



FINAL REMARKS
For Bob Gordon

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I'm thrilled to be able to be part of this celebration of the man I think we should all start calling the Notorious RWG.

I first encountered Bob Gordon—or rather, I first encountered his work—in 1994. I was on a gap year between college and law school, working in the appeals bureau of Robert Morgenthau's Manhattan District Attorney's Office and applying to a history Ph.D. program. The office had a law library, complete with all the major law reviews. I decided that during my lunch hours I would read legal history in the law reviews so that I'd be at least a little bit ready for the J.D./Ph.D. program on which I had decided to embark.

I paged through the big volumes, the way one used to in the Stone Age, looking for interesting articles. When I found one, I mined the footnotes for citations to others. In the law reviews that year, I met many of you who are here at this conference today: Willy Forbath, Tom Grey, Dirk Hartog, Laura Kalman, David Rabban, John Henry Schlegel, and others. I read some books, too: both volumes of Morton Horwitz's *The Transformation of American Law*¹ and Lawrence Friedman's big books.

In the middle of my reading I encountered two of Bob's essays: *Historicism in Legal Scholarship*² and *Critical Legal Histories*.³ These were different, or at least they seemed so. They were methods articles. And so I copied them, on the office copy machine, putting them onto long, legal-sized eight-and-a-half-by-fourteen-inch copy paper.

I took them home to a tiny Brooklyn studio apartment and devoured them, using a yellow highlighter and a red pen instead of a fork and knife. I was hardly a good judge of their quality. What did I know!? But I found them

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1. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

2. Robert W. Gordon, *Historicism in Legal Scholarship*, 90 *YALE L.J.* 1017 (1981).

3. Robert W. Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57 (1984).

magical, as if they held the keys to a secret kingdom I knew little about. They were erudite and never pompous; they were smart and never dull. Important things seemed to be at stake, but they were never self-righteous.

For the next decade I carried the marked-up copies of these two articles around with me, through every apartment and grad school crash pad. They became ratty and dog-eared. One year back in Brooklyn they fell victim to a flood that smudged the red pen and mixed it with the yellow highlighter, resulting in big orange splotches alternating with some kind of powerful mold. For a week, drying pages of *Critical Legal Histories* populated every available space.

Most of all, I carried the now nearly destroyed articles back to New Haven as a student, where lo and behold my good fortune: This Bob Gordon fellow had just joined the faculty! And not just him. In a short number of years, Yale had hired John Langbein, Reva Siegel, and James Whitman, too. It was a cohort that produced an extraordinary number of protégés in a relatively short period.

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In the Yale group assembled in the 1990s, Bob was my principal mentor, though I was lucky to get to work with all four of the main figures. Working with Bob shapes my engagement in the field to this day in almost every respect, from the ideas I produce to the classes I teach, from the students I advise to the colleagues with whom I work. I've long thought that anything good in what I've written is attributable to the influence of David Brion Davis, who was my undergraduate advisor, and to Bob. I guess you could say that the drying pages of *Critical Legal Histories* still populate virtually every surface of my professional life.

One lesson I learned from Bob comes back to me with particular frequency. It is a fact of life that even the best scholarship fails. Sometimes failure is more readily apparent in brilliant scholarship than in mediocre scholarship; the limits of the former can be all the more visible. Indeed, human reason doesn't yet seem capable of completely solving the knottiest problems of the humanities and the social sciences. That's probably for the best; it keeps things interesting. And let's face it—most work, certainly most of my work, is not operating anywhere close to the frontiers of brilliance. The scholarship we read and write is dreadfully flawed and partial.

I learned from Bob, however, to read with optimism—to read for what's good in a work rather than for what's bad. Most of our partial and limited efforts to account for meaning in the human experience have *some* value in them. There are things to be learned, ideas to be sparked in even the most unlikely of papers and books, and especially those too cluttered and chock-full of stuff to let a flawed theory get completely in the way. Bob taught us to read for the good stuff.

In truth, there was a period early on when I wondered whether he read my student papers at all. They would come back virtually without a mark. But with Bob, line edits weren't the point. The key moment was the conversation, usually in his office off the main hall of the law school building, where he would talk in the most wondrous ways about the topic of the paper in question. In sheer delight, while munching on a piece of candy and gesticulating wildly, Bob would toss off pearls of wisdom. A student left that office with a research agenda for the month or the year, and sometimes for an entire career.

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Bob's strategy of reading with optimism has a huge payoff for constructing a scholarly field, too. By aggregating the valuable bits and pieces from the flotsam and jetsam of the scholarly landscape, one can compile a powerful picture of the whole field. It is no coincidence, then, that Bob is as responsible as any scholar for legal history's theoretical frame.

What was most exciting to me about the oversized photocopies I carried around all those years, and what is still exciting, is that those pages promised to connect power and law without abandoning either in the historical analysis.

The principal mechanisms for this extraordinary trick are the two theoretical moves most identified with the theoretical frame Bob helped to erect: the idea that law is constitutive in history and the idea that its history is contingent.⁴ These two ideas now appear in dozens of books in the field,⁵ as well as in countless chapters and articles.⁶ They are the subject of conferences

4. See *id.* at 103-13 (constitutive); *id.* at 81-87 (contingent).

5. Any list would be underinclusive, as is this one. For examples of works addressing constitutivity, see TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* (2011); GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890-1940* (1994); ARIELA J. GROSS, *WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA* (2008); HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* (2000); SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* (2014); and MARY ZIEGLER, *AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE* (2015).

For examples of works addressing contingency, see RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007); AMALIA D. KESSLER, *INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800-1877* (2017); WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996); DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* (1997); CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* (1993); LAURA WEINRIB, *THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE* (2016); and JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* (2004).

6. This list, too, is underinclusive. For examples of works addressing constitutivity, see JOHN FABIAN WITT, *Elias Hill's Exodus: Exit and Voice in the Reconstruction Nation, in PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW* 85 (2007); and
footnote continued on next page

and symposia.⁷ Bob has no monopoly on such ideas, of course. But he has powerfully influenced their place in legal historical inquiry over the past three decades. Certainly they animate virtually everything I have written, beginning with *The Accidental Republic*,⁸ a book that took the contingency theme a little bit too literally and studied the accidental in the accidental. That book, I should say, is the result of pearls of wisdom dropped by Bob in the first office conversations I had with him beginning in the mid-1990s.

Constitutivity and contingency are big ideas. But they have a problem, too. At a certain level of social theory abstraction, these claims run into what we might call a field boundary problem.

Almost every social formation or domain of cultural production, it quickly turns out, is constitutive and endogenous, if studied closely enough. And almost every social formation, it turns out, is contingent.⁹ Thus, for example, the drumbeat of analogies to Kuhnian histories of science in Bob's theoretical essays.¹⁰ Those analogies are apt in Bob's work because at a certain level of social theory abstraction, the history of law and the history of science function almost identically. They are constitutive. They are contingent. So are the film industry, business schools, and sport fishing. Yada, yada, yada.

This is a problem for externalism more generally. As Bob's 1975 appreciation of J. Willard Hurst put it with respect to the legal realists, the move to externalisms posed grave risks because, among other things, it left them with

Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641 (2003).

For examples of works discussing contingency, see Stuart Banner, *Legal History and Legal Scholarship*, 76 WASH. U. L.Q. 37 (1998); Charles Barzun & Dan Priel, *Jurisprudence and (Its) History*, 101 VA. L. REV. 849 (2015); William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767; Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225 (2001); William J. Novak, *Constitutional Theology: The Revival of Whig History in American Public Law*, 2010 MICH. ST. L. REV. 623; James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941 (1997); Rebecca J. Scott, *Public Rights, Social Equality, and the Conceptual Roots of the Plessy Challenge*, 106 MICH. L. REV. 777 (2008); Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994); Christopher Tomlins, *After Critical Legal History: Scope, Scale, Structure*, 8 ANN. REV. L. & SOC. SCI. 31 (2012); John Fabian Witt, *Contingency, Immanence, and Inevitability in the Law of Accidents*, J. TORT L. (2007), <https://perma.cc/W533-CADT>.

7. E.g., Symposium, *The Critical Use of History*, 49 STAN. L. REV. 1021 (1997); Symposium on Gordon's "Critical Legal Histories," 37 LAW & SOC. INQUIRY 147 (2012).

8. WITT, *supra* note 5.

9. Cf., e.g., THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 4 (1962) ("An apparently arbitrary element, compounded of personal and historical accident, is always a formative ingredient of the beliefs espoused by a given scientific community at a given time.").

10. See, e.g., Gordon, *supra* note 2, at 1020 n.5; Robert W. Gordon, *Morton Horwitz and His Critics: A Conflict of Narratives*, 37 TULSA L. REV. 915, 925-26 (2002).

no principled way to resist the move from traditional legal materials into the vast and confusing world of the social.¹¹ Bob says of Roscoe Pound: He “venture[d] outside the law-box,” “did not like what he saw,” and “went back in and slammed the door.”¹² Only the eccentric Underhill Moore was true to his principles. Moore, the purest of the Yale realists, threw away all his law books in exchange for measuring tapes, stopwatches, and street plans to measure behavioral patterns.¹³

Most other realists, Bob says, had a failure of nerve. They couldn’t live with the consequences of their historicist principles. They abandoned the dangerous thrill of history’s subversiveness, sacrificing it for the reassuring certainty of a fantasy about an autonomous legal order with comfortably well-established boundaries.¹⁴

And so an interesting social theory question about the law is: What is distinctive to it? What is its particular social structure? What happens in the history of the specific domain of the law? What are its special patterns and formations? What marks it off from other special domains?

If we ask what is distinctive to the law as a domain of cultural production as compared to other such domains, I think the answer is likely to be something about the particular features of law as a social practice. Unlike, say, science, film, business schools, and sport fishing, the law’s constitutive oomph—the thing that gives law the authority to leave its imprint on the world—is rooted in its claims to legitimacy.

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Law’s legitimacy matters a lot to Bob’s work because it is connected to his theory of historicism’s disruptiveness.

Bob’s theoretical essays assert that the law’s legitimacy rests on a claim to autonomy from mere politics. But that claim, Bob contends, is false.¹⁵ In his most dangerous mode, the Notorious RWG wields history to reveal that law is not autonomous from the world it seeks to govern.¹⁶ So much for its supposed claim to legitimacy!

11. See Robert W. Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 *LAW & SOC’Y REV.* 9, 35-36 (1975).

12. *Id.* at 36.

13. See LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960*, at 18 (1986); Gordon, *supra* note 11, at 33; John Henry Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 *BUFF. L. REV.* 195, 200-01 (1980). See generally Underhill Moore & Charles C. Callahan, *Law and Learning Theory: A Study in Legal Control*, 53 *YALE L.J.* 1 (1943).

14. See Gordon, *supra* note 11, at 34.

15. See, e.g., Gordon, *supra* note 2, at 1019-24; Gordon, *supra* note 11, at 30-31.

16. See, e.g., Gordon, *supra* note 11, at 30-31.

This assertion was part of the excitement of Bob's critical legal histories: It was the exuberant leap from the cliff from which the realists had drawn back.

In truth, however, the law's legitimacy doesn't rest on so precipitous an account of the law's autonomy. If it did, the U.S. legal system would almost certainly teeter on the edge of collapse. Think of Jed Shugerman on the politics of judicial selection: The United States has had elected judges for nearly 200 years.¹⁷ Political scientists have shown us that electoral cycles drive judicial decisionmaking, even in ordinary humdrum cases.¹⁸ These facts have been awkward for the rule of law. But they have not caused a yawning crisis for its legitimacy.

I would put a historicist account of law's legitimacy a little bit differently. The law's legitimacy rests not on its autonomy alone, but on a complex set of social settlements in which enough people, enough of the time, agree to go along with legally determined outcomes.¹⁹ In these settlements, there seem to be a few elements that are very important to the law's claims to legitimacy: basic things such as prospectivity, generality, publicity, and consistency with basic reason.²⁰

These elements may seem to recapitulate the classic claims to neutrality and autonomy familiar in what Bob calls the "mandarin" legal materials.²¹ But they're not only that. In the work of the lawyer, these features of legality are basic tools of the trade. Invoking such basic principles is what we do when we engage in law as a social practice.

As tools in a trade or craft, these elements of legality are not autonomous. They are rooted in the institutions of a profession and its social practices. They are connected to its interests and to its history. They are social products. They have a politics, of course. But that's OK—or at least it is usually OK.

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Seen this way, history might not be as disruptive as Bob sometimes styles it. Historicism turns out to be a technology for destroying particularly

17. See JED HANDELSMAN SHUGERMAN, *THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* 4 (2012); see also James Whitman, *European Commission Savages US*, BALKINIZATION (Dec. 30, 2017, 1:56 PM), <https://perma.cc/CFV8-8JT6> (remarking on the deep politicization of U.S. judicial selection methods).

18. See, e.g., Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 255 (2004).

19. On the psychology of this process, see TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006).

20. I have in mind a very traditional thin account of legality such as the one presented in LON L. FULLER, *THE MORALITY OF LAW* (1964).

21. See, e.g., Gordon, *supra* note 3, at 120-21; Robert W. Gordon, "Critical Legal Histories Revisited": A Response, 37 LAW & SOC. INQUIRY 200, 208 (2012) (describing mandarin law as "elite doctrine" or "formal-official-level rules"). For more on the mandarin materials, see Susanna L. Blumenthal, *Of Mandarins, Legal Consciousness, and the Cultural Turn in US Legal History*, 37 LAW & SOC. INQUIRY 167 (2012).

tendentious accounts of the sources of law's legitimacy,²² but not for destroying all that is of value in the law—not even close.

And no one reading Bob's work sympathetically could really imagine that Bob would want to do such a thing. His work exudes a deep respect and admiration, even a love, for the kinds of humane projects human beings have been able to carry out in and through the law.

Which brings me to Bob's work on the legal profession. There is a suppressed connection between his theoretical essays and his histories of the profession. In his histories of the profession, little turns on the law's claims to autonomy. Instead, Bob excavates and cares for and puts to use the best tools of the trade—the traditions and norms and craft values that are at the core of the social settlements that lend law whatever legitimacy it has.²³

In this work, Bob is not leaping off any cliffs and revealing the law to be without legitimate foundations. He stands on firm ground. The reason, I think, is that his work on the legal profession holds some answers (largely implicit) to dilemmas and conundrums offered by the theoretical essays. In particular, the field seems to have boundaries after all: It is the study of those social formations whose legitimacy rests on the distinctive craft tools of the law. This is why Bob's work on the social theory of legal history and his work on the profession are of a piece, for the latter illuminates the structure of the former. The history of the law, for Bob, is the history of the tools of a craft, broadly construed.

What is most inspiring to me about Bob's approach is its characteristic combination of theoretical sophistication and humane values. I think that's what Bob means when he says, as I have heard him say, that he is the Crit you can take home to Mother. He is simultaneously uncompromising and decent. And that is a combination worth celebrating.

22. I would include in the category of tendentious accounts of the sources of the law's legitimacy the forms of jurisprudence bookending the twentieth century that aimed to insist on a sharp separation between politics and law: classical legal thought on one hand and Antonin Scalia's rule-based approach on the other.

23. For a sampling of Gordon's works, see Robert W. Gordon, *The Citizen Lawyer—A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169 (2009); Robert W. Gordon, Commentary, *A Collective Failure of Nerve: The Bar's Response to Kaye Scholer*, 23 LAW & SOC. INQUIRY 315 (1998); Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255 (1990); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988); Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185 (2003); Robert W. Gordon, Essay, *The Return of the Lawyer-Statesman?*, 69 STAN. L. REV. 1731 (2017).