Robert W. Gordon in conversation with David Sugarman

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The discussion that follows arises out of more than six hours of recorded conversations in which Bob Gordon talks about his life and work.[1] It delineates the importance of Bob's

[1] Bob Gordon and I have been corresponding, drawing on and acknowledging each other's work, exchanging ideas and collaborating on assorted projects and publications since 1980. Our recorded conversations commenced in London, England, in November 2016, and were completed via Skype during the course of 2017. I have only lightly referenced our

family background and early life; the Cold War, the Vietnam War, the Civil Rights Movement and the 1960's; his undergraduate studies at Harvard; his experience of learning law at Harvard Law School; the teachers that most inspired him; his early years as a law professor at Buffalo and Wisconsin; his multifarious research and writing projects, many unfinished or unpublished; and some of the key ideas, ideals, individuals and movements that shaped his thinking, writing and professional development including Barrington Moore Jr., Stanley Hoffmann, Mark de Wolfe Howe, John P. Dawson, Stewart Macaulay, Willard Hurst, E.P. Thompson and the Warwick School of Social History, Morton J. Horwitz, Duncan Kennedy, Lawrence M. Friedman, F.W. Maitland, American Legal Realism and Critical Legal Studies. It also illuminates a range of topics including how he came to write his most cited publication, "Critical Legal Histories", and its intended goals; his response to its success and to subsequent criticisms, including the efficacy or otherwise of his influential notion of "law as constitutive of consciuousness"; how his vocal and highly visible support for Critical Legal Studies affected him; his copious writings on the legal profession, and their place within the literature on lawyers and society; the presentist dimensions in his work and his response to the issue of presentism; the use of history for either conservative or progressive causes; his preference for essay writing; and his writing style and polemical goals. His reflections on teaching and writing brings the conversation to a close.

Here is Bob in his own words, adding a more personal reflection and commentary to his more formal publications and presentations. I see this conversation as a dialogue with a large invisible audience. By uniquely illuminating the ideas and biography of one of the most

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discussion, focussing on Bob's wide-ranging body of scholarship. I would like to thank Susan Bartie and Léonie Sugarman for their helpful comments. I will always be indebted to Bob Gordon for his friendship and inspirational influence.

influential and much--loved legal historians of the last fifty years, it provides food for legal scholars wishing to think about the relevance of their role, whilst for historians (legal or otherwise) it offers a window into the theory and method of legal history and the ways in which intellectual currents in legal history were navigated over the second half of the twentieth and early twenty--first centuries.[2] Hopefully, it conveys the spirit of our dialogue, and, among other things, what a good time we were having.

DAVID SUGARMAN: Bob, could we begin by you telling me something about your family background and your upbringing?

[2] This essay is the latest in a series of interviews I have undertaken with leading legal and allied scholars, some of which have been incorporated into my publications: David Sugarman, "Hart Interviewed: H.L.A. Hart in Conversation with David Sugarman," *Journal of Law and Society* 32 (2005): 267-293, "In His Own Voice: H.L.A. Hart in Conversation with David Sugarman" http://blog.oup.com/2012/12/h-l-a-hart-in-conversation-with-david-sugarman/ (21 July 2018), "Beyond Ignorance and Complacency: Robert Stevens' Journey Through *Lawyers and the Courts*," *International Journal of the Legal Profession* 16 (2009): 7-31, "A Special Relationship? American Influences on English Legal Education, c. 1870-1965," *International Journal of the Legal Profession* 18 (2011): 7-57, "Brian Simpson's Approach to Legal Scholarship and the Significance of *Reflections on The Concept of Law", Transnational Legal Theory* 3 (2012): 112-126.

BOB GORDON: My father alternated between being a professor, a civil servant and a diplomat.[3] As a result, I spent some of my childhood in and around Cambridge, Massachusetts, where he taught, and much of it overseas. He was an administrator of the Marshall Plan who was assigned to Paris and London and then later became an Ambassador to Brazil, so we moved around quite a lot. He had a very successful career. I always felt intimidated by him, as if I lived in his shadow, and had to live up to a lot, and could not hope to duplicate his accomplishments. Particularly around the Vietnam War era, he and I had some fairly sharp differences on the issue of the War which he eventually came to see my way, I'm happy to say. It was a classic oedipal struggle. For all the problems that I had with him, he was always the example of virtue in the old civic-republican sense.

My mother is also an important influence.[4] She was a frustrated intellectual who loved reading. She was a graduate student at Harvard in Sociology when she met my father. In those days, a woman could go on to academic life, but it was hard to do if they were married. And the life we led, one which involved a lot of moving around the world, would have been incompatible with a scholarly life.

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[3] Lincoln Gordon (1913-2009) graduated from Harvard at nineteen, earned his doctorate as a Rhodes scholar, and published his first book at twenty-two. He joined the Harvard faculty in 1936, and taught government and international economics during the next twenty-five years. See, further, Bruce L. R. Smith, *Lincoln Gordon: Architect of Cold War Foreign Policy* (Lexington, Kentucky: University Press of Kentucky: 2015); Robert D. McFadden, "Lincoln Gordon Dies at 96; Educator and Ambassador to Brazil", *New York Times*. December 21, 2009.

[4] Allison Gordon (nee Wright) (1909--1987).

My parents valued learning. Their friends tended to be intellectuals and even those who were very successful in some profession or as civil servants also had intellectual interests, so we were used to a lively intellectual culture. My parents were part of a cosmopolitan transatlantic culture estranged from American parochialism. My upbringing was a little bit of an estrangement from my own society because Joe McCarthy seemed to have a large popular backing. It was like living in a bubble. The only downside for me was my parents and their friends were such impressive people that I grew up with a feeling of intellectual inferiority. I could never live up to these glittering examples, and I still feel that way after all these years. It really was an upbringing of tremendous privilege.

So, you felt an outsider and an insider?

Absolutely.

In what ways did your parents influence you?

I think the influences were profound. I inherited a lot of my father's views, particularly the importance of public service. He was a liberal Democrat in politics. We grew up with books all around us. My mother was a New England, blue-stocking feminist, and from an early age all of us four children felt that there was something unnatural in the obvious inequalities in the situation of women and men.

My parents were representative of the belief that was common then: that their professional status and abilities carried with them an obligation of civic and public service--the noblesse oblige ideology of professionals. They didn't just subscribe to it, they lived it and their example has been very influential on my work on the legal profession, for example. A lot of my work on the legal profession comes out of a feeling of shock and disappointment that in

this profession, which played such an important role in previous periods of American history, so many of them had decided to abandon that role in favour of making money.

How did their commitment to public service impact on you?

It's quite likely that I would have become a foreign service officer or a public interest lawyer, or particularly, a government career lawyer, had it not been for the fact that when I emerged from law school, Richard Nixon was President and opportunities for a career in government service seemed unpromising.

Is there a connection between your parents' commitment to public service and your life choices?

I think it's conceivable. At this time in my life I tend to reproach myself for not having had enough civic courage when it counted. The people I most admired were indeed the people who spoke out, beginning with those who spoke out in the 1950s against Cold War witch hunts and McCarthyism. One of them was Mark de Wolfe Howe. I admired him enormously both in his scholarly and his political personas. He was a very fine legal historian, but also a civil libertarian and a progressive liberal democrat. He was active in politics, in the anti--McCarthy campaign, and eventually went south to help the civil rights movement. He was a Boston patrician and a delightful and admirable person. If there is anybody that I aspired to be like at the time when I was at law school, it was him.[5]

[5] For Bob's tribute to Howe, see Robert W. Gordon, "A Scholar-Activist in the 1950s and 60s: The Civil Rights and Civil Liberties Causes of Harvard Law School's Mark DeWolfe Howe," Harvard Law School Lecture Series, 16 April 2015.

What about the Cold War, the Vietnam War, the Civil Rights Movement and the 1960s – how, if at all, did these affect you?

They affected me a great deal. The Cold War I felt a very close connection to because many of my family's friends were targeted and they lost their jobs. So, McCarthyism was not an abstract threat to us.

One of the regrets of my life is that I was not personally more involved in the Civil Right Movement. I went to the march on Washington in 1963. Unfortunately, those were the years when I was drafted, so I spent them staving off the communist threat as a soldier in Germany. The anti--war movement on the other hand, I was very much a part of. I wrote various polemics against the war and went to an endless number of demonstrations and meetings and so forth. I was not particularly happy with the student revolutionary left. I just never got into it, unlike my friend Duncan Kennedy, who rocks with the spirit of May 1968. I never tripped it to Utopia. It all seemed to me then and it still seems to me hopelessly impractical.

Turning to your university education, who were the teachers who most influenced you, and in what ways?

I think sometimes that I'm simply the sum of my teachers and there isn't anybody else. Again, Mark Howe was important. He taught an undergraduate course on Anglo--American legal history, which was probably what ignited my interest in legal history.[6]

https://www.youtube.com/watch?v=ksUBvu6pIdk (21 July 2018).

[6] Harvard College, Cambridge, MA. 1959-62; 1967. A.B. 1967.

Still as an undergraduate at Harvard, I came to know my junior year tutor, Stanley Hoffmann, the political scientist and historian of France. He was one of those European émigrés who was multi--lingual and a polymath, and he had a wonderfully ironic approach to the world and a sense of humour. He was the person who taught me how to think analytically about history. Besides being a historian, he was also a social scientist and so he felt that it was necessary not only to know what happened, but to place what happened in relation to other times and places, and to have a notion of the social formations in which events took place. His way of approaching history as a political scientist was really illuminating and I'm still using it.

Then, also, as an undergraduate, another tutor I had was Barrington Moore Jr. His comparative historical approach was really formative for my life. It struck me as a model of what comparative historical learning ought to be. He and Hoffmann founded an undergraduate program called Social Studies, which was a mixture of history, economics and sociology.[7] In addition to being inter--disciplinary and dealing with specific social problems it embraced the notion that historical context, a cogent theoretical perspective and a familiarity with the ideas of the "classic" social thinkers of the past were vital to the analysis of society. I was admitted to this wonderful program.

At law school[8] there were two legal historians (other than Howe) who had a profound influence on me. One was Morton Horwitz, who was beginning his teaching at Harvard, and

[7] See, further, http://socialstudies.fas.harvard.edu/history (21 July 2018).

[8] 1968-71.

I was in his first legal history class. Morty was a revelation, and an inspiration.[9] Probably the most significant figure in my law school experience was John Dawson. He was someone who sees beneath the formal doctrine. He wrote some of the most important legal realist work – work that was rediscovered by the critical legal studies movement and proved to be very influential. But he was a typical Harvard Law School teacher in that he only asked questions. You never knew what Dawson thought about anything, at least, not from the classroom.

So, Harvard Law School sustained your interest in legal history and law and society?

Yes. But I was baffled by the way law was taught. It was an overwhelmingly doctrinal curriculum, and whenever you expressed an interest in where a doctrine came from, or, why it changed the way it did, this was dismissed as irrelevant to the business at hand.[10] Only

[9] Robert W. Gordon, "Morton Horwitz and his Critics: A Conflict of Narratives," *Tulsa Law Review* 37 (2002) 915-927 (recalling the excitement of Horwitz's classes on legal history), "Method and Politics: Morton Horwitz on Lawyers' Uses and Abuses of History," in *Transformations in American Legal History II: Law, Ideology and Methods - Essays in Honor of Morton J. Horwitz,* ed. Daniel W. Hamilton and Alfred. L. Brophy (Cambridge, Ma.: Harvard University Press, 2010).

[10] The history and practice of legal education and scholarship has been an important focus of Bob's writing. See, for example, "Lawyers, Scholars and the 'Middle Ground'", 91 (1993) *University of Michigan Law Review*: 2075-2112, "The Case for (And against) Harvard" [Review of *Logic and Experience: The Origin of Modern American Legal Education* by William P. Lapiana], *Michigan Law Review* 93 (1995): 1231-60, "Professors and Policy-Makers: Yale Law School Faculty in the New Deal – and After," in *History of the Yale Law School: The Tercentennial Lectures,* ed. Anthony T. Kronman (New Haven: Yale University

Dawson and Horwitz, and a couple of other faculty, were interested in these questions. I wrote a couple of legal history papers whilst still in law school, including one on church and corporation in Massachusetts in the eighteenth--century. Like a lot of my work, I never published it.

I'm interested in your experience of Buffalo, which I know was your first law school post.[11]

Buffalo was a very stimulating place. Marc Galanter was there at the time, and Stewart Macaulay visited. Stewart's work on law in action was very influential.[12] He inspired another early historical project, another one that I never published, on lawyers for New York

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Press, 2004), "Willis's American Counterparts: The Legal Realists' Defence of Administration," *University of Toronto Law Journal* 55, (2005): 405-425, "The Law School, the Profession, and 'Humane Professionalism'", *Osgoode Hall Law Journal* 44, (2006): 157-166.

[11] Bob was a faculty member of the Law School, State University of New York at Buffalo, 1972-77.

[12] See, for example, Stewart Macaulay, "Non-Contractual Relations in Business – A Preliminary Study," *American Sociological Review* 28 (1963): 55-69. See, further, Robert W. Gordon, "Macneil, Macaulay, and the Discovery of Power and Solidarity in Contract Law," *Wisconsin Law Review* (1985): 565-579.

merchants in the late eighteenth--early nineteenth centuries--trying to pursue some Macaulay--like questions: what uses did these commercial interests make of law, and so forth? I gave a paper on this to my first American Society for Legal History meeting. That was an exciting project and in connection with that I was in a reading group at Buffalo with Galanter and Macaulay, and I think Jack Schlegel and Al Katz, and we were reading Max Weber. So, I thought this is very interesting: instead of hypotheses about the relation of law and capitalism, what if I took some New York capitalists and tried to find out what uses they actually made of law? And I learned how extremely difficult it is to build a theory on empirical material.[13]

You tested the historical veracity of Macaulay's thesis about the non--use of law in business. Was that when you began to question the traditional assumptions about the relationship between law and society, and society's supposed "needs" for law and legal institutions?

I think so.

Perhaps these business people in New York didn't need law in some or most of the ways that were often assumed?

[13] Two of Bob's early essays illustrate this difficulty: Robert W. Gordon, "Legal Thought and Legal Practice in the Age of the American Enterprise, 1870-1920," in *Professions and Professional Ideologies in America*, ed. Gerald Geison (Chapel Hill: University of North Carolina Press, 1983), 70-110, "'The Ideal and the Actual in the Law:' Fantasies and Practices of New York City Lawyers, 1870-1910," in *The New High Priests: Lawyers in Post-Civil War America*, ed. Gerard W. Gawalt (Westport, Conn.: Greenwood Press, 1984), 51-74.

Yes. Business people drew on the legal system, they drew on lawyers, and they litigated occasionally, although most of their resort to lawyers was for contractual advice. They structured their affairs sometimes a little bit with the help of lawyers, but most of what they're thinking about doesn't have much to do with the legal system. This started leaning me towards the view that law in many ways was less important than it appears in some of the standard treatments of law and society, but also more important because it does help set the background conditions of social life, and that these assumptions, much more than conscious use of law and lawyers, are where law makes itself felt.

How would characterise your relationship with Willard Hurst?

I got to know Hurst very well.[14] We lunched almost every week. It was a very intense relationship.[15] I found my relationship with Hurst was very similar to the one I had with my father. It was like being a son all over again. He was always extremely supportive. But he had his own strong ideas about what people ought to do, and so he was always trying to press me to pick up projects and write legal history his way and I was always, sometimes politely, and sometimes not so much [laughs], rebelling.

So, did you construct yourself against Hurst?

[14] Bob got to know Hurst well during his tenure as a Professor, University of Wisconsin Law School (1977-83).

[15] See, generally, Robert W. Gordon, "Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography," *Law and Society Review* 10 (1975): 9-55, "Hurst Recaptured," *Law & History Review* 18 (2000): 167-175.

I think that's a big piece of it. So, we have here a couple of successive oedipal rebellions: one against my father; another against the doctrinal teachers at the Harvard Law School which propelled me into the study of social history; and then the next, which was probably connected with rebellion, and partly against Hurst's influence.

The tensions between me and Hurst were exacerbated by my enthusiasm for the "history from below" social history of the E. P. Thompson--Warwick School.[16] Hurst believed in social history, but he was very sceptical of some of the left--wing social history, partly on the completely defensible ground that it was in his view too moralistic, that the working--class heroes were too heroic and that the upper class were too wicked. I, for my part, thought that he had excessively muted class conflict in his own work and I used to argue this, I hope reasonably tactfully, when we were together.

Of course, his work doesn't, as later critics point out, say anything about Native Americans, slavery, blacks and women. Hurst's view was, yes, those were all subordinated and marginalised groups. But because of that, they were not major players in the drama of legal history.

Was Hurst's resistance to class analysis a consequence of his American exceptionalism? Under this optic, America was very different from, say, Britain and Continental Europe: it

[16] For example, E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (London: Allen Lane, 1975); Douglas Hay, Peter Linebaugh, John G. Rule, E. P. Thompson, and Cal Winslow (ed.), *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (London: Allen Lane 1975).

wasn't feudal, and class was less important. So, the history of American law was singular and distinctive, and this hadn't been sufficiently recognised. Also, the history of American law merited exclusive attention not least because so much more needed to be done.

Yes.

Perhaps, this was reinforced by the contrast that he perceived between his kind of American legal history, and the dominant traditions of legal history across the Atlantic. Hurst was preoccupied with modernisation and the creation of modern society. His legal history was Realist--influenced and socio-economic. Whereas British and Continental European legal history, with some notable exceptions, was mostly concerned with the evolution of pre--modern legal doctrine and institutions and was frequently unreceptive to the concerns and insights of American Legal Realism.

Exactly. Hurst follows Louis Hartz in many ways here. Hurst was out to make converts in his gentle but very insistent way and so he was bound to set up a certain amount of resistance. He was a pioneer of socio-legal history. Everybody in the field owes him a tremendous debt. I think the main limitation of his work is its lack of a comparative dimension.

I think a lot of readers mistake his work for a celebration of all things American. And, of course, it is nothing of the kind. He thinks that this thoughtless, commercial capitalism has disastrous consequences. He is an environmentalist way ahead of his time. He's concerned with resource conservation, and so forth. The interesting thing is Willard was in touch with a whole range of people who were cosmopolitan intellectuals, so he was not intellectually parochial at all.

He read many of the great European social thinkers and was very into Weber. But he Americanized them?

Exactly. Hurst is really all about how experience is processed through this apparatus of concepts like fee simple absolute property, and so forth, as the paradigmatic legal form, except that for Hurst, it doesn't have any history; it's simply transplanted from radical influences in England to middle class influences in America, and it remains in much the same form.

He doesn't make the connection with culture, he doesn't develop it as a dynamic cultural phenomenon. He's writing a form of cultural history but doesn't recognise that he's doing cultural history.

That's right. It may have been Bill Novak who pointed out that a lot of Hurst's sociology came from Talcott Parsons, and that it has much the same static quality as structural functionalist sociologies.

It was while I was thinking about Hurst that I saw a missing element in his form of social legal history. Hurst does tell a story about a form of consciousness. Indeed, he explains it as a radically deficient consciousness, not up to the mark for the social tasks that it has to perform in nineteenth--century America. But his story lacks detail and specificity about where this consciousness comes from, why it takes the forms that it does, and how it changes over time. It does have an account of a transformation in the late nineteenth--century under the challenges posed by the externalities of industrialisation, as we would now call them. But it doesn't devote any attention to how people get the pictures of the world that they carry in their heads.

Lawrence Friedman, my dear friend, and one of the great influences on my own work, comes out of the same tradition of historiography which is reluctant to concede influence to any elite

or elite idea formations.[17] They're both resolutely democratic historians for whom history is the story of struggling and striving in the world below what Supreme Court Justices or legal treatise writers are doing up in their eagles' nests. At best they are rationalisations, sometimes maybe simply rationalisations of power politics and positions, which is what Horwitz would say.

Moving on, can you say something about Duncan Kennedy's influence on your work?

Duncan made the historical study of doctrine exciting. He disclosed the possibilities of doctrinal study and doctrinal history as a form of intellectual history.[18] Particularly interesting was some of the structuralist features of critical legal studies.

Such as?

The notion that law is structured around various kinds of polarities or contradictions at any given time; that within any set of legal doctrines there is a cluster around different poles. One

[17] Robert W. Gordon, Morton J. Horwitz, ed. *Law, Society, and History: Themes in the Legal Sociology and Legal History of Lawrence M. Friedman* (Cambridge: Cambridge University Press, 2011).

[18] Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* (Beard Books, 1998 [1975]), "Form and Substance in Private Law Adjudication," *Harvard Law Review* 89 (1976): 1685-1778, "The Structure of Blackstone's Commentaries," *Buffalo Law Review* 28 (1979): 205-382. For a more recent exemplar of Kennedy's approach to legal history see his, "Three Globalizations of Law and Legal Thought: 1850-2000" in *The New Law and Economic Development. A Critical Appraisal*, David Trubek and Alvaro Santos, eds. (Cambridge: Cambridge University Press, 2006): 19-73.

pole tends to be dominant and the other exists in the form of exceptions or modifications. Once you start noticing these polarities or contradictions, you see them everywhere. Duncan's work more than anybody else's introduced me to the structures of legal reasoning and the way in which ideological conceptions of law helped to shape how people interpret legal phenomena and indeed social phenomena. So, this gets me a little bit away from Hurst and Lawrence Friedman's interest group determinants of legal concepts, and more into how these influences get processed once inside the law box.

As for other influences at this time, how important were Gramsci, the Frankfurt School, Western Marxism, post--Marxism and the new social history of crime, policing and punishment?

They were important for all at CLS.

All of whom were taking ideology and superstructure more seriously than conventional Marxism.

Exactly. Gramsci was an important influence. Actually, a lot of this is in E.P. Thompson, who seems the prototype of the Critical Social Historian.[19] So much of Thompson really is about the formation of consciousness. A lot of Hurst is too, when you come to think of it.

Partly because I was fascinated with the ideas of people like Duncan Kennedy, and shared his interest in high legal doctrine, and also with social history "from below" of the E.P. Thompson kind, I thought there's got to be some way to combine both these things, to give each its due.

[19] Robert W. Gordon, "E.P. Thompson's Legacies," *Georgetown Law Review* 82 (1994): 2005-2011.

And this acknowledges the importance of law as ideology, and the relative autonomy of the law. Hurst and Lawrence (Friedman) shared a reluctance to concede very much to the autonomy of the law. Whereas the movement to which you signed-up, CLS, was part of a diverse international movement that acknowledged the significance of the relative autonomy of the law and of legal ideas for the constitution of society. It argued against merely instrumentalist and interest group interpretations of what law and lawyers do.[20]

That's right. I think that reluctance has its roots in their own rebellions against the dominance of doctrinal legal history, and their insistence on the "social", and the undoubted validity of their insight that most ordinary people neither know nor care anything about high level legal doctrine--it's a theme that you get in Macaulay's work as well. So, it becomes an interesting challenge: if you absorb the lessons of social history, and of legal realism, to try to reconnect the worlds of legal theorising to the social struggles below Olympus.

And they're also more instrumentalist.

Yes.

Lawrence is more cynical about what makes these people tick, about this autonomy of law stuff, and how it mediates power and wealth.

Absolutely.

[20] Bob first adopted this approach in the early 1980's: see, for example, Robert W. Gordon, "New Developments in Legal Theory," in *The Politics of Law,* ed. David Kairys (New York: Pantheon, 1982) 281-302, "Legal Thought and Legal Practice in the Age of the American Enterprise, 1870-1920," 70.

Whereas you're saying, law's autonomy is important.

Lawrence concedes importance to what he calls the legal variable. But his position is that the importance of legal doctrine has been exaggerated compared to the power struggles, vested and other interests, and so forth that make demands on the legal system, and bring law into being in the first place.

So partly this is just a matter of relative emphasis; what is it that you're studying? And I think you see a later generation of social legal historians, making an effort to achieve the kind of synthesis that I'm talking about. Yes, we study social influences and the work of social actors too; but what happens in legal doctrine is also a pervasive "surround" in everyday life. This is what I was trying to capture in my essay on critical legal histories; it was an effort to look at what was happening in the field of legal history, and to see how it was trying to achieve this synthesis.[21]

That nicely sets the stage for our discussion of "Critical Legal Histories".[22] Can you tell me how you came to write this piece and your underlying goals?

I was asked to contribute to a symposium on critical legal studies. And so, trying to figure out what to do in response to that I think the urge was to try to explain both to legal intellectuals and law professors what the Critical Legal Studies movement was about and why it was different from what they imagined it to be. What they imagined it to be about was fairly conventional Marxist or Charles Beard-like progressive historiography of the virtuous

[21] Robert W. Gordon, "Critical Legal Histories," *Stanford Law Review* 36 (1984): 57-125.

[22] See above.

masses against the capitalist villains following a fairly conventional Marxist script. So, I felt I had to explain to them that it wasn't that, that actually it was a critique of conventional Marxism as well as the conventional liberal story and on basically the same grounds: that they were both overly deterministic stories about the relationship of law and society.

Another thing was--and this was in my earlier piece on historicism in legal scholarship[23]--that contemporary legal scholarship relies to a large extent on unstated implicit assumptions about historical development and social conditions, and because they're implicit they're not really brought to the surface. So, it would be useful to try to bring some of these assumptions to the surface: what assumptions are being made about how law is created, and what it does? That was another impulse. And then I felt at the same time an urge to explain what the genre of legal intellectual history that Duncan Kennedy and his school were writing, and why this wasn't just Langdell all over again. So, there were several miscellaneous motives, but they almost all have to do with trying to explain one school of thought to another.

My immediate goal was to try to dispel some of the intense hostility that was being directed towards critical legal studies (CLS) both within the legal academy and the law and society movement. I was trying to say: CLS is not as hostile to yours as you think it is, and it's not so different.

In writing it I was struck by the uniformity of the grand narrative story that so many of these accounts shared, and as a critique of that, there's all the wonderful historiography, such as Maitland, which challenges these grand narratives. The way Maitland, with barely subdued

[23] Robert W. Gordon, "Historicism in Legal Scholarship," *Yale Law Journal* 90 (1981): 1017-1056.

laughter, takes up the story of collective society maturing into individualist society and turns it on its head.[24] This is a classic CLS move.

A key theme of your work and mine at the time was that the more historians examined the interplay between law and society, the more questionable appeared the common assumptions about that interplay; and that the historiography demonstrated that very clearly.[25] You singled out "functionalism" as part of the problem. Treating law not merely as the ideology of lawyers, but also as expressive of a more general consciousness – as in Duncan Kennedy's

[24] See, further, J.W. Burrow, ''The Village Community' and the Uses of History in Late Nineteenth Century England," in *Historical Perspective: Studies in English Thought and Society*, ed. Neil McKendrick, (London: Europa Press,1974), 255-284.

[25] David Sugarman, "Theory and Practice in Law and History: A Prologue to the Study of the Relationship between Law and Economy from a Socio-Historical Perspective," in *Law, State and Society*, ed. Bob Fryer, Alan Hunt, Doreen McBarnet and Bert Moorhouse (London: Croom Helm, 1981), 70-106, "Law, Economy and the State in England, 1750-1914: Some Major Issues," in *Legality, Ideology and the State*, ed. David Sugarman (London: Academic Press, 1983), 213-266, Gordon, "Legal Thought and Legal Practice in the Age of the American Enterprise, 1870-1920," 70, David Sugarman and G. R. Rubin, "Towards a New History of Law and Material Society in England, 1750-1914," in *Law, Economy and Society: Essays in the History of English Law, 1750-1914*, ed. G.R. Rubin and David Sugarman, (Abingdon: Professional Books, 1984), 1-123, Gordon, "Critical Legal Histories", 57*, David Sugarman, "Writing 'Law and Society' Histories," *Modern Law Review* 55, (1992): 292-308.

work--was how one might break with functionalism and better understand law in society. And this is where Doug Hay's, "Property, Authority and the Criminal Law" was important.[26] Hay's sensitivity to the complex interplay between the physically coercive and ideological dimensions of the criminal law, and the importance he attached to law's ideological dimensions (majesty, justice, mercy etc.), reflected and sustained what became a fundamental proposition of the period: namely, that understanding laws' ideological dimensions was crucial to understand the effectivity of law. And you responded to this challenge.

Absolutely. I found Hay's essay electrifying. It came on me like a sudden thunder storm and illuminated in a flash all kinds of things which I had been thinking about rather incoherently. I think that essay has had that effect on a lot of people. It was a kind of a formative event.

How did you come to formulate the idea that law is "constitutive of consciousness"?[27]

More than anything else, it emerged out of conversations with Duncan Kennedy. I was struggling with how to connect Duncan's work on the evolution of legal consciousness, as reflected in mandarin legal texts, with ordinary people in the world below; that is, what's the connection between elite legal discourse and the blood, struggle and toil of E. P. Thompson's labouring masses and their bosses, and Willard Hurst's middle--class men, and so forth. What do these realms have to do with each other?

Also, it came from reading Legal Realists. It's at this time that a lot of us went back to the Legal Realists--especially Hale's work, and Dawson's essays on duress – which helped make

[26] Douglas Hay, "Property, Authority and the Criminal Law," in *Albion's Fatal Tree*, 17-63.

[27] Gordon, "Critical Legal Histories," 109-113.

the connections for us. Of course, its law that constitutes markets, that constitutes what strikes or picketing are permissible tactics of economic warfare, and what are condemnable as riots or trespasses or coercion or violence. Once you recognise this, it seems simple. That's the connection.

There's a whole body of scholarship that's inspired by the notion of law being constitutive of consciousness, and it's also been subject to a certain amount of criticism. What's your take on it now?

It still seems to me right. The critiques, I think, address simply a particular form of the idea: that it's the legal concepts and ideas contained in mandarin law texts that inform everyday life. Now I wouldn't make that claim; and it's a misinterpretation of the claims that I make in "Critical Legal Histories". It's not the refined lawyers' concepts of property that constitute how most people deal with property rights. Rather, it's a vulgarised form of it. It's the relationship to mandarin texts of, say, Harriet Martineau, to David Ricardo and Thomas Malthus. We're not talking classical political economy; we're talking vulgarised classical political economy. But the connections are nonetheless there. The notion of a division between state and market is theorised by legal intellectuals and economists long before it becomes an element in popular consciousness. It's how we all think today.

One might argue that constitutive implies a one--directional, law--first, law--determining--society notion of causality which overstates laws' effectivity.

I don't think so. That would be a more idealist account than I would be inclined to make because I don't think it works that way. I think there's a lot of filtering--up as well as filtering--down, if you like. This isn't the story about the relationship between high level legal intellectuals and their work, and what goes on in everyday life. It's a story of different parts of society doing their part in ideology--making, and in concept formation, and I think

what you see at the mandarin level is often a distilled version of what's trickling up, and then you get the reciprocal influences of trickling down.

How do you demonstrate that the mindset of ordinary individuals was constituted by law, rather than a host of other normative ideas which interact with law, even if law is to some extent constitutive?

There isn't anything permanent or durable that distinguishes the legal from the non--legal. In some places obviously particularly in theocracies, the religious is the legal; I mean if you're dealing with Sharia, by definition there's no distinction. I never thought that there was much profit in trying to isolate the legal or distinctively legal as compared to anything else. I think the most useless diversion that jurisprudence has put us on during the last few generations is the "what is law" question. It's whatever it is considered to be at a given place and time. The attempt to refine or extrude or isolate the purely legal aspect of anything seems to me like a fool's errand.

It has been claimed that "Critical Legal Histories" discounted systematic causation.

I do feel that to be true. Indeed, one of its objects was to convey and produce scepticism about systematic causal theories of historical change. One of the puzzling aspects to me of the general message of "Critical Legal Histories" is that the kind of evolutionary functionalism that it criticises is still so resurgent in the world and there's still so much of it around. I think these theories can't withstand rigorous historical examination. Now after you've got through destroying the systemic causal theories, where does that leave you? It leaves you without faith in the rebuilding of systematic large--scale causal theories. But I have very few regrets about that. I think such theories, whether they're in the complacent form of global Western capitalism at its triumph, or in the once very powerful but now completely discredited form of the inevitable triumph of communism, have been very

damaging. So, we are put in the position of not being able to confidently point to any over--arching theory of social change as the rationale for politics. I think that's a blessing.

Why do you think "Critical Legal Histories" was so influential?

I'm really not sure. Like a Rorschach test, people read out of it whatever they want, with some kind of vindication for their own programme. What I was trying to do was to address questions that, for example, have occurred to every law student. They want to know: what's the connection between the stuff that I'm learning--how to rigorously analyse legal doctrine--and what goes on out there in the real world? Okay, it's a series of justifications for ruling class privileges, it's ideology. That's helpful, but then you get E. P. Thompson's paradox; yes, it's ideology, but it's ideology that trips up the rulers too. So that moves you towards law as a field of struggle kind of thinking, which I think is also helpful and explains things. I was inclined to take it one step further and that's the notion that law was partly constitutive of social reality. Now that's a banal insight, and it's become almost a cliché; but I will say in my defence it wasn't then, and it still takes a while for many people to get the point.[28]

And perhaps many historians still haven't got the point?

[28] On Bob's reflections on the theory and method of legal history subsequent to "Critical Legal Histories", see, for example, Robert W. Gordon, "The Arrival of Critical Historicism," *Stanford Law Review* 49, (1997): 1023-1029, Catherine L. Fisk and Robert W. Gordon, "Foreword: 'Law as...': Theory and Method in Legal History", *UC Irvine Law Review* 1, (2011): 519-542, Robert W. Gordon, "'Critical Legal Histories Revisited': A Response", *Law and Social Inquiry* 37 (2012): 200-215, "Some Final Observations on Legal Intellectual History", 64 *Buffalo Law Review* 64 (2016): 215-223.

That's right.

In effect, you are saying that law teachers and law can be important in terms of shaping and re--shaping the world, that what you do as a law teacher can be important. It's introducing a degree of agency, if you like, a melding of American legal realism and Thompsonian social history. Does that sound right?

That's exactly right.

How did the success of "Critical Legal Histories" and your vocal and highly visible support for CLS, affect you?

One of the reasons that I started writing articles and giving talks explaining what CLS was about was a feeling of extreme annoyance at how CLS was being treated.[29] I think I benefitted from being one of the people who was relatively temperate in debates about CLS. My professional career was not derailed by CLS; but that of many younger people was, and almost all for completely specious reasons as far as I could tell. Almost inevitably when there's a voice on the Left, people start equating it with the most vulgar forms of instrumentalist Marxism and this was the position taken by people who were established scholars and very intelligent people and who actually professed to be reading CLS stuff, and I think: how can you read this, which contains so many denials of the vulgar instrumentalist Marxist position, and believe that its vulgar instrumentalist Marxism. It's like Edmund Burke's reaction to the French Revolution: unless CLS is utterly repudiated, anarchy will prevail and civilised society will cease.

[29] See, for example, "An Exchange on Critical Legal Studies between Robert W. Gordon and William Nelson", *Law and History Review*, 6 (1988): 139-186.

You have had a longstanding interest in the legal profession and have written copiously about it. It has perhaps been your principal field of writing and research in recent years. In reviewing your output on the topic, I was struck by the parallels between your work and that of Hurst. For example, you both treat the legal profession as a vital, but often Cinderella, field of study; and you both have contributed significantly to the development of this field, inspiring others to take lawyers and legal services seriously. I'm thinking here of Hurst's pioneering treatment of the profession in *The Growth of American Law*,[30] and his Llewellyn--like concern with law jobs, which you share.

Yes. Hurst's work on the legal profession is among the best stuff he ever wrote. That long section in The Growth of American Law on lawyers was striking and prophetic. Hurst was, in that sense, way ahead of his time; he really anticipates Rick Abel[31] and Magali Larson[32] on

[30] James W. Hurst, *The Growth of American Law: The Law Makers* (Boston: Little, Brown and Co., 1950).

[31] Richard L. Abel, "The Rise of Professionalism" *British Journal of Law and Society* 6, (1979): 82-98, *American Lawyers* (Oxford: Oxford University Press, 1989), "Epilogue: Just Law?" in *The Paradox of Professionalism. Lawyers and the Possibility of Justice*" ed. Scott L. Cummings (Cambridge: Cambridge University Press, 2011) 296-318 cf Robert W. Gordon, "Are Lawyers Friends of Democracy?" in *The Paradox of Professionalism* 31-49.

[32] Magali Sarfatti Larson, *The Rise of Professionalism: A Sociological Analysis* (Berkeley: University of California Press, 1977).

the professional project, and also my own abiding interest in lawyers as law makers. In The Growth of American Law, the Bar turns out to be one of the major law makers, which, of course, is true.

Your Holmes Lectures exemplified these concerns.[33] Could you tell me your reasons for writing them?

It seemed a good occasion for missionary work of a rather traditional kind. I saw the lectures as fitting into a long tradition of lawyers' speeches which were part Jeremiad and also had the classic structure of the Jeremiad which was a lamentation for a falling away of the good old traditions and good old cause, followed by a rousing summons to recover them and so forth. So, it was quite self--consciously in that tradition of lawyers Jeremiads and reminding people of past ones. Our legal profession has in many ways been quite exemplary in the scale and scope of its public contributions. Some of those are not so great, like building the legal architecture for the rationalisation of slavery, for example, or, carrying into effect the legal means of resisting orders to end segregation and discrimination. But there are many lawyers involved on that other side, John C. Calhoun and the army of southern resistors and so forth. So, we have this extraordinary tradition of lawyers as leading figures in public culture and state building, impressive accomplishments in a lot of ways. I think people should be more aware of this than they are and this tradition is to some extent why people go to Law School and are attracted by law as a vocation. And yet, in the conditions of its actual practice these ideals, except in moments like public emergency, like massive depression or war, they are forgotten about. Though here and there you see private practitioners involved in the Civil

[33] Robert W. Gordon, "Lawyers as the American Aristocracy," Holmes Lectures, Harvard Law School, Cambridge, Massachusetts, 1985 (unpublished).

Rights Movement, and volunteering for the defence of the Guantanamo detainees, for example, which is very much in that tradition.

So that's part of what I call my normative project. It's rallying history and tradition in the service of trying to re--animate the public ideals of the profession. A piece of mine that I'm most pleased with is one I wrote about the Clinton impeachment and the behaviour of Ken Starr.[34] That was written out of real outrage and indignation of the conduct of the lawyers who were investigating Clinton and I thought it was just a paradigm case of someone who was given a public commission, independent counsel, who completely betrayed his position of trust by turning it into a partisan witch hunt.

It seems to me that this vein of your scholarship contrasts with the more negative treatment of the legal profession that one sees from the likes of Larson, Abel, and Dezalay and Garth.[35] You seem to be constructing a middle way, a third way, the possibility that the ideology of professionalism can and should be redeemed, at least to some extent, and here's how we do it.

I think that's right. The interlocutor with whom I have had most dialogue about this is Rick Abel, whose work is colossal in its achievements. But you know, Rick and I actually aren't

[34] Robert W. Gordon, "Imprudence and Partisanship: Starr's OIC and the Clinton-Lewinsky Affair", *Fordham Law Review* 68 (1999): 639-722.

[35] On Larson and Abel, see above. On Dezalay and Garth see, for example, Yves Dezalay and Bryan Garth, *The Internationalization of Palace Wars: Lawyers, Economists and the Contest to Transform Latin American States* (Chicago: University of Chicago, 2002).

that far apart on a lot of things. Remember the book that he wrote about lawyers in South Africa?[36] It's really a book about lawyers in a heroic role, trying to salvage some narrow remnants of justice in an oppressive autocratic regime and under unfavourable conditions. I just think that Rick in general has a critical and sort of negative view of it. Also, on professionalism, I don't think he and I disagree really all that much. It's the difference between conceiving professionalism in rather narrow terms, as simply a self--interested cartel, which it often is; and of conceiving professionalism as ampler, and of the kind articulated by Durkheim, for example, in some readings of Max Weber and the remnants of the Durkheim project in the work of Talcott Parsons. This is now disparaged by most sceptical scholars of professionalism as simply apologia; but I don't think it ever was simply apologia. I'm rather fond of Harold Perkin's work on professionalism in nineteenth and twentieth--century England.[37] Although he is a historian with a Left perspective, he is not a disparager of professionalism as a professional ideal. Rather, he sees professionalism as a powerful organising ideology for an aspiring middle class, so it's partly a bid for status and power; but along with the bid for status and power, comes the kind of conduct or aspirations that would justify that status and power and notion of the responsibilities and trusteeship of the elite which I find very attractive. And this leads me back to my father's generation of public servants in whom I think that ideology of stewardship or responsibility or trusteeship was very strongly internalised. They undertook to serve the public good for less money than

[36] Richard L. Abel, *Politics by Other Means, Law in the Struggle against Apartheid, 1980-1994* (London: Routledge, 1996).

[37] Harold Perkin, *The Rise of Professional Society: England Since 1880* (London: Routledge, 1989).

they could have earned in profit--seeking, and often with little recognition and sometimes despite a lot of hostility. So, I've never been able to think of professionalism as just a protectionist ideology.[38]

There is a strong presentist dimension in your work. You connect the past and the present often and quite explicitly. How has presentism affected your writing?

It's an interesting question. I think it all has a little to do with the funny positioning of being an historian in a Law School or, if you like, of being a lawyer who is also trying to write history. There's always some puzzlement about what your role is. I think there are ways of being a presently engaged scholar without being faithful--less to the aspirations and ideals of historical scholarship, and this is a theme that as you know I return to again and again. One of the functions of a legal historian is trying to break some of the false bonds that tie us to the past, to relieve us of the pressures of false necessity and false legitimation. The false necessity: we're in a set of legal institutions and practices which are necessitated or determined by our past; and false legitimation, which says, don't worry, the status quo is about the best that we can aspire to. I think a historicist sensibility helps to dissolve both of

[38] Robert W. Gordon, "The Independence of Lawyers." *Boston University Law Review* 68 (1988): 1-83, "Why Lawyers Can't Just Be Hired Guns," in *Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation*, ed. Deborah L. Rhode (Oxford: Oxford University Press, 2000) 42-58, "Law as a Vocation: Holmes and the Lawyer's Path", in *The Path of the Law in the Twentieth Century*, ed. Steven J. Burton (Cambridge: Cambridge University Press, 2000) 7-32, "The Return of the Lawyer-Statesman?", *Stanford Law Review* 69, (2017): 1731-1764.

those affirmations of necessity. So that's why I don't really think there's a radical inconsistency between past and present projects. Maitland obviously believed the same thing, but he was very dubious about trying to extract people's political commitments from their historical scholarship.

You engage with debates about the current socio--political and legal situation, and how to make America (if not the world) a better place and look to history as a means of doing so.

That's right. Although in a curious way I also have, like most people of my generation and the generation that followed, a historicist sense that the past really is different.

And that presentism is something to avoid?

Presentism in the writing of history is something to try to avoid; and yet, why do we write history? Why do we try to understand the past? Some people's interests really are largely antiquarian, and I completely respect that. I think that's the mode that one has to be in while actually trying to understand what's going on in the past--to try to transport oneself back into that time and see the world through their eyes. And yet, the urgency of the intellectual project: why do we do this? Not everybody in legal history has the same answer; but my interests are strongly presentist in that sense. A great deal of the purpose of the historicist sensibility is simply to critique those forms of conservative and nostalgic histories of law.

Which is something that you've written about: the way in which we appropriate history for either progressive or conservative functions.[39] And you play that game. You appropriate

[39] Robert W. Gordon, "Legal History: The Past as Authority and Social Critic," in *The Historic Turn in the Human Sciences*, ed. Terrence McDonald (Ann Arbor: University of Michigan Press, 1996), 339– 367.

history to your cause. "Critical Legal Histories" is an example of appropriating history to tell a very different story, and to attempt to enlist an exceptionally wide--ranging group of liberal and orthodox historians to the cause, demonstrating that they too were critical legal historians. [Laugh].

Exactly. This is history recruited to anti--determinist ends. In western society, and particularly in America, there's the strong pull of western exceptionalism: how the West grew rich and free, a grand narrative of development in which law plays a fairly central part in most of these accounts. And here's the whole CLS thing. These narratives, particularly the sense of inevitability and inescapability, become part of the description of our condition that makes change difficult to imagine and therefore difficult to push for. Things are simply written off. Our prosperity and our freedom depend on not deviating too far from this inevitable and inescapable path. We get trapped by these ways of thinking and acting. And I keep thinking there's all this great scholarship which questions the modernisation story, the law and industrialisation story, and the Marxist story of the evolution of capitalism. It challenges these big evolutionary functionalist grand narratives. But as soon as one of these grand narratives is criticized, another rises in its stead. So, I think there is a strong present interest in being able to crack some of these things open in order to liberate imaginative possibilities. But, of course, it doesn't tell you what to do next

It emphasises human agency; that there are other possibilities. This was one of the core themes of some of the best of the so--called new social history.

Exactly.

It seems to me that your anti--determinist outlook was also shaped by Maitland, who you have repeatedly quoted with approval, especially that wonderful passage in Maitland's letter to Dicey of 1896:

"The only direct utility of legal history (I say nothing of its thrilling interest) lies in the lesson that each generation has an enormous power of shaping its own law. I don't think the study of legal history would make men fatalists; I doubt that it would make them conservatives; I am sure that it would free them from superstitions and teach them that they have free hands."[40] That's a mantra in your work.

Yes, it is. There are very similar sentiments in Holmes' lectures on the utility of history. But if you want the most felicitous expression of anything, you go to Maitland.

George Orwell declared that one of the reasons he wrote is the desire to see things as they are, to find out true facts and store them up for the use of posterity.[41] Is that a view you share?

For sure. I think for all historians the dominating motive is to try and get through all the different layers, beyond the self--deception, to some kind of underlying reality. And if you feel you've caught a glimpse of it, even for a minute, you want to report it. That's why we do history, right? It's for the thrill of getting to, even though we know perfectly well that this is

[40] Frederic William Maitland to Albert Venn Dicey (1896) in *The Letters of Frederic William Maitland*, 2 vols., ed. C. H. S. Fifoot and P. N. R. Zutshi (Cambridge and London, 1965–95) 2: 116. See, further, James, Kirby, "History, Law and Freedom: F. W. Maitland in Context," *Modern Intellectual History* (2017): 1-28.

[41] George Orwell, "Why I Write" (1946) in *George Orwell. Essays*, (London: Penguin Books, 1994) 1-6, 3.

going to be a version, it's the thrill of getting to the marrow of the thing and see things as they really are.

Orwell also said he wrote for political reasons, in that no book was genuinely free from political bias and that every writer was in some sense a propagandist, pushing the world in a certain direction and concerned to get a hearing.[42]

Yes, that sounds very true. I think the driving impulse is to try and tell the truth about things. One of the reasons you're motivated in telling the truth is that you want to fling it into the faces of people who either can't or won't see it, and who get things wrong. So, I think good history is always simultaneously a history of error.

You tend to write articles, book chapters, and book reviews, rather than books. Is that conscious or is it just fortuitous?

I think the basic source of it is funk.[43] I have two unpublished manuscripts on lawyers, and I keep thinking, one of these days I'm going to bring at least one of them out, and I hope both before my string ends.[44] But there's something very daunting about a book. Even the

[42] See above, 4-7.

[43] Meaning -- avoiding a task or thing out of fear.

[44] *Lawyers of the Republic*; *The American Legal Profession, 1870-2000* (being an expanded version of Robert W. Gordon, "The American Legal Profession, 1870-2000," in *The Cambridge History of Law in America. Volume 3*, ed. Michael Grossberg and Christopher Tomlins (New York: Cambridge University Press, 2008), 73-126).

recently published collection of my essays; I was invited to do it about fifteen years ago, but I've been so reluctant to do it. Finally, Sally Gordon and Holly Brewer talked me into it.[45]

Is this because you're a perfectionist?

I would like to think it was because I'm a perfectionist. I think it's just funk. A book is a statement about one's whole identity as an intellectual, and as an academic. I distributed pieces of that identity over smaller things to make a smaller target.

I wonder if it's because you're a natural essayist?

I think that's right. It's a form in which I'm much more comfortable.

And that leads me onto another distinguishing feature of your writing: it is wonderfully lucid and literate. You don't seem to be interested in just preaching to the converted. Rather, you consciously seek to engage with strangers, people in other fields and with beliefs perhaps other than your own. You write and talk to people in a way that's not overly abstract, that's relatively close to the facts, that's not jargon--ridden, and is sufficiently balanced despite your obvious political sensibilities. You have a good novelist's gift for writing, for telling tales and capturing your readers' attention.

[45] Robert W. Gordon, *Taming the Past. Essays on Law in History and History in Law* (Cambridge: Cambridge University Press, 2017), which gathers together some of Bob's voluminous scholarship. See, further, Ariela J. Gross, Susanna L. Blumenthal *et al*, celebration of *Taming the Past*, *Stanford Law Review* 70, (2018): 1623-1681.

I think it has something to do with the journalism background. Also, I like the essay very much as a literary form. I think my prose style was influenced at an early age by reading the essays of Orwell and Bernard Shaw, and more recently mostly English essayists, like Stefan Collini. Also, Lawrence Friedman, who is unbelievably accessible--his stories, his ability to express complex ideas in straightforward prose is admirable. My style is a little more elaborate, more rococo, longer sentences and so forth than these great masters, but maybe a little closer to Collini than to Orwell's.

It's also about persuasion--being a more effective polemicist. You consciously seek to mobilize people, whether in person, or through your writing.

That's right. I have a strong sense of audience and the people I want to persuade. Sometimes its fellow lawyers, or it's also Law and Society people and Critical Legal Historians.

You're interested in talking to liberals and conservatives as well as lefties, teasing out what it is they share, propelled by a desire to sustain greater inclusivity.

Absolutely.

And, indeed, claiming some of them as Crits--suggesting that they write Critical Legal Histories too, albeit, unwittingly. But it's a strategy that's had mixed success. Some of those you singled out were deeply affronted.

I know. I told John Reid that he was a Crit. [laughs]

Another feature of your work is its comparative and international sensibility. You were ahead of the "comparative" and "international" turns in legal history of the last two or three decades. I'm thinking of, say, your article on freedom of speech in America and England, your tribute to E.P. Thompson, your review of Harry Arthurs book on legal pluralism in nineteenth--century England, your contributions to Canadian legal historiography, your work

on undoing historical injustice in Latin America and so on.[46] More generally, you seem to look over your shoulder at what's going on beyond America--as is evidenced by your footnotes. Where does that come from?

Barrington Moore is part of it. You are an important part of it because it was you who really introduced me to social legal history in England. And a lot of the knowledge that I have of comparative legal history comes from you. One of the things that's been wonderful about recent turns in legal historiography is how all of a sudden, it's comparative in a way, and on a scale, that none of us ever dreamed of in the old days. It first starts with Atlantic studies and it extends to….

Empires, colonies and colonialism, imperialism, indigeneity, human rights, international law, transnational movements…

Exactly.

[46] Robert W. Gordon, "Law and Disorder," *Indiana Law Journal* 64 (1989): 803-830, "Tribute: E.P Thompson's Legacies," "Without the Law II" [Review of H.W. Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth-Century England*] *Osgoode Hall Law Journal* 24 (1987): 421- 436, Robert W. Gordon and David Sugarman, "Richard C.B. Risk - a Tribute," in *Essays in Canadian Law, vol. viii, in Honor of Richard Risk* ed. G. Blaine Baker and Jim Phillips, (Toronto: University of Toronto Press, 1999) 3-17, Robert W. Gordon, "Undoing Historical Injustice," in *Justice and Injustice ed.* Austin Sarat and Thomas Kearns (Ann Arbor: University of Michigan Press, 1996) 35-60.

We have covered a lot of ground, Bob, and it's been great fun. Perhaps you could end by summarising for me why you teach and write?

I love teaching. I think if I had been able to fulfil my ideal vocation it would have been that as an actor, and teaching is as close as I can get to acting. I'm a shy person, personally, but I enjoy public performance, having the stage, the engagement with the students and participants. There's an existential thrill from pedagogy, that you feel that you know a little bit more than they do, and these are things that are exciting to know, that they are insights that give some purchase on the world.

Writing is difficult. Whenever I have to sit down and write, I wonder, "Why did I ever get into this? This is so painful! This is so difficult!" Unfortunately, the fates endowed me with a critical sense which is stronger than my creative abilities so I'm able to see what's wrong with a sentence the minute that it appears on the screen. So really, writing for me has always been something of an ordeal. The reason why I became a critical scholar and why I've written so much about historiography is because it's a place where my critical faculties can get engaged and where I find my writing flows a lot more easily than when I'm reporting on the findings of my research. The only thing that improves with age is that since you care less about what other people think, the fear of just being completely embarrassed by whatever appears under your name in print recedes.