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REFLECTION

Everything Is Contingent: A Comment on Bob Gordon's *Taming the Past*

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In the introduction to *Taming the Past*, Bob Gordon invokes a well-known passage in Oliver Wendell Holmes's 1897 essay *The Path of the Law* in which Holmes, likening law to a dragon, argues that history serves either to kill law or to tame it.[1] But how exactly does history do this?

Holmes's was a very specific understanding of history, one that was increasingly gripping the imagination of late nineteenth and early twentieth century Euro-American modernist thinkers and that was sharply different from the foundational and teleological historical models that had hitherto dominated the nineteenth century imagination. All these earlier models—whether the Scottish Enlightenment's feudalism-to-commerce model; the Whiggish model about the progress of liberty; Hegelian, Comtean, or Marxist models; or the models of Henry Maine and Herbert Spencer—had linked past, present and future according to some particular logic. In all these models, history pointed somewhere. By contrast, the Holmesian modernist historical model offered neither meaning nor direction: It served principally to tear down the pretended suprahistorical foundations of phenomena by showing that such phenomena had arisen in historical time. As Holmes showed in *The Common Law*,[2] modernist history could kill or tame the dragon that was law by showing that law was "merely" historical and, hence, that the pretended suprahistorical foundations of law, whether rationality, morality, logic, or unchanging tradition, were spurious.[3] Once law's foundations were

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1. *See* ROBERT W. GORDON, *Introduction* to TAMING THE PAST: ESSAYS ON LAW IN HISTORY AND HISTORY IN LAW 4 (2017) (citing OLIVER WENDELL HOLMES, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 167, 186-87 (1920)).

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

3. For a detailed exploration of this point, see Kunal Parker, *The History of Experience: On the Historical Imagination of Oliver Wendell Holmes, Jr.*, POLAR, Nov. 2003, at 60, 60-64.

dismantled, ground was cleared. Present and future could be rethought and remade.

In *Taming the Past*, Gordon strikes a distinctly Holmesian modernist note:

> Now that I see all these essays collected together, it occurs to me that in one way or another they almost all make some version of the same point: that the historicized past poses a perpetual threat to the legal rationalizations of the present. Brought back to life, the past unsettles and destabilizes the stories we tell about the law to make us feel comfortable with the way things are.[4]

Thus, for Gordon, what he calls "the historicized past" serves to undermine our reassuring accounts about law. This is done by showing that law is (to use Gordon's preferred adjective) "contingent."[5] For Gordon, contingency entails the following: It shows that a particular law (or institution or practice or idea) is the product of a momentary confluence of factors that have come together in historical time; that matters could well have transpired differently at the putative moment of that law's origin; that that law's meanings have changed in and over historical time; and that that law therefore has no necessary hold over us and leaves us free to plot alternative futures.[6]

Thus far, it would appear, history for Gordon serves mainly to tame the dragon of law. But the book's title is *Taming the Past*. As it turns out, history in Gordon's oeuvre also serves to tame the dragon of the past, to render the past itself contingent. In this regard, the dragon Gordon would tame is not the past in itself, the res gestae of history, but rather the past that presents itself to us in the form of foundational histories. Once again following the path charted by Holmes, Gordon argues repeatedly that history undermines the altogether-too-neat narratives of progress or decline that have so often captivated American progressive and conservative legal thinkers and allowed them to distinguish law from "mere" politics. When done right, Gordon suggests, history renders all such foundational narratives contingent.

Even as Gordon tames the dragons of law and foundational history, he identifies other dragons for the taming. In two celebrated articles—*Historicism in Legal Scholarship*[7] and *Critical Legal Histories*[8]—Gordon famously turns on the dragon of society. Where post-World War II sociolegal scholars piously insisted that law adapted to—and could therefore be understood in terms of—

4. GORDON, *supra* note 1, at 5.

5. *See, e.g.*, *id.* at 8.

6. *See id.* at 7-11.

7. ROBERT W. GORDON, *Historicism in Legal Scholarship*, *in* TAMING THE PAST, *supra* note 1, at 183.

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

society,[9] Gordon insisted that society was itself constituted by law.[10] It could thus not serve as a stable ground outside law in terms of which law could be measured or derive meaning. Insofar as law was contingent, to the extent it constituted society, it rendered society contingent, too. Another dragon tamed.

Gordon leads us, then, into a particular kind of predicament: Everything is contingent. What kind of place has Gordon brought us to? I tried to come up with a metaphor for this place, and the first thing I came up with was an iPhone screen where all icons wobble simultaneously (and where the phone wobbles too). Perhaps the metaphor is infelicitous. But the questions remain. What is it like to live in a world where everything wobbles, where everything may be rethought and remade, where there is no stable refuge? How might we compare this world to the ones Gordon urges us to abandon for it?

As Gordon recognizes repeatedly, Anglo-American lawyers were hardly strangers to the use of history and, therefore, no strangers to the practice of rendering particular objects—laws, practices, or institutions—contingent. Over the centuries, Anglo-American lawyers regularly marked out this or that object as the product of a particular moment in time that made it either a relic of an outmoded past, a valid feature of the present, or a harbinger of the future. Anglo-American lawyers typically performed these operations in terms of foundational histories. For centuries, they also did so without shedding the idea that law possessed its own ahistorical foundations, modalities, and temporalities.[11] Closer to our own historical moment, working people, black people, women, LGBTQ communities, immigrants, the indigent, and others have at various points all made arguments about the contingency of this or that legal object on the basis of an understanding of American history as a continuous expansion of liberty and equality. Such arguments have often been accompanied by faith in the special ahistorical foundations, modalities, and temporalities of law. But for Gordon, such kinds of demonstration of contingency are partial, insufficient, and in the final analysis unacceptable because they rest upon the "wrong" kind of history, namely foundational history.[12] The examples I have provided would be earlier or later iterations of what Gordon calls, in *Critical Legal Histories*, "evolutionary functionalism," which he characterizes as the idea that "the histories of certain advanced Western societies, most notably the United States, describe an evolutionary

9. *See, e.g.*, LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 13-25 (1973); JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 3-32 (1956).

10. *See* GORDON, *supra* note 8, at 261-67.

11. *See generally* KUNAL M. PARKER, COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790-1900: LEGAL THOUGHT BEFORE MODERNISM (2011).

12. *See* ROBERT W. GORDON, *Taming the Past: Histories of Liberal Society in American Legal Thought*, *in* TAMING THE PAST, *supra* note 1, at 317, 356.

development that is both natural (in the sense that some version of it will happen in every society unless 'artificial' constraints force a deviation) and, on the whole, progressive."[13] "Evolutionary functionalism" is, of course, a dragon Gordon tames.

In seeking to situate Gordon's preference for total contingency, I found revealing the blurb before *Critical Legal Histories*, in which Gordon describes the critical legal studies movement's disdain for incremental or partial legal change:

> [T]here was common agreement around the idea that the way law was taught in American law schools, rationalized in legal scholarship, and deployed in legal arguments and decision-making . . . tended to contribute to the complacent idea that the legal system in force was just about as efficient, just, and rational a system as it could be ("false legitimation" we called this); and that it could not be reformed except in minor ways without risking economic and political catastrophe ("false necessity").[14]

Thus, those arguing for the contingency of only this or that object in terms of some foundational narrative about law or history or society might be guilty of arguing from false necessity. Only dwelling in total contingency—which implies total transformation—overcomes this falsehood.

In this regard, I will make a few brief and interrelated observations.

First, it is not clear that those who render this or that particular object contingent in terms of historical or legal foundations do something radically different from those who think of everything as contingent. The demonstration of the contingency of this or that thing typically takes place against a backdrop of things imagined as stable or provisionally held stable. In other words, to return to my iPhone metaphor, although we know that all icons wobble, we typically focus on just one icon at a time. Much contemporary legal history scholarship of the kind Gordon applauds in the introduction shows only that this or that *particular* object is contingent, not that everything is. I also suspect that many contemporary legal historians working hard to demonstrate that this or that particular object is contingent are motivated, whether or not explicitly, by precisely the progressive, foundational histories Gordon warns us against.

Second, one might well ask what we lose when we give up on foundational ideas of law, history, and society. Gordon has thought about this. In the essay *Taming the Past: Histories of Liberal Society in American Legal Thought*, Gordon recognizes the power of foundational thinking in American history: "The core legal story of liberal society as the gradual release of liberty from 'feudal' restraints toward more personal liberty and political inclusion, has surely been

13. *See* GORDON, *supra* note 8, at 223, 225 (capitalization altered).

14. *See id.* at 220.

an immensely powerful force for emancipation: ask Thurgood Marshall . . . ."[15] Nevertheless, Gordon repudiates this kind of foundational history on the ground that it all too often "allow[s] us to fog over and forget the bad past, to pretend that our abominations and errors never happened, or that if they did that they are safely left behind, locked up in the dead past."[16] But this is not how I read the work of many scholars of, say, race in the United States (to say nothing of Thurgood Marshall) who refuse to paper over anything even as they hold out a vision of history as an unfolding of justice.

Third, I want to suggest that Gordon might not always read many Anglo-American legal thinkers sympathetically. In essay after essay, he writes that Anglo-American legal thinkers—whether in the eighteenth, nineteenth, or twentieth centuries—were excessively wedded to the dragons of law, foundational history, and society that he has tamed. According to Gordon, the Holmesian modernist moment to which he is heir never really caught on. But such an account slights the immense intellectual work of twentieth century American legal thinkers (to say nothing of the equally complex efforts of those in earlier periods), who struggled mightily with the task of reconstructing ideas of law, history, and society in the aftermath of the modernist critique. I will point to just one example, the post-World War II constitutional theorist Alexander Bickel, who labored throughout his career with the problem of how to defend an idea of law after the Holmesian critique. In his last book, *The Morality of Consent*, Bickel wrote:

> "I do not know what is true," said Holmes. "I do not know the meaning of the universe." His biographer, Mark DeWolfe Howe, wondered whether our stomachs were "strong enough to accept the bitter pill which Holmes tendered us." They had better be. We had better recognize how much is human activity a random confusion, and that there is no final validity to be claimed for our truths. If we allow ourselves to be engulfed in moral certitudes we will march to self-destruction from one Vietnam and one domestic revolution—sometimes Marcusean and often not—to another. And yet we do need, individually and as a society, some values, some belief in the foundations of our conduct, in order to make life bearable. If these too are lies, they are, as Holmes's great contemporary, Joseph Conrad, thought them, true lies; if illusions, then indispensable ones.[17]

After Holmes, Bickel argued, law needed to figure out how to be a "true lie," something known to be a lie and nevertheless insisted upon as true. The same goes for ideas of history and society that after the modernist critique have both gone away and yet remain with us. How might one place Gordon's critique of someone like Bickel as arguing from false necessity in conversation with Bickel's response that he is holding onto a true lie?

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15. GORDON, *supra* note 12, at 355.

16. *See id.* at 356.

17. ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 77 (1975).

To end, I suggest that Gordon's rigorous antifoundationalism—his insistence on showing that everything is contingent—does not recommend itself because it is a superior politico-legal strategy. As Gordon himself recognizes, it would be easy enough to show that foundational ideas of law, history, and society have accomplished as much as, if not more than, antifoundational ones. Nor should we imagine that antifoundationalism poses dangers less grave than those posed by foundationalism. So what do we do with Gordon's embrace of antifoundationalism, with his career-long celebration of the contingent, with his endorsement of total contingency? If Gordon's antifoundationalism cannot point to its own superiority as an instrument, it can certainly gesture to itself—perhaps *only* gesture to itself—as an aesthetic. In the world Gordon constructs in his brilliant synthetic essays, we encounter the deep pleasure he derives from dwelling in contingency, from destabilizing and unsettling, from stripping himself (and us) of our comforting stories about law, history, and society. In its iconoclasm, his is a distinctly modernist pleasure, the pleasure of discomfort, and, as such, one that is hard to argue with.

I note a final paradox. Gordon passes into contingency through the act of taming, a word conveying docility, management, and control rather than the wildness and exhilaration that contingency supposedly entails. It makes sense, then, that Gordon chooses for the cover of his book a deeply religious image, that of St. George slaying the dragon, of the good vanquishing the bad. Antifoundationalism frequently turns to foundationalism to produce its aesthetic effects. Is this Gordon's "true lie"?