. GORDON, *The Past as Authority and as Social Critic: Stabilizing and Destabilizing Functions of History in Legal Argument*, in TAMING THE PAST, *supra* note 1, at 282, 288 [hereinafter GORDON, *The Past as Authority*].

16. See GORDON, *supra* note 1, at 22.

17. See RABBAN, *supra* note 7, at 69, 90, 330, 334.

18. See *id.* at 328-29.

19. See *id.* at 197-98, 212, 271, 280, 327, 334, 338.

20. See *id.* at 334, 337, 516.

21. See GORDON, *The Past as Authority*, *supra* note 15, at 288.

22. See GORDON, *supra* note 1, at 22.

tradition. “The whole fabric of the common law,” Adams wrote, “rests on a quantity of assumptions which as history are destitute of any sound basis of fact, and these assumptions have decisively influenced the ideas even of those English historians who, technically speaking, knew no law.”²³ Adams believed that the assumptions of the common law tradition, like the prior religious assumptions of medieval monks, thwarted the production of scientific history that met scholarly standards.²⁴ Challenging Henry Maine, Adams also expressed skepticism “about the ‘mania’ for theories that assumed all societies passed through fixed stages of development.”²⁵

Bigelow described the history of the common law in England since the Anglo-Norman period as an unfortunate decline from higher standards of justice. The loss of the right of the king’s chancellor to issue new writs, he argued, produced “the endless train of subtleties reaching down to the present day, which have so often resulted in the perversion of justice,” and prompted “centuries of constant and deserved reproach” to English law.²⁶ He also maintained that the resolution of the dispute “between King Henry II and Thomas Becket in the middle of the twelfth century” about “the respective roles of church and state” represented “the defeat of an emerging and healthy collectivism by [a] ‘self-interested individualism’ . . . that had devastating and continuing consequences for English law and society.”²⁷ Highlighting the contingency of legal history, Bigelow asserted that reasonable compromises on both sides of the dispute could have avoided this disastrous result.²⁸ Another eminent late nineteenth century American legal scholar, William Gardiner Hammond, “urg[ed] scholars to focus on ‘the genealogy of legal rules and institutions’” but repeatedly stated that a “genetic relation” should not be inferred from resemblance.²⁹ “Although he acknowledged that Anglo-Saxon institutions had their ‘counterparts’ in the New England town meeting, he maintained that there is ‘no historical connection between them’” and that

23. See RABBAN, *supra* note 7, at 161 (quoting Book Review, 114 N. AM. REV. 196, 199 (1872)).

24. *See id.*

25. *See id.* at 166 (quoting Book Review, 120 N. AM. REV. 432, 437 (1875)).

26. *See id.* at 197-98 (quoting MELVILLE MADISON BIGELOW, *PLACITA ANGLO-NORMANNICA: LAW CASES FROM WILLIAM I TO RICHARD I*, at xxx (Boston, Soule & Bugbee 1881)).

27. *Id.* at 212 (quoting Melville M. Bigelow, *Becket and the Law*, in *PAPERS ON THE LEGAL HISTORY OF GOVERNMENT: DIFFICULTIES FUNDAMENTAL AND ARTIFICIAL* 186, 186 (1920)).

28. *See id.* at 212-13.

29. *See id.* at 337 (first quoting William Gardiner Hammond, *Lectures on the History of the Common Law of England and America: Lecture 1*, at 47 (on file with author); then quoting 2 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 206 (William G. Hammond ed., San Francisco, Bancroft-Whitney Co. 1890)).

American historians who incorrectly claimed continuity had “greatly exaggerated” even their resemblances.³⁰

Bigelow and Thayer focused on the importance of eliminating dysfunctional survivals.³¹ Bigelow maintained that “the law is handicapped in all its branches with historical survivals” and “should be constantly laying aside the grave-clothes of a dead past.”³² “Even if laws were effective in the past,” he reasoned, “why when they no longer work should they ‘have a posthumous life, to trouble men living under other conditions?’”³³ “Past law should remain only ‘so long as it is adapted to’” the present.³⁴

Thayer believed that surviving rules that “had lost their original justifications . . . should be retained if they served useful functions in the present.”³⁵ But he concluded that many survivals were dysfunctional, a point he repeatedly made in his lengthy treatise on the law of evidence, as in highlighting the continuing “curse of hearsay.”³⁶ Thayer expressed his hope that his historical reconstruction of “the long and strange story of the development of the English jury and the immense influence it has had in shaping our law” would prompt his readers to recognize the importance “of certain much-needed reforms in the whole law of evidence and procedure.”³⁷

I agree with Gordon that Holmes, while sometimes identifying “perverted survival[s]” from past law that do not serve any contemporary purpose, more often limited himself to tracing the evolution of a rule from its origins to its current form and sometimes maintained that this evolution revealed the rule’s logic or teleology.³⁸ Holmes occasionally observed that the demonstration of survivals should prompt reconsideration of current law, and he sometimes explicitly advocated reform.³⁹ But because Holmes, unlike Thayer, believed that most survivals had become functional through the invention of new

30. *Id.* (quoting William Gardiner Hammond, Lecture III: The Anglo-Saxon Period 40 (on file with author)).

31. *See id.* at 209.

32. *Id.* at 209-10 (quoting Melville M. Bigelow, *Introduction to CENTRALIZATION AND THE LAW: SCIENTIFIC LEGAL EDUCATION* 1, 2 (1906)).

33. *Id.* at 209 (quoting Melville M. Bigelow, *A Scientific School of Legal Thought*, 17 GREEN BAG 1, 13 (1905)).

34. *See id.* at 209-10 (quoting Bigelow, *supra* note 32, at 2).

35. *Id.* at 283.

36. *See id.* at 280-81 (quoting JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 523 (Boston, Little, Brown & Co. 1898)).

37. *See id.* at 270 (quoting THAYER, *supra* note 36, at 3).

38. *See* ROBERT W. GORDON, *Holmes’s Common Law as Legal and Social Science*, in *TAMING THE PAST*, *supra* note 1, at 50, 61-63 (quoting *Commonwealth v. Cleary*, 51 N.E. 746, 746 (Mass. 1898)).

39. *See* RABBAN, *supra* note 7, at 240.

policies that replaced their original justifications, he thought it unnecessary to consider their revision.⁴⁰ In this important respect, Holmes, typically portrayed (even by Gordon) as more critical than his contemporaries, was tamer.⁴¹

Some Americans explicitly denied the normative authority of past law while distancing themselves from English and European scholars. Hammond “maintained that people should reflect self-consciously about whether ‘we ought to continue the custom or the precedent’ derived from the past, a point many writers in the [European] historical school had ‘overlooked.’”⁴² “Just because current law can be explained historically, [he] observed, does not mean that it should be treated uncritically.”⁴³ Francis Wharton, a well-known American treatise writer, believed that the historical school in England and Europe often expressed “an undue reverence for those institutions which a nation has outgrown.”⁴⁴ Emphasizing his own adherence to the fundamental evolutionary principles of the historical school, Wharton asserted that “[u]ndue reverence . . . is not a necessary incident” of this approach.⁴⁵ He reasoned that “the recognition of the continuousness of the existence of a nation, composed, as is necessarily the case, of elements constantly changing and developing, involves the corresponding and sympathetic change and development of the laws.”⁴⁶

The relationship between Maitland and the first generation of professional legal scholars in the United States reveals the extent to which they had similar views about the common law tradition and the study of legal history. Maitland not only respected the original scholarship of the Americans, as Gordon importantly observes; he also shared many of their historiographical assumptions. Like the Americans, he reflected the fundamental evolutionary perspectives that dominated historical thinking in the nineteenth century, often expressed through metaphors of organic growth.⁴⁷ Maitland repeatedly

40. *See id.* at 238-40.

41. *See id.* at 217, 261-62, 460-61, 465; *see also* GORDON, *supra* note 38, at 52-53, 59.

42. RABBAN, *supra* note 7, at 328 (quoting William G. Hammond, *On Precedent and the Doctrine of Authority in the Law*, in FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS, OR PRINCIPLES OF INTERPRETATION AND CONSTRUCTION IN LAW AND POLITICS* 312, 313 (William G. Hammond ed., St. Louis, F.H. Thomas & Co. 3d ed. 1880)).

43. *Id.*

44. *See id.* (quoting FRANCIS WHARTON, *COMMENTARIES ON LAW* § 59, at 94 (Philadelphia, Kay & Brother 1884)).

45. *See id.* (quoting WHARTON, *supra* note 44, § 59, at 94).

46. *Id.* at 328-29 (quoting WHARTON, *supra* note 44, § 59, at 94).

47. *See id.* at 401.

cited the “infancy,” “germ,” and “embryonic history” of subsequent law.⁴⁸ He “associated legal evolution with national and racial history,” stressing “the continuous history of ‘our own Teutonic race.’”⁴⁹ He emphasized that his monumental two-volume history of English law was “primarily concerned with the evolution of legal doctrine[s].”⁵⁰ Like the Americans, he referred to external influences on legal doctrine without elaborating them, explaining that “they do not come within the history of law.”⁵¹

Gordon observes that many legal historians, whatever their historiographical commitments, are motivated by the “sheer thrilling interest” of the subject,⁵² which, for Maitland and his American colleagues, largely consisted of the evolution of the common law.⁵³ Bigelow and Maitland exchanged views about the invention of writs, distress for rent arrear, and the liability of townships.⁵⁴ Ames and Maitland had a lengthy exchange of letters about Ames’s article *The Disseisin of Chattels*, which was stimulated by Maitland’s article *The Seisin of Chattels*.⁵⁵ These technical doctrines of early English common law are not particularly thrilling to most American legal historians today, but they were for the leading American and English legal historians of the late nineteenth century.

The similarities between Maitland and the Americans he admired and frequently cited underline that many late nineteenth century scholars, including those who did important original work on the history of the common law, shared some but far from all the historiographical assumptions Gordon attributes to the common law tradition. Of particular importance, many did not write about the history of the common law to “tame the past” by providing a source of “normative authority” for current law.⁵⁶ Writing evolutionary legal history about the history of common law doctrine tied to nation and race often coexisted with the attributes Gordon associates with critical historiography. The critical legal scholars of the 1970s and 1980s were

48. *Id.* (quoting 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 228 (Cambridge, Univ. Press 2d ed. 1898)).

49. *Id.* at 402 (quoting 2 POLLOCK & MAITLAND, *supra* note 48, at 448).

50. *See id.* at 394 (quoting 1 POLLOCK & MAITLAND, *supra* note 48, at 232).

51. *See id.* at 403 (quoting 1 POLLOCK & MAITLAND, *supra* note 48, at 80).

52. *See* ROBERT W. GORDON, *Taming the Past: Histories of Liberal Society in American Legal Thought*, in *TAMING THE PAST*, *supra* note 1, at 317, 354 (attributing the quote to Maitland).

53. *See* RABBAN, *supra* note 7, at 302-08, 399-402.

54. *See id.* at 204-05.

55. *See id.* at 302; *see also* J.B. Ames, *The Disseisin of Chattels*, 3 HARV. L. REV. 23 (1889); F.W. Maitland, *The Seisin of Chattels*, 1 LAW Q. REV. 324 (1885).

56. *Cf. supra* text accompanying notes 5-6.

not the first to take a historicist approach to the history of legal doctrine, though their frequent goal of demonstrating the contradictions and indeterminacy of doctrine is very different from the attempts by late nineteenth century scholars to provide an accurate narrative of the history of the common law.

Gordon's discussion of late nineteenth century American legal thought understandably covers only a few pages in a highly original essay that sketches the long history of American legal historiography from the late nineteenth century to the mid-twentieth century, largely as a backdrop for assessing the subsequent contributions of Hurst. Reflecting Gordon's characteristic virtues, the essay insightfully identifies and elegantly summarizes different schools of thought, displays intellectual generosity to other scholars, and opens new lines of inquiry. Like so many others, I have benefited from these virtues. His praise of the late nineteenth century American legal historians encouraged my own interest in reading them, which provided the basis for claiming more diversity in their thought than revealed in his summary. His provocative comments about "the abnormally long half-life" of their historiographical assumptions well into the twentieth century⁵⁷ should prompt further study of this insufficiently explored period in scholarship and teaching about legal history.

57. See GORDON, *supra* note 1, at 23.