



REFLECTION

***Critical Legal Histories and
Law's (In)determinacy***

Reva B. Siegel*

Introduction

Over the years, I have had the delight, adventure, and nourishment of having Bob Gordon as friend, colleague, and co-teacher. But for this Reflection, I was moved to excavate Gordon's role in my life *before* I ever met him, in those years when a first encounter with *Critical Legal Histories*¹ helped me find my voice as a law student in New Haven in the 1980s.

As I have pulled on the string of these memories, what strikes me is how *Critical Legal Histories* enabled some of my first work on the modernization of marital status law, even as I argued with the article's core claims about law's indeterminacy. Gordon asserted that law structured social life at the deepest levels; my work on marriage law illustrated how this was so. At the same time, my work on marriage law led me to resist Gordon's claim that law was indeterminate. The marriage cases demonstrated the many ways that inequalities in the law's interpretation and enforcement structured social life. Yet in the end my encounter with the indeterminacy thesis would shape the ways I came to understand law's role in enforcing inequality. My formative encounters with *Critical Legal Histories* raised questions about the plural ways histories can be critical.

Critical Legal Histories as Map

In the 1980s, I was a student at Yale Law School beginning to ask questions about gender in the law. Convinced that history offered a powerful resource, I

* Nicholas deB. Katzenbach Professor of Law, Yale University. I am indebted to Sally Gordon, Ariela Gross, and John Witt for organizing this celebration of Bob Gordon. I thank Jack Balkin and Robert Post for lively conversation about the themes of this Reflection and Ashraf Ahmed and Dylan Cowit for their research assistance.

1. ROBERT W. GORDON, *Critical Legal Histories*, in TAMING THE PAST: ESSAYS ON LAW IN HISTORY AND HISTORY IN LAW 220 (2017) (reprinting Gordon's 1984 article).

set out to write a paper about the reform of the common law of coverture with my legal history professor Robert Cover. Cover was riveting but plainly uncomfortable advising me about gender questions.

Enter Bob Gordon. I stumbled across *Critical Legal Histories* while poring over the 1984 volume of the *Stanford Law Review* in the Yale Law School library.² The volume was like contraband in New Haven. I knew of no Yale faculty who then supported critical legal studies. (During my time at the law school, Owen Fiss backed into an uneasy embrace of feminism in the belief that feminists might demonstrate the faith in law of the civil rights movement.)³ Positioned prominently after Peter Gabel and Duncan Kennedy's *Roll Over Beethoven*,⁴ *Critical Legal Histories* was programmatic and methodical by contrast. Even so, it was a tough read. A formative read. Gordon's inimitable blend of erudition and insouciance invited me in; his high spirits beckoned me along.

Arguing for a critical legal studies-affiliated practice of historiography he termed "critical historiography,"⁵ Gordon advanced several claims that together would earn the article canonical status.⁶ He (1) refused systems of explanation that divided law from society and invited accounts that "blurr[ed] the 'law/society' distinction," flipping causal relationships posited by materialism and functionalism in order to emphasize (2) "the constitutive role of law in social relationships."⁷ But if law was constitutive of the social, then *what was law?* Gordon explained that law was not restricted to events in state agencies and courts; it also structured relations "that people commonly recognize and enforce without officials anywhere nearby."⁸ Law could structure relationships without officials presiding because law exerted power through reason—(3) law was "constitutive of consciousness."⁹ As Gordon explained:

[T]he power exerted by a legal regime consists less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the

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

3. See Owen M. Fiss, *The Death of the Law*, 72 CORNELL L. REV. 1, 15 (1986) (observing that like the civil rights movement, the feminist movement might make claims on law as an instrument of public value). Fiss recalls supervising our student reading group on gender and the law. See OWEN FISS, *PILLARS OF JUSTICE: LAWYERS AND THE LIBERAL TRADITION* 121-22 (2017).

4. Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984).

5. See GORDON, *supra* note 1, at 260 (capitalization altered).

6. See, e.g., *Symposium on Gordon's "Critical Legal Histories,"* 37 LAW & SOC. INQUIRY 147 (2012).

7. See GORDON, *supra* note 1, at 261, 265 (capitalization altered).

8. See *id.* at 266.

9. See *id.* at 267 (capitalization altered).

world described in its images and categories is the only attainable world in which a sane person would want to live.¹⁰

Yet famously, even as Gordon invoked law's power to structure social life, he simultaneously emphasized (4) law's indeterminacy, its plasticity. In a key section entitled "Indeterminacy Located in Contradiction," Gordon committed legal history to chronicling law's fundamental contradiction:

[Law's] indeterminacy exists because legal rules derive from structures of thought We are . . . constantly torn between our need for others and our fear of them, and law is one of the cultural devices we invent in order to establish terms upon which we can fuse with others without their crushing our identities. . . .¹¹

Gordon's claims in *Critical Legal Histories* authorized me to write and provoked me to argue. I had arrived in law school in flight from literary studies dominated by cultural materialism,¹² and I embraced Gordon's critique. *But to what end?* It has been fascinating to reread *Critical Legal Histories* all these decades later and reexperience many of the excitements and puzzles I had as a law student decades ago.

"The history of DOCTRINE? This is the big Liberating move?"¹³

The article's invitation to investigate law as structuring social life was immensely enabling. I was then interested in writing about the marital status rules of the common law, about coverture and its nineteenth century legislative reform. In legal history we had learned that the Married Women's Property Acts and earnings statutes marked the law's progress from relations of status to contract.¹⁴ But did the statutes granting wives property rights in their labor and capacity to contract in their own right in fact end coverture? *Did the law disestablishing hierarchy in fact end hierarchy?* That was a question worth asking in the midst of the 1980s, as the Burger and Rehnquist Courts

10. *Id.*

11. *Id.* at 271-72.

12. See, e.g., Catherine Gallagher, Review Essay, *The New Materialism in Marxist Aesthetics*, 9 THEORY & SOC'Y 633, 633 (1980) (offering a critical discussion of RAYMOND WILLIAMS, MARXISM AND LITERATURE (1977), and TERRY EAGLETON, CRITICISM AND IDEOLOGY: A STUDY IN MARXIST LITERARY THEORY (1978)).

13. GORDON, *supra* note 1, at 274.

14. See generally NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK (1982) (discussing marital property reform in New York); HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS 168-70 (London, John Murray 1861) (introducing the thesis that the development of ancient legal regimes into modern ones involved a "movement from Status to Contract" (emphasis omitted)).

were declaring that the nation had achieved equality at law and were withdrawing from the work of the Second Reconstruction.¹⁵

Gordon's invitation to take law's structure seriously was the green light I needed to analyze legal categorization as a scene of struggle. As I read through earnings statute decisions, it slowly dawned on me that the musty cases recording women's failed earnings statute claims contained more than lost frontier history. They demonstrated "the constitutive role of law in social relationships."¹⁶ The earnings statute cases showed the law at work drawing new lines between the market and family, and in this way modernizing coverture's logic for the industrial era.

So what then did it mean for law to be "constitutive"? Just how structuring (and how determining) was that? Once the earnings statutes declared a married woman able to contract *sui juris* and conferred on her property rights in her own labor, could a married woman now enter into contracts for her labor like any other? If so, could she sell her household labor to family boarders—or to *her husband*? If the movement of our law was from status to contract, judges should have allowed wives to enter market-based relations with their husbands. Wives asserted the claims; yet judges rejected them, over and over and over, on contractarian and on anticontractarian grounds.¹⁷ Judges declared interspousal agreements for wives' domestic labor unenforceable for want of consideration—acting as if wives' obligations of marital service were fixed when in fact they were in flux under the earnings statutes, stabilizing only as judges construed "[t]he contract doctrine of consideration" to "codif[y] the canon of domesticity."¹⁸ Over time judges edged away from the old language of the common law and began instead to emphasize that the intrinsic and distinctive feature of a wife's family labor was its altruistic character; wifely labor was presumptively performed *for love*, not for pay.¹⁹ As a California court declared in 1993, "[E]ven if few things are left that cannot command a price, marital

15. *Cf., e.g.,* *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289-90 (1978) (opinion of Powell, J.) ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."); *Washington v. Davis*, 426 U.S. 229, 245 (1976) ("As an initial matter, we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies 'any person . . . equal protection of the laws' simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups." (alteration in original)).

16. GORDON, *supra* note 1, at 265.

17. I wrestled with the earnings statute paper for many years, publishing it years later. See Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127 (1994).

18. See *id.* at 2185.

19. See *id.* at 2187-94.

support remains one of them.”²⁰ A wife’s role was defined by “gendered structures in the relations of production and distribution”—as Gordon had emphasized—by the economy *and* by law.²¹

Law might take the form of “mandarin”²² rulings on consideration doctrine but, again, as Gordon had emphasized, law did not require the intermediation of courts. Following the logic of the earnings statute cases, I discovered that in the nineteenth century, conflict over who owned rights in wives’ household labor spilled out of the courts and into the public arena. Suffragists regularly emphasized the expropriation of wives’ household labor as a ground for demanding the vote: The woman’s rights movement claimed for wives joint rights in marital property by virtue of wives’ contribution to the household economy.²³ In woman’s rights conventions and suffrage newspapers there was talk of how law enforced women’s pecuniary dependence on men.²⁴ The joint property claim was *constitutional*: It demonstrated that men did not virtually represent women’s interests and so provided reasons why women required the vote—direct representation in the state.²⁵ Susan B. Anthony invoked joint property claims when she was tried for voting unlawfully during the New Departure.²⁶ Joint property discourse gave me my first glimpse of popular constitutionalism in action.

Critical Legal Histories of What?

Critical Legal Histories helped me find my path. Yet it was as provocation to argument, not as a recipe for writing, that the article proved most enabling. From my first read to my most recent, I have resisted the claims about law’s indeterminacy that rest at the heart of *Critical Legal Histories*.

20. *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16, 20 (Ct. App. 1993).

21. See Siegel, *supra* note 17, at 2209.

22. See GORDON, *supra* note 1, at 277-78 (contrasting “mandarin” or “elite legal thought” with “vernacular” or “common forms of legal discourse”).

23. See Reva B. Siegel, *Home as Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850-1880*, 103 YALE L.J. 1073, 1076 (1994) (“The antebellum woman’s rights movement sought to emancipate wives’ labor in the household as well as in the market, and to do so, advocated ‘joint property’ laws that would recognize wives’ claims to marital assets to which husbands otherwise had title. The movement argued that wives were entitled to joint rights in marital property by reason of the labor they contributed to the family economy.”).

24. See *id.* at 1113 (conventions); *id.* at 1156-60 (newspapers).

25. See Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 991-92 (2002).

26. See Siegel, *supra* note 23, at 1147-48.

While the Crits “stirred up a fabulous ruckus” in the legal academy by deconstructing “the core doctrinal subjects of the first year curriculum,”²⁷ I thought that the indeterminacy thesis as expressed in the article made claims about the character and properties of law on terms too radically abstracted from social context—the context in which we experience law.

I first encountered Gordon’s claims about law’s indeterminacy in the midst of the Crit conflicts of the 1980s, when Duncan Kennedy and Morton Horwitz were arguing whether the political valence of all legal doctrine could be “flipped.”²⁸ Despite the utopian vistas the method opened,²⁹ it seemed to me to divert attention from the social forms in which we encounter law.

Did “indeterminacy” well describe my experience of the law in the earnings statute cases? It did not. In a society that celebrates freedom of contract, *all* courts refused to enforce a contract between husband and wife for her domestic labor, for well over a century.

Critical Legal Histories opened by arguing for blurring the law-society distinction but in its closing pages seemed strangely unengaged with the ways law is actually socially embodied. There, Gordon conceded that “there are plenty of short- and medium-run stable regularities in social life, including regularities in the interpretation and application, in given contexts, of legal rules”—but he was not interested in them, instead emphasizing that “[t]he Critical claim of indeterminacy is simply that none of these regularities are *necessary* consequences of the adoption of a given regime of rules.”³⁰ Indeterminacy here seemed to be a claim about law’s “core” more than its mere “applications”; indeterminacy was structural, semiotic, a property of reason, rather than social practice, the lifeworld, or law’s “vernacular.”³¹

The history I was uncovering concerned “regularities . . . in the interpretation and application . . . of legal rules”³² that Gordon seemed to walk past in the article’s concluding pages—that is, problems of power and inequality in the exercise of legal authority.

Even so, my encounter with Gordon and the Crits left its impression on the very ways I understood law’s role in structuring inequality. As the earnings

27. See GORDON, *supra* note 1, at 278.

28. Cf. J.M. Balkin, *The Promise of Legal Semiotics*, 69 TEX. L. REV. 1831, 1834 & n.15, 1835 (1991).

29. See Hendrik Hartog, *Introduction to Symposium on “Critical Legal Histories,”* 37 LAW & SOC. INQUIRY 147, 150 (2012) (“A legal decision represented at most a momentary conclusion to ongoing struggles. And beneath the seamless surface of the law in casebooks and in statute books lay buried or defeated alternatives, even utopian possibilities.”).

30. See GORDON, *supra* note 1, at 281.

31. See *id.* at 271-72. For Gordon’s distinctions between elite and vernacular forms of law, see *id.* at 277-78.

32. *Id.* at 281.

statute cases came to teach me, status inequality is no static thing, no determinate form of domination. Contra Kitty MacKinnon, who famously argued in 1989: "Man fucks woman; subject verb object."³³ Law was playful and perverse and played a protean part in keeping inequality alive.

The earnings statute cases show how social arrangements could be preserved through legal change or what, in an article called "*The Rule of Love*," I came to call "preservation-through-transformation."³⁴ "As reform of the common law marital status rules illustrates, this process of ceding and defending status privileges will result in changes in the constitutive rules of the regime and in its justificatory rhetoric," I observed, "with the result that, over time, status relationships will be translated from an older, socially contested idiom into a newer, more socially acceptable idiom."³⁵ In subsequent years, I began to explore other kinds of legal constraint on change. In our constitutional order, citizens and officials reason within roles that structure and discipline argument, as does the effort to persuade under conditions of conflict.³⁶ The legal system may be open, but opportunities to change it are mediated by institutions and deeply influenced by inequality of status and resources.³⁷

33. CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 124 (1989).

34. Reva B. Siegel, "*The Rule of Love*": *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2178 (1996).

35. *Id.* at 2179. For application to race, see Reva Siegel, *Essay, Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 *STAN. L. REV.* 1111 (1997).

36. See, e.g., Reva B. Siegel, *Community in Conflict: Same-Sex Marriage and Backlash*, 64 *UCLA L. REV.* 1728, 1732 (2017) ("I use the term ['constitutional culture'] to draw attention to popular and professional understandings about law in the United States that structure the roles of citizens and officials in making claims in conflicts over the Constitution's meaning. These understandings about role, and the beliefs about institutional authority on which they rest[,] help citizens and officials decide whether they must defer to one another and when and how they may contest each other's views. It is through these role-based understandings that the constitutional order coordinates its commitments to democracy and the rule of law."); Reva B. Siegel, 2005-2006 Brennan Center Symposium Lecture, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 *CALIF. L. REV.* 1323, 1365 (2006) [hereinafter Siegel, *Constitutional Culture*] ("As movements endeavor to persuade the public of the merits of their claims, they are forced to reckon with the arguments of their opponents. . . . The countermobilization dynamic thus disciplines the ways movements make interpretive claims on a constitutional tradition, and structures dispute in such a way as to prepare the ground for lawmaking by public officials." (footnote omitted)).

37. On the mediating role of institutions, see, for example, Reva B. Siegel, *Comment, Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 *HARV. L. REV.* 191, 201-36 (2008) (analyzing how legal views of the Second Amendment have been shaped by the entertainment industry, direct mail and interest group advocacy, political parties, academics, representative government, and courts). On the ways inequality shapes constitutional meaning, see, for example, Siegel, *Constitutional Culture*, *supra* note 36, at 1356 ("The forms of community realized through constitutional argument depend on the social structures that mediate the relation of speaker and addressee. If the constitu-

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Law—by reason of its semiotic properties as law and its social embodiment as law—can be open and constraining at one and the same time.

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My resistances in reading Gordon raise questions about what is “critical”³⁸ and remind us of the many kinds of critical legal histories that *Critical Legal Histories* has provoked and enabled.

tional order is marked by social stratification or opportunities for democratic voice are formally or structurally unequal, the consent condition is likely to operate in ways that will reproduce and legitimize these conditions.”).

38. For an account of the emancipatory possibilities of attending to contingency in historical narrative, see Hartog, *supra* note 29, at 150. For a much more skeptical account of the value of producing “a past for law that is completely contingent, perpetually contested, and continuously renegotiated,” see Christopher Tomlins, *What Is Left of the Law and Society Paradigm After Critique?: Revisiting Gordon’s “Critical Legal Histories,”* 37 LAW & SOC. INQUIRY 155, 164 (2012).