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Summary of Discussion of *Historicism in Legal Scholarship*

The discussion was initiated by Professor Barbara Black of Yale Law School. She acknowledged that history poses problems for the rationalizing enterprise in which most legal scholars engage. She suggested, however, that only a very small, though very visible, fraction of legal scholars would find their endeavors “mocked” or “menaced” by the social and temporal contingency of law. Only those who sought to discover universal norms—the “super-rationalizing” enterprise—would be driven so far as consciously to adopt “evasive techniques” to avoid the exposure of contingency. Pointing to Gordon’s fourth response, resignation, she observed that only for the few with such aims would recognition of the complexity and richness of history be likely to constitute “resignation.” The vast majority of legal scholars, in contrast, engage in valuable and fruitful middle-level theorizing, to which the existence of social fact, historic or synchronic, could not really be described as threatening.

In response, Gordon said that the small group of ambitious theorists were not alone; the vast range of middle-level work in legal scholarship was also subject to the perils of historicism. Middle-level work also seeks to rationalize, to justify, and to reform. Another legal scholar from the audience agreed with Gordon’s characterization of the state of legal scholarship. He stated that he had skimmed two years of issues of ten leading law reviews and that Gordon’s description aptly covered ninety-five percent of the articles.

A professor in the audience questioned Gordon’s assertion that legal scholars felt threatened by historicity. He argued that even though they might recognize the contingency of law, they limit their own work to the contingent rules and principles that exist at the present time. Gordon explained that he would distinguish between an objectively present intellectual threat and something that is perceived as a threat. Tax teachers, he agreed, do not experience Maitland as destabilizing, but they might feel threatened by history if they thought deeply about it. Of course, the conversation would stall if the scholar said, “I’m just a tax specialist.” But if one pursued the conversation and asked, “what is the social utility of the tax system?” and, “what is the role of lawyers in rationalizing it?”, the questioner would get
Discussion of Gordon

back, in increasingly large doses, an extremely contingent theory. Once the structure of basic normative premises underlying middle-level work has been exposed, the threat of historicism is apparent and the avoidance mechanisms can be identified.

A scholar from the audience questioned Gordon's assertion that history is radically destabilizing and that it threatens the rationalizing enterprise. He agreed that the rationalizing effort is a response to contingency; it begins with the recognition that a problem exists and should be explored. Reason-giving is threatened by history, however, only if it attempts to be universal. Otherwise, he suggested, it is not necessary for the recognition of historical contingency to threaten the concept of rationality. Gordon responded with an analogy to scientific knowledge. The publication of Kuhn's work on the structure of scientific revolutions\(^1\) had thrown scientists into a panic. It suggested to them, "All we're doing is constructing paradigms, no one of which is more true than another." Similarly, in Gordon's view, the contingency of legal principles is inherently threatening to legal scholarship. He challenged the members of the audience to consider the possibility that their own work, in twenty years, would come to be seen as an apologetic for the current social order.

Speaking from his own experience in teaching legal history, a law professor observed that most persons do not perceive history as very threatening. Reading a history of prisons and plantations in the early nineteenth century in South Carolina may suggest that these institutions were used to stigmatize marginal groups, but it does not suggest more troubling conclusions. Gordon agreed that, for this reason, legal history is often unsatisfying to teach. People don't use it the way it should be used. Students readily understand that nineteenth century law served a legitimating function for the existing social order, but they do not turn the same critical analysis upon their own law. He wishes that the menace of historicity were more acutely and painfully felt.

Responding to Gordon's observation about the decline of legal history in the law schools in the early twentieth century, and to Professor Horwitz's comments, an academic in the audience suggested a functional explanation for the decline. Legal history was useful at the end of the nineteenth century, he suggested, because it helped lawyers understand the law. For example, medieval studies could help lawyers straighten out problems in the common law of real prop-

erty. But the situation changed as statutes were passed and more and more areas of law were reformed. Legal history became irrelevant to professional lawyers. On the other hand, with the rise of professionalization, other historians felt themselves unequipped to do legal history.

Gordon responded that the functionalist account of the rise and fall of legal history was a prime example of adaptation theory, and one that was not supported by the facts. Gordon’s own research suggested that, in fact, the basic conditions had not changed. Lawyers in the 1870s and 1880s made little use of legal history. The role of legal history changed not because of a change in circumstances but because of a change in people’s view of the past. In a deep and mysterious way, the paradigms of useful knowledge changed. Moreover, in the past decade, legal history has enjoyed a considerable revival in the law schools, not correlated in any way to the functional importance of the subject to the legal profession.