Book Review

Ellen Holmes Pearson, *Remaking Custom: Law and Identity in the Early American Republic*. Charlottesville: University of Virginia Press, 2011, pp. 251, $42.50.

Reviewed by Steven J. Macias

Ellen Holmes Pearson makes the case that early republican legal scholars—those writing to *circa* 1830—were central to defining national identity and to creating an American culture. In a sense, these scholars, whom Pearson terms "legists," were the progenitors of the modern-day law professor. *Remaking Custom*, therefore, should be of interest to all those concerned not only with the history of legal scholars but also with these legists' potential for actively shaping the legal system. Pearson's work is perhaps even more important at a time when the value of professors' legal scholarship is so hostilely questioned by the bench, bar and public more generally.

Remaking Custom appears in the University of Virginia Press's series, Jeffersonian America—a series that should be better known among legal scholars. Catherine Allgor's *Parlor Politics*,[1] Marshall Foletta's *Coming to Terms with Democracy*,[2] and Jeffrey Pasley's "*The Tyranny of Printers*"[3] are just a few of the titles that have significance to many of the legal and constitutional events that took place in the early republic and that can still shed light on modern concerns. Pearson's work can now be added to that list as she writes "about the ways the United States' first generation of legal scholars used their lectures and writings to explain American law and its history and character" (1).

Pearson's work might seem more a study in contrasts than comparisons with modern legal academia. The legists who form the bulk of Pearson's study "combined the disciplines of history, law, and politics in their lectures so that they could articulate to their students the origins and evolution of the common law within their states and their nation" (16). In stark contrast, David Segal's recent *New York Times* articles have criticized law schools as emphasizing

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1. Catherine Allgor, Parlor Politics: In Which the Ladies of Washington Help Build a City and a Government (Univ. of Virginia Press 2000).
2. Marshall Foletta, Coming to Terms with Democracy: Federalist Intellectuals and the Shaping of an American Culture (Univ. of Virginia Press 2001).
3. Jeffrey L. Pasley, "The Tyranny of Printers": Newspaper Politics in the Early American Republic (Univ. of Virginia Press 2001).

the "theoretical over the useful."[4] The author proves his point by faulting law schools for teaching topics ranging from "the variety of property law in post-feudal England" to "postmodern legal theory," with citation to Chief Justice John Roberts' recent objection to a hypothetical article about "the influence of Immanuel Kant on evidentiary approaches in 18th century Bulgaria"—which "isn't of much help to the practicing bar"—thrown in for good measure.[5]

Segal himself could have benefitted from Pearson's work, in which case he would not have made a gross, but unfortunately common, error about the origins of legal education in early America. Segal contends that a "trade-school anxiety can be traced back to the mid-19th century, when legal training was mostly technical and often in rented rooms that were unattached to institutions of higher education."[6] But the mid-19th century is far too late to begin a discussion of trade-school anxiety. It is also misleading in that it neglects the institutionalized legal education that was already established in the first three decades of the century. If the mid-19th century is notable for anything related to legal education, it is the decline in scholarly focus of the previous decades. As Pearson explains, as early as the 1820s scholars criticized the rising generation of lawyers "for being lazy and poorly read, and lawyers trained in the old methods feared that the fast-track legal education that the younger set demanded would turn their profession into nothing more than a trade" (176).

Pearson ends her discussion of first-generation legal scholars with the publication of James Kent's four-volume *Commentaries on American Law*, which originally appeared between 1826 and 1830. This is "a logical place to end" because "with this comprehensive American treatise, the nation's legal culture seemed to have emerged from England's shadow" (7). The first two chapters give a sense of how Pearson conceives the Americanization of both the common law and constitutional and political principles. The next three chapters focus on how legists affected and explained discrete areas of law, in particular, the law of property acquisition and inheritance, slavery, and the treatment of Indians through public land law. The final substantive chapter focuses on the content and purposes of the newly emerging native legal treatises. The common themes that bind these chapters include the rise of the American preference for consent and choice over and above the English preference for custom, as well as the conscious effort to distinguish American law and political institutions from English precedent.

Pearson's source selection is quite interesting in that she primarily uses published material from names that have slipped from the collective memory of modern legal academia. James Kent, St. George Tucker, Tapping Reeve,

4. David Segal, What They Don't Teach Law Students: Lawyering, N.Y. Times, Nov. 20, 2011, at A1, *available at* 2011 WLNR 24046683. *See also* David Segal, The Price to Play Its Way, N.Y. Times, Dec. 18, 2011, at BU1, *available at* 2011 WLNR 26126941 (criticizing the American Bar Association's accreditation process).

5. Segal, What They Don't Teach Law Students, *supra* note 4.

6. *Id.*

Zephaniah Swift, Hugh Henry Brackenridge, Peter Du Ponceau, Nathaniel Chipman, and David Hoffman form the core of Pearson's informants. Tucker, the first American to edit and annotate a native edition of Blackstone's *Commentaries* in 1803, was also the second professor of law and police at William and Mary, in addition to being a state judge. Reeve, founder of the famous Litchfield Law School, the most important proprietary law school in the early republic, also authored the first major American treatise on domestic relations law. Swift was a state court judge and author of the first comprehensive treatment of American law, *A System of the Laws of the State of Connecticut* in 1795. Brackenridge, also a state court judge, authored *Law Miscellanies*, a single volume collecting and annotating those parts of Blackstone relevant to Pennsylvania. Du Ponceau was founder of the Legal Academy of Philadelphia and author of the first monograph on federal court jurisdiction in 1824. Chipman, a Vermont Supreme Court justice, composed an early work on political and legal thought, *Principles of Government*. Finally, Hoffman, who receives the least amount of attention from Pearson, was by far the most innovative early legal educator, being the first law professor at the University of Maryland and publishing numerous law lectures and his six-year reading list, *A Course of Legal Study* in 1817. As Pearson shows, the body of work produced by these legists is rich and underappreciated by legal scholars and historians of all stripes. These men form the center of Pearson's work "because they incorporated something of their society's history and character into their law books" (6).

Common Law, Constitutions, and Character

Pearson's first two substantive chapters explain the Americanization of the common law and constitutionalism, and in particular, how a burgeoning American character informed each of those subjects. When Americans spoke of the "common law" in the early republic, they frequently had wider "political and cultural purposes" than to simply refer to a body of rules (29). Instead, the "common law" referred to a legal culture that historically had valued precedent and custom over and above Enlightenment-style rationality. The Americans, however, "reframed the meaning of custom in a common-law culture by adding elements of consent and choice" (12). The combination of "custom" and "choice" allowed James Wilson to praise the common law for its flexibility in adapting to the needs of the new nation (25). Pearson builds on earlier work that explained Wilson's views on common law and consent as responses to Blackstone's views on sovereignty, including his conclusion that the common law was inapplicable in the American colonies.[7] In claiming that the common law did not apply to the conquered lands that formed the colonies because Parliament had never formally acted to do so, Blackstone sounded a note of American inferiority that would continue to echo in the ears

7. *See* John V. Jezierski, People or Parliament: James Wilson and Blackstone on the Nature and Location of Sovereignty, 32 J. Hist. Ideas 95 (1971). *See also* Eliga H. Gould, Zones of Law, Zones of Violence: The Legal Geography of the British Atlantic, circa 1772, 60 Wm. & Mary Q. 471 (2003) (explaining England's restriction of the common law as a means of maintaining its supremacy).

of early Americans, especially the elites who resented the cultural supremacy of England and Europe.

The process of Americanization helped "to diminish lingering feelings of cultural dependence on England" (22). The theme of cultural inferiority is a prominent one in the historiography of the early republic,[8] and Pearson's work goes a long way in explaining how the legists' prime motivation in their legal scholarship was to overcome those national self doubts. In the realm of the common law this means that consent and choice overtook custom or, as one historian has put it, Americans began to prefer "reason over precedents."[9] In the realm of constitution making, especially at the state level, the concepts of custom and choice became even more tangible.[10]

Although the states varied a great deal in their constitutional goals and provisions, some common themes help to make sense of American constitutionalism as a concept. Even though voting qualifications were still tied to property ownership, suffrage generally expanded under the belief that more equitable representation was more in keeping with the science of government. Binding representatives to constituents' wishes was rejected, but legislatures were still thought to be the best security for the people as against the executive. That security was itself increased with open government provisions, checks and balances, and the lack of any privileged position of service comparable to the British House of Lords. In the judicial province, there was more disagreement as to what constituted an independent judiciary; nevertheless, Pearson makes several observations in this regard. Courts of chancery generally played a minor role in state judiciaries because the American conception of equity pervaded the common law itself. Precedent was slightly less important than in England, and the juries served as "alternative representative bodies, as additional symbols of popular sovereignty, and as powerful checks on the actions of judges" (67).

These constitutional commonalities, as well as the shift in common-law thinking, were all conscious attempts to distinguish the American system of law and government from its British forebear. It is certainly not Pearson's claim that the legists themselves were responsible for these changes in constitutional and legal thought. Instead, Pearson's point is that the legists viewed their job as selling the American improvements in law, first to their students, then to the cross-Atlantic legal community. "It was up to the law educator to show the

8. On the general theme of American cultural inferiority, see Joseph J. Ellis, After the Revolution: Profiles of Early American Culture (W.W. Norton & Co., Inc. 1979) (explaining cultural aims in art, literature, and drama, as well as Noah Webster's hopes for American linguistic prominence via his dictionary); Foletta, *supra* note 2. Foletta discusses the publication of the North American Review as an attempt to raise American letters to a European standard. Law was a frequent subject of scholarly critique in the Review. *Id.* at 158–72.

9. Craig Evan Klafter, Reason over Precedents: Origins of American Legal Thought (Greenwood Press 1993).

10. The classic work on state-level constitutional thought prior to the Philadelphia Convention is Gordon Wood, The Creation of the American Republic, 1776–1787, pt. 2 (Univ. of North Carolina Press 1969).

next generation of practitioners where Americans had improved upon their English legal inheritance and to help shape legal and social institutions that would enhance the American character" (10).

Legists in Action: Property, Slavery, and Westward Expansion

The second part of Pearson's book (even though not divided as such) contains three chapters on private property, slavery, and public lands. This is an interesting division of topics in which to explore the legists' ideas about American law because, with the exception of property and inheritance rights, it is far from clear that these topics were of paramount concern to the men who form Pearson's source material. That is not to say that they did not discuss slavery, westward expansion and American Indians. However, it is not always clear that any uniquely *legal* outlook informed their thoughts on these subjects. One suspects that these categories are ways for Pearson to give race and, to a lesser extent, gender a prominent role in her historical narrative. Regardless, the topics ultimately work well to demonstrate how the legists went about explaining and justifying the unique features of American law as the result of moral and cultural improvements.

One of the earliest 20th century histories of the American Revolution emphasized the uniform shift in land laws: "Democratic land-tenure was the natural thing in a new country like America, and made its way at once when political revolution loosened the ties of old habit."[11] Progressive historian J. Franklin Jameson explained that the post-revolutionary elimination of entails and primogeniture in the states had a "common cause," namely a "social revolution" rather than a strictly political or legal revolution. Pearson likewise emphasizes the changes in land tenure, but additionally she discusses those groups that did not necessarily fare so well in this democratic revolution.

Because land law changes did not benefit all groups equally, Pearson's explanation necessarily rejects Jameson's democratic explanation. Instead, Pearson emphasizes the moral and republican justifications for the changes in land law. The legists explained the changes in law as the result of a new recognition that real property was "a moral tool by emphasizing the idea that private possessions should be used to the best advantage of the community" (83).

The legists reiterated that the elimination of primogeniture and entails, as well as English forfeiture and escheat rules, proved the moral advancement of American law over the English common law. Chancellor Kent suggested Roman law, with its reflection of "the universal law of civilized society," as a basis of reform (83). This led Kent to further suggest that the law of descent was rooted in natural law, contrary to Blackstone's purely positivistic, but irrational, understanding (92). Brackenridge emphasized that broader property distribution would increase public utility (99). "Tucker cast American notions of rational choice as superior to English impulses to follow

11. J. Franklin Jameson, The American Revolution Considered as a Social Movement 38 (Princeton Univ. Press 1926).

tradition unthinkingly" (90). In making the case against primogeniture, Tucker employed the power of reason to explain that the firstborn son did not necessarily inherit either virtue or talent.

But, as Pearson tells us, "America's progressive inheritance laws only went so far" (101). "While free white males benefited from the Americanization of property ownership and inheritance law, women gained little ground" (111).

"Legal scholars," according to Pearson, "were among the first to wrestle with the moral and historical questions about the nature and evolution of American slavery" (114). Perhaps one of the most curious features of the legists' writings is how the vast majority, whether northern or southern, agreed upon the non-natural-law nature of slavery, and thus its immorality. Both St. George Tucker of Virginia and James Kent of New York blamed England for introducing slavery into America. Tucker even conceived an entire plan for the gradual elimination of slavery and reprinted it in his edition of Blackstone in 1803. Another, Zephaniah Swift of Connecticut, "employed the strategy of elevating his own nation's reputation by deflating England's character" (129). At the Litchfield Law School, Reeve and Gould disagreed over how to teach slavery. The older Reeve taught that slavery was illegal in Connecticut because it was against natural law. By contrast, the younger Gould, although morally opposed to it, taught that slavery was legal because it was countenanced by positive law (120).

Although Pearson concludes that the legists' anti-slavery sentiments were genuine, she nevertheless contends that they did not always explain the law of slavery in a straightforward manner. In other words, blaming England and claiming illegality via natural law were both means of whitewashing the issue. Legists like Tucker and Reeve "could manipulate their perception of the law to accommodate their own social opinions about the place of slavery in their states, but the reality of the law did not always correspond to their perceptions" (139). In their constant attempts to raise the cultural and moral status of their nation through its laws, the legists tended to paint a rosier picture of the state of slavery in America.[12]

As with slavery, Native American Indians presented a novel challenge for the legal system; "No English precedent existed for such a situation" (142). Pearson believes that the legal justifications offered for the treatment of Indians "provide a glimpse into Anglo-Americans' sense of entitlement to territory and empire" (142). Unlike the problem of slavery, the Americans could not blame the English for introducing the Indians onto the land in the first instance. Hence, the "legists struggled with the challenge of making this part of the American character a positive attribute" (143). Moreover, whereas many legal scholars had seen slavery in action, "with a few notable exceptions," they were "detached from the frontier struggles between Indians and white settlers" (146). The legists' basic tack was to use "natural law concepts of discovery and

12. The standard work on the law of slavery is Thomas D. Morris, Southern Slavery and the Law, 1619–1860 (Univ. of North Carolina Press 1996).

occupancy and the notion of consent to justify appropriation of Indian lands" (149).

Because the legists "considered themselves teachers of much more than the law, they expended considerable energy defending their nation's right to territory" (145–46). Hugh Henry Brackenridge, a frontiersman who lived in Pittsburgh, used Vattel's *Law of Nations* to turn questions of property rights into questions of public utility—"what was best for the largest number of people" (149). Brackenridge, besides being a legist and justice of the Pennsylvania Supreme Court, was also a famous novelist in his time and thus wrote for several different audiences.[13] When writing about Indians for a broader audience, he used "more emotional language" to paint a "savage image" of Indian land claimants (161). However, when writing for an audience of lawyers, Brackenridge used the language of rationality and utility-based calculations. "He wrote that the land should be used in a way that would sustain the greatest number of people and provide 'the greatest sum happiness; that is, the cultivation of the soil'" (163). Kent likewise followed utilitarian reasoning in his judicial opinions on the matter (149–50). Even though Kent was sympathetic to the Indians' plight, he described their disappearance as inevitable, which "helped give the next generation of legal practitioners the intellectual tools to participate in, and justify, imperial expansion" (171).

Legal Scholarship

The legal scholarship produced in the early republic had one basic goal: to highlight the distinctions between the American and English legal systems, glorifying the former, showing the failings of the latter (175). The legists largely accomplished this goal by claiming that Americans, unlike the English, treated law as a science and thus were in a better position to advance their nation, both morally and culturally, through law. The treatises were "part of the move toward professionalization in the law, the drive for a more scientific study of the law, and agitation for Americanization of the law through codification" (178).

Kent's work embodies the fruition of the American "remaking of custom." Although his work was fundamentally a defense of the common law, he demonstrated respect for European civil law and recognized that Americans could benefit from it. Kent also emphasized the importance of universality and natural justice over the English preference for immemorial custom. The Roman law was useful in fulfilling that emphasis as well. Kent, along with others, recognized the increased importance of commercial subjects and, yet again, the universal principles of justice associated with Roman law helped in developing a commercial jurisprudence for America. Finally, Kent, like other early republican legists, strove to develop new federal precedents while balancing existing state precedents.

13. *See* Ellis, *supra* note 8, at 73–110.

Pearson closes with the example of Tucker's son, Henry St. George Tucker, also a legal scholar, but a far more conservative, states rights lawyer. His treatises focused more on state law than federal law, but he followed Kent's lead in the Americanization process (187–91). According to Pearson, this is "a telling illustration of the shift in mentality from the custom-oriented, unwritten-law society of Henry St. George Tucker's father to a society that saw considerable merit in statute law" (191).

Modern-Day Legists

Whether a group of modern-day legists exists, or should exist, is an interesting question, which, if the blogs are representative, seems to occupy the time of law professors. *Remaking Custom* can usefully shed light on this question by adding some historical perspective to the discussion. As Pearson explained, the legists were a group of legal scholars—writers and teachers—who attempted to teach "much more than the law." They wanted to shape the character of the profession by first shaping the character of students. This, in turn, would result in a legal profession that would prove a benefit to the nation, both locally and internationally. Whereas Europe set the standards in literature, art, and philosophy, America would set the standard in law. Having examined many of Pearson's primary sources for my own work, I am certain that she has accurately characterized the legists' motives and the means through which they attempted to achieve them. The writings of the legal elites show, even more than Pearson discusses, an overarching concern with morality. This certainly comes through when she writes about inheritance law, slavery, and the taking of Indian property, but the concern with justifying every legal rule in moral terms permeated far deeper than these obviously morally charged topics. The very method of legal reasoning worried these legists because the new Enlightenment interest in science undermined their epistemological foundations. As Pearson hints, many of them found a new morality in universal notions of justice located in natural and Roman law. Moreover, they found that turn-of-the-century rationality and utility provided the means by which the law could attain just solutions to complicated social problems.

By contrast, it seems that no working law professor actually believes that the fate of the nation rests in his and his fellow professors' hands. The social, cultural, political, and demographic changes that always restrict the usefulness of the historical analogy seem especially relevant here. But perhaps we can narrow the question and ask whether modern law professors share the same concern with the relationship between legal reasoning and morality and justice. In other words, do modern law professors share the legists' preference for reason over precedent? Do they share the concerns of early republican law professor, Jesse Bledsoe of Kentucky?

> One great reason, among others, why there are so few eminent lawyers, is, that they are too apt to learn law, as a parrot does language: by rote. Cases, are read

> with a view, to their particular circumstances only; while the principles upon which the decision is based, are overlooked or not understood. A mere case lawyer, can never be a great one.[14]

Many other legists echoed Bledsoe's sentiments in the early republic, stressing the point that law was not simply a trade that was to be learned by imitation of a master craftsman. One of Bledsoe's successors at Transylvania University, Daniel Mayes, was especially critical of "mere case lawyers." Mayes asked, "How often have the ablest ministers of justice been compelled to smother the cries of conscience, and sacrifice the rights of a party upon the altar of the idol, *stare decisis*!"[15] He further criticized the existing method of training lawyers: "Wholly unable to assign a reason for anything they do, but acting as the preceptor acted before them, because he so acted, they acquire the art, whilst wholly ignorant of the science of jurisprudence."[16]

Stanley Fish frames the current debate in legal education in a similar fashion: "whether principle or history should inform a court's decision."[17] In his course on religion and law, Fish teaches the works of philosophers Berlin, Locke, Rawls, Hobbes, Kant, Unger, and Rorty. Even though he recognizes that his students will not likely be citing those names in a legal brief, Fish nevertheless justifies his pedagogy by explaining that "the practice of law is more than a technical/strategic exercise in which doctrines, precedents, rules and tests are marshaled in the service of a client's cause."[18] Moreover, to those who might claim that a student's time is better spent learning how to draft a brief or write a contract, that is, learning the tricks of the trade, instead of reading Rorty, Fish retorts, "learning the tricks of the trade would not amount to much and might well be impossible for someone who did not know—in a deep sense of *know*—what the trade is and why it is important to practice it." Lamenting the decline of the liberal arts in the face of the current emphasis on "practical short-term payoffs," Fish wonders whether law will be the next victim of this shortsighted focus: "The law is surely a practice but it is also a

14. Jesse Bledsoe, Introductory Lecture on Law 9 (Nashville, Tenn., Republican & Gazette 1827).

15. Whether Law Is a Science?, 9 Am. Jurist & L. Mag. 349, 355 (1833) (reviewing and quoting Daniel Mayes, An Introductory Lecture, delivered to the Law Class of Transylvania University on the 5th of November, 1832 (Lexington, KY, H. Savary & Co. 1832)). The American Jurist misprinted the title of the lecture as being delivered on the "8th" of November, but the published lecture is correctly cited in the parenthetical.

16. Daniel Mayes, An Address to the Students of Law in Transylvania University, Delivered at the Beginning of the Session for 1835, 5 (J. Clarke & Co. 1835).

17. Stanley Fish, Teaching Law, N.Y. Times Opinionator, Dec. 12, 2011, *available at* http://www.opinionator.blogs.nytimes.com/2011/12/12/teaching-law/.

18. *Id.* A similar theme was heard in the words of Harvard's Simon Greenleaf who "look[ed] with pity on the man, who regards himself a mere machine of the law." Simon Greenleaf, A Discourse Pronounced at the Inauguration of the Author as Royall Professor of Law in Harvard University 17 (James Munroe & Co. 1834).

subject, and if it ceases to be a subject—ceases to be an object of analysis in classrooms and in law reviews—its practice will be diminished."[19]

Fish comes closest to echoing the words of the early republican legists. Their greatest fear was, if the law remained a mere trade whose ranks were filled with unlearned pettifoggers, then the study of the subject would never be a respectable one. Because the law dealt with topics as fundamental as domestic and international peace and justice, it was too important a subject to go unstudied. If those trained in the law were not going to reflect on it in a systematic manner, then who was, asked the legists.

The nation's first professors of law were well aware that they were going against the grain—promoting liberal studies in the face of a profession that did not always see the usefulness of formal education. In a sense, the tension between the legal academy and the practicing bar has never faded. In April 2010, the president of the State Bar of California decried "the embarrassing disconnect between legal education and law practice."[20] But the substance of his complaint is not new. What is new is that the modern legal academy has not defended itself with the vigor of the original American legal professoriate. For better or worse, there are no modern-day Simon Greenleafs, moralizing to state bar presidents that clients don't always know what is best for themselves.[21] Nor are there any Professor Thomas Coopers, explaining that the "practical skills of lawyering and representing clients"[22] are merely the traits of a tradesman, not the deep learning of the scientist.[23] But perhaps the social worth of tradesmen has been undervalued throughout the history of legal education, and likewise the professional worth of "legal scientists" by the practicing bar. *Remaking Custom* allows us to consider the benefits and the drawbacks of such an active and forceful set of legal intellectuals at a crucial point in American history.

19. Fish, *supra* note 17.

20. Howard B. Miller, Legal Education for the 21st Century, Cal. St. B.J., Apr. 2010, *available at* http://www.calbarjournal.com/April2010/Opinion/FromthePresident.aspx.

21. Greenleaf, *supra* note 18, at 17 ("[O]ur clients are not always the best judges of their own interests," especially when they have forgotten that they are not merely "solitary individuals," but "men connected with society by enduring ties.").

22. Miller, *supra* note 20.

23. Thomas Cooper, Bentham's Judicial Evidence, 5 S. Rev . 381, 413 (1830) (The common lawyer is trained "as a shoe-maker learns to make shoes: it has no tendency to enlarge the mind.").