

WHO OWNS THE CRITICAL VISION IN INTERNATIONAL LEGAL HISTORY? REFLECTIONS ON ANNE ORFORD'S *INTERNATIONAL LAW AND THE POLITICS OF HISTORY*

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Anne Orford's important *International Law and the Politics of History* invites reflection on foundational, nearly existential questions for the field of international legal history—and especially its role in ongoing struggles in international politics.¹ In the past twenty years, the booming historiography of international law has attracted the attention of both historians and international lawyers.² Scholars with differing disciplinary sensibilities have since coexisted in ways that have mostly diversified the dialogue within the field. At times, however, they have also voiced a certain unease about their coexistence. Orford calls attention to contentious and sticky points in this dialogue, particularly to questions of methodology, and also to the political repercussions that such coexistence has for the practice of international law. *International Law and the Politics of History* contributes the perspective of a critical international lawyer—immersed both in the practice and in the historical inquiry of international law—to this scholarly debate.

While *International Law and the Politics of History* sets out on a much-needed inquiry—studying international legal history in relation to political struggle—it does not engage its subject in its full complexity. At its core, the book is preoccupied with demonstrating that earlier, more experimental, and critical forms of international legal history have been replaced by objectivist historiographical accounts that have contributed to a depoliticized, neo-formalist turn in international law.³ Orford seems to treat international historians' objectivist voices as largely responsible for those developments.⁴ Arguably, however, this set of actors played epiphenomenal or minor causal roles in the much bigger drama of critical legal history's demise and the concomitant turn to neoformalism; several of them have also been sympathetic with—if not motivated by—similar calls to politicize history. The broader historical, intellectual, and political conditions behind the erasure of critical legal history remain unexplored in Orford's work—a question that other critical scholars should

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

2. The monumental work that marked this moment was MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960* (2001).

3. See, e.g., ORFORD, *supra* note 1, at 319–20 (summarizing the neo-formalist turn to history in international law).

4. See *id.* at 81–82 (describing historian's critique of international law scholarship for lacking objective methodologies).

pursue in earnest.

Scholars of a critical orientation may also wish to rethink the overbroad disciplinary identities engendered in international legal history's methodological debates. Lawyers and historians invested in challenging the received wisdom in international law should instead consider forging alliances based on their shared political concerns and projects. Scholars operating in the current context of material and intellectual assault on the humanities have much to gain from joining arms to consider the ways that writing international legal history in the present can serve to disrupt, rather than affirm, the status quo.

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I. THE RISE OF EMPIRICISM IN INTERNATIONAL LEGAL HISTORY

Orford responds to calls by international historians—largely inspired by debates taking place within intellectual history—for greater methodological self-awareness in the study of international legal history.⁵ Historians have been concerned primarily with questions of context and presentism—inspired by the Cambridge School of intellectual history, which most notably includes Quentin Skinner, J.G.A Pocock, and John Dunn.⁶ As the Cambridge School asserts, to properly situate utterances in time, scholars ought to reconstruct the linguistic and, more generally, historical context in which they occurred.⁷ The goal is for the scholar to resist projecting their own prejudices upon the past—to refrain from treating history as a mere “pack of tricks we play on the dead.”⁸ Such insights have especially guided historians in critiquing postcolonial histories written from within the Third World Approaches to International Law Movement (TWAIL).⁹ TWAIL accounts were developed in tandem with a broader turn to the study of international legal

5. See *id.* at 182–84 (describing necessity for self-awareness and professionalism in academic study of international lawyers).

6. *Id.* at 93; see also Samuel James, *JGA Pocock and the Idea of the “Cambridge School” in the History of Political Thought*, 45 HIST. EUR. IDEAS 83, 84 (2019) (suggesting that by late 1970s Pocock was commonly grouped with Skinner and Dunn as “leading exponents” of Cambridge School approach to history of political thought).

7. James, *supra* note 6, at 84–85.

8. *Id.* at 85; Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 HIST. & THEORY 3, 14 (1969).

9. Focusing primarily on the work of ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005).

history by critical international lawyers in the late twentieth century.¹⁰ Historians critiqued these postcolonial histories for being guided by questions of domination in the present and remaining blind to anti-imperial traditions in past political thought.¹¹ As Orford suggests, those histories were, in time, largely silenced and erased from the canon of international legal historical scholarship.¹²

The critiques that Orford revisits carry the echo of earlier challenges that took place in the context of U.S. legal history. During the 1970s and 1980s, scholars located in the United States turned to the writing of critical legal history—a move that was at once meant to challenge the Cold War liberalism that prevailed in the United States and also formed part of a bigger turn to history in the American legal academy.¹³ Several of those critical histories appeared to have been written from very specific theoretical takes—privileging the study of legal consciousness as it emerged from doctrinal materials, deploying structuralism in order to read history as language, and appropriating “genealogy” as a radical method of producing history deeply connected to the present.¹⁴ Just as in the field of international legal history today, however, critical legal history was met with skepticism. Legal historians questioned its premises and methodological soundness, privileging contingency, and sensitivity to context.¹⁵ Legal history in the United States eventually became oriented towards sociolegal and cultural approaches that studied the “lived experience of the law” rather than the history of legal consciousness through “Mandarin” doctrinal materials.¹⁶ Critical legal history assumed a position on the

10. See, e.g., Nathaniel Berman, *But the Alternative is Despair: European Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792 (1993) (documenting postmodernist’s continued attachment to modernist international legal notions); David Kennedy, *The International Style in Postwar Law and Policy: John Jackson and the Field of International Economic Law*, 10 AM. U. J. INT’L L. & POL’Y 671 (1995) (praising professor John Jackson’s broad, multifaceted, and nuanced approach to contemporary international economic law).

11. ORFORD, *supra* note 1, at 77–78; see, e.g., Ian Hunter, *The Figure of Man and the Territorialisation of Justice in ‘Enlightenment’ Natural Law: Pufendorf and Vattel*, 23 INTELL. HIST. REV. 289, 289–91 (2013) (tying postcolonial doctrines of law of nature and nations of Samuel Pufendorf and Emer de Vattel to European state-forming activity); ANDREW FITZMAURICE, *SOVEREIGNTY, PROPERTY, AND EMPIRE (1500-2000)*, at 13–14 (2014) (arguing that postcolonial critiques of liberalism are still rooted in imperialism).

12. ORFORD, *supra* note 1, at 75.

13. On this earlier turn to history in domestic American law, see generally LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1996).

14. For an exposition of critical legal history as a genre, especially, see generally Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).

15. See Daniel R. Ernst, *The Critical Tradition in the Writing of American Legal History*, 102 YALE L.J. 1019, 1034 (1993) (reviewing MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992)) (“[P]rofessional historians . . . have overwhelmingly rejected French structuralist and post-structuralist methods for a position that ‘allowed for contingency, stressed human agency, [and] was expressed in an ‘empirical idiom.’” . . . The past, like a person with whom we converse, has other things on its mind, events transpiring well before we arrived on the scene. The historian should be sensitive to this context, because it gives meaning to what the past has to say.”).

16. See Susanna L. Blumenthal, *Of Mandarins, Legal Consciousness, and the Cultural Turn in US Legal History: Robert W. Gordon. 1984. Critical Legal Histories*. Stanford Law Review 36:57-125, 37 L. & SOC. INQUIRY 167, 167 (2012) (“[L]egal historians have focused their attention

fringes of legal historiographical orthodoxy, even while silently suffusing the field with some of its insights.¹⁷

In addition to challenging arguments inspired by the Cambridge School, Orford also revisits substantive historical work premised on an assumed ability to recover an objective past.¹⁸ She focuses on several practitioners of international legal history, including Isabell Hull, Lauren Benton, Lisa Ford, Samuel Moyn and Quinn Slobodian.¹⁹ At various times and to varying degrees, those historians have made claims about revealing the true origins of the historical phenomenon they were studying or their historical complexity.²⁰ Orford also turns her attention to international lawyers who appear receptive to methodological discipline.²¹ This call for disciplinary purity, then, represents not an isolated phenomenon but a much larger tendency—one that Orford considers worth exploring in its full complexity and effects.²²

Orford challenges those persistent claims she labels “empiricist” both on epistemological and on political grounds.²³ As Orford suggests, aspirations for disciplinary purity in the form of strict adherence to the Cambridge School’s approach to intellectual history offer a distorted vision of history as an objective truth to be found, rather than one produced at the time of and in relationship to the historian’s own circumstances.²⁴ Historical scholarship is presented as “impartial, neutral, and free of political manipulation”²⁵ while in actual fact it is neither “impartial or verifiable.”²⁶ Intellectual historians bring a “tone of certainty . . . to their accounts of what legal regimes or texts really mean,”²⁷ a tone that contrasts sharply with the language of indeterminacy or interpretive uncertainty that Orford privileges.²⁸ At the same time, as Orford shows, some of the contextualist histories

[in the past twenty-five years] on the interaction between official and lay forms of law-making with a decided emphasis on popular legal consciousness.”).

17. *See id.* at 167, 177–78 (listing the more influential insights that have morphed into conventions for field of U.S. legal history).

18. *See* ORFORD, *supra* note 1, at 99 (noting scholarship of international legal historians criticizing international lawyers for poor methodology).

19. *Id.* at 79–81, 100–01.

20. *See id.* at 103 (explaining international law historians’ confidence in the correctness of historical methods as a standard against which international legal scholarship can be compared).

21. For references to Kate Purcell, *On the Uses and Advantages of Genealogy for International Law*, 33 LEIDEN J. INT’L L. 13 (2020) and CHRISTOPHER R. ROSSI, *WHIGGISH INTERNATIONAL LAW: ELIHU ROOT, THE MONROE DOCTRINE, AND INTERNATIONAL LAW IN THE AMERICAS* (2019), *see* ORFORD, *supra* note 1, at 84–85.

22. *See* ORFORD, *supra* note 1, at 104 (explaining lengthy, widespread tradition of stereotyping lawyers to perpetuate historical methods as objective).

23. *See id.* at 15 (giving overview of criticisms of empiricism related to meaning-making and politics).

24. *See id.* at 16 (arguing that so-called objective historical methodology is implicitly influenced by context).

25. *Id.* at 319.

26. *Id.* at 243.

27. *Id.* at 319.

28. *See id.* at 252, 319 (discussing how historians engage in same choice-making process as lawyers).

aim to reveal the political undertones of legal argument. Those histories present an image of the legal profession as at once hopelessly antiquated and lacking self-reflection.²⁹

International Law and the Politics of History in turn alerts historians to the consequences that such methodological claims—to purity and objectivity—create for the practice of international law. Orford makes plain that such claims, while on their face appearing as simple questions of methodology, actually take place in a highly politicized context and indeed produce consequences for politics.³⁰ As she shows, international lawyers have capitalized on (or even, perhaps, manipulated) histories of international law with credentials of objectivity—as a way to ground their arguments for particular legal interventions in the present.³¹ Orford brings up the work of intellectual historian Quinn Slobodian as an example.³² In *Globalists*, Slobodian studies the intellectual origins of global economic governance with the intention of revealing its political biases. Orford suggests that, despite its noble intentions, Slobodian’s work in fact brings “a tone of certainty” to the field of international economic law—a tone that has helped shore up controversial views of the World Trade Organization.³³ The moves deployed by historians like Slobodian—“demonstrating law’s contingency, revealing its politics, and showing its relation to power”—have produced effects that have by now been mostly “normalised.”³⁴ In the end, then, historians’ work remains deeply bound to and may come to the aid of the politics of the present, sometimes in unexpected ways; the history of international law is a history deeply embedded within politics—it is politics “all the way down.”³⁵

Orford argues that these efforts to develop more methodologically “pure” and objectivist histories are reshaping international legal thought.³⁶ Within a legal field where critical scholars and practitioners have long struggled to advance legal realist insights, the rise of historical empiricism is fueling a neo-formalist turn. Rather than reckoning with the insights of legal realism, and especially that legal argument is deeply political in its nature, objectivist historical accounts enable a “hermeneutic of suspicion” in the language of legal theorist Duncan Kennedy: Parties cast doubt on their opponent’s narrative by characterizing it as political, and thus subjective, while claiming objectivity for their own position through history.³⁷

29. *See id.* at 173–75 (describing some contextualist histories as having political effects).

30. *See id.* at 255–57 (arguing that contextualist historians are as political as the lawyers they critique).

31. *See id.* at 294–96 (explaining how lawyers believe their interpretations of law to be objective because the history surrounding the law is purportedly objective).

32. *Id.* at 296–99.

33. *Id.* at 297; *see also* QUINN SLOBODIAN, *GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM* (2018) (providing history of neoliberal globalism).

34. ORFORD, *supra* note 1, at 177.

35. *Id.* at 299.

36. *Id.* at 315–20.

37. *Id.* at 5–9. On the theory of the “hermeneutic of suspicion,” *see* Duncan Kennedy, *The Hermeneutic of Suspicion in Contemporary American Legal Thought*, 25 L. & CRITIQUE 91, 91 (2014).

Counterintuitively then, even though an empiricist turn would seem to comport with legal realism's affinity for studying the "law in action," the turn to history moves the field farther away from legal realism and into the discourse of objectively verifiable truth.³⁸

II. LEGAL REALISM AS INTERNATIONAL LEGAL HISTORY'S LOST EPISTEMIC FOUNDATION

International Law and the Politics of History is most successful as an epistemological defense of critical international lawyering against neo-formalist legal argument. In responding to methodological claims of objectivity, Orford appears to single-handedly defend an entire legal tradition (legal realism) and an entire practice (that of critical international lawyering) against fashionable trends that she understands as deeply troubling. Orford aspires to remove the comfort of objectivity that rhetorical invocations to history can produce. The goal is ultimately that of reacquainting those involved in the field—whether lawyers or historians—with the potentially destabilizing, but eventually liberating, reality of contingency and political confrontation in the present: "All that is available is to construct an argument and commit to the premises or values underpinning it, knowing and fully accepting that everything about that is contingent."³⁹

Orford here calls attention to an issue of broader significance for modern-day legal thought.⁴⁰ The term "formalism" in Orford's work does not connote excess conceptualism but rather an aspiration to ideological coherence and objectivity, such that it distracts from the political circumstances that undergird the conduct of international legal discourse.⁴¹ Whether this empiricist desire for objectivity counts as traditionally formalist or as a form of "social conceptualism," it is arguably continuous with broader trends that aspire to create some form of autonomy for legal argument vis-à-vis politics.⁴² In the hegemonic consciousness of the United States,

38. The call to study the "law in action," rather than the "law in books," was originally made by Roscoe Pound, a proponent of sociological jurisprudence rather than legal realism, but also formed part of the discourse of legal realism. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 14 (1910); see also Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 433 (1930) (discussing value of Pound's introduction of contrast between law in books and law in action).

39. ORFORD, *supra* note 1, at 320.

40. *Id.* at 294–96.

41. *Id.* at 295.

42. I borrow the term "social conceptualism" from Karl Klare, who has used it to discuss the legal consciousness of the New Deal Supreme Court after 1937. Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 280 (1978). Klare points to a "hybrid style of legal reasoning . . . [that is] more attentive to social and political realities and more self-conscious and candid about the political character of adjudication than its conceptualist predecessor," yet also "premised on the notion that a disjunction between law and politics is necessary to legitimate the judicial role." *Id.* While discussing methodological, rather than judicial, developments, Orford's account of the "fetishisation of context" that occurred in the context of the law and society movement bears certain parallels to that of Klare, insofar as this move to context was also much more conscious of the existence of an "empirically determinable 'society'." ORFORD, *supra* note 1, at 252.

for example, those trends include urges to create a “New Private Law” based on objective standards as well as the all-too-powerful move to originalism in constitutional law.⁴³ It appears that international law, then, while often relegated to the penumbra—rather than the core—of legal thought, reveals developments to which all legal scholars should remain sensitive: that the erstwhile “triumph of anti-formalism and anti-metaphysics” in the legal field exists on rather uncertain grounds, given lawyers’ more general search for epistemological safety.⁴⁴

While *International Law and the Politics of History* astutely observes the consequences of championing uncontested historical truths in international law, it provides less satisfying explanations of the underlying forces that gave rise to this turn.⁴⁵ Orford reminisces with apparent nostalgia on the early days of critical legal historiography. The early critical legal canon, she argues, became increasingly erased either by international historians who challenged its methodological premises or by a subsequent generation who recovered critical history’s questions with the intention of politicizing the field of international law anew.⁴⁶ What were the circumstances under which the work of critical international lawyers writing in the late twentieth century was erased from scholarly memory, such that critical historians writing in the early twenty-first century felt compelled to revisit their questions, while others felt comfortable claiming objectivity as the guiding principle for the field? Orford herself directly asks this question—which seems both central to her project and a premise for appreciating the impact of the historical challenges on which she reflects—but does not seem to engage it further.⁴⁷

By narrowly identifying international historians as the protagonists in this drama, *International Law and the Politics of History* regrettably misses the opportunity to recover the deeper and broader histories behind the fall of critical legal historiography. In Orford’s account, it appears as if international historians themselves erased critical legal scholarship, either by calling out international lawyers for disregarding the rules of professional engagement with history or by willfully ignoring their predecessors.⁴⁸ This issue arguably merits greater investigation. In addition to investigating the impact of critical legal history’s earlier demise within U.S. legal history, for example, one ought to interrogate international law’s historical relationship with legal realism and the competitions that took place among the purported heirs to its legacy within the field.⁴⁹ More generally, it would be significant to understand the international legal profession’s own stance towards

43. For private law, see John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640 (2012); For the connections Orford draws to originalism, see ORFORD, *supra* note 1, at 96–98.

44. ORFORD, *supra* note 1, at 295.

45. *See id.* at 172–78 (critiquing legal historians for blindly accepting facts).

46. *See id.* at 253–84 (discussing historians’ erasure of legal scholars’ work).

47. *See id.* at 102 (questioning scholars differing methodologies throughout time).

48. *See id.* at 75–81 (examining revisionism in legal history).

49. On the question of competing international legal realisms in the U.S. academy, see Afroditis Giovanopoulou, *Between Managerialism and the Legal Counterculture: The Yale Program in Law and Modernization in the History of the Global 1970s*, 7 J. INSTITUTIONAL STUD. 829 (2021).

the critical legal work produced in the 1990s and earlier: the extent to which the profession espoused critical work as part of their own professional self-understanding or perhaps normalized it in its hopeful and optimistic flirt with power at the end of the Cold War. When seen from this broader perspective, the success of modern-day international legal histories appears more a symptom of the field's own tendencies than their actual cause.

Whether regarding past histories or present-day realities, international lawyers should consider their own role in introducing the language of objectivity into international legal thought. Arguably, they exist in a complex relationship with the historical material that is presented to them and do not necessarily consume it as unmediated truth. Orford brings up the example of Slobodian's work, on which international lawyers have already capitalized.⁵⁰ It appears salient, then, that scholars inquire more persistently into the ways the international legal profession exists in relation to such historical materials, the ways lawyers explore and incorporate these materials into their work, and the rhetorical maneuvers they deploy in presenting them as objectively verifiable truth. While defending critical international lawyering, Orford seems to turn a sympathetic eye to the profession as a whole and extols international lawyers' methodological sophistication.⁵¹ It only follows that international lawyers enjoy a certain degree of agency in cementing an objective history of international law and, through it, the emergence of neoformalism in the consciousness of the legal profession.

III. HISTORY AS PURITY, HISTORY AS STRUGGLE

Just as with international lawyers' attitudes, it is helpful to disaggregate and situate the attitudes of professional historians towards empiricism, including those to whom Orford responds. I have already discussed that U.S. legal history has approached critical legal methodologies with a measure of skepticism.⁵² By contrast, scholars in other historical fields appear more sympathetic to recognizing the limits of empiricist historical methodology. Historians have in the past persistently challenged empiricist faith in the archive, especially when studying the history of colonialism. Historians, for instance, have explored the historical and analytical meaning of archival silence and the possibility that archival material might be read "against the grain" in an effort to render visible unspoken colonial violence.⁵³ As with critical international historiography, so too the historiography of colonialism

50. See *supra* text accompanying notes 30–35 discussing Slobodian's work in further detail.

51. See ORFORD, *supra* note 1, at 176 ("In other words, the analytical problem with the claim being made by those seeking to historicise law is not that their method is revolutionary or will force lawyers to give up our illusions about the apolitical and transcendental character of international law. The analytical problem with this claim is the opposite – it is *not* a new or radical insight for lawyers.") (emphasis added).

52. See *supra* text accompanying footnotes 45–49 discussing U.S. legal history approach to critical legal methodology.

53. See, e.g., MICHEL-ROLPH TROUILLOT, *SILENCING THE PAST: POWER AND THE PRODUCTION OF HISTORY* (1995) (analyzing gaps in historical narrative and what these gaps demonstrate about power inequities); ANN LAURA STOLER, *DURESS: IMPERIAL DURABILITIES IN OUR TIMES* (2016) (arguing colonial histories contribute to present day inequities).

has developed a complex relationship with empiricism and archival truth.

The figures examined within Orford's own narrative also seem to share an unequal commitment to contextualism and archival purity as definitive of their professional identity. While some of the moves deployed within their accounts might, at first glance, appear as manifestations of methodological rigidity, they may also be seen as performative or rhetorical tropes for some, catering to the particular self-understanding of the historical profession.⁵⁴ When viewed from this perspective, the contextualist historian emerges more as an opportunist persona that scholars occasionally and strategically deploy than as an uncritically espoused and unequivocally shared methodological sensibility. Just as international legal argument undeniably comes with certain rhetorical undertones, so do such calls for methodological accuracy.

Similarly, the figures examined in Orford's work espouse differing normative views, which, accordingly, shape their interventions in the field of international law. As the description emerges from Orford's own account, some historians view international lawyers more as "scholastics," "moralising judges" (i.e., hopelessly antiquated),⁵⁵ entertaining "naïve faith in metaphysical claims, formalist arguments, and timeless principles,"⁵⁶ whereas others understand them more as opportunists and anti-intellectuals, as "instrumentalising and politicising the past in the process of making partisan legal arguments."⁵⁷ As a result, their diagnoses of the trouble with the field of international law differ substantially. Some understand it as being defined by "too much" politics; whereas others see it as containing "too little" politics. Consequently, some aim to dispel antiquated notions of progress by calling forth political engagement, while others seek to correct international lawyers for their all-too-political preoccupations by laying claim to objectivity.⁵⁸ Given the

54. For instance, see Samuel Moyn's response: "Orford makes much of some rash (or strategic?) verbiage in one of my books to the effect that it restored the 'true history' of human rights. . . . I am a melodramatic and moralizing writer." Samuel Moyn, *The Long and the Short of the History of the Laws of War*, LAWFARE (Sept. 14, 2021, 8:01 AM), <https://www.lawfareblog.com/long-and-short-history-laws-war>.

55. ORFORD, *supra* note 1, at 14.

56. *Id.* at 177.

57. *Id.* at 294; cf. Samuel Moyn, *Martti Koskenniemi and the Historiography of International Law in the Age of the War on Terror*, in *THE LAW OF INTERNATIONAL LAWYERS: READING MARTTI KOSKENNIEMI* 340, 353 (Wouter Werner et al. eds., 2017) (contributing an intellectual perspective in the historiography of international law).

58. Even historians who have written extensive methodological critiques that Orford challenges, like Lauren Benton, have made the political or presentist concerns of their work fairly transparent. For instance, see the last chapter of the groundbreaking work, LAUREN BENTON, *A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES, 1400–1900*, at 279–300 (2010), which openly discusses the history of layered or divided sovereignty in relation to 9/11 and Guantanamo Bay. *See id.*, at 299. ("If such patterns tell us something important about empires and their interactions between 1400 and 1900, they may also illuminate more recent examples of legal anomaly. The rationale for creating military commissions at Guantánamo Bay, and the choice of an island garrison, reveal continuities with the processes explained in this book. The transfer of elements of sovereignty, including negotiations over a status akin to bare sovereignty in such places as Iraq and Afghanistan, points in the same direction."); ORFORD, *supra* note 1, at 262 (challenging Benton).

diverse positions that historians assume both politically and intellectually, the fact that *International Law and the Politics of History* treats their interventions under the common rubric of empiricism likely detracts from the power of its worthwhile message.

Some of the calls for greater methodological purity that Orford explores in her work can also be read as subtle forms of gatekeeping that arise in the context of a resource-deprived historical profession, which is compelled to justify its continuing relevance both in the academy and in relation to contemporary politics. The historical profession today operates against the background of increasing material constraints within the neoliberal university and, relatedly, occasionally attempts to reinvent itself as a discipline relevant for modern-day political leadership.⁵⁹ The pressures exerted upon the humanities in today's intellectual environment arguably produce greater anxiety for the historical profession to define and refine its methods. Especially because historians tend to open up to other disciplines in search of new matter and a new position from which to speak truth to power, it is little surprise that such efforts at gatekeeping might be directed at their interlocutors.

In situating and evaluating the various critiques that Orford's rich work revisits, it is helpful to think with more, rather than less, context—not so much to defend or justify those critiques but rather to draw out the potential for new alliances between the two, apparently competing professions. Both sidelined at the level of the American academy and existing in an ambivalent relationship to political power, the historical profession and the international legal profession arguably share similar anxieties and, thus, greater possibilities for future connection. Rendering the political economy and the political context in which the historical profession operates more visible helps bridge the distance created by the opposing images—the anti-intellectual lawyer, the antiquated historian—that each profession entertains for the other.

IV. CODA: POLITICS ALL THE WAY DOWN

Rather than judge alliances and affinities on the basis of some overbroad professional identity—which international legal history's protracted methodological debates seem to favor—scholars operating in today's academy may wish to draw connections on a more engaged basis: the situational level of politics. This is especially true for those historians engaged in a conscious effort to shake up the received wisdom in the field of international law and for critical international lawyers, who both share this task as a common project: both are struggling with the self-understanding of international law as a field of progress and promise. Regardless of their methodological disputes, both are invested in exploring the limits of international law's redemptive potential, which skews the narratives developed within the field and defines the limits of the field's imagination. Methodological disputes aside, both lay claim to, and can own, the critical vision in international legal history.

59. For a discussion of concerns with regard to history's role in modern-day leadership, see generally JO GULDI & DAVID ARMITAGE, *THE HISTORY MANIFESTO* (2014).

Given the extent to which the field of international law has normalized their critiques (and those of their predecessors) and given the environment of assault upon the humanities, critical lawyers and radical historians may wish to reflect together on how the history they write serves their common purpose. Orford generally refrains from producing her own particular vision and sometimes suggests that lawyers ought to resist this turn to history altogether.⁶⁰ At other times, Orford appears to make a nod to situationalism: using history on a pragmatic basis to make a particular political intervention rather than conforming to one particular method as a means of getting to the correct outcome—writing history “in the spirit of making rather than finding.”⁶¹ In the same spirit, scholars might wish to reverse their order of priorities, to prioritize outcome over method and to approach critical legal history more as an attitude and with fewer methodological preoccupations. In light of today’s pressing intellectual, political, and material circumstances, the question of whether critical history *has* a method readily morphs into the burning issue: how to write histories with which international law will reckon and struggle rather than normalize as a once shameful past, long transcended by international law in its hopeful journey to progress.

60. ORFORD, *supra* note 1, at 320.

61. *Id.* at 269.

