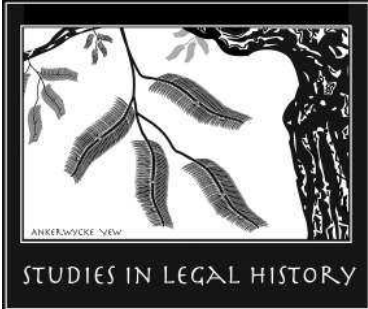


Taming the Past

Lawyers and judges often make arguments based on history – on the authority of precedent and original constitutional understandings. They argue both to preserve the inspirational, heroic past and to discard its darker pieces – such as feudalism and slavery, the tyranny of princes and priests, and the subordination of women. In doing so, lawyers tame the unruly, ugly, embarrassing elements of the past, smoothing them into reassuring tales of progress. In a series of essays and lectures written over forty years, Robert W. Gordon describes and analyses how lawyers approach the past and the strategies they use to recruit history for present use while erasing or keeping at bay its threatening or inconvenient aspects. Together, the corpus of work featured in *Taming the Past* offers an analysis of American law and society and its leading historians since 1900.

ROBERT W. GORDON is a Professor of Law at Stanford University and Chancellor Kent Professor of Law and Legal History, Emeritus at Yale University. He was President of the American Society for Legal History in 2000–02, has served on several bar association committees and task forces devoted to reform of the profession, and has previously taught at Buffalo, Wisconsin, Harvard and Oxford.

Cambridge University Press
 978-1-316-64400-3 — Taming the Past
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Taming the Past

Essays on Law in History and History in Law

ROBERT W. GORDON
Stanford University



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CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom
One Liberty Plaza, 20th Floor, New York, NY 10006, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
4843/24, 2nd Floor, Ansari Road, Daryaganj, Delhi – 110002, India
79 Anson Road, #06-04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

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www.cambridge.org

Information on this title: www.cambridge.org/9781107193239

DOI: 10.1017/9781108147668

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First published 2017

Printed in the United States of America by Sheridan Books, Inc.

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data

Names: Gordon, Robert W. (Robert Watson), 1941– author.

Title: Taming the past : essays on law in history and history in law / Robert W. Gordon, Stanford University

Description: New York : Cambridge University Press, 2017. | Series: Studies in legal history | Includes bibliographical references and index.

Identifiers: LCCN 2017003076 | ISBN 9781107193239 (hardback)

Subjects: LCSH: Law–United States–History. | BISAC: LAW / Legal History.

Classification: LCC KF352 .G67 2017 | DDC 349.73–dc23

LC record available at <https://lcn.loc.gov/2017003076>

ISBN 978-1-107-19323-9 Hardback

ISBN 978-1-316-64400-3 Paperback

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Cambridge University Press
978-1-316-64400-3 — Taming the Past
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To the memory of
Allison Gordon (1909–1987)
Lincoln Gordon (1913–2010)

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Foreword

John Fabian Witt and Sarah Barringer Gordon

Robert W. Gordon has been an active legal historian for almost fifty years. He is an indisputable leader in a flourishing scholarly field. His laurels are many. But the distinguishing feature of his career is the particular combination of accomplishments that mark his still-growing legacy.

Bob (as he is known to one and all) has long been famous for unsurpassed theoretical incisiveness and analytic acuity. From the very beginning of his career, his interventions into the field of legal history have been propelled by a powerful grasp of legal and social theory. His essays, including several reprinted here, established the theoretical foundations for much of the work in the field of legal history – foundations that remain in place to this day. One need think only of the outpouring of work in the field over the past forty years identifying the law's contingency, establishing its constitutive effects in social life, documenting the recursive feedback loops between law and society, and delighting in the subversive character of legal-historical inquiry. In each of these areas and many more, Bob's essays led the way in identifying the paths followed by scholars of the history of the law in the decades since.

Bob is widely known, as well, as a convivial interlocutor, generous commentator, and critic. As a mentor, he has guided generations of legal historians into the field and its historiography. From his first post at SUNY Buffalo to Wisconsin, Yale, and Stanford, Bob's erudition has earned him pride of place among scholars of American legal history. He has served as the president of the American Society for Legal History, his work has been the subject of symposia and honors, and the many friends and admirers who have benefited from his epistolary talents on their behalf have called down praises upon his head. Bob wears such eminence with modesty and grace.

Together, these two characteristic achievements – the analytic rigor he brings to all his work and the generous building of a field – embody the essence of Bob's contribution to the field. He has managed what for most of us is nearly

impossible: to build a field while simultaneously endowing it with a sharp and uncompromising theoretical apparatus.

The only gap in the record is remedied by this volume. It is high time that the work of this fine historian of law is made available to the field. Collected here are eighteen articles, essays, and reviews, including four that have not previously been published, and many that are all too obscure and/or entirely unavailable on our standard databases for scholarship. In other words, a treat is in store for the reader of this volume. Here, gentle reader, the Gordonian oeuvre lies before you, and the authors of this Foreword undertake to provide only the briefest overview, to whet the appetite. The collection tracks Bob's central focus on the history of legal thought, especially the complex relationships among law, legal practice, and the American state from 1870 through the present. Equally important, Bob's critical historiographies draw in wide swaths of scholarship, integrating otherwise disparate strands of historical work into breathtakingly new conversations.

Viewed now for the first time as a whole, the Gordonian oeuvre establishes that Bob's work is imbued with craft, based in wide reading and thinking, and situated on the cutting edge of both law and history. Reflecting the image on the cover of this book, Bob thinks of this collection as an exercise in "taming the dragon," by which he means that he sees the historicism wielded by legal historians as an animal dangerous to those (lawyers, especially) in the present who would naturalize the status quo. In Bob's world, this dragon is poised to comfort the afflicted and afflict the comfortable. As an admonition to those who would deploy the past in ways that paper over complexity, contingency, and contestation, Bob's critical historicism has much caution to offer the legal profession and professoriate, and many avenues for those of us in the field of legal history to explore.

We stress three among the many aspects of Bob's work that deserve attention, and no doubt each reader will add others to the list.

The wordsmith: To the extent that legal history, especially work on the history of the legal profession in America – one of Bob's perennial interests – has otherwise been the province of unduly legalistic prose that only an antiquarian lawyer could love, we invite the reader to a most welcome departure. Bob's work sparkles in part because of his unerring quest for the *mot juste* and his evident delight in the richness and subtlety of language.

Consider the opening of Bob's iconic "Critical Legal Histories," which promised something "bound to look like a seed catalogue or a Pocket Guide to the Common and Exotic Varieties of the Social/Legal Histories of North America." Who can forget the "mandarin materials" of the law as "among the richest artifacts of a society's legal consciousness," or the reminder that the best forms of scholarly work (even where flawed) are "always grandly overflowing" their "conceptual channels"? The functionalist model, Bob describes thus: "When commerce summoned loud, 'Thou Must!,' contract whispered low, 'I can!'" In the face of such epigrammatic genius, one can barely help wanting to join the

conversation, loudly or with an enthusiastic whisper, as the case may be. For us, the impulse is as powerful today as it was when we first encountered Bob's energizing work decades ago. Great writing stands the test of time.

The theoretician: Bob's work has led and helped sustain the broad expansion in what we think of as relevant to legal history. As a fellow traveler of cultural and intellectual historians, and as a sympathizer with social history, Bob's work has spanned historical genres. In the legal academy, his work explained and validated historicism more generally. Among historians, Bob's evident command of legal developments across time has expanded historical attention to the ways that legal matters reflect – and in turn affect – society more broadly. Bob's historical brilliance, in other words, helped bring history back into what had long been a predominantly internalist tradition in legal history, while his lawyerly sophistication helped bring law back into the literatures on social and political history and the history of ideas.

Bob does all these things gracefully, usually using a scalpel rather than a machete. Contrary to the common reputation of the *enfants terribles* associated with the Critical Legal Studies movement (a reputation that is largely though not entirely undeserved), Bob has found value in an extraordinarily broad array of competing perspectives. With one breath he embraces the historiography of the cultural turn. With the next he celebrates the virtues of social histories. In one sentence, he cites the value of economic histories by Alfred Chandler, Robert Fogel, or Douglass North. And then he makes a deft turn through the bottom-up history of political movements. This is not to say for a minute that Bob doesn't bring out a sledgehammer from time to time: crude, economically deterministic accounts have brought out Bob's unmediated scorn. But such rebukes emanate from the spirit of openness and curiosity about the multifariousness of the human social and legal experience that the objects of his ire aimed to deny. One might say that Willard Hurst inaugurated the modern era of legal history by opening it up to the history of society. Bob himself has said as much! But he expanded significantly Hurst's methodology and reach, and brought it into conversation with both sides of the law–history divide.

And yet, even as he generously synthesizes entire literatures in elegant turns of phrase, Bob has left his own distinctive theoretical mark, one that is still evolving. More than three decades after the iconic twin articles "Historicism in Legal Scholarship" and "Critical Legal Histories," the intricacies of the law-and-society relationship still preoccupy the field. Many of us are left with case studies in the theoretical structures Bob identified. Did law shape society a little bit more, or did society exercise a little more authority over the law? What were the points of contingency in the development of the law? Only the most fearless among us have dared try to think beyond the basic analytic paradigm set out in Bob's work.

The mensch: In part because of Bob's example as a practicing legal historian, but even more importantly because of his selfless kindness to all, he has helped build a field that is now sophisticated, successful, and grateful to him. Bob has

earned the respect of many audiences. He is, for example, trained in law, not history, yet speaks fluently the language of both. Through his efforts on behalf of the field, and through his many students in both history departments and law schools, he has sustained the careers of at least two (and growing) generations of legal historians. He is also a friend and mentor to many who have never been his students, but whose good fortune it has been to profit from Bob's genial and capacious desire to be of assistance to all in the field.

Consider, for example, his reprises of the iconic "Critical Legal Histories" article, both of which are republished here. Presented with ample opportunity to settle scores or dole out dollops of approval or disapproval, Bob embraces (with characteristic goodwill) the disorderly reactions and pell-mell critiques his own work has generated.

Across a career marked by such craft and brilliance and caring, Robert W. Gordon has produced a body of fine scholarship and criticism. To see this extraordinary scholar in action, you have only to turn the page.

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Introduction

To the *Law & Society Review*, for “Introduction: The Common Law Tradition in American Legal Historiography,” 10 *Law & Society Review*. 9–55 (1975).

To the *Law & History Review*, for “Hurst Recaptured,” 18 *Law & History Review*. 167–175 (2000).

To the *Yale Journal of Law and the Humanities*, for “The Elusive Transformation,” 6 *Yale J. Law & Hum.* 137 (1994).

To Harvard Law School, for “Method and Politics: Morton Horwitz on Lawyers’ Uses of History,” in 2 *Transformations in Legal History* (Hamilton & Brophy eds., 2010).

To *Georgetown Law Review*, for “E. P. Thompson’s Legacies,” 82 *Georgetown L. J.* 2005–2011 (1994).

To *Hofstra Law Review*, for “Holmes’s Common Law as Legal and Social Science,” 10 *Hofstra L. Rev.* 719–746 (1982).

To the *Yale Law Journal*, for “Historicism in Legal Scholarship,” 90 *Yale L. J.* 1017–1056 (1981).

To the *Stanford Law Review*, for “Critical Legal Histories,” 36 *Stanford L. Rev.* 57–125 (1984).

To the University of Michigan Press, for “Legal History: The Past as Authority and Social Critic,” in *The Historic Turn in the Human Sciences* 339–367 (Terrence McDonald ed. 1996); and for “Undoing Historical Injustice,” in *Justice and Injustice* (Sarat & Kearns eds. 1996), 35–75.

To the *Miami Law Review*, for “The Constitution of Liberal Order at the Troubled Beginnings of the Modern State,” 58 *Miami L. Rev.* 373–400 (2004).