



REFLECTION

How Not to Train Your Dragon, or Living Dangerously in the Law

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*Taming the Past*¹ and the image that graces its cover are meant to call to mind the cave-dwelling dragon of which Oliver Wendell Holmes spoke in his famously iconoclastic 1897 vocational address *The Path of the Law*.² While the speech is most commonly associated with “our friend the bad man” and the prediction theory of law,³ Bob Gordon redirects our attention to what the great jurist had to say about the place of history in “the rational study of the law.”⁴ As Gordon reminds us, Holmes assigned history a role that was preliminary and mostly negative, speaking of it as “the first step toward an enlightened skepticism, that is, toward a deliberate reconsideration of the worth of . . . [legal] rules.”⁵ There was a tinge of the romantic in this rendering of historical inquiry, for in his next breath Holmes figured the quest for the past in heroic terms: “When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is . . . his strength.”⁶ But Holmes emphasized that “to get him out is only the first step,” implying that the *historian’s* work was then done.⁷ The next step was “either to kill him, or to tame him and make him a useful animal,” a decision Holmes implied should be made by “the man of statistics and the master of

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1. ROBERT W. GORDON, *TAMING THE PAST: ESSAYS ON LAW IN HISTORY AND HISTORY IN LAW* (2017).
2. Holmes’s address was published in the *Harvard Law Review* later that year. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).
3. See Holmes, *supra* note 2, at 460.
4. See ROBERT W. GORDON, *Introduction* to *TAMING THE PAST*, *supra* note 1, at 1, 4 (quoting OLIVER WENDELL HOLMES, *The Path of the Law*, in *COLLECTED LEGAL PAPERS* 167, 187 (1920)).
5. See *id.* (quoting HOLMES, *supra* note 4, at 187).
6. Holmes, note 2, at 469.
7. See *id.*

economics.”⁸ Holmes was contemptuous of legal arguments and practices that proceeded solely or blindly upon the authority of the past. And he “look[ed] forward to a time when the part played by history” in the study of law “shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them,” which he took to be the province of the social sciences.⁹

In arraying himself against appeals to the past as a source of authority, Holmes qualifies as a practitioner of critical history in Gordon’s book. But the Victorian jurist’s modes of contending with the dragons of our legal past do not appear as an unambiguously good model in *Taming the Past*. Indeed, a pronounced ambivalence runs through all Gordon has written about Holmes, though it is most apparent in the essays Gordon penned on *The Common Law*¹⁰ and *The Path of the Law*, in each case to mark the 100th anniversary of the work’s publication. While Gordon praised *The Common Law* for seeking to ground legal theory in “cosmopolitan historical learning” and underscoring “the historical and social contingency of legal rules,” he declared the book as a whole to be “at war with itself,” reflecting an unresolved tension between conceptualism and historicism in Holmes’s legal thought and practice.¹¹ Gordon nonetheless tempered these criticisms as he concluded the piece, acknowledging it to be “somewhat ungracious” to focus on Holmes’s shortcomings on such an occasion, “making him, in a sense, my host and me his parasite.”¹² He then recast the relationship in almost oedipal terms as he recalled Ralph Waldo Emerson’s advice to Holmes after reading the latter’s critique of Plato: “[W]hen you strike at a king, you must kill him.”¹³ Yet Gordon was quick to disclaim anything like homicidal aggression, explaining: “It is simply because Holmes saw so much deeper than others that I expect more of him and find his persistent reluctance to develop those insights harder to forgive.”¹⁴ Writing in a similar vein about Holmes’s *The Path of the Law* some

8. *See id.*

9. *See id.* at 474.

10. O.W. HOLMES, JR., *THE COMMON LAW* (Boston, Little, Brown & Co. 1881).

11. *See* ROBERT W. GORDON, *Holmes’s Common Law as Legal and Social Science*, in *TAMING THE PAST*, *supra* note 1, at 50, 52, 73-74. In an introductory note to the version of this essay included in *Taming the Past*, Gordon credits Thomas Grey with since changing Gordon’s mind on this score, pointing to the ways Holmes’s work constituted a synthesis of analytic and historicist schools of thought. *See id.* at 50.

12. *Id.* at 73.

13. *See id.* (alteration in original) (quoting 1 MARK DEWOLFE HOWE, *JUSTICE OLIVER WENDELL HOLMES* 54 (1957)).

14. *Id.* Gordon suggested that a number of Holmes’s contemporaries—namely Karl Marx, Max Weber, Henry Maine, Rudolf von Jhering, Theodor Mommsen, Otto von Gierke, and F.W. Maitland—were more successful in bringing such insights to fruition. *See id.* at 74 & n.173.

fifteen years later, Gordon found the rendering of “law as a vocation” in the speech “strangely disappointing,” once again lamenting the jurist’s failure to live out the potential in his own ideas.¹⁵ To be sure, Holmes had admirably spent his career in the public world among practical-minded Boston lawyers and businessmen rather than “withdraw[ing] . . . [to] become a pessimistic Cassandra . . . or an expatriate aesthete” like others in his intellectual milieu.¹⁶ But Gordon could not recommend Holmes’s professional ethic of living “greatly in the law,”¹⁷ as it encouraged undue deference to the powerful and valorized “isolated acts of heroic intellectual achievement” instead of calling on lawyers to perform constructive roles in the polity.¹⁸ And Gordon maintained that any improvement of the legal system and the society it is meant to serve “will have to come from efforts both more collaborative and more engaged.”¹⁹

This is, of course, a Holmesian way of reading the compelling figure of Holmes, helping us to see just what is his strength. Viewing him through Gordon’s eyes also brings into sharper focus the distinguishing features of Gordon’s own critical historicism, an enterprise that questions the very possibility of taming or escaping the past. Reflecting upon its invocation in legal argument over time, Gordon warned that “history does not make a good domestic pet” because the past is too unruly to supply “authoritative sources of safe principles, certain rules, sound doctrine and happy tales of progress.”²⁰ Contrary to the “evolutionary functionalism” that has characterized both formalist and realist strains of modern U.S. legal thought and that posits law’s “progressive adaptation” to social developments,²¹ he submitted that our current legal institutions came into being “through a process rather more nearly resembling that of biological evolution.”²² As he put it, “Multiple forms are continually being produced. Some disappear, killed off by predators or random external shocks; some survive for contingent reasons, and some are

15. See Robert W. Gordon, *The Path of the Lawyer*, 110 HARV. L. REV. 1013, 1018 (1997).

16. See Robert W. Gordon, *Law as a Vocation: Holmes and the Lawyer’s Path*, in *THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 7, 26-27 (Steven J. Burton ed., 2000).

17. OLIVER WENDELL HOLMES, *The Profession of the Law*, in *COLLECTED LEGAL PAPERS*, *supra* note 4, at 29, 30.

18. See Gordon, *supra* note 15, at 1018.

19. See *id.*

20. ROBERT W. GORDON, *Taming the Past: Histories of Liberal Society in American Legal Thought*, in *TAMING THE PAST*, *supra* note 1, at 317, 360.

21. See ROBERT W. GORDON, *Critical Legal Histories*, in *TAMING THE PAST*, *supra* note 1, at 220, 229.

22. ROBERT W. GORDON, *The Past as Authority and as Social Critic: Stabilizing and Destabilizing Functions of History in Legal Argument*, in *TAMING THE PAST*, *supra* note 1, at 282, 306.

selected for certain functional purposes then sidetracked and co-opted for other purposes entirely.”²³ Yet it is history’s unruliness that paradoxically constitutes its greatest value to lawyers in Gordon’s estimation. Attending to the twists and turns of the path of the law enables us to better perceive “the radical potential of conservative arrangements” and seize upon the “possibilities for transforming society and economy in more democratic and egalitarian—as well as to be sure more autocratic and unequal—directions.”²⁴ The clarion call of *Critical Legal Histories*, Gordon’s seminal 1984 *Stanford Law Review* article,²⁵ as well as subsequent essays elaborating this approach, was for scholarship written with a consciousness of “the contingency, fragility, and revisability of all models of the past,”²⁶ work that “produces disturbances in the familiar, comfortable strategies that lawyers use to tame the past in order to normalize the present.”²⁷

For a conflicted law and history graduate student first encountering this work, unable to decide whether to pursue a career in public interest law or in academia, this was heady stuff. Teaching by example, Gordon demonstrated that these professional paths were not mutually exclusive, a lesson I had the great fortune of learning from him firsthand as one of his first students at Yale University. Most vivid in my memory are the wide-ranging conversations that took place in his office, often turning into de facto seminars in which he enthusiastically initiated us into the field of legal history (as he ecumenically defined it). Over the course of my time in New Haven, I internalized the key tenets of *Critical Legal Histories*, which was fast becoming something of a new orthodoxy among scholars of my generation. I was especially compelled by the notion that history was a disruptive and potentially transformative endeavor, an implication Gordon optimistically and emphatically drew out from this schema, both in print and in person. His vision is perhaps best summed up in the words of F.W. Maitland, which he has more than once quoted with evident approval:

The only direct utility of legal history (I say nothing of its thrilling interest) lies in the lesson that each generation has an enormous power of shaping its own law. I don’t think that the study of legal history would make men fatalists; I doubt it would make them conservatives: I am sure that it would free them from superstitions and teach them that they have free hands.²⁸

23. *Id.*

24. *See id.*

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

26. *See* GORDON, *supra* note 22, at 307.

27. *See* GORDON, *supra* note 4, at 7.

28. Letter from F.W. Maitland to A.V. Dicey (July 1896), in 2 THE LETTERS OF FREDERIC WILLIAM MAITLAND 104, 105 (P.N.R. Zutshi ed., 1995). For two works in which Gordon has quoted this language, see ROBERT W. GORDON, *The Common Law Tradition in* footnote continued on next page

No one better conveys the thrilling interest of legal history than Gordon, and his emphasis on contingency inspired me to think anew about supposedly timeless problems concerning the nature and limits of human knowledge, freedom, and responsibility as they played out in the arena of law, where the proverbial rubber hit the road. Yet as I began to pursue my chosen subject—the jurisprudence of insanity as it was applied in nineteenth century civil trials—doubts crept into my mind about the emancipatory effects of the critical history method I was deploying, ones that have intensified over the years. To some extent, this might be owing to the intractable nature of the philosophical conundrums upon which I have centered my work. But the seeds of these doubts were actually sown by Gordon himself, for even as he celebrated the growing body of critical legal history, he acknowledged that the “newly playful awareness of contingency” had also engendered “some sense of loss of direction,” tending “to deprive people of any strong basis for confidence in transcendent standpoints for critique of the present order.”²⁹ These concerns have since been amplified by critics of the Gordonian paradigm who contend that this historicist rendering of the law as “plural, contested, socially constructed, [and] vernacular”³⁰ has made a fetish out of complexity and “paralyzed generalizing inquiry,”³¹ displacing causal analysis with thick descriptions that offer only “an illusory route to meaning”³² while disarming “the powerless, . . . whom we once desired to liberate.”³³

In contemplating such questions about the utility of critical legal history, Holmes once again provides a revealing case, not least because this dragon-slaying and -taming jurist presents something of a challenge to the “free hands” thesis. Here it is worth noting that Holmes’s figuration of history as a fantastically ferocious creature in *The Path of the Law*³⁴—an address commonly regarded as a modernist exercise in mythbusting—was more than a whimsical or eccentric flourish. In conjuring up this particular image for his audience, he was participating in the late nineteenth century revival of interest in medieval life, its martial ethic, and the chivalric code in particular. This was not only an

American Legal Historiography, in TAMING THE PAST, *supra* note 1, at 17, 34 n.56; and Robert W. Gordon, “Critical Legal Histories Revisited”: A Response, 37 LAW & SOC. INQUIRY 200, 212 (2012).

29. See GORDON, *supra* note 22, at 308.

30. Christopher Tomlins, *Historicism and Materiality in Legal Theory*, in LAW IN THEORY AND HISTORY: NEW ESSAYS ON A NEGLECTED DIALOGUE 57, 67 (Maksymilian Del Mar & Michael Lobban eds., 2016).

31. 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, 158 (2012).

32. See Tomlins, *supra* note 30, at 65-66.

33. See Tomlins, *supra* note 31, at 164.

34. See Holmes, *supra* note 2, at 469.

expression of the lasting impact of Holmes's searing Civil War experience on his professional life but also, as Jackson Lears has suggested, an antimodernist protest against the "overcivilized gentility and intellectualism" of late nineteenth century culture and an attempt to restore a sense of purpose, if not meaning, to the universe.³⁵ Of a piece with the obsession to establish the continuity and superiority of an Anglo-Saxon legal tradition and warrior race in this period, Holmes valorized a "militarist drive for mastery and delight in action for its own sake," exhibiting and helping to fuel a fascination with brutal violence that terminated in self-defeat and ironically encouraged accommodation with the ethos of corporate capitalism.³⁶ As the work of Thomas Grey has convincingly documented, Holmes was at once alive and vulnerable to the pitfalls and temptations of "romantic antiquarianism."³⁷ Gordon similarly casts Holmes's vision of the legal vocation as "highly romantic, indeed Quixotic," insofar as he summoned up legal lore to elevate the profession "above the humdrum and sordid" even as he "placed skeptical roadblocks across all of the generally recommended paths for those who would seek meaning and value in the lawyer's work."³⁸

If the study of legal history did not exactly make Holmes a fatalist, neither did it free him from the pull of the past. Animated by a complex of chivalric and skeptical impulses, he professed his love of "ancient things,"³⁹ revered the common law as "one of the vastest products of the human mind,"⁴⁰ and scorned most reform movements (with the notable exception of eugenics) while he generally maintained "an unconvinced conservatism" with respect to social improvers and their projects.⁴¹ As Gordon has observed, Holmes's historically grounded policy science emphasized the environmental constraints on would-be do-gooders, teaching them the "hard lessons of scarcity and the limits of social intervention."⁴² Indeed, as Gordon writes, Holmes seemed "almost to relish the brutality of quasi-natural forces such as race domination and the expansion of large-scale corporate capitalism," harboring little or no faith in

35. See T.J. JACKSON LEARS, *NO PLACE OF GRACE: ANTIMODERNISM AND THE TRANSFORMATION OF AMERICAN CULTURE, 1880-1920*, at 136-38 (1982).

36. See *id.* at 118, 123-24, 139.

37. See Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 812-13 (1989).

38. See Gordon, *supra* note 16, at 15.

39. See Grey, *supra* note 37, at 812-13 (quoting Letter from Oliver Wendell Holmes, Jr. to Harold J. Laski (Feb. 27, 1917), in 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916-1935, at 63, 64 (Mark DeWolfe Howe ed., 1953)).

40. See *id.* (quoting HOLMES, *supra* note 4, at 194).

41. See *id.* at 812 (quoting OLIVER WENDELL HOLMES, *Holdsworth's English Law*, in COLLECTED LEGAL PAPERS, *supra* note 4, at 285, 289); see also Gordon, *supra* note 16, at 26.

42. See Gordon, *supra* note 15, at 1015.

“the capacity of legal controls to soften the impact of natural necessity.”⁴³ To the extent judges and lawyers retained the “discretion to choose,” Holmes urged them “to be passive instruments of society’s or clients’ ends.”⁴⁴ He conceived of members of the legal profession not in terms of their traditional roles as “social mediators . . . and curators of the legal framework” or as “seekers of justice,” but rather as mainly functioning to contain the enthusiasms of reformers.⁴⁵ One might find, as Gordon does, a certain glory in the ability of the Holmesian “lawyer-hero” to “not only . . . face the cold unfeeling universe without flinching” but also to “use his intelligence to uncover its impersonal laws,” by means of which he might “catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.”⁴⁶ Still it bears emphasis that Holmes was a man who confessed to “in a sense worship[ing] the inevitable,” even as he recognized that “the human sense of power over events was only ‘the trick by which nature keeps us at our job.’”⁴⁷

The example of Holmes thus points toward some of the disadvantages of critical legal history for life, though perhaps the problem is not in the method but in the martial spirit with which it was deployed by this jurist. Endeavoring “to keep the soldier’s faith against the doubts of civil life,”⁴⁸ he approached the past as object of conquest and found a strange kind of solace in the vision of his “transforming thoughts” controlling a future he could not contemplate.⁴⁹

Taming the Past, by contrast, promises to do nothing of the sort, its author viewing legal history as “a field of terror, pain, conflict, and scruffy, crazy utopians dreaming of escape to a better life.”⁵⁰ As Gordon traverses this landscape and surveys the potential of critical historicism, it is to the work of Friedrich Nietzsche that he has recourse, calling to mind the imagery of a tribunal rather than a cave as he describes the process by which the critic calls

43. Gordon, *supra* note 16, at 26.

44. See Gordon, *supra* note 15, at 1018.

45. See *id.*

46. See Gordon, *supra* note 16, at 27 (quoting Oliver Wendell Holmes, Jr., The Path of the Law, Address at Boston University (Jan. 8, 1897), in 3 THE COLLECTED WORKS OF JUSTICE HOLMES: COMPLETE PUBLIC WRITINGS AND SELECTED JUDICIAL OPINIONS OF OLIVER WENDELL HOLMES 391, 399 (Sheldon M. Novick ed., 1995)).

47. See Grey, *supra* note 37, at 846 (first quoting Letter from Oliver Wendell Holmes, Jr. to Morris R. Cohen (Jan. 30, 1921), in LEONORA COHEN ROSENFIELD, PORTRAIT OF A PHILOSOPHER: MORRIS R. COHEN IN LIFE AND LETTERS 333, 334 (1962); then quoting Letter from Oliver Wendell Holmes, Jr. to John C.H. Wu (May 5, 1926), in JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 184, 185 (Harry C. Shriver ed., 1936)).

48. OLIVER WENDELL HOLMES, *The Soldier’s Faith*, in SPEECHES 56, 64 (Boston, Little, Brown & Co. 1896).

49. See Gordon, *supra* note 16, at 17.

50. GORDON, *supra* note 20, at 360.

the past to account, conducting a painstaking interrogation before rendering judgment.⁵¹ Reflecting on the stakes of such inquiries, Gordon concedes that even “bad history, with its selective oblivion,” has its virtues, sometimes “promoting reconciliation and healing of social wounds after a period of great strife and trauma.”⁵² And myth-laden narratives likewise have utility, serving as “an immensely powerful force for emancipation . . . especially because it’s not *all* mythical, not by a long shot.”⁵³ But critical history remains indispensable if we are to ensure that these encouraging storylines do not have the effect of “obscur[ing] continuing injustice.”⁵⁴ Speaking in these normative terms even as he calls for “a more contextualized, complicated, multivalent, ironic, contradictory, historicized kind of history,” Gordon insists that critical historicism does not necessarily leave us adrift in a sea of contingency.⁵⁵ Guarding against “a naïve nostalgic traditionalism” without allowing themselves to become weighed down to the point of paralysis by the accumulating “horrors of history,” critical legal historians open up “a space for freedom and innovation,” pointing toward “roads actually taken but since forgotten or abandoned, possibilities once dreamed of but unrealized, social arrangements and understandings of startling variety.”⁵⁶

In embracing this unsettling reality, Gordon models a way of living dangerously in the law as he steers clear of the twin perils of complacency and despair. Appreciating that “[t]he past is too savage, too primitive, too tragic and too radical, too disorderly and too violent; both too utopian and too authoritarian, for the everyday uses to which lawyers habitually want to put it,” Gordon shows us that the dragon’s ferocity may be a liberating force, opening our minds “to imagine a wide array of possible futures.”⁵⁷

51. *See id.* at 320.

52. *See id.* at 354.

53. *See id.* at 355.

54. *See id.* at 356.

55. *See id.* at 356-57.

56. *See id.*

57. *See id.* at 360.