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REFLECTION

**Bob Gordon's Critical Historicism
and the Pursuit of Justice**

Ariela J. Gross*

My initial encounter with critical legal historicism was as a graduate student in history at Stanford trying to decide whether to stay in graduate school, teach, and do research, or go to law school to pursue politics. During my first year, I lurked around the law school, attending my first legal history workshop. It was a discussion of Bob Gordon's *Critical Legal Histories*,¹ then six years old. It was an exciting departure from typical academic prose—the élan of the writing, the insouciance of summarizing swathes of historiography in a few characteristic bon mots, and especially the insights into the inadequacy and overdeterminism of “evolutionary functionalism,”² which characterized so much of the historical work I had read. But the most electrifying thing about *Critical Legal Histories* was the idea of the legal historian as a swashbuckling crusader knocking down the canards of received thought, killing or taming dragons, offing the fathers. It was heady stuff. For someone on the cusp of deciding between a career in politics fighting for justice and a career as a historian telling stories about the past, it was exciting that perhaps one could do both.

In *Critical Legal Histories*, Gordon called for a return to the “mandarin” sources,³ yet most of his students did the opposite.⁴ We took his exhortations

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

2. See *id.* at 59-65 (capitalization altered).

3. See *id.* at 277-78.

4. Compare *id.* at 117-25, with Susanna L. Blumenthal, *Of Mandarins, Legal Consciousness, and the Cultural Turn in US Legal History*, 37 LAW & SOC. INQUIRY 167, 176-81 (2012) (discussing work by several of Gordon's students, including me, that focuses on trial
footnote continued on next page

about the mutual constitutiveness of law and culture, as well as his insights about law's indeterminacy and especially about legal consciousness, and used them to explore the ways subaltern people contested and shaped legal and constitutional regimes from below.⁵ The idea that law was up for grabs enough that even oppressed people could shape its meaning was freeing.

Undoing Historical Injustice,⁶ the last essay in Gordon's book *Taming the Past*, epitomizes the potential that critical legal historicism has for the pursuit of justice. My focus on this essay may seem self-serving, as a perusal of the author footnote will reveal that I helped Gordon with the research for this piece twenty years ago.⁷ However, I want to reflect on it now precisely because our conversations at the time, and my view of the legal historian at work, modeled to me exactly what we should be doing as we try to bring critical historicism to bear on pressing questions of justice in the present day. Those conversations, and the seminar Gordon taught on the uses of history in law, were the starting point for my obsession with questions of memory, law, and politics, especially with regard to race and slavery.⁸

As a number of the authors in this collection note, *Critical Legal Histories* has had an enormous reach and influence; has been read by legal scholars, historians, literary critics, and students in a wide range of fields; and could be said without exaggeration to have spawned two generations of work in legal history. *Undoing Historical Injustice* is almost the opposite: Buried in a rather unheralded collection of essays, it appeared in the midst of an outpouring of work on transitional justice written largely without the benefit of Gordon's

courts and other local-level agencies as arenas of social struggle), and Christopher Tomlins, *What Is Left of the Law and Society Paradigm After Critique?: Revisiting Gordon's "Critical Legal Histories,"* 37 LAW & SOC. INQUIRY 155, 162-63 (2012) (discussing recent work suggesting that mandarin and popular sources of law remained on different planes).

5. See, e.g., RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007); ARIELA J. GROSS, *DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM* (2000).
6. ROBERT W. GORDON, *Undoing Historical Injustice*, in *TAMING THE PAST: ESSAYS ON LAW IN HISTORY AND HISTORY IN LAW* 382 (2017).
7. *Id.* at 382 n.*.
8. See Ariela J. Gross, *All Born to Freedom?: Comparing the Law and Politics of Race and the Memory of Slavery in the U.S. and France Today*, 21 S. CAL. INTERDISC. L.J. 523 (2012) [hereinafter Gross, *All Born to Freedom*]; Ariela Gross, *The Constitution of History and Memory*, in *LAW AND THE HUMANITIES: AN INTRODUCTION* 416 (Austin Sarat et al. eds., 2010); Ariela J. Gross & Chantal Thomas, *The New Abolitionism, International Law, and the Memory of Slavery*, 35 LAW & HIST. REV. 99 (2017); Ariela Gross, *When Is the Time of Slavery?: The History of Slavery in Contemporary Legal and Political Argument*, 96 CALIF. L. REV. 283 (2008).

insights—and much the worse for it.⁹ The essay is one of the most insightful efforts to analyze liberal polities' attempts to remake themselves in light of injustices instigated by the previous regime. Rather than focusing on whether their strategies are forward- or backward-looking, Gordon classifies their approaches as “narrow agency, broad agency, and structural” according to whether they “attribute injustice . . . to bad actors, bad groups, [or] bad structures.”¹⁰ Trials of deposed leaders could be narrow agency or broad agency, depending on whether they home in on individual bad actors or put forward a broader theory of conspiratorial wrongdoing. Other broad agency approaches include broad compensation schemes like reparations to Japanese American internees and truth and reconciliation commissions. Structural approaches could include redistributive schemes or even affirmative action programs if they are framed in terms of restructuring societal hierarchies.

The brilliance of this setup is that although agency-based approaches are certainly all backward-looking and structural approaches can be forward-looking, all these strategies embody a historical narrative. Each is an attempt to “reweav[e] the severed threads of memory” by connecting the future to an imagined counterfactual past—restoring the arc of history to the way it should have been, making up for the deviation of the unjust past.¹¹ Thus, slavery, seen as a historical deviation from a timeless principle of colorblindness rather than as a foundation of whites' freedom and of capitalism in the United States, can be compensated, and its memory erased, merely by bringing it to an end and declaring formal equality. Likewise, if Nazism was only “a criminal ‘outlaw state’ concentrated in a few [bad] officials,” excising it was a relatively simple matter of removing the bad apples.¹² The essay shows us that each of these approaches comes with its own version of history and thus its own “reweaving.” These narratives are central to the politics of regime change and policymaking, and they demonstrate why we need legal historians, who can surface the histories embedded in law and policy and—possibly—offer us alternative paths.

This work exhibits many of Gordon's trademark features: erudition, worn lightly; blending of social scientific categorization and analysis with an almost literary interpretation of cultural narratives; and (most unusually for legal history and especially promising in offering alternative paths to a just future) comparativism. With a very light touch, Gordon weaves together the stories of

9. For the original essay, see Robert W. Gordon, *Undoing Historical Injustice*, in JUSTICE AND INJUSTICE IN LAW AND LEGAL THEORY 35 (Austin Sarat & Thomas R. Kearns eds., 1996).

10. See GORDON, *supra* note 6, at 383-84.

11. See *id.* at 383.

12. See *id.* at 388-89.

reconstruction in the United States after the Civil War as well as in the 1960s, in post-World War II Germany, and in the post-Soviet republics in the 1990s. This comparativism has been a model I have tried to follow in my own work, looking across time and geography to understand why certain narratives repeat themselves (or don't).¹³

Gordon doesn't hide his light under a bushel. He prefers structural responses to injustice and has little truck with retribution or even reparation. He "focus[es] on a particular type of forward-looking response to . . . injustice: the restructuring response."¹⁴ The conventional emphasis on backward- and forward-looking approaches he originally eschews actually reemerges in his treatment of structural strategies because he clearly admires their forward-looking aspect. Gordon notes that during Reconstruction, although freed slaves themselves saw confiscation schemes in which property would be taken from vanquished planters and redistributed to the formerly enslaved in the form of forty acres and a mule as compensation for years of stolen labor, the "main motive" of Radical Republicans like Thaddeus Stevens who put forward these schemes in Congress "was to transform the political economy of the South and in consequence its political sociology."¹⁵ Gordon approves of this structural goal more than the compensatory one, although he notes that structural approaches met fierce resistance both in the post-Civil War South and in post-World War II Germany and that they failed spectacularly in the first case and fell far short of their goals in the second.¹⁶

The rest of *Undoing Historical Injustice* goes on to analyze the competing approaches to the Second Reconstruction in the United States, beginning in 1965 and continuing to that moment (the mid-1990s).¹⁷ Conservatives, including Justices Antonin Scalia and Clarence Thomas, followed the narrow agency approach, which, Gordon notes, appears "at first glance completely anti-historical" but in fact "is rooted in a conservative historical narrative of deep continuities subjected to temporary interruptions and deviations."¹⁸ The liberal race-conscious remedies of the post-1965 years were for the most part broad agency approaches.¹⁹ Gordon argues that the persistent focus of liberals on the "sins" of past discrimination and the "perpetrator-victim" model of broad agency approaches begged for counter-victimization narratives (such as

13. See, e.g., Gross, *All Born to Freedom*, *supra* note 8, at 526.

14. GORDON, *supra* note 6, at 387.

15. See *id.* at 388.

16. See *id.* at 390-95.

17. See *id.* at 395-415.

18. See *id.* at 395-96.

19. See *id.* at 398.

claims of reverse discrimination) and led to political failure.²⁰ He also notes that “[a]gency-based theories are really of very limited use . . . for understanding systemic or society-wide injustice” and voices the fear that they could “inhibit structural solutions.”²¹ Finally, although one might argue that structural approaches “obscure the moral significance of social injustice,” Gordon concludes that “in practice” it has been quite the opposite: agency-based approaches have been “exculpatory” because they have scapegoated a few and let the rest of society off the hook.²²

Looking back on the piece twenty years later, the most interesting thing to me, as I study the relationship between the memory of slavery and contemporary racial politics and law, is that Gordon’s favored structural analyses of the past have experienced a great resurgence not only among historians but also in journalism and in public debate. The connections between slavery and capitalism—the idea that major institutions like banks, insurance companies, universities, and of course the democratic republic itself were built on the backs of slaves—have gained public currency.²³ Furthermore, an entire literature on what Ira Katznelson called “white affirmative action”—the vast web of government programs and benefits that accrued only to white people in the twentieth century, as well as the active government cooperation in building segregated cities and suburbs through the actions of the Home Owners’ Loan Corporation and the Federal Housing Administration, vividly embodied in redlined maps—has exploded in the last few decades.²⁴ Yet all this work on structure, rightly celebrated by Gordon, has been linked, most clearly in the work of Ta-Nehisi Coates, not so much to calls for structural solutions as to broad agency approaches like reparations, precisely the ones Gordon considered dead ends.²⁵ Yet they have a great moral hold on our imagination.

20. See *id.* at 399 (quoting Kathleen M. Sullivan, Comment, *Sins of Discrimination: Last Term’s Affirmative Action Cases*, 100 HARV. L. REV. 78, 78 (1986) (capitalization altered)).

21. See *id.* at 409-10.

22. See *id.* at 411-12.

23. For an overview of the literature, see *SLAVERY’S CAPITALISM: A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT* (Sven Beckert & Seth Rockman eds., 2016). This work was discussed not only in sources like the *Nation*, see Greg Grandin, *Capitalism and Slavery*, NATION (May 1, 2015), <https://perma.cc/F8MB-WQ3M>, but also in mainstream publications like *Forbes*, see Dina Gerdeman, *The Clear Connection Between Slavery and American Capitalism*, FORBES (May 3, 2017, 12:47 PM), <https://perma.cc/5VJF-PLZ5>.

24. See generally, e.g., IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* (2005); RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017). For the term “white affirmative action,” see KATZNELSON, *supra*, at 164.

25. See, e.g., Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <https://perma.cc/KBW7-BGEB>.

Gordon's work anticipated a world in which historical narratives about slavery have come to dominate contemporary political discussions with regard to race to an unprecedented extent. It was written before universities like Brown, Harvard, Princeton, and Georgetown reckoned very publicly with their own histories of slavery, asking explicitly what institutions owe the descendants of those they enslaved. It was written before staged public battles over the Confederate flag flying above state capitols and, of course, long before white supremacists marched in Charlottesville to defend the city's Confederate monument. In today's political and legal spheres, appeals to the past of slavery and its aftermath are more salient than ever.

Gordon may have been correct that reparations and other broad agency approaches to racial justice are difficult to implement and politically polarizing, but can a structural analysis of historical injustice be wed to an approach that is more politically and morally inspiring? Is it possible to heed the tremendous force of the moral claims for reparations without falling prey to the traps of competitive victimization? My hope is that we can heed the voices of the freed slaves themselves who, from the end of slavery well into the nineteenth century, made claims on their former owners, on states, and on the federal government for reparations. Movements for black rights and Black Power have drawn on this call for reparations for over a hundred years. Their legal and constitutional claims must form the basis for any effort to undo historical injustice and to create a more just world in the future. The counternarrative created by professional historians and now perhaps by constitutional interpreters can help heal the wounds of the past by reimagining the Constitution through the eyes of the enslaved who claimed freedom.

To truly take the perspective of the freed slaves who could not vote on the ratification of the Reconstruction Amendments, rather than that of the Radical Republicans or their political opponents, means that we cannot dismiss the deep impulse toward reparation. Perhaps rigorous structural analysis of the histories of injustice can lead us to political approaches that are as broadly structural as reparations can be: not individual payments but broad social and economic programs. The brilliance of Bob Gordon's critical legal historicism is that his students can use it not only to understand deep structures of law and legal doctrine but also to see the way law has been a terrain of contestation, in which people from below have made and continue to make claims for justice.