THE POLITICS AND PROTOCOLS OF INTERDISCIPLINARY ENCOUNTERS

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It is an honor and a gift to have my book *International Law and the Politics of History* discussed with such energy and insight by colleagues from history, philosophy, political science, and international law. I am grateful to the convener of this symposium, Jeffrey Dunoff, for his commitment to building engaged communities in and around international law. It is fascinating to see how the diverse group of authors assembled here took the arguments made in the book in many different and at times unexpected directions. While some engaged with or reacted to the encounter between international law and history that motivated the book, others extended into new fields my exploration of how interdisciplinary encounters might be more productively conducted. In this response, I build on their reflections to explore the politics and protocols of encounters across and between disciplines.

In order to draw out the points of agreement and disagreement with my interlocutors, I begin by sketching a brief overview of the book's key argument. The book has been read by some as a polemic or (in the contribution of Lauri Mälksoo to this collection) a manifesto, and there is indeed a strong argument that runs as a red thread throughout. But the individual chapters also offer a detailed description and thinking through of the relations, roles, forms, and practices of international law—which is the field in which I have experience—and an equally detailed engagement with the claims made by historians who work with or against international law. I have tried to be as precise as possible about the claims I make, and to give a careful account of the work of those with whom I am in conversation, particularly if I disagree with their arguments. I also acknowledge and try to address reasons that my argument might give people pause. But inevitably in this format I will convey much more of the polemic than of the careful description upon which it is based.

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I. THE TURN TO HISTORY AND THE TURN TO THE INTERNATIONAL

In brief, *International Law and the Politics of History* is motivated by the effects of an encounter that has taken place between international law and history over the past two decades. Most international lawyers are very familiar with the claim that international law has taken a "turn to history," despite international lawyers having been engaged with the past for as long as there have been international lawyers.[1] That "turn" is taken to refer to a renewed engagement with history in international legal scholarship that began in the 1990s. More broadly, the book is about the ways in which international lawyers look to other fields to ground our arguments about the nature, meaning, and effects of international law.

Chapters 2 and 3 sketch the nature of the encounter between international law and history that motivated the book. Chapter 2 resituates the work that has been characterised as taking a turn to history since the 1990s within the broader field of international law and practice out of which that work initially emerged. International lawyers operate in a field, language, and milieu that is shared, often uneasily, between the world of professional practice and the world of the university. I argue in Chapter 2 that in order to understand what international legal scholars were doing when we turned to history, it is necessary to pay attention to the contemporaneous arguments that were being made in international legal practice. As Annelise Riles has argued, the legal academy is "integrated first into the profession and only secondarily into the social science division of the modern university."[2] It is not

1. GRB Galindo, *Martti Koskenniemi and the Historiographical Turn in International Law*, 16 EUR. J. INT'L L. 539 (2005); Matthew Craven, *Introduction: International Law and its Histories*, *in* TIME, HISTORY, AND INTERNATIONAL LAW 1, 3 (Matthew Craven et al eds., 2007); Thomas Skouteris, *The Turn to History in International Law*, *in* OXFORD BIBLIOGRAPHIES IN INTERNATIONAL LAW (Anthony Carty ed., 2016); Matthew Craven, *Theorizing the Turn to History in International Law*, *in* THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 21 (Anne Orford & Florian Hoffmann eds., 2016).

2. Annelise Riles, *Legal Amateurism*, *in* SEARCHING FOR CONTEMPORARY LEGAL THOUGHT

possible to understand what international legal scholars are doing when we write about the past if the contemporaneous arguments being made in international legal practice are ignored. Even if international lawyers do not make any reference to practice in a piece of writing, the institutional context of international legal scholarship includes the world of international legal practice.

With that relation to practice in mind, I explore in Chapter 2 why the end of the Cold War marked a moment at which history began to play a more central role in international legal argumentation. I show that given the context of a unipolar world in which international law was being remade in the image of the sole remaining hegemonic power, it is perhaps unsurprising that the past, present, and future of international law became a field of increasing interest and attention. That focus on international law's history only intensified as the project of realizing a new international law for a world of liberal states began to falter in the first decades of the twenty-first century.[3] In the wake of the war on terror, the interconnected financial, energy, climate, food, and humanitarian crises of the early twenty-first century, and the disruptions to the US-led international order posed by the rise of China and the populist backlash against liberal multilateralism, history continued to be a key site of struggle over the nature, meaning, and proper role of international law. The sense that history may not have ended and that a world of liberal states was not necessarily our destination re-entered the mainstream of international legal debate. Indeed, for some more dramatically inclined legal scholars, there was a "struggle for the soul" of international law being played out through debates about the past.[4]

Much of that initial scholarly work engaging with the history of international law was motivated by what historians call "presentist" concerns. Some scholars looked to the past to understand the role international law had played in contributing to the global financial crisis, climate change, mass dislocation of peoples, and the growing vulnerability, insecurity, and inequality that were increasingly apparent within and between states. Others sought to muster a defense of existing international institutional arrangements and treaty regimes by linking their development to progress narratives. Lawyers assembled past texts, concepts, practices, and institutions to make arguments directed at rationalising, shaping, or resisting the transformation of international law over the turbulent decades following the end of the Cold War. Legal scholars engaged with the past in the process of participating in the everyday routines of international legal work, attempting to understand what role international law had played in shaping the rapidly changing global situation, using inherited legal concepts when arguing before courts and tribunals, seeking to contest accepted interpretations of treaties or state practice in relation to new contexts, using analogical arguments to point to precedents for understanding current situations, or participating in exercises of regulatory redesign

499, 514 (Justin Desautels-Stein & Christopher Tomlins eds., 2017).

3. For the description of the U.S.-led vision for international law in those terms, see Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1995).

4. Anthony Carty, *Visions of the Past of International Society: Law, History or Politics?*, (2006) 69 MODERN L. R. 644, 645 (2006); Philip Alston, *Does the Past Matter? On the Origins of Human Rights*, 126 HARV. L. R. 2043, 2077 (2013).

in the aftermath of financial, security, climate, energy, refugee, and food crises. In addition, a growing body of work responded to the shift in geopolitics caused by the resurgence of Russia and the rise and influence of China, in part through rethinking the history of international law from perspectives opened up by a focus on historical agents outside the North Atlantic.

While some of those international lawyers saw themselves as undertaking historical projects, most did not. In general, the work undertaken by international lawyers did not conform to professional historical protocols in either style or method. The aim of that work was unashamedly and overtly presentist. Practicing lawyers appealed to the past in making legal arguments, and legal scholars engaged with those legal arguments by engaging with the past. The key point of Chapter 2 is that the international legal scholarship that has since been characterized as taking a "turn to history" needs to be understood as in part an attempt to make sense of, be intelligible to, and intervene in that rapidly shifting field of argumentative practice.

But while the legal academy is integrated into the profession, it is also integrated into the modern university. International legal scholars are also in conversation with debates in the humanities and social sciences, and our work is enriched, influenced, and shaped by engaging with work from many other disciplines, including history. This aspect of the situation of international lawyers informs the second version of the turn to history in international law, the turn to history as method. In chapter 3, I explore how the turn to history as method was shaped in part by the corresponding "international turn" taken in the academic discipline of history.

Initially, it seemed serendipitous that international lawyers, legal historians, and historians more broadly were developing a collective interest in the past of international law. Not only did this offer areas of substantive overlap, but lawyers and historians seemed to have a common project—complicating overly simplistic accounts of the inevitability of a newly triumphant liberal international law. Yet as debates over the history of international law became more visible, institutionalised, and contested, a growing number of historians of international law began to challenge the accounts of the past offered by international lawyers on methodological grounds.

Over time, the turn to history began to be understood as a project that should be distanced from the argumentative practice of international law and instead its success measured against empiricist protocols of certain academic historians. Legal historians expressed concern that international law advocacy and scholarship was "tainted" by "improper historiographic methods,"[5] and called on legal scholars to adopt "best practices" or "make use of the basic rules of historical methodology."[6]

As Chapter 3 shows, central to these arguments was a set of claims about what "the basic rules of historical methodology" actually were. Those rules were taken to include the prohibition against anachronism (that is, placing a text or concept in the

5. David J. Bederman, *Foreign Office International Legal History*, *in* TIME, HISTORY, AND INTERNATIONAL LAW 43, 46 (Matthew Craven et al. eds., 2007).

6. Randall Lesaffer, *International Law and Its History: The Story of an Unrequited Love*, *in* TIME, HISTORY, AND INTERNATIONAL LAW 27, 37 (Matthew Craven et al. eds., 2007).

wrong time), the need to contextualize texts (based on the argument that each text has a determinate historical context from which its meaning can be derived), the prohibition against presentism (meaning interpreting the past through the lens of the present), and a concern with what the Cambridge historian Herbert Butterfield referred to as "abridgement" (the writing of narratives about the past that linked different periods or treated history on a broad scale). International lawyers in turn proved very receptive to the idea that empiricist historical methods offered a set of technical rules to which legal scholars should conform when writing about the past, and quickly began to call out their colleagues for violating those "rules." The sense that the legitimacy of these rules was unquestionable, that the method of applying them was determinate, and that it was self-evident that these rules could and should simply be adopted by lawyers emerged strongly from the tone in which that debate was conducted.

The idea that empiricist historical methods offered a standard against which to measure the utility and propriety of legal scholarship was based on a set of claims about what "the basic rules of historical methodology" could allow historians of international law to do. Historical approaches were presented as means of upholding "standards of veracity and verifiability,"[7] "distinguishing the abuses from the uses of history,"[8] and resisting "the political manipulation of the past for present political purposes."[9] Historians of international law, unlike lawyers, could take a "properly impartial or historical view" of the past,[10] and do so without imposing any "hermeneutic template" on past practices or texts.[11] International lawyers, in contrast, were said to be engaged in "factional cultural politics rather than scholarship,"[12] "the promotion of ideology,"[13] and "suspend[ing] empirical history altogether" in the pursuit of a morally suspect "academic anti-positivism."[14] International lawyers who questioned the universal applicability of the contextualist historical approach to "the creation of meaning" presented "new dangers."[15] Empiricist historical methods could and should be used to challenge and correct the misleading, ideological, distorted, and partisan accounts produced by international lawyers. At its starkest, the claim made in the debates over method was that historians had progressed while international lawyers had been left behind in the nineteenth century: "the distance between the juridical and the historical may in fact

7. Lauren Benton, *Beyond Anachronism: Histories of International Law and Global Legal Politics*, 21 J. HIST. INT'L L. 7, 9 (2019).

8. SAMUEL MOYN, HUMAN RIGHTS AND THE USES OF HISTORY, at xii (2d ed. 2017).

9. Andrew Fitzmaurice, *Context in the History of International Law*, 20 J. HIST. INT'L L. 5, 13 (2018).

10. Ian Hunter, *The Contest over Context in Intellectual History*, 58 HIST. & THEORY 185, 192 (2019).

11. Ian Hunter, *About the Dialectical Historiography of International Law*, 1 GLOB. INTELL. HIST. 1, at 6 (2016).

12. *Id.* at 19.

13. CHRISTOPHER R. ROSSI, WHIGGISH INTERNATIONAL LAW: ELIHU ROOT, THE MONROE DOCTRINE, AND INTERNATIONAL LAW IN THE AMERICAS 51 (2019).

14. Hunter, *supra* note 11, at 7, 23.

15. Fitzmaurice, *supra* note 9, at 30.

be the distance between nineteenth-century approaches to history and more reflexive and critical historical methods."[16]

As I make clear and discuss in detail at various points throughout the book, the empiricist methods being presented as unquestionable in the field of international law have long been challenged within the discipline of history by other historians, as well as by art historians, postcolonial theorists, literary theorists, and queer theorists. Numerous historians have questioned the self-evidence of anachronism as an error,[17] challenged the assumption that the temporal context for a text or artwork is narrow, contained, or self-evident,[18] and produced sophisticated reflections about the ways that interdisciplinary work across law and history can function to unsettle the methodological certainties of both fields.[19]

Indeed, while international lawyers were being berated for questioning or failing to conform to the "basic rules" of empiricist historical methodology, historians were writing influential manifestos expressing concern about how the demand for conformity with specific empiricist conventions was being deployed within the field of history.[20] For example, in *The History Manifesto*, Jo Guldi and David Armitage questioned the particular "training in thinking about time" that has dominated Anglophone history departments since the 1970s,[21] arguing that it had resulted in a discipline that "rewarded intensive subdivision of knowledge" and "the triumph of the short *durée*."[22] In their *Theses on Theory and History*, Ethan Kleinberg, Joan Wallach Scott, and Gary Wilder expressed a related concern about the way in which an "obsession" with empiricist methodology as the measure of historical competence was working to normalize and reinforce an "anti-theoretical and unreflexive orientation" amongst historians.[23] They argued that the discipline of history had become committed to an eighteenth century vision of itself as an "empiricist enterprise" committed to a "scientistic method".[24] Debates over method were dismissed as trivial, because empiricist historians failed to acknowledge that the "preoccupation with empirical facts and realist argument" was founded upon "a set of uninterrogated theoretical assumptions about time and place, intention and agency, proximity and causality, context and chronology."[25]

The key point to note, however, is that little if any of that scholarship registered in debates about historiography in international law. It was the methods of empiricists rather than critical or heterodox historians that were introduced as the

16. Kate Purcell, *On the Uses and Advantages of Genealogy for International Law*, 33 LEIDEN J. INT'L L. 13, 34–35 (2020).

17. See the discussion in ANNE ORFORD, INTERNATIONAL LAW AND THE POLITICS OF HISTORY 87–88, 153–56 (2021).

18. *Id.* at 88.

19. *Id.* at 88–89, 96–98.

20. *Id.* at 89–91, 127.

21. JO GULDI & DAVID ARMITAGE, THE HISTORY MANIFESTO 51 (2014).

22. *Id.* at 51–53.

23. ETHAN KLEINBERG, JOAN WALLACH SCOTT, & GARY WILDER, THESES ON THEORY AND HISTORY 1, 4 (2018).

24. *Id.* at 1.

25. *Id.* at 5.

basic rules of historical methodology or best practices. Overall, as the turn to history in international law intensified, the legitimacy of empiricist historical rules was increasingly treated as given and the desirability of applying those rules to international law treated as self-evident. Questioning those rules or their relation to the operation of law was dismissed as trivial. In the words of Lauren Benton, the "deeply flawed debates" over the applicability of empiricist historical methods to international law merely served as "distractions from weightier discussions."[26]

The end result was that the turn to history began to be understood as a project that should be distanced from the argumentative practices of international law. For many of the early career scholars with whom I was working, compliance with empiricist and contextualist protocols was becoming the measure of scholarly rigor for historical work. Overall, the structure of the debate produced a static account of both international law and history, reducing any sense of the complex roles, positions, and approaches available in either discipline.

II. HISTORY'S LAW AND LAW'S HISTORY

In Chapters 4 and 5 of the book, I stand back from the debate to examine more broadly how it was structured, on what terms, and with what consequences. I suggest that in order to understand the stakes of the turn to history as method, both for historians and for lawyers, it is necessary to consider a much longer narrative about the relations between law and history. Chapter 4 focuses on the stories that one tradition of historical writing has told about lawyers and about the liberatory effects of humanist historicizing about law. Chapter 5 explores what that older story misses about the way that contemporary international lawyers work with the past in the practice of legal argumentation.

In Chapter 4, I consider how bringing history into relation with law has enabled a form of boundary-shaping that co-constitutes an idealized (or demonized) sense of both fields. In doing so, I show that the progressive narrative about empiricist historiography is intimately bound up with a particular image of law. I focus in particular on the work of a group of historians referred to since the 1970s as the Cambridge School.

As I explain in detail in the book, I focus on scholars associated with the Cambridge School for a number of reasons.[27] First, their approach has been a touchstone for many participants in the debate over the correct methods for studying the past in international law. Many of the historians who have engaged with the turn to history in international law and the related turn in international relations have been associated with or influenced by the Cambridge School. Many, although not all, of the new historical studies in international law and international relations have overtly drawn upon a Cambridge School or contextualist approach to shape their practice.

But more importantly, the methodological manifestos associated with the proponents of the Cambridge School approach provide the clearest, most compelling, most influential, and at times most polemical accounts of why the

26. Benton, *supra* note 7, at 7.

27. ORFORD, *supra* note 177, at 93–99, 105–12.

extension of particular kinds of empiricist historical methods from the interpretation of past events or figures to the interpretation of "past" ideas and texts is necessary. The strongest account I could find of why and how empiricist methods could plausibly be extended to the field of law emerged out of contextualist history, and so I discuss it in some detail. But as I show throughout the book, the same empiricist assumptions underpin the work of those who understand themselves to be doing a history of practice and those who understand themselves to be offering a disciplinary history.

The argument for applying rules of empiricist historiography to the study of past texts or practices is not confined to scholarship that understands itself to be historical. The claim made by the contextualist historians is a far more ambitious one, and it is the Cambridge School scholars who have most powerfully defended that more ambitious claim. As Quentin Skinner, the most influential proponent of the "contextualist" method associated with the Cambridge School, has made clear, contextualist historiographers understood themselves to be offering something more than "a method for doing the history of ideas."[28] Rather, the goal was more ambitious: "to articulate some general arguments about the process of interpretation itself, and to draw from them a series of what I take to be methodological implications."[29] Skinner claimed that this methodology was not merely "a suggestion, an aesthetic preference, or a piece of academic imperialism," but "a matter of conceptual propriety, a matter of seeing what the necessary conditions are for the understanding of utterances."[30] The method espoused by Skinner is taught in many first year history programs worldwide, and has become "a kind of orthodoxy across the interpretative social sciences."[31]

The ambitious nature of the claim made by Cambridge School historians is that contextualist historical method offers the only reliable way of understanding the meaning of any past text or statement. This move from past events or past figures to past texts is key. After all, there is nothing very remarkable about the claim that an event or a specific historical figure should be placed in historical context. But international law is not an event or a person that can be located straightforwardly in a specific historical context, and nor is it self-evident that a legal text, concept, or practice has a single historical context from which its meaning can be determined. It was scholars associated with the Cambridge School who argued strongly for the extension of empiricist methods to the interpretation of ideas, texts, or concepts and to the study of fields such as philosophy, theology, and law.

In exploring the methodological arguments made by influential historians associated with or influenced by the Cambridge School, I began to notice a striking feature of their methodological manifestos as well as of the narratives they produced

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28. Quentin Skinner, *A Reply to my Critics*, *in* MEANING AND CONTEXT: QUENTIN SKINNER AND HIS CRITICS 231, 234 (James Tully ed., 1988).

29. *Id.* at 234.

30. Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 HIST. & THEORY 3, 49 (1969).

31. Peter E. Gordon, *Contextualism and Criticism in the History of Ideas*, *in* RETHINKING MODERN EUROPEAN INTELLECTUAL HISTORY 32 (Darrin M. McMahon & Samuel Moyn eds., 2014).

using those methods. In a close study of decades of work by Herbert Butterfield, JGA Pocock, Skinner, and Ian Hunter, I show that their methodological claims are shaped by a powerful story about the liberating force of empiricist historiography. Law and the figure of the lawyer play a major part in that story. Lawyers, it turns out, are everywhere in the work of contextualist historians, both in their manifestos about method and in the narratives they produce using those methods. The figure of the lawyer as scholastic apologist for power or as moralising judge reappears throughout the texts of contextualist historians—as Whig constitutionalist in the writings of Butterfield,[32] as English common lawyer in the writings of Pocock,[33] as Renaissance Italian scholastic lawyer for Skinner,[34] and as Prussian natural lawyer for Hunter.[35] In addition, Butterfield, Pocock, Skinner, and Hunter each offer historical narratives in which the figure of the lawyer functions as the foil against which a second figure is opposed—a figure who arrives on the scene to challenge the oppressive authority of received tradition with the liberating methods of historicizing contextualism. The hero of those stories is the historicizing humanist, who deploys methods that bear a striking resemblance to those of the contextualist historian. This narrative helps make sense of the certainty with which empiricist historians have presented their role as radical disrupters of legal orthodoxy, through methods that are presented as at once impartial, scientific, and revolutionary.

The claim made on behalf of empirical histories of international law is that they are able to correct or complete the work of international lawyers in two key ways: first, they can offer interpretations of past legal texts or practices that are impartial and are not informed by the struggle for the meaning of law in the present, and second, they can have a liberating effect on existing claims to legal authority by showing that international law is a human creation rather than the embodiment of timeless values and inherited traditions. Chapter 5 questions those claims. It explores what that familiar historical narrative misses about the way that contemporary international lawyers work with the past and with time in the practice of legal argumentation. I offer there a detailed description of the forms, practices, roles, and techniques through which international lawyers engage with the past. I sketch some of the ways that international legal arguments have made use of the past in theory and practice over the past century and show the impossibility of correcting those uses of the past without in turn becoming part of the legal battle.

For example, I argue that humanist historicizing and anti-metaphysical claims are not above the struggle for law, because those arguments about meaning and interpretation have been incorporated as a central part of international jurisprudence and practical argumentation for at least the past century. Challenges to metaphysics and to formalist reasoning are already embedded within the existing argumentative field of the international legal academy and legal practice. In this sense for

32. *See generally* HERBERT BUTTERFIELD, THE WHIG INTERPRETATION OF HISTORY (1965).

33. *See generally* J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY (1987).

34. *See generally* QUENTIN SKINNER, THE FOUNDATIONS OF MODERN POLITICAL THOUGHT (1978).

35. *See generally* IAN HUNTER, RIVAL ENLIGHTENMENTS: CIVIL AND METAPHYSICAL PHILOSOPHY IN EARLY MODERN GERMANY (2001).

international lawyers, as for most twenty-first century lawyers, "we are all realists now."[36] Critiques of metaphysical or ahistorical thinking that seek to place international law into a historical context or attack the idea of a transcendental foundation for the law have been fully incorporated into our patterns of legal argumentation in practice.[37] In any given situation, to argue that a legal text should be interpreted in light of the intentions of a particular actor in a particular historical context is simply to take one possible side in a legal debate. That doesn't mean that metaphysical thinking or transcendental claims have disappeared from international law. Rather it means that the claim to be able to reveal the metaphysical or enchanted thinking of an opponent is just one more argumentative tool in the international lawyer's toolbox.

As a result, the project of historicizing the law has political effects that are situational—it may be liberatory or it may not. To understand how historicist methods operate as interventions, we need to have or be given some sense of the institutional structures, the language games, the patterns of argument, and the styles of performance that make up the contemporary practices of international law. I undertake that work in Chapter 5, by exploring in detail the ways that international lawyers engage with the past in legal argumentation, including through the assembling of historical facts, choosing to adopt either a contextualist or an evolutive interpretation of a treaty, reasoning or refusing to reason by precedent, choosing particular practices as legally intelligible, and making arguments about the purpose of a treaty or a legal institution. That work is normative rather than empirical, and any attempt by historians to enter into the game of arguing about whose intentions or which contexts are relevant in interpreting the meaning of past texts or which past practices are relevant to the development of international law will also be normative rather than empirical.

It is important to stress that my motivation in writing that detailed description is *not* to defend international law. Rather, my starting premise is that whether you want to defend international law, use international law, challenge international law, or destroy international law, you need first to understand the situation of international law today. I conclude that accepting the terms of the current debate about the role of empiricist methods in international law poses a problem for our understanding of international law and the role of international lawyers. The current debate traps all of us, lawyers and non-lawyers alike, in a fantasized ideological battle from earlier centuries, in which lawyers are all imagined as scholastics who work for the Holy Roman Emperor or the Pope. To imagine that when international lawyers make arguments from the "utopian" or transcendent pole of the apology/utopia divide we do so because we do not know that there is any alternative is to misunderstand the nature of the game that is being played. Empiricist historical arguments have a more complex effect in a field dominated by powerful players and

36. WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 382 (1973).

37. For responses that note the unavoidable impact of realism on legal thought while suggesting that remnants of metaphysics and formalism can be found in the legal process school, rights theories, and law and economics, see David Fraser, *What a Long, Strange Trip It's Been: Deconstructing Law from Legal Realism to Critical Legal Studies*, 5 AUSTL. J. LEGAL SOCIO. 35 (1988–89); Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465 (1988).

states that have long since incorporated the argument that metaphysical or formalist thinking about international law is naïve.

Historicization does not automatically undermine the foundations or challenge the operation of contemporary international law, although it will do so in some circumstances. The important task for those engaged in legal argument is to grasp the effect of taking a particular approach in different situations.

III. THE HISTORY OF WHAT? THE POLITICS OF MAKING INTERNATIONAL LAW

Chapters 6 and 7 suggest why this encounter matters. Historians of international law are presented and present themselves as offering impartial, verifiable accounts of the history of international law, in a hyper-partisan field in which partisan accounts are all that anybody else has to offer. In Chapter 6, I argue in contrast that their accounts are necessarily as partisan and political as those produced by the most pragmatic of lawyers. Any study that is presented as a history of international law, or of a sub-field such as human rights law or international economic law, involves an account of what "international law" or "human rights" or "international economic law" is. The question that comes prior to the writing of such a history is: what is the history of international law a history of? Any study that is presented as a history of international law involves writing a history of something for which there is no stable referent or fixed object.

There is no uncontested, impartial, or "verifiable" answer to the question "what is the history of international law a history of?," because there is no uncontested, impartial or verifiable answer to the question "what is international law?." There is no impartial or verifiable account of the context into which particular legal texts or concepts should be placed, the methods by which texts should be interpreted, whose interpretation of a text or concept is authoritative, who counts as a "subject" of international law, what counts as a "source" of international law, the sites in which international law is made, and thus what kinds of archives offer what kinds of "evidence" about what international law really means or meant at any given moment or where it really originated. The answer to any of these questions is political or normative rather than technical or empirical.

Presenting a history of something called "international law" involves generalizing and abstracting. To see an action, event, person, concept, or text as somehow related to "international law," it is necessary to have in mind a general picture, image, or concept of "international law." That work of generalization and abstraction is creative and political work. The same is true about writing histories of international law. Historians of international law have to decide which practices and texts out of the mass of archival material available from past eras is relevant to the history of international law and why. The author of such a history gives form, shape, direction, scope, content, character, and meaning to something called "international law" by choosing how to narrate the history of that object.

As a result, when an empiricist historian presents their work as offering a history of something called "international law," they necessarily take a partisan position. Any work that settles on "international law" as an object will accept and indeed consolidate one out of a range of contested presentist accounts of what international law is. International law is an object whose representation matters to

those who exercise power, including professionals who have a great deal at stake in competitive struggles over its meaning and role. As a result, "all writing on international law," including histories of international law, "must be intrinsically polemical."[38] To offer a history of "international law" requires explicitly taking a position on what "international law" is or implicitly accepting someone else's account of what international law is. Neither is politically innocent. Each historical project that takes international law as an object is part of the contemporary struggle over how international law should be understood and represented.

Indeed, the more successful a historian is at presenting a plausible account of the history of an object that they effectively present as international law or international human rights law or international economic law, the more they become part of the legal field and the international law game. As a result, successful historians of international law become part of an interpretative community that is responsible for shaping the public sense of what an object called international law is and might become, through narrating a history for that object. They became participants in the struggle over what international law is and does in the world.

And that's OK! To be clear, I don't see being part of the struggle for international law as a criticism. None of that would matter so long as historians didn't present their accounts as somehow empirical correctives to the normative and partisan mythmaking of international lawyers or so long as their readers didn't believe the claim that historical scholarship about law is somehow empirical and impartial rather than idealized and partisan. But historians do make such claims and, perhaps more importantly, international lawyers echo those claims. Historians of international law promise empiricist accounts of past legal material that is above the battle for the meaning of international legal texts, concepts, practices, or international law itself in the present.

Chapter 7 concludes that this encounter raises issues that go to the heart of the role of lawyers in contemporary international politics. The current interplay between international law and history serves to offer a new grounding for formalism in an extremely fraught political context, in which international law and adjudication play a central role in the justifying the distribution of material resources on a shared planet. Historical arguments are increasingly used to found legal interpretations or legal arguments in that post-realist field.[39] I characterise the international law field as post-realist because what counts as a persuasive legal argument in international law has been deeply influenced over at least the past century by the realist challenge to the idea that law is a system of rules, the meaning of which is determinate and the consequences of which in any individual case can be mechanically derived from those rules.

The realist challenge to the tenets of formalism and positivism, particularly that of the early American and Scandinavian realists, has led in two different directions

38. Philip Allott, *Language, Method, and the Nature of International Law*, 45 BRIT. Y.B. INT'L L. 79, 93 (1970).

39. The turn to history thus allows lawyers to escape the work of making "normative legal argument without the crutch of formalism." Singer, *supra* note 37, at 533.

in international law.[40] On the one hand, the realist challenge fueled a more sceptical version of legal thinking, which rejected the idea that there was a rational solution to every legal problem that could be uncovered by the use of the correct method, model, or process. American legal realists stressed that law is "made, not found,"[41] in order to challenge formalist modes of legal reasoning deployed to legitimize the role of judges and adjudicators, in a context where conservative U.S. judges were nullifying progressive social legislation in the name of protecting property, liberty, and freedom of contract. The forensic dissection of such claims by the legal realists reshaped the nature of persuasive legal argument.[42]

But the realist challenge also inspired a search for more scientific foundations for the law.[43] Law might be politics all the way down, but perhaps other fields of human knowledge could still offer neutral, verifiable, or objective grounds for legal reasoning. Over the past century, there have been numerous attempts to reestablish methods that lawyers could use to make decisions about legal issues without taking sides in political struggles.[44] Some have sought to find those new foundations for formalism in allegedly rational processes or decision-making procedures (such as the veil of ignorance or game theory). Others have posited abstract values or criteria for judgment that are said to trump or transcend political divisions (such as rights, dignity, welfare, equality, or efficiency). Others have sought to turn normative disputes into debates about social scientific data or facts. In each case, the ambition has been "to create a new foundation" for adjudication or legal reasoning "to replace the discredited foundations of formalism."[45]

I suggest that appeals to history are one way of doing that work in international law today, involving what I describe, borrowing from Duncan Kennedy, as a hermeneutic of suspicion.[46] Kennedy adopted the concept of a hermeneutic of suspicion to describe a striking feature of American legal debates. He noted that the "prosecution and denial of the accusation of ideologically motivated error in legal reasoning" had become an aspect of "everyday practice across the whole domain of law."[47] In those debates, the skeptical approach and critical techniques developed by legal realists were being deployed against opponents, but the more extreme skeptical conclusion that law on both sides is politics all the way down was avoided.

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40. For a detailed discussion of the arguments made by American and Scandinavian realists and their effect on international legal argumentation, see ORFORD, *supra* note 17, at 208–15, 249–52, 285–94.

41. Singer, *supra* note 37, at 533.

42. ORFORD, *supra* note 17, at 289–91.

43. Singer, *supra* note 37, at 516.

44. *Id.*

45. *Id.* at 516. *See also* Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985) (discussing aftermath of realists debunking formalism in legal reasoning).

46. Duncan Kennedy, *The Hermeneutic of Suspicion in Contemporary American Legal Thought*, 25 L. CRITIQUE 91 (2014). The idea that there exists a recognizable hermeneutic of suspicion was developed by Paul Ricoeur to describe the mode of interpretation inspired by Freud, Marx, and Nietzsche—the three "masters of suspicion." PAUL RICŒUR, FREUD AND PHILOSOPHY: AN ESSAY ON INTERPRETATION 32–36 (1970).

47. Kennedy, *supra* note 46, at 107.

Instead, lawyers tended "to uncover hidden ideological motives behind the 'wrong' legal arguments of their opponents, while affirming their own right answers allegedly innocent of ideology."[48] In the context of U.S. constitutional debates, the hermeneutic of suspicion made it possible to hold together two contradictory ideas—that there are some judges (that is, those who are on the other side of politics) who offer politicized interpretations of the law, and that there are nonetheless right answers to ideologically charged questions to be found in the constitution, if only it is interpreted correctly.[49] The apparent contradiction was mediated by making ideological interpretations appear aberrational or incorrect rather than inevitable.[50] The truth is out there, if only the other side would stop manipulating the meaning of legal texts or practices for political purposes.

We can see something similar happening in international law, both within this debate and more broadly. A cross-disciplinary hermeneutic of suspicion informs the claim that the other side is distorting history, creating myths, or misrepresenting the meaning of a legal text or regime, while the historicizing work of our side reveals the intended meaning of the legal text or the real origins of a regime or the true history of the discipline. Rather than accepting the political choices involved in any representation of international law, including our own, the appeal to history as a foundation for arguments about the meaning of international law has been accompanied by the deployment of a hermeneutic of suspicion to unveil the ideological errors of the opposing side. We turn to history as a foundation for grounding our arguments about the real history of a regime, the origins of international law, or the meaning of a past text.

This neoformalist move is being made in a particular context. With the ending of the Cold War, the international adjudication of disputes over trade and investment has come to play an increasingly significant role in justifying the distribution of wealth and the securing of profits on a global scale. The increasingly high stakes of international adjudication have placed stress on the need to present international law as neutral, impartial, and free of politics, even as the subject matter of trade and investment adjudication is intensely political and increasingly contested. Appeals to the history of international law play a significant role in resulting debates over the legitimacy of international adjudication. The resort to a hermeneutic of suspicion in that highly fraught context makes it possible to argue that the other side's interpretations of international law are political, while our side offers an account of international law that strips away the myths and the invented traditions and reveals law's true meaning or origin or logic.

The turn to history has thus become a turn to a particular tone or style of writing about law—what I have called a turn to history as method. This turn to history as a method for thinking about law is strongly neoformalist. Formalist arguments about what a text really means, or what an international institution is really designed to achieve, or what international law is really for can be smuggled into legal argument in the guise of empirical history. To speak in the language of history about

48. *Id.* at 91.
49. *Id.* at 135–36.
50. *Id.* at 136.

international law is to speak with a tone of certainty that is otherwise largely unavailable to lawyers.

My argument is that, despite its appeal, we should resist this turn to history as neoformalism. Lawyers cannot look to historians (or anyone else for that matter) to save the day with impartial and verifiable evidence-based interpretations of what international law really is, means, or stands for. Nor is it productive to continue reproducing the hermeneutic of suspicion, accusing others of improperly politicizing, instrumentalizing, or misusing history while claiming that our side uses history in a properly scientific manner. International law and its histories are made rather than found. 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. Few international lawyers today would present that work as purely technical and mechanical.

That is not to say that studying historical material is worthless. Rather, the question is not which method is scientific or proper or impartial, 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, including contextualist historiography, may be extremely useful in one context but get in the way of a clear analysis or a persuasive legal argument in another.

The final point to note in opening is that while many stories about interdisciplinary work or about critical scholarship involve narratives of marginalisation or failure, *International Law and the Politics of History* tells a story of success. This is a story about what happens when a new approach to the study of a field begins to become central, dominant, and mainstream. Where once innovation was the name of the game, as the new approach begins to be taken seriously, its proponents seek to appear more professional, rules of historical methodology begin to be defined, risk-averse defensiveness kicks in, and innovation or nonconformity begin to be criticized as unscientific, or political, or both.

I argue that this is not a problem for history or historians writ large. Rather, it is a problem for those who turn to history in order to inform an engagement with and potential transformation of the work that an object called "international law" or people called "international lawyers" are doing in the present. The book is animated by a commitment to studying the history and transformation of international law as a basis for enabling international lawyers to intervene in the current situation in politically productive ways. For those whose work has that aim, it is necessary to be open to the possibility that a method or form of critique that was unsettling or transformative in one situation will not necessarily have those effects in another. Treating one approach to international law or any other powerful field of practice as somehow above the battle makes it harder to think analytically and strategically about its utility for the task at hand. The result is that we may be busily equipping ourselves and our students to fight the last battle—training ourselves "for wars that are no longer possible, fighting enemies long gone" and leaving ourselves "ill-equipped in the face of threats we had not anticipated, for which we are so

thoroughly unprepared."[51]

IV. HOW TO DO THINGS WITH INTERNATIONAL LAW, POLITICS, AND HISTORY

A. Situating International Law Within History

The first set of responses offer a view of the book from four innovative historians: Natasha Wheatley,[52] Afroditi Giovanopoulou,[53] Kunal Parker,[54] and Morten Rasmussen.[55] Wheatley and Rasmussen are historians of international and European law, while Giovanopoulou and Parker identify as working within a tradition of critical legal history. For these contributors, history is the book's context, and the arguments I make are to be understood within and according to the terms of the discipline of history broadly conceived. The authors understandably focus on how the book represents the historical field, whether it has engaged with enough historians or the right historians, and whether I as an international lawyer sufficiently appreciate what I should and could have learned from historians.

What these responses do not appear interested in is whether and how the methods of historians might be challenged or unsettled by the encounter with international law, and how the image of history with which the book engages was enabled by that encounter between international law and history. There seems to be no consideration of the possibility that historians might have something *about method* to learn from the encounter with international lawyers. This reflects a tendency that I discuss in the book. The encounter between international law and history has repeatedly been portrayed by historians as a one-way affair, in which international lawyers have something to learn from historians (in Parker's sceptical response: "Have international law scholars *nothing* to learn from historians of international law?").

Indeed, for many historians of international law, any questioning by legal scholars of the universal and timeless applicability of empiricist historical rules across time, space, and situation demonstrates only a "misunderstanding" about historical method (a claim repeated in this symposium by Rasmussen) rather than raising any deeper philosophical, analytical, or political concerns. The drive to continue representing empiricist methods as beyond informed critique is striking, given that, as Parker notes, these empiricist methods are subject to critique within the discipline of history itself. Although Parker feels that I should have devoted more space to this internal critique, I have nonetheless engaged with the implications of

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51. Bruno Latour, *Why Has Critique Run out of Steam?: From Matters of Fact to Matters of Concern*, 30 CRITICAL INQUIRY 225 (2004).

52. Natasha Wheatley, *Genealogy of a Battlefront*, 36 TEMP. INT'L & COMPAR. L.J. 9 (2022).

53. Afroditi Giovanopoulou, *Who Owns the Critical Vision in International Legal History? Reflections on Anne Orford's* INTERNATIONAL LAW AND THE POLITICS OF HISTORY, 36 TEMP. INT'L & COMPAR. L.J. 19 (2022).

54. Kunal M. Parker, *Professional and "Amateur" Historians: Contribution to a Symposium on Anne Orford*, INTERNATIONAL LAW AND THE POLITICS OF HISTORY, 36 TEMP. INT'L & COMPAR. L.J. 31 (2022).

55. Morten Rasmussen, *History and International Law: A Reappraisal of a Difficult Relationship*, 36 TEMP. INT'L & COMPAR. L.J. 37 (2022).

the critical response to empiricist rules of methodology from within the discipline of history in far more detail than most other contributors to this debate, *including* historians. Within the debate over methods for writing histories of international law that motivated this book, it is as if that critique never happened. Even within the pages of this symposium, Rasmussen takes as given the essential wrongness of anachronism, presentism, reasoning by analogy, progress narratives, and so on. Empiricist historians and the international lawyers who adopt their approaches have continued to insist on the propriety of a narrow set of methodological dogmas for scholarship that engages with the past in international law, as if critiques of those methods and the assumptions upon which they are based have never arisen in the field of history. Indeed, if one attended only to the positions taken in the debate playing out in relation to international law, it would seem that international lawyers are the first scholars ever to question the self-evident nature of concepts such as "context" or "anachronism."

My interest is in how the encounter between the two disciplines made that possible—how it gave historians a space in which to produce an image of their discipline as somehow above a partisan struggle for the meaning of the past, while dismissing legal scholars who questioned the claims made for empiricist historiography as a distraction. While intense debates about historiography continue unabated amongst historians, engagement with international law seemed to provide a ground on which to reassert conventional empiricist methods and, perhaps more surprisingly, to propose those methods as if to do so were somehow revolutionary. The encounter between international law and history allowed empiricist historians to make claims about their methods that would be, and were being, contested within the field of history itself. The book argues that the encounter with international law enabled the (re)constitution of history as a discipline committed to verifiability, impartiality, and the liberating effects of humanist method, and that the encounter can be understood as part of a much longer tradition structured in those terms.

In addition, Parker and Rasmussen respond to my book with the call for me to read more history. They propose that if I don't agree with the historians with whose work I engage in detail, the answer is to look to the work of other historians. I should note that I have already cast a very wide net both substantively and methodologically in the book, engaging with histories of international law, histories of European law, disciplinary histories of international relations, histories of international law and empire, histories of the common law, histories of law as a social and professional practice, art histories, contextualist histories, conceptual histories, the German historical school, histories of Ordoliberalism, critical legal histories, and debates over originalist approaches to U.S. constitutional history, to name just some of the literature with which the book engages. Perhaps unsurprisingly then, I do not agree with Rasmussen that my sample of historical work is "exceptionally thin," but I invite readers to judge for themselves and explore the book's detailed footnotes and the fifty-one-page bibliography rather than take my word for it. The broader point is that the call to read more history evades the key arguments that the book makes about the dominance and effect of empiricist historiography in the encounter between international law and history and about the inability of empiricist methods to deliver on the promise of offering an impartial account of the legal past. As I argue

in the book, looking to other historical methods does not resolve issues about the inevitably partisan and political quality of historical accounts of international law's past but merely pluralizes them.[56]

Giovanopoulou also suggests that the historians of international law to whom I refer may simply be strategically deploying empiricist tropes without having any real underlying methodological commitments. To support that point, she cites Samuel Moyn's response to my book in a blog post: "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." Moyn's post, however, significantly understates my references to his work and the numerous claims he has made about the capacity of historians to correct international legal scholarship. I do not base my response to Moyn on the basis of some "rash" verbiage in one book.[57] To give some examples of the claims I discuss, Moyn has presented his revisionist history of international human rights as replacing "myths" with the "true origins" or "real history" of the discipline.[58] He described his work as challenging the "misuse of history" by those whose *longue durée* narrative "distorts the past to suit the present."[59] Moyn has argued that historians can distinguish "the abuses from the uses of history" and differentiate between "ideologues" who "through selective evidence or misleading interpretation, betray the dead," and those who are "anxious about the threat of anachronism" and respect the alterity of the past.[60] More broadly, Moyn has claimed that the initial and "undoubtedly crucial" task for historians of international law is "to reclaim law from the lawyers" and our "foreshortened version of intellectualism."[61] It is difficult to see such statements as merely rash or strategic verbiage. They have effects both on the authority with which Moyn's work is treated by international lawyers and on the methods for interpreting the past that are considered available to the scholars who come after him.

More broadly, the responses of these four historians illustrate that the stakes of the debate with which the book engages look very different depending on which disciplinary, institutional, temporal, or national context we choose to place it within. For Wheatley and Rasmussen, the turn to history in international law involves a handful of international or European legal scholars and a small group of historians. In that framing, the scope and scale of international legal argumentation engaged with the past during the decades since the end of the Cold War is radically narrowed and the issues become focused on the world of the academy rather than the world of practice. For Giovanopoulou and Parker, the context of the book is reframed in terms of debates within the U.S. academy and what Giovanopoulou describes as "the much bigger drama of critical legal history's demise." She urges me to see the issue from the "broader perspective" of "the competitions that took place among the purported

56. ORFORD, *supra* note 17, at 299–310.

57. *See id.* at 27–8, 43, 79–81, 99–100, 102–3, 253–54, 263–65.

58. SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY 5, 7 (2010).

59. MOYN, *supra* note 8, at 1.

60. *Id.* at xii.

61. 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 353 (Wouter Werner et al. eds., 2017).

heirs" of legal realism in the US academy. From that perspective (which from my vantage point appears to involve a smaller rather than bigger drama), postcolonial histories and histories written from within the Third World Approaches to International Law (TWAIL) movement "largely became silenced and erased from the canon of international legal historical scholarship." Yet as I noted earlier, my book does not tell a story of silencing and erasure, nor is it limited to discussing historians of international law based in the United States or Europe. In contrast to the U.S. academy, the international legal profession as a whole has been relatively open towards critical international legal scholarship. International lawyers whose work is critical, interdisciplinary, or informed by TWAIL hold chairs in many parts of the world, receive significant funding, liaise with governments in many parts of the Global South, and have been elected to the U.N. International Law Commission, the International Court of Justice, and as U.N. Special Rapporteurs on a range of human rights over the past decades. Far from being silenced or erased, the TWAIL movement in particular and critical approaches to international law more generally are influential in many parts of the world.

The effect of these reframings is in turn a demonstration of the meta-argument of the book—contexts are made not found. How we construct contexts and why we put a particular text or a debate into a particular context is a matter of politics or normative judgment. That context will in turn shape what we take the relevant text or debate to mean. Rather than accept the framing of the debate offered to date, the book shows what the encounter might look like if we recharacterize international lawyers as equal contributors to a debate over the methodologies and philosophies of history rather than as naïve or under-performing students in a class taught by history professors. And it shows what it might look like if we recharacterize historians as equal participants in the struggle for the meaning of international law in the present rather than impartial chroniclers of the law's past. As these varied framings show, the stakes of the debate appear quite different depending upon the context we construct for it.

B. Situating History in the Practices of International Law

The contributors to Part 2 on international law are all creative legal scholars whose work is enriched by interdisciplinary engagements, including with history. Their responses to the book are informed by a commitment to conducting interdisciplinary scholarship that engages critically with international law, and with what my argument means for that commitment. It was a pleasure to read the ways in which these contributors sought to explore the different possibilities that the book opens up for legal scholarship.

Of the contributors to Part 2, Megan Donaldson[62] expresses most unease about the book's implications, perhaps in part because she is trained both in history and international law, and her scholarship offers a meticulous and rigorous example of how such work can be done. As I say at many points throughout the book, I am not engaged in attacking the methods of empiricist historiography, but rather in

62. Megan Donaldson, *The Figure of the Lawyer in Orford's* INTERNATIONAL LAW AND THE POLITICS OF HISTORY, 36 TEMP. INT'L & COMPAR. L.J. 53 (2022).

questioning the claims made by empiricist historians of international law about what they can achieve with those methods. Nonetheless, I appreciate that the book might be uncomfortable reading for scholars who identify as occupying the space between disciplines and who have been able to make an accommodation with the disciplinary conventions of both law and history. Donaldson's interest in working across international law and history makes her particularly attentive to the implications of the book's arguments for work in international law that seeks an audience beyond the world of lawyers. For Donaldson, my argument poses challenges for those legal scholars who "are invested to some extent in making themselves persuasive or at least intelligible within existing parameters and to existing figures of legal authority," while also seeking a conversation "with a much larger and more diverse audience."

I agree, but I would suggest that those challenges already existed and indeed were one of the motivations for writing the book. As I noted earlier, historians of international law have tended to treat as interlocutors (or as targets for critique) only a handful of lawyers whose published monographs specifically engage with historical themes or are written in a style that is designed to be intelligible to a broader public. The effect has been that historians of international law have engaged primarily with scholars working as part of the TWAIL movement or on questions related to international law and empire. Historians were able to engage with that work because it is written to be accessible and legible and tries to communicate the complexities of legal debates to a broader audience. Yet despite representing historians and lawyers as being part of a shared enterprise and claiming sufficient knowledge of the legal field to be able to correct the historical understanding of international lawyers, historians of international law have largely not acknowledged, let alone engaged with, the work of most scholars and practitioners who are part of the contemporary field. The effect of this narrowed focus has meant that historians of international law have mounted energetic critiques of figures like Antony Anghie or of other international lawyers whose work engages with histories of empire, while the scholarship or practical arguments of mainstream international lawyers have been unremarked upon and unchallenged.

Yet, as the book argues, much of what TWAIL or other critical international law scholars were criticised for doing, such as using analogies, choosing relevant precedents from a mass of past cases, considering the evolutive meaning of concepts rather than treating them as determined by a given temporal context, or assembling different events and texts into a coherent narrative, is the standard work of mainstream international lawyers. There were, however, no heated articles charging, say, Daniel Bethlehem, Harold Koh, or Christopher Greenwood with betraying historical protocols by reasoning via analogies, using precedents, assembling arguments out of past materials, or engaging in presentism. One reason I sought to broaden the debate was that if critical international legal scholars were going to be told that their legal methods were flawed because they failed to conform to historical protocols, it made sense to ventilate the claim properly. Otherwise, the effect was to confine the argumentative choices available to one small group whose work is legible to scholars in other disciplines while leaving mainstream lawyers to continue playing the legal game as usual. The book argues that in order to understand what

those legal scholars who seek to be intelligible both within and beyond international law are doing, it is necessary to have some understanding of, or at least curiosity about, the disciplinary conventions, language games, narratives, or rules that will shape the way both internal and external audiences hear what is being said.

I am delighted that Francisco-José Quintana and Sarah Nouwen suggest the book can be read as a "liberation" and a call for openness, diversity, and creativity,[63] and that David Schneiderman, one of the legal scholars who has pioneered critical and genealogical approaches to the field of international investment law, considers that the book speaks to debates in international investment law.[64] Yet both responses suggest that in my description of the international law or international investment law fields as post-realist, I am being too generous or too optimistic. To be clear, I don't mean this claim to suggest that all international lawyers overtly and enthusiastically embrace the insights of legal realism. Rather, when I claim that these fields are post-realist, I mean it in the same sense that we talk about post-colonialism or post-modernism. Temporally speaking, the current pattern of argument and authority in the field of international law exists in the aftermath of realism—indeed, the aftermath of waves of realism. It is not news to anyone that some lawyers claim that international law is a social product rather than a set of rules handed down from time immemorial, or that legal texts or legal practices are open to conflicting interpretations, or that judges make choices between competing and contradictory rules or precedents in reaching decisions in specific cases, or that a state may choose one regime rather than another in which to bring a dispute in order to privilege one set of interests rather than another. What makes those fields post-realist is that we are all then left to reckon with the potential anxiety that such claims produce. My argument is that the appeal to history currently offers one way of addressing the unresolved conflicts produced by the widespread acceptance of realist premises on the one hand, and the role played by formalism in justifying the expanded role played by international adjudication in global politics on the other.

C. The Politics of History and the Limits of Empiricism

The contributors in Part 3 respond to my argument that the claims made for empiricist historiography cannot be realized. Karen Alter,[65] Daniel Bodansky,[66] and Lauri Mälksoo[67] each seek to show that a particular version of positivist empiricism can offer lawyers the things we lost with the triumph of anti-formalism and anti-metaphysics, such as an escape from partisan struggles over meaning, an evidence-based understanding of what legal texts really mean, statements of facts about the past that are outside legal argument, and a non-instrumental approach to the choice

63. Francisco-José Quintana & Sarah M.H. Nouwen, *In Defence of International Law*, 36 TEMP. INT'L & COMPAR. L.J. 65 (2022).

64. David Schneiderman, *Investment Law and its Others*, 36 TEMP. INT'L & COMPAR. L.J. 77 (2022).

65. Karen Alter, *Making Politics of History and International Law*, 36 TEMP. INT'L & COMPAR. LJ. 95 (2022).

66. Daniel Bodansky, *The Places in Between*, 36 TEMP. INT'L & COMPAR. LJ. 107 (2022).

67. Lauri Mälksoo, *The Contested Politics of History in International Law: A Reply to Anne Orford*, 36 TEMP. INT'L & COMPAR. LJ. 117 (2022).

of past precedents or analogies as a basis for legal argument. The responses by Alter, Bodansky, and Mälksoo reject the argument that both international lawyers and historians of international law are involved in making patterns with past material rather than finding them and reject the argument that in so doing our work is partisan rather than above the battle. They believe that scholars can empirically establish the truth of our own accounts and the falsity of our ideological opponents', and that the modernist appeal to empirical methods offers the trump card that allows us to do so. They dismiss my argument that we all need to take responsibility for our creativity and generativity in the project of making the law and its history, and do not accept that we assemble and confer power on the objects of our research and practice. In short, we disagree fundamentally about the stakes of engaging in intellectual and professional work that takes international law as its object.

While there is not the space to rehearse the detailed arguments made in the book about why empiricist historians cannot present impartial accounts of past legal texts or practices that are not informed by normative choices in the present, I will simply stress that my interest is in the ways that both the ability of historians of international law to present their work as empirical and the ability of international lawyers to use historical scholarship to ground legal interpretations depend upon constant differentiation between history and law. The book focuses on how the encounter between international law and history has enabled an idealized and abstracted idea of empiricist historical methods that can operate free from international law's normative and institutional concerns.[68] The responses by Alter, Bodansky, and Mälksoo reproduce that idealized account, whereas my book subjects it to scrutiny.

In addition, I take care to show why I consider that the structure of argument founded upon the alleged empiricism of historians leads us down the wrong path. Historians have favorably compared their own alleged ability to offer an "evidence-based" approach to studying the past based on upholding "standards of veracity and verifiability,"[69] to the approach of international lawyers, who are engaged in "factional cultural politics rather than scholarship".[70] They draw a clear line between evidence and interpretation, empiricism and politics. As the book argues in detail, however, the relation between "evidence" and "interpretation" in law is more complicated than that. In a sense, historians are right about lawyers and truth. The lawyer's relationship to truth is indirect. This is not to say that lawyers do not take facts seriously or that we are nonchalant about lying. Rather, the point is that as lawyers we operate in the register of proof and probability rather than truth and falsity. Evidence, fact-finding, and inference are intertwined with the interpretation and practice of law more broadly, and determining which facts are relevant to a legal analysis is not simply an empirical process.[71] As trial lawyers know well, once the facts of a legal case are assembled, much of the normative work has been done.

68. For a related approach to the mutual constitution of science and law in the process of adjudication, see SHEILA JASANOFF, SCIENCE AT THE BAR: LAW, SCIENCE AND TECHNOLOGY IN AMERICA (1995).

69. Benton, *supra* note 7, at 3, 10.

70. Hunter, *supra* note 11, at 19.

71. ORFORD, *supra* note 17, at 218–23.

Similarly, the choice to present particular facts and not others as relevant to the "history of international law" is inescapably normative and embedded within institutional struggles over the meaning of law in the present.

I take a different approach to Alter on the question of what scientific method involves in one other significant respect. I disagree strongly with Alter's nonchalant dismissal of the proposition that historians of international law should acknowledge, where relevant, their reliance on the collective work of legal scholars. Alter defends the failure to do so as just "the American style," in which "vast quantities of scholarship, especially scholarship by women and underrepresented groups, is systematically ignored" but which nonetheless produces work that is "important" and "useful." While calling this "the American style" seems unfair to the many scrupulous US scholars who are very clear about situating their work in the broader literature, I carefully show in the book how the adoption of such a "style" by some historians of international law creates significant problems for our comprehension of the present.[72]

In addition, as I and many others have argued, the social and communal character of science is its greatest strength.[73] The value of scientific research derives as much from the collective processes of "showing our working," tracing our steps, citing our sources, and situating our research within the broader literature in order to share, debate, and test our ideas (processes which Alter treats as marginal), as from the privileging of particular methods (which Alter sees as central).[74] The natural sciences in particular have a strong culture of systematically requiring all relevant existing literature to be cited at the beginning of a paper, in order to ensure the public building up and testing of knowledge over time.[75] More broadly, the authority of scientific knowledge has always been an effect of the politics, and not just the techniques, of its production. If we look back to the birth of the experiment as a foundation of scientific practice in Restoration England, we can see that the community of "experimental philosophers" was presented as a "model of the ideal polity"—a community without an arbitrary ruler, inhabiting a public space in which free men faithfully testified to the results of the experiments they witnessed in order to produce useful knowledge that could intervene in the world.[76] The foundation for any authority that the resulting scientific knowledge can claim will come from trust in our collective practices rather than from reifying our methods.[77]

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72. *See id.* at 265–83.

73. Anne Orford, *Scientific Reason and the Discipline of International Law*, 25 EUR. J. INT'L L. 369 (2014). For a recent argument in these terms, see NAOMI ORESKES, WHY TRUST SCIENCE? (2019).

74. Mike Hulme and Jerome Ravetz, *"Show Your Working": What "ClimateGate" Means*, BBC NEWS (Dec. 1, 2009).

75. *Academics Shouldn't Be Afraid That Their Work May Not Be Being Cited as Much as They Would Like: Citation Rates Vary Widely Across Disciplines*, LSE IMPACT BLOG (May 31, 2011).

76. STEVEN SHAPIN AND SIMON SCHAFFER, LEVIATHAN AND THE AIR-PUMP: HOBBES, BOYLE, AND THE EXPERIMENTAL LIFE (1985). On the shift from a focus on science as representation to a focus on science as intervention, see IAN HACKING, REPRESENTING AND INTERVENING: INTRODUCTORY TOPICS IN THE PHILOSOPHY OF NATURAL SCIENCE (1983).

77. See ESTHER TURNHOUT, WILLEMIJN TUINSTRA AND WILLEM HALFFMAN,

D. Reflections on the Conduct of Interdisciplinary Encounters

The final set of responses by Oliver Diggelmann,[78] Jeffrey Dunoff,[79] Steven Ratner,[80] and Harlan Grant Cohen[81] take up the questions the book poses for interdisciplinary encounters more broadly. I am grateful that these contributors did not see the book as a call to the barricades, but rather, in Dunoff's words, a call for the "building of bridges across disciplinary divides." Each of their essays offered thoughtful reflections on how interdisciplinary encounters might better be approached. Diggelmann cautions that it is important to remain open to the doubts to which interdisciplinary encounters can give rise. Dunoff notes the need for interdisciplinary encounters to avoid reifying disciplinary borders. Ratner shares my sense that it is important to avoid outsourcing our normative commitments to some apparently objective outside discipline. And Cohen offers a poetic and redemptive meditation on what the rabbinic tradition teaches about the meaning of collaborative learning: "[k]nowledge and understanding are pursued not through solitary readings of texts, but through debate, questioning, and argumentation, not with an enemy or adversary, but with a trusted friend." In the final section of this response, I want to draw on these reflections, to think further about how interdisciplinary encounters might be conducted to avoid some of the problems with which the book wrestles.

V. EIGHT PROTOCOLS FOR INTERDISCIPLINARY ENCOUNTERS

The book aims to contribute to a more nuanced and reflexive conversation between international lawyers and historians that is open to the plural ways in which we make meaning about the past. A number of the contributors to this symposium, however, commented that this left them with the feeling of being *too* unconstrained. Donaldson, for example, felt uneasy about the vision of law emerging from the book as "a self-referential, self-authorising, perpetually mobile discourse." She concluded that "[w]riting both in and beyond law, straddling the edges in the way that I take Orford to be advocating, will demand a particular style and openness." Parker argued that in suggesting that historians should not seek to impose their methods on scholars in another discipline, I was not taking sufficiently seriously "the difficulty of shedding at will the disciplinary norms and methods into which one has been socialized." And Bodansky noted critically that I do not attempt to set forth methodological rules to replace the methodological "dogmas" that I question.

As I discussed earlier, mandating a different set of rules or methods for

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ENVIRONMENTAL EXPERTISE (2019). See also Latour, *supra* note 51, for a critique of scholarship that values the letter rather than the spirit of empiricism.

78. Oliver Diggelmann, *Historiography as Creative Constructivism? Anne Orford on the Criticism of International Legal Scholarship by Contextualist Historians*, 36 TEMP. INT'L & COMPAR. LJ. 141 (2022).

79. Jeffrey L. Dunoff, *International Law and the Politics of Interdisciplinarity*, 36 TEMP. INT'L & COMPAR. LJ. 151 (2022).

80. Steven Ratner, *Not Just the Historians: Anne Orford's Insights and the Suspicions Between International Law and Philosophy*, 36 TEMP. INT'L & COMPAR. LJ. 163 (2022).

81. Harlan Grant Cohen, *Journeys Through Space and Time While Reading* INTERNATIONAL LAW AND THE POLITICS OF HISTORY, *Found on a Palimpsest, Translated for You, the Reader*, 36 TEMP. INT'L & COMPAR. LJ. 129 (2022).

historical research will not resolve the issues I raise. This does not mean, however, that anything goes in the encounter between the rules of one discipline and the rules of another or that I believe encountering another discipline requires "shedding" our disciplinary socialization. While some international lawyers try to establish that the European tradition of international law is universal and beyond politics, and some historians of international law seek to make the same claims for their empiricist methods, I prefer to focus on the "inter-" involved in both international and interdisciplinary encounters. Rather than managing the potential conflict caused by interdisciplinary encounters by trying to impose our rules on the other discipline, I want to conclude the rich conversation developed in this symposium by proposing that we think in terms of protocols by which to conduct such encounters.

I have argued elsewhere that we might understand the tradition of international law that emerged alongside the modern European state system as a source of protocols, rituals, and obligations governing the meeting of laws.[82] In that sense, European international law offers an archive of one set of attempts to solve the problems that arise in the encounter with strangers, under the conditions of a modern politics lacking any universal authority (whether religious, imperial, or sovereign) to guarantee the truth of one law rather than another. The public international law of Europe emerged out of the collapse of the *respublica Christiana*, as one attempt to respond to the resulting fragmentation of Christian Europe into separate states. Protocols governing the movement, immunity and privileges of diplomats were one of the earliest forms of international law to develop in that fractured Europe.

Once European powers had colonized much of the world, Europeans began to think of their regional law as universal.[83] But remembering the early forms of international law that emerged alongside the practice of diplomacy associated first with cities and then nation-states within Europe might offer resources for international lawyers to understand ourselves as encountering other legal (or disciplinary) orders as one participant among many rather than as the representatives of a universal law. Contextualist historiography has also been motivated by encountering rather than erasing differences between present and past. And scholars in international relations have begun to explore the potential of new approaches to diplomacy as a guide to "finding ways and terms under which rival entities and ways of living can co-exist and flourish."[84]

Thinking in terms of the protocols that might govern encounters between disciplines, rather than mandating that one discipline conform to the rules of another, might thus offer a better guide to the conduct of interdisciplinary work in which there is no authority to guarantee the truth of one set of rules rather than another. So while I am not able or willing to provide a new set of methodological rules for

82. Anne Orford, *Ritual, Mediation, and the International Laws of the South*, 16 GRIFFITH L. REV. 353 (2007).

83. Yasuaki Onuma, *When Was the Law of International Society Born? – An Inquiry of the History of International Law from an Intercivilizational Perspective*' 2 J. HIST. INT'L L. 1, 5 (2000).

84. Costas M Constantinou & James Der Derian, *Sustaining Global Hope: Sovereignty, Power and the Transformation of Diplomacy, in* SUSTAINABLE DIPLOMACIES 1, 2 (Costas M Constantinou & James Der Derian eds., 2010).

studying the legal past, I will conclude this symposium by proposing a set of protocols for the conduct of interdisciplinary encounters.

1. Don't take anyone's word for what the other discipline is or means (not even mine). As you get started, don't treat any description or map of another discipline as authoritative. Any description of a disciplinary field, including of who is inside or outside the field, is itself a normative act of interpretation. If you are reading your way into a new field, and you come across a piece that seems to offer you the map to this new land or the key to the kingdom, keep reading to figure out how that map was created and how it has been received. Did the author do the mapping themselves or did they produce the map based on surveys created by others? Who has criticised it and why? Do those critiques seem fair and compelling? If not, what does that tell you about the original piece or about its critics? How would you situate the resulting alliances, struggles, and schisms in relation to your own values and commitments?

2. Learn the language. Try to figure out the key terms, concepts, authorities, and touchstones that structure the field you are entering. Accept that this will take time and effort, just like learning any other language. Don't condemn the people you are encountering in this new discipline because they use a different language to yours. Don't assume that the people you encounter mean the same thing as you do when they use a term that your two disciplines share. Don't assume that everyone who speaks this new language shares the same politics—there are always dissident speakers of any centralized language. All of this doesn't mean giving up your disciplinary mother tongue. It does mean spending time on and taking seriously the endlessly complicated work of translation.

3. Situate yourself. Do not imagine yourself above the encounter looking down on the people below you, mapping their movements, and classifying their behaviour. Reflect upon how the process of being disciplined in your own field has required coming to incorporate, defend, resist, transmit, and generally orient yourself in relation to a set of constitutive disciplinary narratives, generic conventions, hierarchies, language games, practices, and social relations. Be ready to translate and explain the working premises of that disciplining process to the strangers you encounter in the new field. Don't imagine that you can have a meaningful encounter with strangers and yet have the conventions that found your own discipline left unquestioned or unchallenged. Don't think that you can just occupy a new field and displace the people who are already there. Take seriously the relations you create with the existing inhabitants as you encounter the new discipline.

4. Treat every text as an intervention. It can be easy to think that some articles or books are an exception to this rule. This is particularly the case for work written with a tone of certainty or condescension, or by authors who denounce the work of others as naïve, partisan, or unscientific and portray their own work as savvy, impartial, or rigorous. Try to understand what the author is trying to achieve in writing this text. Ask yourself why the text is being written in that field and why now—why are particular issues on the agenda at this moment? How does the text fit into the broader structure and practice of argument within the discipline or the communities outside the university with which it engages? With what positions is the intervention allied? Who is it trying to defeat? How does it relate to broader institutional manoeuvres or struggles for power both within the university and

beyond? For example, any account of international law (or its history) that doesn't attend to the fact that international law is a dialectical field will run the risk of presenting one side of the story as somehow representing the whole. It is vital to look for competing arguments and seek to understand the stakes involved in the resulting debates in order to avoid offering an unwitting amplification of someone else's ideological intervention.

5. Show your work; cite your sources: The practices of showing our work and citing our sources are central to the idea of science (broadly conceived) as a collective enterprise. These basic tenets are even more important when it comes to interdisciplinary work. Citing the sources upon which a researcher relies for references, interpretations, frames, and narratives makes it possible to subject to scrutiny claims to be making novel arguments about another discipline or to be exposing or correcting the work done there. By making clear what sources have been relied upon to shape an interpretation of another discipline and why, readers can understand how that interpretation was formed and have a means of assessing the stakes of that interpretation.

6. Think through the encounter. Think about what work the interdisciplinary encounter is doing for you. What do you want from the other discipline? What gap do you think it is going to be able to fill for you (as a researcher, as a human being)? Why do you think that this discipline can offer you what you have been unable to find elsewhere?[85] What (celebratory or critical) vision of your own field are you able to constitute through the encounter with the other discipline that you could not plausibly constitute otherwise? Is that a good thing or a bad thing?

7. Expect to work hard. If you read this list and think it all sounds like too much hard work, then interdisciplinary research is probably not for you. If you imagine that you can stroll into another field, survey it swiftly, and either immediately claim its insights as your own or teach everyone there a thing or two, you either have too ambitious a sense of your own capability or too little sense of theirs.

8. Be creative; take responsibility. I hope that my book and the conversations in this symposium might offer scholars interested in international law, and particularly early career scholars, the tools and encouragement to resist dominant methodological prescriptions, whatever form they take, and to make the most of the creativity and generativity we exercise in the project of making the law and its history. In the end, no other discipline or method can lift us above the political struggle for the law or offer us an escape from uncertainty. All that is available is to construct an argument and commit to the premises or values underpinning it, knowing and accepting that everything about that is contingent. We need to take responsibility for those choices and their implications and to realise that doing so is an ongoing, evolving, and collective process that we undertake, thankfully, not alone but in community.

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85. See Maria Aristodemou, *A Constant Craving for Fresh Brains and a Taste for Our Decaffeinated Neighbours*, 25 EUR. J. INT'L L. 35 (2014) for a further exploration of these questions.