PROFESSIONAL AND "AMATEUR" HISTORIANS: CONTRIBUTION TO A SYMPOSIUM ON ANNE ORFORD, *INTERNATIONAL LAW AND THE POLITICS OF HISTORY*

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Anne Orford's *International Law and the Politics of History* is a polemic directed against historians of international law who want to school international law scholars about the "truth" of their subject.[1] I am neither a historian of international law nor an international law scholar. I am a historian of American legal thought with an interest in questions of method. Accordingly, my comments here will be restricted to some of the issues of method raised by Orford's book.

According to Orford, international law scholars grew interested in history at the very end of the twentieth century as the consequence of a confluence of factors, the most important of which was the emergence of the United States as the sole global hegemon eager to push its international law agenda on other countries. It was the desire to resist U.S. hegemony in international law that initially pushed international law scholars in this direction.[2] Shortly thereafter, historians "discovered" international law in a big way as an object of interest and began to offer correctives to (what they deemed) the clumsy historical efforts of international law scholars.

According to the historians (in Orford's rendering), the meaning of international law texts and concepts can be found by situating such texts and concepts in their appropriate temporal contexts—generally speaking, the historical periods in which the texts and concepts emerged. This is, apparently, where international law scholars fail. Their sins are many: anachronism or presentism, a promiscuous shuttling between distinct historical moments that should be kept apart, an indiscriminate mixing of historical arguments with other kinds of arguments, and so on. The result of such international lawyerly sins means that international law is a quagmire of uncertainty and contradiction. Professional history can supposedly offer a way out: "[H]istorical methods are appealed to for objective accounts of past contexts . . . . [W]e can use the work of historians to establish truths about international law."[3]

Orford pushes back against such pretensions. In many respects, she argues, historians simply fail to understand what international law scholars are doing. In light of their proximity to the practice of international law, international law scholars

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1. ANNE ORFORD, INTERNATIONAL LAW AND THE POLITICS OF HISTORY (2021).

2. I am not certain that "history" (depending on how we understand the term) was not fully a part of international law thinking from the field's inception in the early modern period, but this is not a point worth belaboring here.

3. ORFORD, *supra* note 1, at 7.

are writing not only for each other, but also for judges, politicians, diplomats, business elites, practicing lawyers, law students, etc. Given such mixed audiences, their scholarship is intended to be used in multiple ways, ways that reach beyond the circle of scholars. It makes sense, then, that international law scholars should be avowed disciplinary "amateurs" in the sense that the legal anthropologist Annelise Riles has identified as typical of legal scholars generally.[4] It is entirely comprehensible that they should constantly flout the methodological rules that professional historians have set for themselves. Historians might assign international law scholars failing grades as historians. However, *qua* "amateurs," international law scholars were never trying to do professional history in the first place.

Orford goes further. She argues that historians have chosen as their target a very small group of international law scholars: "[v]ery few of the hundreds of legal scholars cited in this book ever appear in the work of those revisionist historians of international law."[5] This small, unrepresentative group of international law scholars is typically caricatured. Moreover, it turns out, caricaturing lawyers builds on a venerable historiographical tradition in which historians have staged a contrast between the scholastic, ahistorical legal scholar and the humanist, context-sensitive historian who always saves the day.

Orford punches harder still. She suggests in Chapter 7—to my mind the strongest chapter of the book—that the historians who purport to school international law scholars on the "truth" of their subject have in many cases derived the very objects they investigate from the work of international lawyers. Orford's "take-down" of historians from Lauren Benton and Lisa Ford to Samuel Moyn to Quinn Slobodian to Ian Hunter is often brilliant (and even funny).

With all this, I wholeheartedly agree. Orford's book is a very welcome riposte to the many pieties about method and context that historians often recite unthinkingly. I also endorse Orford's strong defense of critical international law scholarship in the face of (largely white) historians' methodological attacks that have the effect of softening the image of, or otherwise rendering "understandable," European colonialism. The invocation of disciplinary method as a way of blunting the political claims of those speaking on behalf of the disempowered has a long and depressing history. All too often, it is precisely claims that flout disciplinary insistence on method—think, the civil rights claims made in the face of opposition from legal process scholars—that we need and that in turn become the spur to all kinds of scholarship, historical and otherwise. Consider all the wonderful African American history that has been written as a consequence of the civil rights movement and the way it convulsed the citadels of knowledge. For all these reasons, I hope Orford's book finds an audience beyond the world of international law scholars.

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4. Annelise Riles, *Legal Amateurism, in* SEARCHING FOR CONTEMPORARY LEGAL THOUGHT (Justin Desautels-Stein & Christopher L. Tomlins, eds. 2017). Riles' essay, which Orford cites repeatedly, offers many different definitions of "legal amateurism" that I cannot go into here. It is safe to say, however, that "legal amateurism" is to be distinguished from the self-understanding of the typical professional scholar trained in the humanities or social sciences.

5. ORFORD, *supra* note 1, at 43.

Let me move, however, to a few qualifications of my overall enthusiasm. To my mind, Orford offers a caricature of what historians say they do that is every bit as problematic as the caricatures of international law scholars she accuses historians of employing. Although Orford is careful to cite specific statements by historians, she also offers characterizations of what historians say they do in her own voice. I do not recognize myself in these characterizations. I do not recognize in them any historian I know. Indeed, I wonder how many contemporary historians—including Orford's targets in the book, Benton and Ford, Moyn, Slobodian, and Hunter—would characterize their own work as "objective" or as establishing the "truth." Even Rankean history, with its extravagant claim to represent history "as it actually happened" (*wie es eigentlich gewesen*) was a more complicated affair than this.[6]

Efforts to think carefully about problems of meaning and context have been part of the modern discipline of history for about as long as the discipline has existed. These efforts find short shrift in this book. Historians have also thought scrupulously about how law—an enterprise that claims a temporality all its own—should be historicized. Their efforts are not assigned a significant role in Orford's discussion. My own book on the relationship between history and law, which explored how the temporalities of the common law intersected with the multiple temporalities of history in the nineteenth century, was a concerted effort to show how law and history could each serve to contextualize the other.[7] This work was intended explicitly to rethink the argument of J.G.A. Pocock's *The Ancient Constitution and the Feudal Law*, a text that plays an important role in Orford's account of how historians have caricatured lawyers. Far from history being *the* standpoint from which to understand law, I argued, law and history offered standpoints from which to understand each other. (This insight is mirrored in Orford's book, in which she shows how historians derive the objects of their inquiry from the efforts of lawyers, even as the book deals with lawyers' turn to history to understand law). To be sure, I am not the only historian who has been receptive to "thinking with" non-historical temporalities, legal and otherwise, as valuable ways to reflect upon historical context-making. Other scholars—for example, Christopher Tomlins—have also been wrestling for a while with the problems of historical contextualization of different kinds of objects, ideas, and events.[8]

My point is not to ask that Orford cite my work or that of Tomlins—Tomlins and I are present in her footnotes, as are scholars like Jacques Rancière. I fully understand why Orford makes the choices she makes. It makes eminent sense to target historians such as Pocock and Skinner who continue (very deservedly, I might add) to enjoy outsize reputations. It also makes sense to respond directly to the

6. The Prussian historian Leopold von Ranke (1795 – 1886) is often taken as the source of historians' archive-based quest for objectivity and historical truth. However, Ranke's own understanding of writing history "as it actually happened" was a good deal more complicated. For a discussion, see PETER NOVICK, THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION, Chapter 1 (Cambridge University Press, 1988).

7. KUNAL M. PARKER, COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790 – 1900: LEGAL THOUGHT BEFORE MODERNISM (2011) (Christopher Tomlins ed., 2011).

8. *See, e.g.,* CHRISTOPHER L. TOMLINS, IN THE MATTER OF NAT TURNER: A SPECULATIVE HISTORY (2020).

claims of those historians those who have tried to school scholars of international law. My point is simply that, from the perspective of a (or *this*) historian, the picture of historians that Orford presents appears caricatured—a bit of a straw person, altogether too easy to knock down.

This leads me to my final set of observations. As stated above, Orford does a very good job in her book of defending the knowledge practices of international law scholars from the didacticism of professional historians. But where do we land as a consequence of her defense? Orford's work seems to endorse a kind of loose pragmatism. As Orford puts it towards the end of the book:

> [T]he question is not which method is objective, impartial, or correct, but which method is useful. Which (partisan and political) vision of the history of international law best helps us to grasp the current moment and why? A particular historical method may be extremely useful in one context but get in the way of a clear analysis or a persuasive legal argument in another.[9]

In other words, the methods of disciplinary history might work well for some questions, while the less rigorously contextual methods of international law scholars might work better for others. Would it be unfair of me to read this (especially given Orford's embrace of "legal amateurism" à la Riles) as a straightforward defense of the international law scholarly *status quo*? If that is the case, I might want to lean a little in the direction of Benton and Ford, Moyn, Slobodian, and Hunter. Have international law scholars *nothing* to learn from historians of international law? Could their approaches and answers not be improved *in any way* through exposure to the disciplinary methods of history? Orford does not spend much time on such questions.

Behind all this lurks another issue. Is it quite so easy to assume (as Orford does) a position *outside* the tools available to one and to decide—depending on the context and the goal—to pick one up, ignore another, combine two or three? Who is the subject who thus gets to "choose" his or her tools and match them to different problems as they present themselves? The historical method for this problem; a formalist approach, perhaps, for that one; maybe considerations of social utility here; an emphasis on process concerns there.

The obvious answer is the legal "amateur," a figure Orford invokes, as I have already noted, with some approval. In Riles' account, it is precisely the legal scholar as "amateur,"—someone not committed deeply to any specific discipline, let alone to any particular method—who positions himself or herself this way. In this regard, it would be well to point out that legal "amateurs" do not necessarily come across looking good in Riles' account. Here is how Riles, herself a trained anthropologist, describes the typical legal scholar:

> Scholars from other fields complain about the vacuousness of legal academics' analytical categories, the casual way data are made to fit arguments, or the lack of commitment to particular problems as American legal scholars casually hop from topic to topic or field to field to keep up with the hottest trends and current events. Many American law professors

9. ORFORD, *supra* note 1, at 316.

> see themselves more as general social commentators, advisors to policy makers and industry, and overall 'smart guys' than as traditional academics . . . .
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> . . . As a young anthropologist, it was downright infuriating to me that law professors did not read much; that they did not take an interest in the details; that they seemed more engaged by acts of self-promotion than by the furthering of knowledge about the law.[10]

It is also worth observing that, to the extent Riles rehabilitates "legal amateurism," *she does so from a specific disciplinary perspective*: that of anthropology. Legal amateurism can teach anthropologists something, she suggests,[11] which is rather different from her shedding her own disciplinary standpoint and embracing legal amateurism *tout court*. Indeed, identifying "legal amateurism" is something *only* an anthropologist positioning herself outside the legal academy and within anthropology can do (no law professor, to the best of my knowledge, wrote about the virtues of "legal amateurism" before Riles). The possibilities of "legal amateurism" only make sense, then, relative to the way anthropologists, rooted in a specific disciplinary context, produce knowledge. These anthropologists are committed to their methods, which is why they try to rethink them.

Professional scholars in the humanities and social scientists—Orford's historian antagonists—are not "amateurs" in Riles' sense. Perhaps one marker of being a professional scholar might be, precisely, the difficulty of shedding at will the disciplinary norms and methods into which one has been socialized? Perhaps trying different methods and approaches on for size is something professional scholars might not do as readily as legal "amateurs"?

At the very least, then, Orford might wish to recognize the (perhaps unbridgeable?) gulf that separates the legal "amateur" who lacks any deep commitment to a particular disciplinary method from the professional historian, who might find it harder to extricate himself or herself from her disciplinary methods and tools (and therefore insists upon them as much as he or she does). This is especially the case because, as Orford herself tell us, the empiricist, contextual approach of historians might be founded in even more profound commitments—Protestant Christianity in the case of Herbert Butterfield, the ontologies of Carl Schmitt in the case of Ian Hunter. It might be one thing to defend the ways of international law scholars from the pious lecturing of historians. It might be quite another to expect historians to be convinced by those ways.

10. Riles, *supra* note 4, at 499.

11. *Id.* at 504–09.