



REFLECTION

Unleashing the Past

Roy Kreitner*

As John Witt and Sarah Gordon tell us in their foreword to *Taming the Past*, Bob Gordon's lifetime of work offers "a sharp and uncompromising theoretical apparatus."¹ The chapters in the third part of *Taming the Past* in particular live up to this promise: They point to legal history's potential and lay out a plan of research and, while it might have been difficult to discern in the 1980s, by now we might say that they laid out a history of the future—our future as legal historians.

So where are we now? Is the future these chapters outline still our future, or are we faced with a moment of change, another generational shift that will have to rework the potential of legal history? What kind of sway does Gordon's articulation of that potential hold over us?

As an introduction to that questioning, I'll offer these lines that Gordon might be speaking to frame our endeavor here, now. They come from *The Tempest*, when Prospero is about to release the play's characters from his spell:

I have bedimmed
The noontide sun, called forth the mutinous winds,
And 'twixt the green sea and the azured vault
Set roaring war; to the dread-rattling thunder
Have I given fire and rifted Jove's stout oak
With his own bolt: the strong-based promontory
Have I made shake, and by the spurs plucked up
The pine and cedar; graves at my command
Have waked their sleepers, ope'd, and let 'em forth
By my so potent art. But this rough magic

* Professor of Law, Tel Aviv University Faculty of Law. For conversations that contributed to this Reflection, I'm grateful to Ariela Gross, Doreen Lustig, and Chris Tomlins.

1. John Fabian Witt & Sarah Barringer Gordon, *Foreword to ROBERT W. GORDON, TAMING THE PAST: ESSAYS ON LAW IN HISTORY AND HISTORY IN LAW*, at ix-x (2017).

I here abjure; and when I have required
Some heavenly music (which even now I do)
To work mine end upon their senses that
This airy charm is for, I'll break my staff,
Bury it certain fathoms in the earth,
And deeper than did ever plummet sound
I'll drown my book.²

As a magician, Prospero has performed the historian's task of bringing the past to life; his potent art has opened graves and wakened the sleeping dead, giving them new voice. But what motivates this magic, and what can we make of the gesture of breaking the spell?

Theorizing Legal History's Potential

It is obviously impossible to do justice to Gordon's theory of history in a few paragraphs, so what follows will be scandalously selective and skewed to what made these articles so powerful and valuable for me. I have a feeling I am not alone, but I cannot be sure of that; at any rate, while it will certainly be personal, I am hoping it will not be too idiosyncratic.

For me, Gordon's theoretical interventions were never about taming the past, but actually about unleashing it. Sometimes, this unleashing seems to be subsumed under what has become something of a magic word: *contingency*. That makes some sense, when we pit contingency against necessity. But for me, an additional set of images always seemed central: enlivening the imagination,³ shaking off old habits,⁴ unfreezing reality,⁵ disrupting tradition,⁶ shocking out of complacency or jolting out of resignation,⁷ getting unstuck.⁸ Looking back now I am prone to believe that some of the attraction to these phrases was their

-
2. WILLIAM SHAKESPEARE, *THE TEMPEST* act 5, sc. 1, ll. 41-57.
 3. See 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, 303 [hereinafter GORDON, *The Past as Authority*]; ROBERT W. GORDON, *Taming the Past: Histories of Liberal Society in American Legal Thought*, in *TAMING THE PAST*, *supra* note 1, at 317, 360 [hereinafter GORDON, *Histories of Liberal Society*].
 4. See ROBERT W. GORDON, *Historicism in Legal Scholarship*, in *TAMING THE PAST*, *supra* note 1, at 183, 218.
 5. See Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195, 201 (1987).
 6. See GORDON, *The Past as Authority*, *supra* note 3, at 295-96.
 7. See GORDON, *Histories of Liberal Society*, *supra* note 3, at 356-60.
 8. See ROBERT W. GORDON, *Critical Legal Histories*, in *TAMING THE PAST*, *supra* note 1, at 220, 234; GORDON, *supra* note 4, at 209; GORDON, *The Past as Authority*, *supra* note 3, at 303.

physicality, the way they alluded to throwing off a garment tied too tight. A straightjacket would be overdramatic; loosening a tie, too routine. Perhaps the right image is taking off a corset.

The general point was overwhelmingly Nietzschean: History had to be used, and its role was to undermine complacency or resignation. In a moment, I'll return to the special relevance of this for legal history, but first I will crudely array a few major elements of this amalgam, a Gordonian-Nietzschean philosophy of history.⁹

First, meanings are constantly established by ousting other meanings in battles for primacy. This point is both interpretive and concretely historical. Interpretations vie for dominance, always in some kind of contest. Nothing simply grows; developments are not organic; order is not spontaneous; and there is nothing pure at the origin.¹⁰ Second, often (perhaps usually) contests over meaning contain an element of misdirection in that the crucial battle is about form and structure rather than particular statements of content. When that happens, the place to look is not necessarily at the propositions advanced, but at the words that betray a conceptual mindset. It is there that the limits of thought and the taken-for-granted give shape to everything else. Third, awakening the past for the present can flow from a variety of attitudes, two of which are absolutely crucial: the monumental and the critical. Monumental history is a mode of overcoming doubt about the very fact that human greatness is a possibility.¹¹ And if the monumental mode is aspirational, critical history, on the other hand, thrives on rage against injustice:

Sometimes, however, this same life that requires forgetting demands a temporary suspension of this forgetfulness; it wants to be clear as to how unjust the existence of anything—a privilege, a caste, a dynasty, for example—is, and how greatly this

9. Gordon cites Friedrich Nietzsche's philosophy of history repeatedly, but the following extrapolation does not rely solely on those citations.

10. For Nietzsche's critique of accounts of purpose in law that could have fit almost seamlessly into Gordon's critique of evolutionary functionalism, see FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALITY (1887), in "ON THE GENEALOGY OF MORALITY" AND OTHER WRITINGS 50-53 (Keith Ansell-Pearson ed., Carol Diethe trans., Cambridge Univ. Press 2017). For analysis, see SAMUEL WEBER, INSTITUTION AND INTERPRETATION 4-5 (1987).

11. Nietzsche's account of the useful modes of history is obviously more complex than as represented here, but part of the point comes through in the claim that the "monumentalistic conception" teaches that "the greatness that once existed was in any event once possible and may thus be possible again." See FRIEDRICH NIETZSCHE, ON THE USES AND DISADVANTAGES OF HISTORY FOR LIFE (1874), in UNTIMELY MEDITATIONS 57, 69 (Daniel Breazeale ed., R.J. Hollingdale trans., 1997). The dangers of monumental history are significant: "Monumental history deceives by analogies: with seductive similarities it inspires the courageous to foolhardiness and the inspired to fanaticism . . ." *Id.* at 71.

thing deserves to perish. Then its past is regarded critically, then one takes the knife to its roots, then one cruelly tramples over every kind of piety.¹²

As important as each of these attitudes is, the multiplicity of attitudes toward the past that can participate in bringing it alive for the present is actually just as important. Fourth, to borrow a phrase, “The past is never dead. It’s not even past.”¹³ It is not the death of the past we should really be worried about, but rather that of the present. Complacency and good conscience can be a kind of death.

Taken together, history that dislodges the resignation to inevitability is at once a rejuvenating liberation and a serious burden. It implies, for history generally, responsibility well beyond generating accurate pictures of the past. For legal history in particular, this is a maneuver with a special urgency. The reason is that so often (and the United States may be an extreme example of this, as de Tocqueville noticed long ago¹⁴), law provides the vocabulary, the syntax, and the conceptual map for how we structure our relationships, for what we owe each other, for what we can expect from one another. Our social institutions—the contract, the corporation, the city, the central bank, the administrative agency, and on and on—are constructed from legal building blocks. The contests over how we understand those building blocks are thus struggles over how we imagine living together; legal history is constantly shaping the imagination of how our politics can be lived.

The Spell of Critical Historicism

All of this must sound familiar, indeed, like a song with several cover versions. It is not only Nietzsche, not only Gordon, but also a central line of critical legal studies (CLS). Yet while it seems like no exaggeration to claim that a generation or more of legal historians have worked under Gordon’s spell, nothing similar can be said for CLS regarding the rest of the legal academy. This difference seems like a productive puzzle, leading me to ask, in Barbara Johnson’s phrase, “How does this gap signify?”¹⁵ Lacking time to explain that gap, I will try instead to exploit it.

Complacency and resignation are still problems, at least if I can judge from my own students. But today’s complacency is, for the most part, not that of thirty or forty years ago—which was a complacency of conformism, of drowning in organizational life, a feeling that a few mega-institutions had

12. *Id.* at 76.

13. WILLIAM FAULKNER, REQUIEM FOR A NUN 92 (4th prtg. 1966).

14. See ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 261 (Henry Reeve trans., New York, Adlard & Saunders 1838).

15. BARBARA JOHNSON, THE WAKE OF DECONSTRUCTION 38 (1994).

rigged the game.¹⁶ Instead, today's complacency's roots lie in a feeling that the world is too big, too global, too complicated, and too networked to be understood, much less changed. Some experience a completely disaggregated universe in which nobody pulls any of the strings—we are all just price takers in markets with no mooring, nearly random generators of preference signals only algorithms make use of and that no one can understand in human terms. Indeed, the very attempt to translate into human terms signals a misinterpretation of our fundamental condition.

Gordon's critical history, alongside CLS but with more institutional success and longevity, helped us to challenge the way basic legal concepts—contract, property, citizenship, work—constricted the imagination. If we were to analogize from economics, Crits were focused on the microfoundations of macro, the relationships built on core concepts. This was almost inevitable for doctrinally oriented CLS work, though much less of a limitation for legal history. In order to continue to live up to its potential, the next generation of critical history may have to combat the new complacency on different grounds. Hints of this seem to be taking shape, especially in the history of international law and in the burgeoning histories of capitalism.¹⁷

Consider, for example, some questions of this sort:

How do changes in pension systems, fiduciary law, and corporate governance shift control over long-term savings away from the state and then away from organized labor, placing control over corporate decisionmaking in the hands of specialists in finance?

How does portfolio theory in financial economics interact with a market for corporate control that in turn drives overseas outsourcing and deindustrialization?

16. Without putting too much store in it, here is a caricature of the resigned attitude of the mid-1970s, the emergence point of CLS: Complacency is a surrender to a spirit of conformism. We are doomed to be cogs in the corporate wheel. The institution has taken over our lives; the big organization runs the show; we are all bit players. The direction of development is inexorable; we are latecomers (Nietzsche would say "epigones," see NIETZSCHE, *supra* note 11, at 83, 94), consigned to passive roles that we can make the best of by playing by the rules. See, e.g., Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 594-602 (1982); Robert W. Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 281 (David Kairys ed. 1982); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 668-75 (1983).

17. On international law, see, for example, PATRICIA CLAVIN, *SECURING THE WORLD ECONOMY: THE REINVENTION OF THE LEAGUE OF NATIONS, 1920-1946* (2013); ODETTE LIENAU, *RETHINKING SOVEREIGN DEBT: POLITICS, REPUTATION, AND LEGITIMACY IN MODERN FINANCE* (2014); and SUSAN PEDERSON, *THE GUARDIANS: THE LEAGUE OF NATIONS AND THE CRISIS OF EMPIRE* (2015). On capitalism, see, for example, *CAPITALISM TAKES COMMAND: THE SOCIAL TRANSFORMATION OF NINETEENTH-CENTURY AMERICA* (Michael Zakim & Gary J. Kornblith eds., 2012); and CHRISTINE DESAN, *MAKING MONEY: COIN, CURRENCY, AND THE COMING OF CAPITALISM* (2014).

How does so-called independence of central banks turn the commercial banking industry into a reliable source of funding for capital market speculation, guaranteeing that the central bank will underwrite asset prices rather than productive capacity or job creation? Or relatedly, how does a separation of fiscal from monetary operations militate against popular pressures regarding economic policy, and how does that in turn affect organized labor and political participation at the party level?

These are not completely new questions. But they all require a synthetic view of a number of legal fields, a story about the integration of seemingly disparate but actually interlocking parts—they point to series of strategic decisions. Moreover, if one succeeds in answering them historically, they offer a promise of seeing current macro-arrangements more clearly, and they thus set up an orientation for thinking about how to intervene in analogous arrangements today. In other words, they shake off the sense of the uncontrollable—or at least that seems to be their potential.

Rather than focusing on the legal category (even capacious categories like responsibility or work), tomorrow's critical histories may focus on large-scale interlocking structural aspects of institutions. The truth, of course, is that interlocking systems are not new. But the perception that they are inscrutable and ineluctable seems to be a central feature of our times and perhaps the central obstacle to the flourishing of the institutional imagination. This may mean that histories exposing and analyzing the way seemingly disparate features of social and economic institutions combine are a way to reinfuse political energy into those places where decisions over their combination are made and justified.

So here is a speculative thought about what we might do if the spell of critical historicism lifts, with a glance back to *The Tempest*. By the time Prospero is ready to release the characters from his magic, we know that they have very different prospects. All the characters, Prospero included, have pasts filled with misdeeds and with a sense that the world was so disorganized that they could escape responsibility (several of the characters have been plotting murders). But when the spell is lifted, it becomes clear that various moving parts are engineered; the awakened characters are alive, in part, to their own responsibility. Some are reborn, having experienced miraculous redemption; others are newly emerging from childhood to horizons they have only fantasized; Ariel, Prospero's loyal spirit, is positively running toward freedom. Their imaginations have been set on fire, and time, which had divided them like space, has been rejoined. They are on the verge of a future together. Perhaps this is critical historicism's next horizon: waking from a spell and a storm to develop the imaginative possibilities that its synthetic historical inquiry opens up.