NEW YORK LAW SCHOOL

NYLS Law Review

Volume 51
Issue 4 *Faculty Presentation Day*

Article 8

January 2006

Uncovering the Past: Lessons from Doing Legal History

Annette Gordon-Reed
New York Law School

VOLUME 51 | 2006/07

ANNETTE GORDON-REED

Uncovering the Past: Lessons from Doing Legal History

ABOUT THE AUTHOR: Annette Gordon-Reed is a Professor of Law at New York Law School and a Professor of History at Rutgers University.

When I agreed to participate in New York Law School's 2006 Faculty Presentation Day, I gave its organizers a title for my discussion — "Uncovering the Past: Lessons From Doing Legal History" — before I had actually decided what I would say. In the time leading up to the panel, I had to ask myself just precisely what that title meant. As often happens when you give a title before you have actually written the paper, some event or circumstance arises that helps you shape what it is you really want to say. That happened to me when I stumbled upon a discussion thread on a history list service.

A young person — I'm presuming the person was young — wrote in to ask whether he should go to law school, graduate school in history, or perhaps get a joint degree. The response from those who participated in the discussion was swift and almost uniform: "No! Do not go to law school!" "It's a waste of time." "It's a trade school; nothing intellectual goes on in law school." The basic point the people who answered the query were making was that nothing happens in law school that could ever help a historian do his or her work.

Now, I'm used to this. Over the past ten years or so, I have been straddling the line between writing about law and writing history — doing some straight legal history — but, for the most part, using the way lawyers think about problems to address what would be called "straight" historical issues; taking what I learned in law school, practice, and even from teaching, about how to solve problems and answer questions. Having been to many conferences where I have heard traditional historians heap scorn upon what law professors do with their scholarship, I am well used to the skepticism that historians have about law professors. It is not just law professors who get on their nerves. Traditional historians are maddened by lawyers and judges who use what they call "law office history," that is, the practice of reading history selectively — highlighting the parts with which they agree and burying facts that do not suit the client's case — which is what they imagine is the only thing that lawyers, and I guess, all who are trained to be lawyers, do.

In fact, that is what bad lawyers do. Any lawyer worth his or her salt knows that you cannot simply ignore or bury your opponent's best arguments. You have to know them as well as your opponent does so that you can deal with them effectively.

When I hear these criticisms, I know very well that historians practice their own version of law office history without using the explicit language of the law. When they sit down to write history, they do not have to announce that they have a "client" or that they are making an "argument" for their particular version of history, but, in actuality, they often do have their version of a "client" and an "argument" that they want to make about the material they present. That they will advocate one side over the other is almost inevitable. They cannot put in everything. The process of selecting what to include and what to leave out is a necessary step in any project, historical or legal, even if it skews the picture. Without editing or selecting material, works would never be finished. The standard one employs in doing this is subjective, and in that subjectivity one can find

behavior that resembles the dreaded practice of "law office" history. This is because people, being as we are, can very easily slide into selecting what is comfortable over what may be more real or true, but discomfiting. To a great extent, law professors, lawyers, and historians are all essentially doing the same thing, but calling it by a different name.

Not all historians disdain law professors. There are many who admire the obvious intellectual power that many of my cohort bring to questions of great importance, such as the interpretation of the Constitution, what to do about civil rights, and other pressing issues of the day. They also admire the comparatively larger salaries. Besides the charge that we practice law office history, perhaps the chief source of their concern about the scholarship of law professors is that we generally publish in student edited law reviews, while they, on the other hand, publish in peer reviewed journals. Only full-fledged historians — their peers — judge the work of other historians. An established historian would find it inconceivable to have to turn his or her work over to a graduate student — a novice — to review and make judgments about his or her article. Peer review, they argue, tends to insure the strength of what they do. On this, I have come to believe that they have a point. I respect the tradition of the student run journal, but there should be more peer reviewing in law scholarship. As things stand, the way we do scholarship makes historians dubious about the notion that anything we do could be of use to them in an interdisciplinary way. Law schools, the main apparatuses that support our scholarship, do not provide much sustenance for people who have a rigorous interest in the life of the mind.

I followed the discussion on the list service until it eventually died out, as threads of that kind must do, but chose not to participate. When I am at conferences or when giving talks, I try to defend my profession by explaining that law professors play a role that is different from the role of lawyers in a courtroom. I tell them that when we are in the classroom, we are there to teach students how to think through a problem which requires, as much as that could be done, seeing all sides of a question and coming to a conclusion about what is the best way to view the issue at hand. We are not, if we are doing it the right way, putting ourselves in the role of an advocate of a particular point of view. The typical way of putting this is that we try to each students how to "think like lawyers," which I take to mean at its essence, to think critically.

The ability to think critically is important in any line of endeavor — law, history, medicine — certainly any activity where important matters are at stake. If historians complain about the overall weakness of law professors' scholarship, I might observe that it has been my experience that the typical law professor certainly has an edge on the typical historian in the area of critical reasoning and analytical thinking. I do not know whether this is a function of the kind of people who choose to go to law school, or those who want to become law professors, or whether our experiences in law school nurtured us into obtaining a gen-

erally greater ability in this area. In law school we are taught, in all classes if we are lucky, but certainly most of the time, to constantly question our assumptions and interrogate the material we read, and to be cognizant (perhaps a little paranoid) about what others know or can learn.

Historians might protest that they do that as well in their training of graduate students, but I think there is something about the process in law school that drives these points home more effectively. Perhaps forcing people to articulate why they believe the things that they believe in a pressured setting focuses the mind in a particular way. To be interrogated about your ideas in front of one hundred-twenty people, to watch that happen to others and commiserate, is a thing that can focus the mind, which is what critical thinking requires. Law students are given examinations with complex fact patterns that require issue spotting, which help students to learn to separate the wheat from the chaff and get at what is really important in a question. Those are valuable skills in any line of endeavor.

A few years before I came across the discussion about whether going to law school was valuable if one wanted to become a historian, I had an experience that I could have offered as another very concrete reason for why law school would be valuable to potential historians, or anyone who would be working in an area that required looking at law. I was seeking information from several historians who had written fairly extensively on a particular statute and set of cases involving slaves. The historians were able to talk to me in great detail about what the statute said and what the cases had held. But, when I posed a question to them about how the law would be applied to the circumstances of a particular enslaved person that I was writing about — presenting the kind of hypothetical that we do in the legal field all the time — they seemed almost taken aback.

I was immediately reminded of students who come into my office to talk about their exams and insist that they know the doctrines of the cases and what they meant. Indeed, sometimes the students have actually recited the words of the doctrine in the examination itself. The problem, of course, is that memorizing and describing what something says is not the same thing as analyzing a question. When confronted with a situation that required the students to apply the doctrine on the examination, they could not do it because they really did not understand the cases and the doctrines that came out of them.

My experience with the group of historians illustrated something quite basic that we who teach at law schools and have attended law schools take for granted: One has to learn how to read cases and statutes. There is a culture of law; legislating, decision-making, reasoning by analogy, talking about law, and judging that informs the way law is applied in a given setting. These very bright and intelligent people, the historians, did not know this culture or way of speaking and writing, and when I asked them how this person in history would likely

have fared, applying the doctrine of the statute and cases, they — like the students I described — could not give me a reasonable answer.

Historians do have an advantage over law professors by being part of a craft that trains new people through a process of mentorship. Young historians are supposed to be guided in their graduate studies by a wise, older person, and they learn how to become effective teachers by teaching classes. Unless we are very fortunate, we law professors do not experience mentorship anywhere near to the same degree as historians, and, depending upon the program at a given law school, we rarely get to teach at all during our time as law students. It has been my experience that law professors must depend on each other to learn how to be teachers and scholars, because our way of getting to the position really does not facilitate doing it any other way. Still, what we do with students is show a relentless drive to learn how to think through problems. Because almost any issue can be constructed as a "problem," unlike the vast majority of people on the list service, I believe strongly that what we learn in law school can be extremely useful to people who want to write history. Perhaps the best of all worlds would be to pursue a joint degree so that one can gain the best of what graduate school has to offer and then get the best of what law school has to offer in the way of sharpening one's analytical and critical faculties.

Many of the issues that come up in historical analysis, particularly in the field in which I work — the scholarship of slavery — are quite contentious. They present us with a set of really tough, almost intractable, "problems." If one sees these issues as problems, one knows that there are ways to approach them that are better or more effective than other ways. This approach allows for creating scholarship that is as useful and valid as anything a traditional historian might create. When I set out to write my book about Thomas Jefferson and Sally Hemings and the way historians treated the question of whether they had had a long relationship and children together,[1] there had been one hundred-fifty years' worth of Jefferson scholarship and no one had been willing, or able, to parse through the problem in an effective way. I think anyone could have done exactly what I did in going through the evidence and demonstrating that there was far more to the story than historians claimed. When I used the tools that we urge students to employ when looking at matters, it did not appear to me as rocket science to see that evidence for Jefferson and Hemings' liaison was, in fact, quite strong. Now, of course, this could well have been more than a failure of analytical ability. One suspects that the treatment of Jefferson and Hemings was an example of historians practicing their own version of law office history.

There is some irony in this because it was not really until I began to operate in an area that was pretty far away from what I thought I had been trained to do that I really began to see what my professors had been trying to teach me in

1. *See* ANNETTE GORDON-REED, THOMAS JEFFERSON AND SALLY HEMINGS: AN AMERICAN CONTROVERSY (1997).

law school: to look at a problem and come up with the best available answer based upon the information that was put before me. That, in the end, is what history is about; finding the best available answer to what was occurring during a given period. So, the value that people recognize in individuals who have been trained as lawyers — the reason employers hire lawyers to do jobs in other fields — is their ability to come into an area and get to the heart of the matter effectively. This is the skill legal professors try to cultivate in our students when we ask: "What is the issue in the case?"

Many historians were quite complimentary of my first book, but there was some hesitancy on the part of others who could not believe that I was acting as a scholar in the way that they would typically recognize. As they attempted to determine whether they could trust what I was saying, the image of the lawyer presenting a case hovered over their assessment. Even the people in the publicity department at my publishing house thought the best way to sell the book was presenting me as lawyer putting a case before a jury, which, by the way, I have never done in my life. The courtroom image was not at all what I was thinking as I was writing. Instead, I envisioned myself as having a conversation with the reader in the same way I would have a conversation as a law professor with a student — trying to walk him or her through the record that was before us — a very different enterprise than being a lawyer presenting a case in a courtroom.

All of this is by way of saying that training in law provides a valuable tool in interdisciplinary scholarship. There are weaknesses; the typical law professor will not be immediately conversant in all the basic texts that historians in a given field would have been exposed to. That, however, is a problem easily rectified: You can read the books. A habit of mind, I think, is much harder to fix. The earlier someone is exposed to the process of critical thinking, the better. I believe law school provides a matchless venue for training in how to think critically. If students take to heart what good law schools and teachers try to instill in them, they need never fear that they cannot make themselves useful in almost any field.