# MAKING POLITICS OF HISTORY AND INTERNATIONAL LAW

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I come to this topic as an outsider, an avid consumer of empirical international legal history, a political scientist, an American, and a scholar committed to interdisciplinary pluralism. These descriptors give me distance, empathy, and a bit of frustration regarding the conversation that Anne Orford engages in her intriguing book *International Law and the Politics of History,* the title of which I invert for this contribution.[1] I am a serial disciplinary transgressor. I have reached, written, and commented beyond my political science and international relations (IR) training and been lauded and pilloried for doing so. I have also transgressed into normative, philosophical, and critical discussions where I am neither particularly skilled nor well read.

Where possible I have drawn on existing scholarship, yet especially before the "historical turn" Orford discusses and the development of a truly interdisciplinary international law scholarship,[2] there was often scant literature to draw on. Because I struggled to find scholarship on legal practice and law in action, I have been especially appreciative when I do find empirical, historical, and contemporary work on legal practice and legal institutions.

Having decided to change my research focus to the topic of global capitalism and law, I spent much of the COVID-induced travel moratorium reading the literature that Anne Orford engages in her book and working with a fantastic Northwestern history graduate student Ming-Hsi Chu to contextualize the literature and understand the fuss about anachronistic, presentist, Whiggish, and contextualist history. I then drew on twelve critical and empirical international law histories for a recent article exploring where and how the transformation from the colonial to the multilateral eras did and did not influence international economic law.[3] Putting to the side for the moment her critique of Samuel Moyn,[4] I was surprised to read Orford's view that empirical historical work somehow claimed to get beyond the

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1. *See* ANNE ORFORD, INTERNATIONAL LAW AND THE POLITICS OF HISTORY 9–10 (2021) (describing, in general terms, Orford's counter-argument to making legal arguments about the past).

2. *See id.* at 1–5 (tracing claims that international law has turned to history and introducing political implications of that switch).

3. *See* Karen J. Alter, *From Colonial to Multilateral International Law: A Global Capitalism and Law Investigation*, 19 INT'L J. CONST. L. 798 (2021) (highlighting an application of tracing international law histories pertaining to global capitalism).

4. *See, e.g.*, ORFORD, *supra* note 1, at 102 (criticizing Moyn's assertion that human rights lawyers have only recently begun concerning themselves with material inequality produced by neoliberalism and U.S. military interventionism).

politics that international legal analysis cannot escape.[5] I did not read the work as making such a claim, nor did I see the works asserting a truth that shoddy legal scholarship cannot or had not seen. Indeed, at times I felt the critique of empirical historical work was motivated mostly by a desire to push back against Ian Hunter's critique of Martti Koskeneimmi's and Third World Approaches to International Law (TWAIL) scholarship,[6] a frustration that critical scholarship was not incorporated more into the cited empirical work, and a bit of jealousy that the methods of empiricism garner more attention for making points that critical scholars have also made. These aspects of Orford's book were a distraction, and insofar as the target was empiricism per se, they reminded me of a frustration I feel when critical scholars suggest that their engagement and insight into politics are more profound.

This is where the descriptors of political scientist and American perhaps become relevant. Political science has experienced decades of methods wars, so I am very familiar with the annoying hubris of evangelizing methods purists who claim to have a corner on truth-finding and truth-telling. It is annoying. I don't know the Cambridge history scholars well enough, but I really don't think that Quinn Slobodian, Lauren Benton, Lisa Ford, or Isabel Hull is making the strong case Orford argues against.[7] So I was trying to figure it out—why was she so annoyed at empirical history as a category? I may be inured to the American-style claiming that Orford quotes, where scholars locate the contribution of their research by suggesting a gap in existing understandings.[8] I share Orford's frustration that vast quantities of scholarship, especially scholarship by women and underrepresented groups, are systematically ignored in the academy.[9] But I mainly see empiricist historians as investigating something specific using the methods of their discipline. Historians may undervalue findings that are not backed by their careful methods, yet I have found the empirical historical studies Orford engages to offer new, original, important, useful, and revealing perspectives on the practice of international law with respect to the issues, periods, institutions, and geographies the authors are studying. For me, the careful empirical grounding does make the insights more convincing.

This sense that historians are just being historians, and that they are not claiming that there is no politics of history, made me wonder—who is Orford arguing against? Who actually believes that history is not politics? Certainly, no historians I know would make this argument. Nor would my empiricist political scientist colleagues make categorical claims about empiricism, since we know that

5. *See id.* at 315–20 (detailing how embracing politics' place in international law can be new frontier of international legal studies).

6. *See id.* at 158 (detailing Orford's response to Hunter's critique of TWAIL scholars).

7. *Compare id.* at 273–83 (criticizing Slobodian's tracing of twentieth-century international law), *with* QUINN SLOBODIAN, THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM 263–73 (2018) (describing emergence of neoliberalism—through genealogy of Geneva School—on a fault line between Global North and Global South).

8. *See, e.g.*, ORFORD, *supra* note 1, at 118 (considering how American scholars studied history of common law).

9. *See, e.g.*, *id.* at 299 n.39 (highlighting argument about the erasure of social feminists, trans and queer people, and feminists of color from histories of 1970s feminism).

one can muster methods and facts to substantiate various positions. Given the number of Americans who believe that the 2020 election was stolen, perhaps I need to be more credulous that there is a large group of scholars who believe that history is factually apolitical. At the same time, I wonder if it is the author's fault what others then do with their work? This is a point I will return to.

I have been discussing, as Orford does,[10] historical scholarship. I am significantly more suspect about what goes on in the American legal academy. Even if we admit that legal politics is always at play (an issue I will also return to), I nonetheless find American law schools jaw-droppingly political in their uses of empirics and history. To name just one example: American originalist law positions, which are deeply associated with Federalist Society conservativism, are too often historically and academically selective to the point that even scholars who are not conversant in the "hermeneutics of suspicion" are naturally skeptical of American legal scholar's historical claims.[11] Meanwhile, those who tend to believe big lies and true-believer originalist and law-and-economics legal scholars are neither going to read nor be convinced by Orford's scholarly debate about the political uses of history. Hence the question: who is she arguing against?

The rest of this contribution focuses on the politics of making history and law. Part I discusses Orford's argument about why, starting in the 1990s, scholars began to politicize the history of international law.[12] Here I raise the question—should we make assumptions about the intentions of empirical scholars just because their research topic is motivated by or speaks to politics? Part II discusses Orford's brilliant explication of why legal scholarship is inherently an act of politics. Here I raise the question of whether the critique applies to all narrative forms of scholarship. Part III concludes by turning down the heat. Orford suggests that holding together the cognitive dissonance of legal scholars requires an inherently adversarial approach to scholarship.[13] Accepting this argument, I nonetheless ask—is it helpful to take an adversarial approach to the work of disciplines where tastes and practices are different? I therefore probe if Orford is actually making and promoting the very politics she is explicating.

10. *See id.* at 1–5 (introducing political implications of international law's switch to historical scholarship).

11. Orford embraces Duncan Kennedy's moniker of a hermeneutic of suspicion. *See* ORFORD *supra* note 1, at 5–6 (citing Duncan Kennedy, *The Hermeneutic of Suspicion in Contemporary American Legal Thought*, 25 L. CRITIQUE 91, 91–92 (2014)). As an empirical scholar, I found the following book to be especially eye-opening: STEPHEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2009).

12. *See* ORFORD, *supra* note 1, at 18 (capturing political stakes involved in international law's turn to history).

13. *See id.* at 248 (noting that field of international law is adversarial and thus will operate in partisan ways).

## I. LIBERAL HUBRIS AND THE NEW POLITICS OF INTERNATIONAL LEGAL HISTORY

I may well be an embodiment of the turn to international legal history that interests Orford.[14] From the vantage point of Brexit and 2022, my dissertation book (which was admittedly replete with American PhD-style overclaiming) may appear political because I argued that the legal claims of the Court of Justice of the European Community (CJEU) were audacious and controversial, and they were never truly embraced in national legal or judicial circles.[15] To be sure, my interest in the topic had been piqued by a disagreement among legal scholars and practitioners, and thus by the politics of the debate.[16] I saw my PhD thesis as analyzing the contestation of legal arguments for and against the supremacy of European law with the goal of understanding why the suspect CJEU interpretation prevailed. Neither then nor now did I see the thesis itself as enacting politics.

It may be impossible for a PhD student or assistant professor writing in another discipline to see themselves as a person with enough power to politicize, let alone to make law or history. I thus found Orford's account of the historical turn that I was unwittingly a participant in[17] to be of great interest.

According to Orford, the turn to the history of international law began in response to developments that formed my PhD training:[18] the finding that democracies do not fight wars against each other,[19] the end of a political contest between socialism and capitalism which spurred an investigation into varieties of capitalism,[20] and a turn to studying history to understand institutions and institutional change.[21] Later in the book, Orford fingers the proliferation of international court rulings, and the neo-formalism of legal scholars who analyzed these rulings, as a

14. *See id.* at 1–5 (summarizing Orford's account of the turn to history in international law).

15. *See* KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE 182–208 (2001) [hereinafter ALTER, SUPREMACY OF EUROPEAN LAW] (arguing history of European Court of Justice in European law led to controversial emergence of international rule of law in Europe).

16. I discussed the conversation and scholarship that motivated my study in KAREN J. ALTER, THE EUROPEAN COURT'S POLITICAL POWER: SELECTED ESSAYS 3–6 (2009) [hereinafter ALTER, EUROPEAN COURT'S POLITICAL POWER].

17. *See* ORFORD, *supra* note 1, at 1–5 (summarizing Orford's account of the turn to history in international law).

18. *See id.* at 18–19 (describing conditions that informed the turn to history of international law).

19. *See, e.g.*, BRUCE M. RUSSETT, GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD WAR WORLD 4 (1993) (arguing that peace between democratic nations is the norm because of shared institutions and values, but expressing concern that this norm may change as new democratic models emerge with the fall of the Soviet Union).

20. *See generally* BOB HANCKÉ, DEBATING VARIETIES OF CAPITALISM: A READER (2009) (collecting decades of scholarship on this topic).

21. *See* Peter A. Hall & Rosemary C. R. Taylor, *Political Science and the Three New Institutionalisms*, 44 POL. STUD. ASS'N 936, 937–42 (1996) (detailing the rise of historical institutionalism school of thought); *see generally* ORFEO FIORETOS, TULIA G. FALLETI & ADAM SHEINGATE, THE OXFORD HANDBOOK OF HISTORICAL INSTITUTIONALISM (2016) (extensively compiling works on historical institutionalism research tradition in political science).

contributor to the politicization.[22] In other words, everything I had studied apparently causally contributed to lawyers and historians politicizing the international law and global historical studies.

I agree with Orford and other critical scholars' critique of this scholarship. Beginning in the 1990s, international officials and an interdisciplinary group of scholars embraced with too little reflexivity democracy promotion, perfecting capitalist governance, and the growing role of international courts as promising developments.[23] By focusing our analyses on empirical questions, and by being insufficiently self-critical and skeptical, we were suggesting that spreading democracy, legalization, international judicialization, and pro-market governance were progressive and positive developments. My only defense is that I was young and Orford's demystification of international legal practice (Chapter 5,[24] which I will soon discuss) did not exist.[25]

Orford argues that historians and critical international legal scholars began to re-examine international legal history as a presentist historical response to the heady heydays of the International Liberal Order.[26] We can understand why a number of critical legal scholars began to connect contemporary liberal politics to international law's imperialist past as a response to liberal international scholarship. Yet Orford's claim is that empirical historical work also began, and that this work was also trying to rewrite the history of international law.[27]

Orford's more specific argument is that liberal internationalism experienced a number of "interrelated financial, food, energy, climate, security, and refugee crises of the early twenty-first century."[28] She sees these crises as creating a preference in the US and Europe for international solutions that circumvented democracy.[29] Although I can imagine that there was not a lot of domestic support for addressing these particular challenges, I probably need to read her work on these crises[30] to be more convinced of the general argument. Most IR scholars would say that neo-liberalism and multilateralism had deep and bi-partisan and grassroots support in the

22. ORFORD, *supra* note 1, at 315.

23. *See id.* at 1–8 (introducing critique of turn to history by contextualist historians).

24. *See id.* at 178–252 (arguing that contextualist historians' methods cannot solve problems inherent to structure of international law practice).

25. *See* Karen J. Alter, *Visions of International Law: An Interdisciplinary Retrospective*, 33 LEIDEN J. INT'L L. 837, 841 (2020) [hereinafter Alter, *Visions of International Law*] (explaining lack of prior scholarship challenging predominant views of political scientists).

26. Orford defines presentism as "the tendency to interpret the past in terms of present interests, values, or concepts." ORFORD, *supra* note 1, at 83. Some historians see presentism as a methodological flaw, and Orford sees historians as wielding the presentist critique to discredit historical international legal scholarship. *Id.*

27. *See id.* at 81–86 (detailing rise of empiricist historical model and criticisms of international legal scholarship by historians that followed).

28. *Id.* at 44.

29. *See id.* at 44–46 (noting a shift in United States and Europe toward creating forms for international lawmaking that circumvent need for state or democratic public's consent).

30. *See, e.g.*, Anne Orford, *Food Security, Free Trade, and the Battle for the State*, 11 J. INT'L L. & INT'L REL. 1 (2015) (discussing relationship between international law and current economic order that enables profit on food insecurity).

exporting states, and significant support among elites in the developing world (who were, admittedly, Western trained).[31] Rather than seeing a plot to circumvent democracy, most IR scholarship would blame the hypocrisy of Westerners, the failure of neo-liberalism to deliver economic development, and the rise of China (or maybe China's admission to the WTO) as generating the crisis of international liberalism.[32] That said, it does not really matter *why* the liberal international order is in crisis. Orford's larger point is that history became politicized because of the international liberal order and its legitimation crisis.[33]

Even if we presume that Orford is right, this doesn't address her argument that empirical histories were ignoring their internal politics.[34] As I said, I think that Orford is mostly upset about a few different issues, and this frustration was for me a distraction. In targeting empirical historical work, including work that is not critical or rejecting of critical scholarship and that does not claim to be making an apolitical intervention, and in then discussing a list of empiricist scholarship including American "anti-formalist scholarship" from the New Haven School, the "international legal process" scholarship of Abraham Chayes, the "transnational legal process" scholarship of Harold Koh, Anne-Marie Slaughter's vision of a "'new world order' of networked bureaucratic guilds," Jack Goldsmith and Eric Posner's rational choice scholarship, and Gregory Shaffer and Tom Ginsburg's work on the empirical turn in international legal scholarship,[35] I see Orford as suggesting that the problem is empiricist work itself, or perhaps the value and validity that many lawyers, practitioners, and scholars place in this work.

Here I disagree, and the disagreement triggers my own annoyance at the reproof that Foucault already said the things that empiricists go on to say.[36] The critical literature was, in my mind, meant to be theoretical and interpretivist. History, actions, and events were part of the interpretivist discussion, but empirics were used as heuristics and anecdote. I can empathize with Orford's frustration that it took Slobodian's book *The Globalist* for mainstream scholars to discuss Ordoliberalism's

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31. *See, e.g.*, YVES DEZALAY & BRYANT G. GARTH, GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY (2002) [hereinafter DEZALAY & GARTH, GLOBAL PRESCRIPTIONS] (providing compilation of several works of legal scholarship that focus on developing new legal orthodoxy); YVES DEZALAY & BRYANT G. GARTH, THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES (2002) [hereinafter DEZALAY & GARTH, PALACE WARS] (examining how ideas of neoliberal economics and international human rights laws that are exported by Western countries like the United States are perceived by non-Western countries); STEPHEN C. NELSON, THE CURRENCY OF CONFIDENCE: HOW ECONOMIC BELIEFS SHAPE THE IMF'S RELATIONSHIP WITH ITS BORROWERS (2017) (arguing that officials within International Monetary Fund share a set of neoliberal beliefs).

32. *See* ORFORD, *supra* note 1, at 44–68 (highlighting economic failures, such as financial crisis, and environmental failures, such as the heating planet, as well as China's economic growth).

33. *See id.* at 44–45 (explaining that crises experienced in twenty-first century stimulated debates about historical decisions and events that led to current global order).

34. *See id.* at 194 (stating that historians tend to ignore how legal scholarship relates to arguments made by practitioners).

35. *Id.* at 211–12.

36. *See id.* at 51–52 (describing Foucault's lectures as legendary and influential on historical scholarship).

influence in European and GATT/WTO legal developments.[37] Yet I don't think that historians need to be reading critical legal scholarship, or that everyone needs to read or be influenced by Foucault, nor do I fault Slobodian, Benton, Ford, or Hull for not turning to Foucault and critical theories in their research. This is because I also empathize with the historian's penchant to prioritize law in action, documents, and texts from the time, as well as scholarship that is also based on the documents and texts of the time. In other words, I accept that these scholars are engaged in empirical history rather than a project to rewrite the history of international law.

This raises for me the question of how we should treat empirical scholarship that engages political debates or that becomes politicized after its publication. I value the reflexive enterprise of pointing out how scholarship may be intentionally or not part of a political agenda. Indeed, I have confessed here and elsewhere to being naïve, Western-centric, and insufficiently attentive to the imperial aspects of international law in the past and present, and I have worked to remedy my omissions.[38] In my mind Orford goes too far when she reads political intentions and a criticism of legal scholarship that is not voiced. Her rebukes[39] may apply to some scholarship, but the sins of some should not be the bases to indict the entire category of empirical history.

I do, however, agree that Samuel Moyn's historical engagement[40] is something different. This is not meant as a criticism of Moyn's scholarship per se, yet Moyn takes great pains to challenge conventional wisdom. Moyn may not be part of the American legal assault on international law,[41] yet as a legal scholar who has spent years at Harvard and Yale Law schools, he is part of a group of American legal scholars who are seriously questioning the scholarly consensus of international law and empirical social science.[42] It is thus time to turn to Orford's arguments about international legal scholarship as a political act.

37. *See id.* at 272–300 (describing Slobodian's *Globalists* as reusing existing frameworks created by international legal scholars without acknowledging their origins).

38. *See* Alter, *Visions of International Law*, *supra* note 25, at 841–50 (describing author herself as naïve political scientist who should be attentive to avoiding Western groupthink).

39. *See* ORFORD, *supra* note 1, at 10 (describing essence of her book as a challenge to empiricist historians' general methodology for interpreting historical international law).

40. *See id.* at 27–28, 79–80, 102–04 (identifying legal scholarship published by Samuel Moyn and his critiques of international lawyers and human rights activists).

41. *See* JENS DAVID OHLIN, THE ASSAULT ON INTERNATIONAL LAW 8–14 (2015) (introducing group of legal scholars united by their hostility toward international law); DAVID SLOSS, THE DEATH OF TREATY SUPREMACY: AN INVISIBLE CONSTITUTIONAL CHANGE 1–5 (2016) (highlighting inconsistencies between historical U.S. law and international law).

42. ERIC A. POSNER, THE TWILIGHT OF HUMAN RIGHTS LAW 1–8 (Geoffrey R. Stone ed., 2014).

## II. (INTERNATIONAL) LAW AS POLITICS; AS MAKING NOT FINDING

Earlier I said in passing that international legal scholarship cannot avoid being political. Orford explains what this means.[43] (I put "international" in parentheses in the heading because Orford would surely agree that her arguments are not limited to the subject of international law.)

Orford argues that legal scholars occupy a place between the academy and the legal profession.[44] Many international legal scholars also practice law, as advisors to governments, lawyers in international legal cases, providers of scholarly opinions, expert participants in U.N. and national commissions and as international judges.[45] Yet even if an international legal scholar does not directly engage the world of practice, Orford argues that there is no way to escape that legal scholarship and teaching *is* legal practice.[46] Orford's discussion is both enlightening for non-lawyers and compelling. Orford explains how legal scholars are forced to grapple with politically problematic origins and usage of international and domestic laws, and many choose to ignore unsavory aspects of law's creation and usage, thereby contributing to the idealized vision of lawyers and judges as apolitical actors who merely apply the law.[47] She also explains that many legal academic scholars "participate in creating the sense of international law as a coherent and autonomous system."[48] She illustrates these points in the extreme when she argues that "lawyers are forced to decide whether or not fascist, colonialist, or imperialist laws will be transmitted after a change of regime or a change of ideology."[49]

As teachers, legal scholars cannot avoid their engagement in legal practice.[50] Legal teachers are helping the emergent class of lawyers become skilled advocates and adjudicators.[51] This requires that teachers constantly engage "the many different roles and tasks involved in contemporary legal practice . . . . [so that] [r]ather than fetishise the law, the role of legal academics in law school classrooms requires us to engage with law as an institutional practice and make its doctrines, processes and modes of transmission intelligible."[52] She later explains how making law intelligible is about making rather than finding law:

> We try to assemble past practices and texts into persuasive patterns, construct disparate fragments and sources into a narrative whole, bring different events or cases into relation, and choose specific precedents or

43. *See, e.g.*, ANNE ORFORD, *supra* note 1, at 255 (explaining that any history of international law necessarily frames what international law is, which is an inherently political act).

44. *Id.* at 185.

45. *Id.* at 186.

46. *See id.* at 189 (describing that in preparing students to be lawyers, international legal scholars engage with the world of international legal practice).

47. *See, e.g.*, *id.* at 216, 286 ("Modern international law has been strongly influenced by US international lawyers who wear their distance from any sense of history, tradition, or institution as a badge of honour . . . .").

48. *Id.* at 186.

49. *Id.* at 205–06.

50. *Id.* at 189.

51. *Id.* at 190.

52. *Id.* at 191.

> analogies as part of the process of legal reasoning. Creative legal work involves creating plausible patterns, analogies, or narratives by assembling past material from disparate sources in ways that are persuasive to legal audiences.[53]

This means that international lawyers are always situating their object (e.g., the law, legal rulings, and legal history) in a presentist context. With this idea, we can understand Orford's frustration with Samuel Moyn who surely understands that he is not simply finding an empirically more accurate history of international human rights law and practice.[54]

Orford does not, however, rest with the claim that legal scholars engage in narrative building.[55] Everything she says, including the extensive quote above, has historical analogues. Still discussing lawyers, she writes: "[e]vidence, fact-finding and inference play a central role in the interpretation and practice of law more broadly, and determining which facts are relevant to legal analysis is not simply a legal process. The presentation of facts has a normative effect."[56] If history is already politicized, then this logic surely applies to the making of history. Her discussion of China's historical politics makes it clear that scholarly intervention regarding China's historical international claims are political.[57] Yet even if it is clear that governments are playing politics with history, and some scholars are knowingly aiding them in this task, does this mean that empirical work on historical topics inevitably enacts these politics?

I agree with Orford that law is different in how it uses narrative.[58] My claim is not that this difference makes legal scholarship shoddy; any such reading says more about the reader than it does the author. Here I will convert what Orford argues into my own terminology. According to Orford, the hermeneutics of suspicion allows a lawyer to maintain a belief that liberal and conservative lawyers may be playing politics, yet that a neutral understanding of the law is nonetheless possible.[59] The cognitive dissonance solution is to cast some interpretations as ideological aberrations, or as empirically or legally mistaken. This strategy requires denigrating counter-arguments so as to maintain the fiction that law is or can be neutral. Invoking Martin Shapiro's discussion of judging, I have called this fiction the noble lie of legal neutrality.[60] Orford goes further, implicating the entire class of legal

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53. *Id.* at 285.

54. *See id.* at 264 (describing Moyn's contention that empirical research supports view that human rights only emerged in the 1970s due to American social movement that Orford describes as tethered to presentism).

55. *See id.* at 219 (explaining that legal scholars' manipulation of facts is itself narrative).

56. *Id.* at 219.

57. *See id.* at 56–68 (discussing legal arguments from international lawyers' who reside beyond North Atlantic and implications that China's rise had on international law and global order).

58. *See id.* at 220–22 (discussing how lawyers analyze relevance and evidence in legal arguments).

59. *See id.* at 310 (discussing important role of hermeneutics of suspicion in practice of international legal argumentation).

60. Discussing judging, Shapiro argued that to make a legal ruling is to pick one side over another, which in itself is not neutral. *See* KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS 35 (2014) (discussing MARTIN SHAPIRO, COURTS: A

practitioners.[61] Orford suggests that everything a lawyer, scholar, or judge does to explicate or reinforce law as something other than politics is in itself a political act.[62] Orford is also making a more adversarial argument. In her analysis, the only way for law to be neutral, and for a correct legal analysis to exist, is to identify and repudiate contrary legal interpretations for being political or otherwise mistaken.[63]

Orford keeps her discussion specific and focused, so I am extrapolating here. But the implications are present in the text.[64] Lawyers are engaged in politics because they are making legal narratives. By implication, is history inevitably political because scholars are, per force, also creating narratives? Or is this history political because history (and law) are so often politicized? And does her analysis travel to every type of narrative building? Is it limited to politicized issues, or does it apply to all historical, sociological, political science, anthropological, psychological, and economic qualitative work?

The empiricist in me wants to find that, at some point, Orford's argument runs out. If it does not run out, then science and methodology do not exist as such. This is, I know, a viewpoint that many scholars of the history of science believe. Perhaps it is my own insufficiently critical cognitive dissonance that wants to cling to the idea that studying a politicized topic is not the same thing as playing politics with one's subject matter. Most scholarly empiricists—myself included—see themselves as following the data, wherever the data leads. Methodology is the mechanism through which a scholar can follow the data. While I often find that the omissions of quantitative and economic work reek of politics, I don't subscribe to the view that empirical work is inevitably an act of politics. The risk is then empirical nihilism, where all knowledge is political. In other words, if all data leads to a conclusion that COVID-19 spreads via aerosolization or human behaviors cause global warming, and if these views are politicized, then an infectious disease epidemiologist and a climate scientist can never be doing *only* science.

Framed as a critique of international law scholarship and practice, I find Orford's argument compelling. Yet this is mostly because law is socially constructed (as is popular historical narrative). When the analysis slips into a condemnation of empiricism, I do not find the argument as compelling.

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COMPARATIVE POLITICAL ANALYSIS (1981)). Moreover, in their role as applicators of state's laws, judges help extend social control over the economy and society, and thus not even the application of the law can make judging a neutral act. *Id.*

61. *See* ORFORD, *supra* note 1, at 312–15 (describing need for different areas of law to be seen as neutral).

62. *See id.* at 315–20 (discussing political choices embedded in apparently technical decisions).

63. *Id.*

64. *See id.* (discussing how particular historical methods may be useful but also get in the way of clear analysis or persuasive legal argument).

## III. CIRCUMVENTING ACADEMIC POLITICS: THE CASE FOR INTERDISCIPLINARY PLURALISM

My defense of empiricism is admittedly insufficient insofar as it is too forgiving of the lack of reflexivity empirical scholars often display. This makes me think that I mostly wish that Orford had been less personal, and perhaps more pluralistically empathetic, in making her case. As a political scientist, I have been accused by European lawyers of seeing conflict everywhere. My answer has always been that politics is about actors with different interests jockeying to shape policy and politics, so of course I focus on contestation. My sense is that my lawyer critics see consensus as positive, and contestation as a problem. I disagree. Contestation is how the status quo is disrupted and how a political order remains accountable to the will of the people, and for these reasons political contestation is to be encouraged.

Yet when it comes to debating ideas, I would prefer that academics did not become an arena for interest-based or ideational jockeying. What follows is, admittedly, a liberal defense that channels the enlightenment idea that a rational debate about ideas produces a better argument. I'm not a fan of academic jousting where the goal is to topple or push an adversary to the ground. I accept and find compelling Orford's argument that law may be adversarial to its core.[65] Legal cases involve two or more sides arguing in favor of their preferred legal interpretation, and this usually involves a claim that the other interpretation is lessor or wrong. Also, as Orford explains, the hermeneutics of skepticism holds contradictory ideas in a careful adversarial balance.[66] But I don't think that academics or scholarship needs to be adversarial to its core.

As an interdisciplinary and pluralistic scholar, I welcome the reality that different disciplines employ different methods, as this means that we collect more evidence, refine our methods and insights, and question or recast existing understandings. This admiration makes me tolerant of disciplinary foibles. Rather than criticize international lawyers for preferring to study easily found texts, a preference that meant that for a long time international legal history was mostly if not exclusively an intellectual history of ideas, I would rather simply be happy that empirical historians and critical scholars found new ways to study international law in action.

I also accept that historians prefer to focus on what their archives, or scholarship that investigates additional or different archives, reveal. I know that historians themselves criticize the prioritization of written history, as ordinary people, marginalized groups, and women are thereby written out of the grand narratives.[67] Fights within the family can productively generate disciplinary

65. *See id.* at 230 (noting that debates are expected even when states agree upon a certain treaty).

66. *See id.* at 310 (discussing how hermeneutic of suspicion makes it possible to hold to contradictory ideas in context of U.S. constitutional debates).

67. *See, e.g.*, Ruth Rosen, *Sexism in History or, Writing Women's History Is a Tricky Business*, 33 J. MARRIAGE & FAM. 541 (1971) (discussing how general histories have ignored minority groups and women); Audrey Osler, *Still Hidden from History?: The Representation of Women in Recently Published History Textbooks*, 20 OXFORD REV. EDUC. 219 (1994) (discussing lack of representation

reflexivity. Yet as an outsider, I treat as a frustrating foible that the historian's methodological penchant has for so many years led to the understudying of global phenomenon.

In calling these foibles, I am lowering the stakes of the disagreement. I know from personal experience that maintaining a pluralistic intellectual community is truly a challenge. Because I believe that insight comes in many forms, intellectual pluralism is for me an end in itself. This end requires mutual respect, including accepting a scholar on the terms they set for themselves. I think it is fair to criticize someone who fails on the terms they set for themselves. This is not my critique of Orford; she succeeds brilliantly on the terms she sets for herself. Yet if she gets to be frustrated with empiricism, then I get to be frustrated with critical scholarship that claims to find "new" something that no one disputes, such as the idea that law enables and constrains, that international law subjugates as often or even more than it emancipates, or that history is political.

Let me end with praise. My student-self wishes that Orford's book existed back in the day, and that I had a chance to engage her book in a graduate seminar on law, history, and politics. It would have greatly aided my dissertation research and writing. I suspect that today's students may respond to Orford's argument about the politics of history with a cynical ho-hum, while surreptitiously benefiting from her explication of evergreen historical controversies she discusses (anachronism, Whiggish history, contextualism, presentism).[68] As an empiricist and a teacher, I would defend empirical methods in the discussion, while also agreeing that all scholars build knowledge using the means and methods that they find convincing, and that they may be reinforcing politics or the status quo in doing so. I would therefore stress Orford's argument that legal scholarship is perhaps always different. Where Orford explains this difference by saying that legal scholarship *is* legal practice,[69] I would explain this difference by arguing that law is normative all the way down. Empiricism may sometimes be normative, and important scholarship may frequently become politicized. Yet working to influence normative assessments and exploring empirical history and causality are different things. That said, we can probably all benefit from more self-reflexivity.

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of women in published history textbooks).

68. *See* ORFORD, *supra* note 1, at 3–5 (discussing international law's connection to historical and political events).

69. *See id.* at 99–104 (describing how historians approach international legal scholarship in relation to academic world of humanities and social sciences).