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Kate Purcell

**Faltering at the Critical Turn to History:  
'Juridical Thinking' in International Law and  
Genealogy as History, Critique, and Therapy**

NYU School of Law • New York, NY 10011  
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ISSN 2161-0320 (online)  
Copy Editor: Danielle Leeds Kim  
© Purcell 2015  
New York University School of Law  
New York, NY 10011  
USA

Publications in the Series should be cited as:  
AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]

**FALTERING AT THE CRITICAL TURN TO HISTORY:  
'JURIDICAL THINKING' IN INTERNATIONAL LAW AND  
GENEALOGY AS HISTORY, CRITIQUE, AND THERAPY**

Kate Purcell\*

**Abstract**

This article reflects on the place of history in international law and its critique. The turn to history in critical international law scholarship has attracted two broad objections. The first alleges a normative deficit: critical histories of international law are considered to be purely deconstructive, failing to direct or effect the construction of positive alternatives. The second objection is often less clearly articulated, with allegations that the turn to history is inappropriate or inadequate attached to arguments favouring the deployment of 'juridical thinking' for the purposes of international law's critique. What is notable about these objections is the extent to which they have been advanced, elaborated upon or otherwise conceded by scholars turning to history to describe, explain and critique international law. Significantly, this appears to follow from either a tacit acceptance or strategic embrace of the very claims and forms of reasoning that critical history is uniquely positioned to challenge—namely, the particular ways in which international law relates past and present. This article traces the dangers and disadvantages of this move. It argues that a reflexive engagement with the forms and uses of history both within international legal reasoning and where international law is taken as the object of historical investigation might strengthen critical history at the point at which it currently falters. The article sets out the advantages in this regard of genealogy as history, critique, and therapy.

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History has been an important resource for critical international law scholarship. While the significance of history for critique was recognized by the ‘first generation’ of TWAIL scholars, a rich TWAIL II literature has since developed this insight in a variety of ways.<sup>1</sup> Though its ‘historically aware methodology’ is informed by other critical approaches,<sup>2</sup> this literature has been a particularly important stimulus for a broader ‘turn to history’ in international law. Most notably, historical analysis has been used to expose the role of the ideologies and practices of European imperialism in the making of international law.<sup>3</sup> Enquiries into international law’s imperial past and efforts to trace its continuing effects—the legacies of colonialism in particular—have unsettled traditional accounts of international law in terms of both content and approach. This has inspired a whole range of critical and revisionist historical studies of the discipline and its doctrines and practices.

Setting to one side the varying strengths and weaknesses of individual critical histories in this vein (and noting that not all historical revisionism is also critical), two general objections to the use of history to critique international law past and present can be found in both sympathetic and unsympathetic responses to such projects. The first alleges a normative deficit: critical histories of international law are considered to be purely deconstructive, either shying away from the hard work of effecting present change and imagining future possibilities, or spurning such endeavours as futile. The second objection tends to be less clearly articulated, though it is perhaps more

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<sup>1</sup> On the distinction between first and second generation TWAIL scholarship see Anghie and Chimni, ‘Third World Approaches to International Law and Individual Responsibility in Internal Conflicts’ (1999) 93 *AJIL* 291; Chimni, ‘The World of TWAIL’ (2011) 3 *Trade, Law & Dev.* 14; Gathii, ‘TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography’ (2011) 3 *Trade, Law & Dev.* 26. Some of the problems with this ‘periodization’ are set out by Mickelson, ‘Taking Stock of TWAIL Histories’ (2008) 10 *Int.C.L.Rev.*355, at 360-361. Nevertheless, there does appear to be a significant difference in the use of history to challenge the neglect of the third world in traditional (and Eurocentric) accounts of international law before and after the 1980s: see Becker Lorca, ‘Eurocentricism in the History of International Law’ in B. Fassbender and A. Peters (eds.), *The Oxford Handbook of the History of International Law* (OUP, 2012) 1034.

<sup>2</sup> Gathii, *supra* note 1. The 1990s saw significant interplay between TWAIL, Critical Legal Studies, Critical Race Theory and Lat-Crit Theory in this regard.

<sup>3</sup> Influential works include G. Gong, *The Standard of Civilization in International Society* (Clarendon, 1984); M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (CUP, 2001) (focusing on inter-imperial competition and conflict); and A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, 2007) (focusing on the colonial encounter). Elements of Koskenniemi’s *Gentle Civilizer* and his epilogue to the 2005 reissue of *From Apology to Utopia* may be understood to respond to TWAIL critique of the latter work: see Rajagopal, ‘Martti Koskenniemi’s *From Apology to Utopia*: A Reflection’ (2006) 7 (12) *German L.J.* 1089.

interesting. Several authors have recently suggested that turning to history in order to critique international law is inadequate, and even, in some sense, improper. Instead, they propose that the ‘juridical’—in the sense of modes of reasoning and concepts immanent to law—should be deployed for the purposes of international law’s critique.

Notably, these objections have been advanced, elaborated upon or otherwise conceded by scholars turning to history to describe, explain and critique international law. This appears to follow from either a tacit acceptance or strategic embrace of the very claims and forms of reasoning that critical history is uniquely positioned to challenge—namely, the particular ways in which international law relates past and present. This article traces the dangers and disadvantages of this move. It is argued that the full critical potential of the turn to history in international law scholarship is left unrealized where the study of the past is taken to ground normative conclusions or framed by the ‘juridical’ terms of the discourse being investigated.

The point is not that constructive criticism or immanent critique employing and engaging with ‘juridical thinking’ is illegitimate per se, but that tactically, these manoeuvres attenuate the particular power of historical critique in relation to international law. This article argues that a reflexive engagement with the forms and uses of history both within international legal reasoning and where international law is taken as the object of historical investigation might strengthen critical history at the point at which it currently falters. It sets out the advantages in this regard of genealogy as history, critique, and even therapy for the international lawyer moved by calls for construction out of deconstruction or advocacy for the ‘juridical’ as the appropriate form for critical engagement with international legal thought and practice. Significantly, this does not entail an argument for nihilism and negation over the reform and redemption of international law or favour ‘external’ over ‘immanent’ critique. Nor does it embrace the inverse. While these were debated as alternative approaches in the early days of the TWAIL movement (which now encompasses both),<sup>4</sup> this typology fails to capture how historical critique—and genealogy in particular—can operate and what it might achieve.

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<sup>4</sup> I am grateful to BS Chimni for emphasising this point in his comments on an earlier version of this paper presented at the Third Annual Junior Faculty Forum for International Law (University of Melbourne, 7-9 July 2014).

## 1. Historical method, 'juridical thinking', and the normative deficit

Responding to commentary on her study of *International Authority and the Responsibility to Protect*, Anne Orford has explained that the book was 'a wager that there is something to be gained—theoretically, politically and empirically—by developing a primarily juridical (rather than historical, philosophical, economic or sociological) method as a basis for exploring... contemporary international developments' such as the array of interventions in the decolonized world rationalized in terms of protection.<sup>5</sup> In a more extended reflection on the relationship between law and history, Orford presents 'the past as law' in opposition to 'the past as history'. Distinguishing legal and historical modes of engagement with the past, she argues that '[t]he self-imposed task of today's contextualist historians is to think about concepts in their proper time and place', while 'the task of international lawyers is to think about how concepts move across time and space.'<sup>6</sup>

Although this article focuses on Orford's argument in these writings, she is not the only scholar of international law to take the view that 'there is something to be gained' by a distinctively legal critique, or to imply that something may be lost in the turn to history. Orford's work is particularly valuable, however, in that she has sought to more clearly articulate and defend this view. A similar view may nevertheless underlie, for example, Akbar Rasulov's implicitly critical comment that, 'like with legal semiotics before it, there...seems to be nothing specifically *legal* about the general theoretical architecture of legal postcolonialism'.<sup>7</sup> A preference for the 'juridical' over the historical also appears to be at play in Sundhya Pahuja's critical redescription of 'the meeting between international law and its "others" (so to speak) as an encounter between rival jurisdictions'.<sup>8</sup> This can be seen in her representation of the alternatives as, on the one

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<sup>5</sup> Orford, 'On International Legal Method' (2013) 1 (1) *LRIL* 166; A. Orford, *International Authority and the Responsibility to Protect* (CUP, 2011).

<sup>6</sup> Orford, 'The Past as Law or History? The Relevance of Imperialism for Modern International Law' NYU IILJ Working Paper 2012/2, at 2.

<sup>7</sup> Rasulov, 'New Approaches to International Law: Images of a Genealogy' in J.M. Beneyto and D. Kennedy (eds.), *New Approaches to International Law: The European and the American Experiences* (Asser, 2012) 151, at 167.

<sup>8</sup> Pahuja, 'Laws of Encounter: A Jurisdictional Account of International Law' (2013) 1 (1) *LRIL* 63, at 65, an argument which draws substantially on S. Dorsett and S. McVeigh, *Jurisdiction* (Routledge, 2012). See further Dorsett and McVeigh, 'Conduct of Laws: Native Title, Responsibility and Some Limits of Jurisdictional Thinking' (2012) 36 *MULR* 470.

hand, attempts to ‘somehow escape from the problems we identify with modern legality by retreating to another discipline, idiom or style’, and on the other, ‘stay[ing] with it and call[ing] it to account from within, often in terms of an (immanent) promise of justice’.<sup>9</sup> Interestingly, both Orford and Pahuja seem to be actually engaged (at least in part) in developing critical histories which challenge standard histories of international law and may also be brought to bear upon international legal practice. To the extent that they make use of the forms and concepts of what Orford identifies as ‘juridical thinking’, however, the critical bite of their historical work may be diminished.

The two objections to a historical critique of international law considered in this article appear to be bound up together. Calls for a juridical approach may be underpinned by a sense that to do otherwise is to retreat from some kind of (undertheorized) responsibility to work within the law, if against it—a phenomenon of interest in itself. The objection to history, however, at least for Orford, seems to be based on the belief that its basic methodological precepts result in a walling in of the past that neglects its continuing relevance for the present. Orford understands contextual history in particular to be dependent upon a strict division between past and present that is fundamentally at odds with the ongoing relation of past and present that characterizes international legal reasoning. She argues, moreover, that a commitment to this distinction is what makes the use of the past in present international law appear hopelessly anachronistic. Her response takes the form of an inversion—she suggests that this very anachronism, recast as the temporal and spatial dynamism of ‘juridical thinking’, is more effective than history as a means of critically engaging international law.<sup>10</sup>

Orford’s broad concern is that (contextual) history cannot help us to understand the way that meaning ‘moves across time and space’.<sup>11</sup> Yet she also appears to be concerned with the capacity of history to answer the immediate question ‘what are we to do?’ Orford suggests that we should value ‘juridical thinking’ for its ability to take the past as ‘a source or rationalisation of present obligations’ and provide a means of

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<sup>9</sup> Pahuja, *supra* note 8, at 96. See also Paulus, ‘International Law after Postmodernism: Towards Renewal or Decline of International Law’ (2001) 14 (4) *LJIL* 727, at 739, who suggests that the turn to history may ‘sometimes [be] an escape of sorts from the exigencies of our own time’.

<sup>10</sup> Orford, *supra* note 6, at 6-7; Orford, ‘On Method’, *supra* note 5, at 175.

<sup>11</sup> Orford, *supra* note 6, at 2.

‘[making] the present intelligible’.<sup>12</sup> She understands the injunction against anachronism as a matter of historical method to exclude these possibilities. Her (re)turn to the juridical, then, appears to be partly motivated by the belief that *normative resources* may be gained by so doing—particularly, that ‘references to past texts’ may be used ‘to achieve...ideological innovation’.<sup>13</sup>

There is some oblique reasoning at work in Orford’s move from history to the ‘juridical’. The suggestion that ‘juridical thinking’ is partly, even substantially, defined by forms of reasoning that treat aspects of the past as normatively significant for the present may be accepted as an adequate description of international legal argument (the use of precedent most obviously). Yet Orford claims that the same form of reasoning accounts for the insight that ‘legal concepts and practices that were developed in the age of formal empire may continue to shape international law in the post-colonial era.’<sup>14</sup> Critical historical scholarship exposing international law’s imperial legacy, however, for the most part does not adopt the form of reasoning used within international legal argument. Nor are the continuing effects of imperialism seen as solely a function of those forms of reasoning (e.g. the continuing validity of precedents established in a colonial context). Rather, the success of TWAIL scholarship in demonstrating that international law has been and continues to be shaped by its imperial past is largely the result of historical analysis informed by a contextualist historical method, as well as postcolonial theory.

Where ‘juridical thinking’ can be discerned in this literature, it is far from clear that this is its virtue. The assumption that international law has always been and remains oriented towards justice, for example, may be considered an effect of juridical thinking. In light of this assumption, critique is a matter of exposing the failures of international law to further justice. Significantly, this initially deconstructive historical analysis is readily transformed into a constructive project aimed at overcoming past failures and finally achieving international law’s ‘immanent promise’.<sup>15</sup> The normative effect of exposing ‘what went wrong’ en route towards justice as international law’s basic

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<sup>12</sup> *Ibid.*, at 9.

<sup>13</sup> *Ibid.*, at 11. See also Orford, ‘On Method’, *supra* note 5, at 174, and Section 3 below on Orford’s understanding of the present utility of her study of the past in *International Authority*.

<sup>14</sup> Orford, *supra* note 6, at 2.

<sup>15</sup> Pahuja, *supra* note 8, at 96.



aspiration may appeal to international lawyers convinced that international law is fundamentally, or at least potentially, a force for good. Yet this form of analysis comes at a cost, and may be better understood as a symptom of the limits of juridical thinking to be overcome than a virtue to be cultivated. What is missing here and in a 'juridical' mode of enquiry more broadly is a critical perspective on the particular form or forms of normativity deployed in international law, which calls for the law to live up to an 'immanent promise of justice' reproduce rather than critically scrutinize.

Orford and other advocates of a 'juridical' rather than historical mode of critically engaging international law recognize that the way in which international legal reasoning tends to relate past and present is problematic *as history*. Yet they also suggest that a distinction between 'juridical' forms of reasoning and historical argument limits, if not precludes, critique on this basis. The following discussion reflects on the factors encouraging this view and questions its plausibility. It is argued that the charge of anachronism, far from being inapposite in relation to the 'juridical', finds a target in standard histories of international law as a discipline and also has teeth in relation to international legal reasoning precisely because grand narratives of international law and legal argumentation within it make use of historical methods and their 'truth effect'. Yet anachronism is not the defining feature of international law, though it can be identified in many traditional histories of international law and certain instances of international legal reasoning. What is significant about international law is rather the centrality of historical forms of reasoning within it. That these forms of reasoning have (historically) tended towards anachronism does not mean that anachronism is necessary or inevitable. Orford's identification of 'juridical thinking' with the movement of meaning over time is not evidence of international law's departure from history, but testament to the extent to which history and law are bound up. This article explores that relation, arguing that a historical mode of analysis remains one of the most potent means of explaining and critiquing international law.

The particular form of critical history which this article seeks to elaborate is genealogy, in the sense developed by Foucault out of Nietzsche's thought. Genealogy is a method by which we may write a 'history of the present'.<sup>16</sup> It is a *historical* mode of

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<sup>16</sup> M. Foucault, *Discipline and Punish: The Birth of the Prison* (trans. Sheridan; Vintage, 2005), at 30-1.

enquiry insofar as it looks to the past to explain the conditions of possibility for present circumstances. It is a form of *critique* oriented towards the present; genealogy aims to examine how it is that things have come to be the way that they are as a tactic. An enquiry into conditions of possibility may expose ‘the accidents, the minute deviations— or conversely, the complete reversals—the errors, the false appraisals, and the faulty calculations that gave birth to those things that continue to exist and have value for us’.<sup>17</sup> It shows how the categories, concepts and practices that appear to us most natural are historically produced and that this history is one of contingency. Significantly, ‘[showing] how things have been historically contingent’ is not to say that they cannot be explained or understood,<sup>18</sup> but that they are ‘for such and such a [historically specific] reason intelligible but not necessary’.<sup>19</sup> This has emancipatory potential insofar as it shows us that ‘what exists is far from filling all possible spaces’.<sup>20</sup>

As such, genealogy is also *therapeutic*—having an antidotal effect on ways of understanding and engaging with the world that are unnecessarily and dangerously constrained, in part by exposing those constraints as both unnecessary and dangerous. The ‘curative science’<sup>21</sup> of history in the form of genealogy is particularly appropriate to international law and so-called ‘juridical thinking’. The way in which international law constantly retrieves the past ‘as a source or rationalisation of present obligation’ or invokes precedents ‘to make the present intelligible’<sup>22</sup> may be investigated genealogically. Rather than adopting the same mode of analysis in order to dispute the content or choice of precedents or to show how far particular features of international law do or do not live up to an inherent principle or ‘promise’ of justice,<sup>23</sup> genealogy exposes what is obscured or excluded by the conceptual categories and practices of international law. This includes its manner of relating past and present, and its

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<sup>17</sup> Foucault ‘Nietzsche, Genealogy, History’ in D.F. Bouchard (ed.), *Language, Counter-Memory, Practice* (Cornell University Press, 1977) 139, at 146.

<sup>18</sup> Marks, ‘False Contingency’ (2009) 62 *CLP*1, at 2.

<sup>19</sup> Foucault, ‘Friendship as a Way of Life’ in S. Lotringer (ed.), *Foucault Live* (trans. Johnson; Semiotext(e), 1989) 308, at 312.

<sup>20</sup> *Ibid.*

<sup>21</sup> Foucault, *supra* note 17, at 156.

<sup>22</sup> Orford, *supra* note 6, at 9.

<sup>23</sup> See Hunter, ‘Global Justice and Regional Metaphysics: On the Critical History of the Law of Nature and Nations’ in S. Dorsett and I. Hunter (eds.), *Law and Politics in British Colonial Thought: Transpositions of Empire* (Palgrave Macmillan, 2010) 11, at 11-12. *Cf.* Pahuja, *supra* note 8, at 96; Orford, *supra* note 6, at 9.

assumptions and expectations regarding normativity. The therapeutic effect for the international lawyer engaged in genealogy, as well as her readers, is to loosen if not entirely break with what Ann Genovese describes as ‘the tendency of law to be legocentric, to view the only sustainable historical narratives as those that mimic law itself.’<sup>24</sup>

In advocating a genealogical approach to the study of international law, I do not claim that genealogy possesses some kind of exclusive validity or universal superiority as a historical and critical method. It is rather the particular advantages of genealogy in connection with international law that recommend it as an approach. Nietzsche, and subsequently Foucault, did not develop the notion of genealogy in the abstract but through specific engagements with contemporary concepts and practices. Genealogy is a practical approach rather than a grand theory, though this does not mean that it cannot be described and utilized as a bundle of intellectual tools.<sup>25</sup> The value of these tools follows from certain features of the object of study. Like the Christian morality examined by Nietzsche and the array of practices studied by Foucault, international law entails ‘efforts to support established authorities on the basis of their origin’,<sup>26</sup> identifying a privileged provenance with both value and necessity. It is because genealogy directly challenges this way of thinking about the past and its relationship with the present that it has particular value for critical work on international law.

## **2. History and the ‘juridical’ in international law**

Strategy may have played a part in the (re)turn of some scholars from history to the ‘juridical’ as a mode of critically engaging international law. The apparent facility with which doctrinal international lawyers turn away from the insights and challenges of historical critique may have prompted recourse to juridical concepts and forms of argument in an effort to engage the ‘mainstream’ on more familiar terms or in relation to more familiar matters. Yet resistance does not necessarily signal the weakness of

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<sup>24</sup> Genovese, ‘How to Write Feminist Legal History: Some Notes on Genealogical Method, Family Law, and the Politics of the Present’ in D. Kirkby (ed.), *Past Law, Present Histories* (ANU E-Press, 2012) 139, at 143.

<sup>25</sup> Skinner makes a similar point in relation to the methodological precepts he advances in ‘Meaning and Understanding in the History of Ideas’ and subsequent works: see Skinner, ‘A Reply to My Critics’ in J. Tully (ed.), *Meaning and Context: Quentin Skinner and his Critics* (Polity, 1988) 231, at 233.

<sup>26</sup> G. Gutting, *Foucault* (OUP, 2005), at 50.

critique in a historical mode. Rather, it points to the complicated relationship between (a) the use of history within international law, (b) standard histories of international law that among other things seek to establish and reinforce its pedigree and status as a discipline, and (c) critical histories of international law.

Critical histories of international law are usually opposed to standard histories of international law, rather than history as it is used *within* international legal argument. Instead of being based on an assessment of where critique is most needed (or where the greatest danger lies), this focus appears to reflect a belief that international legal reasoning is unassailable, or at least less amenable to a historical mode of critique. As such, it seems that a 'juridical' form of reasoning can go where historical critique cannot. The reason why international legal reasoning appears unassailable, however, seems to be the peculiar way in which international legal reasoning relates past and present—that is, precisely the way in which international legal reasoning is historical. Rather than either refusing to engage with or reproducing this 'historico-legal' form of reasoning,<sup>27</sup> attending to the type of history it involves can facilitate a more penetrating critique.

History, as Thomas Skouteris has recently emphasized, is central to international law.<sup>28</sup> A historical mode of critique is a means of engaging with and contesting the 'historical narrative [that] entwines legal writing so seamlessly that it almost passes unnoticed'.<sup>29</sup> The centrality of history to international law admits several different types of intervention. The *content* of international law's claims about the past may be challenged, with consequences for its present application. Revisiting familiar precedents, for example, may alter or expand our understanding of their immediate possibilities.<sup>30</sup> The contextual historian might usefully interrogate applications of the doctrine of intertemporality to recover the idiosyncrasies of past law, which may serve to problematize the doctrine itself. Yet challenges to the content of international law's historical claims may be unduly constrained if they do not also attend to the *form* of historical argument carrying those claims, as well as that relied on to construct any

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<sup>27</sup> Skinner, 'Meaning and Understanding in the History of Ideas' (1969) 8 *History and Theory* 3, at 9; cf. Orford, 'On Method', *supra* note 5, at 172-3.

<sup>28</sup> Skouteris, 'Engaging History in International Law' in *New Approaches*, *supra* note 7, at 99-121.

<sup>29</sup> *Ibid.*, at 100.

<sup>30</sup> Kritsiotis' current work on the *Caroline* correspondence exemplifies this type of intervention: Kritsiotis, 'Reading and Rereading the *Caroline* Correspondence, 1838–1842: Shaping the Modern Right of Self-Defence in International Law', Faculty of Law, UNSW (13 May 2014).

counter-claims. Engagement with international law through history will be more sharply critical where it is methodologically (self-)conscious—aware of what historical enquiry and writing is and what it can and cannot achieve.

The advantage of such an awareness in relation to international law is twofold. First, the critical historian is attuned to the ways in which scholars and practitioners of international law make use of historical argument. Secondly, the critical historian will reflect upon her own method relative to that employed by international law. Many critical histories of international law display this type of reflexivity to some degree. As Skouteris points out, their authors generally understand both the object of study and their writing on it as discourse and do not pretend to recover the truth of the past.<sup>31</sup> Indeed, an important part of what they do is to ‘bring out the instability of history’s claim to truth’.<sup>32</sup> They also take seriously the insights of contemporary historiography regarding, for example, the importance of attending to context and how this differs from a search for causes, as well as the dangers of narratives of progress.<sup>33</sup>

Skouteris remains sceptical about how far ‘self-reflexivity about the limits of method really makes a difference’ in critical historical work on international law.<sup>34</sup> As he observes, many critical historians fall back on conventions such as ‘sequential narrative, cause-and-effect reasoning, ontological statements, and so on’.<sup>35</sup> Interestingly, Skouteris suggests that they may do so in order to acquire ‘professional validity’.<sup>36</sup> This insight informs his proposed solution: critical histories need a different ‘methodological template’—a ‘form that justifies their content’.<sup>37</sup> He suggests that this template might be determined by ‘established group practices’ bolstered by reference to ‘neighbouring social sciences’, with the basic criterion being adequacy to ‘the primary goal’ of ‘the critique of “axiomatic fictions”’.<sup>38</sup>

While Skouteris is right to call on critical historians to move beyond methodological forms inadequate to the content of their claims, the suggestion that

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<sup>31</sup> Skouteris, *supra* note 28, at 112-113.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*, at 114-116.

<sup>34</sup> *Ibid.*, at 116-117.

<sup>35</sup> *Ibid.*, at 117.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

critical historians should identify their own ‘set of professional practices for peer validation’ seems to leave critical history as a kind of preaching to the converted. If ‘mainstream histories’ and critical histories have distinct ‘methodological templates’, how might the latter be mobilized against the former?

One possibility is that critical histories will simply offer an alternative in the same space, leaving the international lawyer to choose between two sets of professional practices. A generous interpretation of this solution might view it as a step towards a greater diversity of international law histories. Such an interpretation might also dismiss any dissatisfaction on the part of either critical or mainstream historians with this accommodation of their disparate approaches as symptomatic of a propensity to universalize their respective methods and insights—a tendency to be resisted. Yet the notion of parallel professional practices remains problematic. The suggestion that ‘mainstream’ histories of international law are valid and persuasive to the ‘mainstream’, while critical histories are valid and persuasive to critical scholars, fails to account for the character of the relation between mainstream and critical histories of international law as one of continual conflict rather than comfortable co-existence. More importantly, it fails to grasp what is at stake in this conflict.

The difficulty is not only that the methodological differences between ‘mainstream’ and critical histories are overstated. Skouteris himself recognizes that ‘there may be quite a bit of middle space’ where ‘engaging history can allow new insights to make a huge difference for a lot of people and for a long time even within the present paradigm of liberal democratic political discourse’.<sup>39</sup> Searching for common ground, however, seems to give up too much of history’s critical potential in relation to international law. The broad claim of this article is that critical histories will have more leverage in relation to international law if they engage overtly with methodology—both their own and that of standard histories of international law and international legal reasoning. The reason why both mainstream and critical historians are unlikely to be content to rely on their respective peer groups alone for validation is that what the latter say matters for the former. This is *because* and not in spite of their methodological differences.

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<sup>39</sup> *Ibid.*, at 118.

The crucial point is that international law is always already deeply historical—‘[international] legal work inevitably requires a positioned engagement with the past, thus producing (or contributing to the production of) “historical knowledge”’.<sup>40</sup> Its manner of engaging with the past, however, has for the most part ignored not only marginal developments but paradigm shifts in historiography and the philosophy of history since the nineteenth century. The methods or techniques that many critical historians of international law fall back upon<sup>41</sup> are the methods and techniques of the international lawyer, whose forms of reasoning and representation are shot through with nineteenth century historiography. The ossification of mainstream nineteenth century historiography in international law is not necessarily surprising, given the importance of this period in the making of modern international law.<sup>42</sup> The use of history in the considerable efforts at this time to establish the character and status of international law *as law* may partly explain the continuing resistance of the discipline to unsettling developments in postmodern historiography.

Critical scholars uneasy with a historical mode of engaging international law and advocating a (re)turn to the ‘juridical’ may share with mainstream historians and international lawyers more broadly a concern to ‘distinguish’ the discipline in the sense of both valorising it and marking it as distinct. There may also be, in the preference for a ‘juridical’ approach, something of the ‘cobbler [thinking] leather is the only thing’.<sup>43</sup> This might be considered natural and justifiable—after all, it is not surprising that international legal scholars of a critical bent or otherwise should wish to work within their area of expertise. Yet there is no reason to presuppose that the most interesting, relevant and effective critique (where directed towards change) will be one worked within familiar disciplinary boundaries. This is particularly true when discourse and practice aimed at the construction and reinforcement of disciplinary boundaries appears to be part of the problem.

Historical forms of critique matter to scholars and practitioners of international law because narratives about the origins of particular doctrines or international law in general are an integral part of the discipline. Yet the significance of this fact has not

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<sup>40</sup> *Ibid.*, at 101.

<sup>41</sup> *Ibid.* 117.

<sup>42</sup> Koskeniemi, *supra* note 3; Anghie, *supra* note 3.

<sup>43</sup> J.H. Summers (ed.), *The Politics of Truth: Selected Writings of C. Wright Mills* (OUP, 2008), at 33.

been fully realized or exploited in critical historical scholarship. Critical histories often draw out the particular historiography already entwined with international legal doctrine and the grand narratives through which international law establishes and reinforces its distinctiveness and pedigree. Their authors, however, do not always recognize the targets of their critique—for example, myths of objectivity and progress—as features of *history* within international law. Even the more robust challenges to this representation of international law's past and present may betray a sense of uneasiness about the fit between their critique and its object—a sense that the latter may resist such critique because it does not claim to be good history, but rather good law. The critic may adopt the problematic historical conventions deployed by law in an attempt to improve this 'fit'.

It seems that there is something to be gained by recognizing that many of those aspects of international law which critical scholarship seeks to challenge are or involve particular forms and uses of history. More specifically, there is something to be gained by recognizing that the historical is closely tied up with the 'juridical'—an intertwinement that may account for some of the distinctive features of international legal reasoning. The 'juridical', as such, is not immune to a historical mode of critique. Its alleged distinctiveness cannot be raised as a shield against critical history.

While international lawyers may defend their methods as law and not history, the critical historian can show how legal reasoning trades on its treatment of the past as *history*. Historical methods which obscure important aspects of the past may have become features of international legal reasoning, but many international lawyers will not be content to concede this much and carry on. Many, perhaps most, international lawyers are historical realists not merely as a matter of strategy or even convention,<sup>44</sup> but because they believe that the facts of a matter can be known—even if they admit that such knowledge can only ever be partial due to a lack of relevant historical evidence or

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<sup>44</sup> Outi Korhonen appears to see some potential in 'a very thin variety of historical realism' that takes as its starting point a convention regarding what historical reality 'is', insofar as this may be the basis for 'further agreement'. She also recognizes, however, that all interested parties will never be present to agree on any such convention, that future implications can never be fully predicted, and, importantly, that the representation of reality agreed upon will 'always display some preferences': O. Korhonen, *International Law Situated: An Analysis of the Lawyer's Stance towards Culture, History and Community* (Kluwer, 2010), at 149.



an overwhelming mass of it, or in view of the perspectival differences recognized by liberal pluralism.<sup>45</sup>

Historical realism in international legal reasoning makes critical challenges to the form and substance of history within international law difficult to accommodate, but also difficult to ignore. International legal argument is strengthened by the use of realist historical narrative only insofar as the coupling of historical realism and narrative form remains professionally respectable and politically persuasive. Where international legal practice is carried on as usual, it is likely to continue to trade on the ‘reality effect’ of this particular form of historical argument<sup>46</sup> (in broad terms, the impression that the law is grounded in the reality of the past). Part of what a critical history of international law can do is to show how these effects are produced.<sup>47</sup> While relative ability to capture the truth will not then be the test for distinguishing ‘better’ history from ‘worse’,<sup>48</sup> both standard histories of international law and history as it is used within international law remain vulnerable to critique by reference to their historical methodology, which often has consequences relating to content.

Writing history in a juridical mode—for example, by referring exclusively or primarily to materials that are also considered ‘sources’ of international law and, indeed, treating such materials *as sources* rather than questioning the form and content of the archive itself;<sup>49</sup> deliberately reproducing the anachronism of international legal reasoning;<sup>50</sup> or redescribing a variety of practices as historically continuous (if suppressed) forms of lawful authority<sup>51</sup>—may effect a degree of change in present international law. Yet scholarship taking this form also cuts itself off from the greater critical potential of history in connection with international law. While critical histories

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<sup>45</sup> Skouteris, *supra* note 28, at 106-108.

<sup>46</sup> See Barthes, ‘The Reality Effect’ in R. Barthes, *The Rustle of Language*, (trans. Howard; Blackwell, 1986), at 141-148; F. Ankersmit, *History and Topology: The Rise and Fall of Metaphor* (University of California Press, 1994), at 125-161.

<sup>47</sup> See Foucault, ‘Truth and Power’ in C. Gordon (ed.), *Power/Knowledge: Selected Interviews and Other Writings by Michel Foucault, 1972-1977* (Pantheon, 1980) 109, at 118.

<sup>48</sup> Skouteris, *supra* note 28, at 117.

<sup>49</sup> On the dangers of this approach and the importance of attending to ‘the archive’s margin, what was written oblique to official prescriptions and on the ragged edges of protocol...’, see A. Stoler, *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense* (Princeton University Press, 2009), at 2 *et seq.*

<sup>50</sup> This is the move embraced by Orford in her reflections on method, though her approach in *International Authority* is somewhat more complicated: see discussion in Section 3 below.

<sup>51</sup> See generally Pahuja, *supra* note 8.

*can* be brought to bear on the form, use and content of history of and within international law, this cannot be done by participating in the problematic ways in which ‘mainstream’ international law currently engages and deploys history.

The turn to history for the purposes of critiquing international law would benefit from being both more, and more consistently, concerned to challenge the way in which international law positions itself in relation to, and otherwise engages, the past. If this prevents the easy uptake of counter-narratives in current forms of legal reasoning, then it may also permit greater resistance to the inevitable efforts to dilute, disarm or co-opt historical critique. Critical histories of international law are especially powerful when they challenge the pedigrees international law claims both for its doctrines and as a discipline. Genealogy, as articulated and exemplified by Nietzsche and later taken up by Foucault, is, as Geuss argues, ‘the exact reverse of what we might call “tracing a pedigree”’.<sup>52</sup> Whereas tracing a pedigree is a process of ‘positively valorizing some (usually contemporary) person, institution, or thing’ by demonstrating a line of succession from an origin which preserves or enhances value, genealogy will usually expose a ‘historically contingent conjunction of a large number of such *separate* series of processes that ramify the further back one goes and present no obvious or natural single stopping place that could be designated “the origin”’.<sup>53</sup> While a pedigree will find its origin in something that is positively valued today, the processes thrown up by a genealogical enquiry may be ‘steeped in blood’.<sup>54</sup> Significantly, as Geuss observes, the bloody origins of present arrangements are not for Nietzsche an argument against them, though they may be for those who believe that ‘things we now value (for whatever reason) *must* have had an origin of which we would also approve.’<sup>55</sup> Some critical histories of international law trade on or indeed share this ‘sentimental assumption’.<sup>56</sup>

Genealogy as a form of both history and critique not only challenges the content of international law’s pedigrees, but this very manner of relating past and present. While genealogy is fundamentally concerned with the relation between past and present, it opposes itself to and exposes the limitations and dangers of the kind of claims for the

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<sup>52</sup> Geuss, ‘Nietzsche and Genealogy’ (1994) 2 *Eur.J.Philos.* 274, at 274.

<sup>53</sup> *Ibid.*, at 275.

<sup>54</sup> *Ibid.*, at 276; F. Nietzsche, *On the Genealogy of Morals* (trans. Smith; OUP, 1996), at 46.

<sup>55</sup> Geuss, *supra* note 52, at 276.

<sup>56</sup> *Ibid.*

present relevance of the past that are exemplary in international law—‘the metahistorical deployment of ideal significations and indefinite teleologies...the search for “origins”.’<sup>57</sup> As we shall see, genealogy is critical of the anachronism of the latter approach to the past, but not because it seeks to restore the truth of the past for its own sake. For the genealogist, history is to be ‘used for life’.<sup>58</sup>

### **3. Genealogy as history: context, anachronism, and the place of the present**

Critical histories of international law assert the significance of investigations of the past for the present. Yet the relationship between past and present may be theorized (implicitly or explicitly) in a variety of ways, not all of which are unproblematic. A common problem is anachronism—a failure of historical method famously detailed and railed against by Quentin Skinner in his 1969 essay on ‘Meaning and Understanding in the History of Ideas’.<sup>59</sup> Anachronism appears as a problem for the historian primarily because the difference of the past may be obscured by its study in terms of the present. The contextual approach identified with the so-called ‘Cambridge School’ may be understood to respond to this basic concern. It would be a mistake, however, to read the critique of anachronism as advocacy for a ‘pure’ description of the past without contemporary relevance or, based on such a reading, to dismiss the charge of anachronism as carrying weight only for those similarly committed to such ‘purity’. The critique of anachronism does not necessitate an embrace of antiquarianism. Nor is it a refusal to engage with contemporary politics.<sup>60</sup> On the contrary, it is to recognize, like Hobsbawm, that ‘the most usual ideological abuse of history is based on anachronism rather than lies’ and to challenge, through history, the myths that legitimize various forms of subjugation.<sup>61</sup>

The critique of anachronism may be misrepresented by those who seek to advance it as often as it is misunderstood by those who doubt its claims. Such a misrepresentation seems to have prompted Orford’s dissatisfaction, even frustration,

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<sup>57</sup> Foucault, *supra* note 17, at 140.

<sup>58</sup> Nietzsche, ‘On the Uses and Disadvantages of History for Life’ in F. Nietzsche, *Untimely Meditations* (trans. Hollingdale; CUP, 1983) 57, at 59.

<sup>59</sup> Skinner, *supra* note 27.

<sup>60</sup> Cf. Orford, *supra* note 6; Orford, ‘On Method’, *supra* note 5, at 174.

<sup>61</sup> E. Hobsbawm, *On History* (Weidenfeld & Nicolson, 1997), at 6-7.

with the injunction against anachronism as applied to historical work on international law.<sup>62</sup> Her counter-argument for ‘juridical thinking’ responds to a characterisation of the critique of anachronism and contextual history more broadly that does not quite do either justice. ‘Juridical thinking’ is presented as its negative, with anachronism redescribed as a dynamic relating of past and present encouraging ‘ideological innovation’ through re-engagement with past texts.<sup>63</sup>

It is perhaps significant that Orford’s initial quarrel with the critique of anachronism concerns its application to Anghie’s work on imperialism and international law. While understandably concerned to defend Anghie’s powerful unmasking of the constitutive and continuing significance of imperialism for international law, Orford identifies the ‘tendency amongst contemporary international lawyers to draw a line between yesterday’s imperialism and today’s international law’—which by no means follows from a critique of anachronism—with allegations that particular aspects of Anghie’s work are anachronistic.<sup>64</sup> This leads her to a general defence of Anghie’s work and TWAİL scholarship at large as ‘an intervention that challenges the place of the past and the work of history in international legal arguments’.<sup>65</sup> Orford suggests, however, that this intervention is facilitated by a distinctively legal insight into ‘how concepts move across time and space’, which she both contrasts with (contextual) history as a matter of ‘[thinking] about concepts in their proper time and place’<sup>66</sup> and identifies with a method—later described as ‘juridical thinking’—that, far from being concerned to avoid anachronism, derives strength from its embrace.<sup>67</sup>

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<sup>62</sup> Orford quotes Lesaffer’s critical comments on anachronism, which are merged with advocacy for an antiquarianism that the critique of anachronism by no means requires: Orford, *supra* note 6, at 6-7. She later associates Lesaffer’s views with contextual history broadly and Skinner in particular: Orford, ‘On Method’, *supra* note 5, at 170-173.

<sup>63</sup> See Orford, *supra* note 6, at 11; Orford, ‘On Method’, *supra* note 5, at 174.

<sup>64</sup> See Orford, *supra* note 6, at 1-3 (including fn11), 15-16. Similarly, in *International Authority*, *supra* note 5, at 39, 41, Orford notes that international lawyers concerned to dismiss the question of the juridical status of states subject to international administration claimed that it was anachronistic. Pahuja, *supra* note 8, at 74, also argues that ‘most [international lawyers] ... [say] that to draw attention to the particularity of the state form is anachronistic, and that since decolonisation, the existence of rival jurisdictions is of historical interest only.’ While both scholars go on to argue that an investigation of these matters is *not* anachronistic and has contemporary relevance, the types of claims they challenge seem to involve a conservative denial of the relevance of the past for the present rather than a critique of anachronism along the lines of that Skinner sets out. To defend the latter is not to affirm the former.

<sup>65</sup> Orford, *supra* note 6, at 3.

<sup>66</sup> *Ibid.*, at 2.

<sup>67</sup> Though again, Orford goes on to argue that Anghie’s work is *not* anachronistic. Specifically, she argues that Anghie’s study of Vitoria ‘in context’ does not project ‘modern internationalism ... onto early modern

The initial difficulty with this analysis is that the TWAIL challenge is consistent with and often powered by a contextual historical methodology that is highly sensitive to the dangers of anachronism. TWAIL scholars have identified European imperialism as the historical context that best explains the development of the discipline and its doctrines. Their work typically challenges the representation of present categories of juridical thought as natural and inevitable. It does not project these categories back onto the past, but shows how an imperialist past has shaped them. Where this scholarship does lapse into anachronism, it comes at the cost of a more powerful historical critique. Thus Hunter argues that in treating *jus gentium* as containing within it at all times (including Vitoria's) a promise of global justice, Anghie obscures 'the disparate intellectual sources...from which rival *jus gentium* discourses were fashioned', as well as the conflicting interests these discourses served.<sup>68</sup>

Orford's vision of law and history as '[standing] on the opposite sides of the dividing line between present obligations and archaic traditions' obscures the relationship between these disciplines (or ways of thinking and sets of practices) by passing over the more complicated interplay between past and present in both.<sup>69</sup> Her defence of 'juridical thinking' depends on a false dichotomy between history and law, in which the former takes the past as dead and gone and studies it for its own sake, whereas the latter recognizes its continuing relevance and actively engages in moving meaning across time.<sup>70</sup> Having identified the 'movement of meaning' across time as the target of the critique of anachronism, she concludes that a study of that 'movement of meaning' *requires anachronism*. The 'juridical', as a form of reasoning well-schooled in anachronism, is then embraced as a means of engaging with and in the 'movement of meaning' in international law.

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*ius gentium*', but considers the use of Vitoria's work after its publication in the US based Carnegie series: Orford, *supra* note 6, at 16. This distinction between Vitoria in his time and subsequent recourse to his work is not clearly drawn by Anghie. Orford embraces anachronism more fully in her 2013 piece, *supra* note 5.

<sup>68</sup> Hunter, *supra* note 23, at 11, 12. This does not mean that Hunter would object to an argument showing how subsequent interpretations of earlier texts considering the *jus gentium*, including those taking it to signify a promise of global justice, shaped international law—though he might insist that those interpretations should also be historicized.

<sup>69</sup> Orford, *supra* note 6, at 2.

<sup>70</sup> *Ibid.*

To the extent that international law simply is anachronistic, it is not clear how a critical perspective or any other advantage could be gained by adopting an equally anachronistic mode of engaging with its doctrines and practices. It is also doubtful whether international law, though often anachronistic, is ‘necessarily’ so.<sup>71</sup> There is some evidence of a concern to avoid anachronism embedded in doctrine, for example, the principle of intertemporality. The same concern may account for the fact that international legal scholars generally take the charge of anachronism seriously, rather than denying its applicability to international law.<sup>72</sup> This reflects the centrality of history in international law. The tendency to anachronism in traditional histories of international law and international legal reasoning is not an inevitable corollary of the significance of history for both the discipline and doctrine. Rather, the extent to which international law entails historical argument is what allows anachronism to be challenged from the standpoint of historical methodology (and by reference to the politics different historical methodologies entail).

Orford’s suggestion that we should turn away from history to a self-consciously anachronistic mode of engaging international law seems to be driven by a concern that ‘good’ history—that is, history that attends to context and avoids anachronism—cannot deal adequately with the movement of ideas over time or claim relevance for the present. She does not, however, provide adequate reasons for this assessment of historical contextualism, nor does she clearly demonstrate the advantages of ‘juridical thinking’ in this regard. In fact, while she appears to ground her case for ‘juridical thinking’ on the relative failings of contextual history, Orford expressly draws attention to a more nuanced understanding of context in contemporary historical work influenced by or associated with the ‘Cambridge School’.<sup>73</sup> She also points to other possibilities for critically engaging the past through historical work oriented towards the present—Foucauldian genealogy in particular.<sup>74</sup> Nevertheless, she continues to insist upon the value of ‘juridical thinking’ in contradistinction to the narrow view of context and the relation between past and present that these (historical) approaches challenge. The first difficulty with this move is that it fails to show why historical work that takes a

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<sup>71</sup> Orford, ‘On Method’, *supra* note 5, at 175.

<sup>72</sup> *Ibid.*, at 172.

<sup>73</sup> *Ibid.*, at 173-4; Orford, *supra* note 6, at 7-8.

<sup>74</sup> Orford, *supra* note 6, at 7-8.

sufficiently expansive view of context and attends to the relevance of the past for the present would not be adequate to the task of explaining and critiquing international law. The second is that the 'juridical approach' advocated may be substantially *less* capable of explaining and critiquing international law than forms of critical history like genealogy.

Orford's study of the responsibility to protect concept is informed by both historical contextualism and certain insights drawn from Foucault. She refers expressly to the relevance of context for the political thought of Hobbes and Schmitt.<sup>75</sup> She also identifies Foucault's approach in *The Birth of Biopolitics* as the inspiration for her focus on the way in which certain international practices of governance have been rationalized through the concept of the responsibility to protect.<sup>76</sup> Yet unlike Foucault, Orford does not study these practices and their rationalisation genealogically. She occasionally suggests that the responsibility to protect concept is part of 'a long tradition of political thought' that includes challenges to papal authority in the sixteenth and seventeenth centuries and the thought of both Hobbes and Schmitt.<sup>77</sup> Her more consistent argument, however, is that this history has an analogical relevance, 'help[ing] to reveal the stakes of the turn to protection as the justification for international authority today'.<sup>78</sup> Rather than exploring the 'historically contingent conjunction' of 'a number of diverse lines of development' in the modern concept of the responsibility to protect,<sup>79</sup> she examines a more limited number of events and thinkers identified as 'similar to' or 'resembling' one another and more recent developments<sup>80</sup> for indications of 'the potential promises and dangers inherent in the linking of authority, responsibility and protection'.<sup>81</sup>

There is clearly room for anachronism in this approach, though Orford does not expressly embrace anachronism as a method in this text (indeed, she appears at least partly concerned to avoid it). The preeminent risk is what Skinner describes as a form of 'conceptual parochialism'—the '[conceptualization of] an argument in such a way that its

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<sup>75</sup> Orford, *International Authority*, *supra* note 5, at Ch. 3. Whether her contextual study is adequate is a separate question. See Peevers on Orford's treatment of the Suez Crisis: 'Conducting International Authority: Hammarskjold, the Great Powers and the Suez Crisis' (2013) 1 (1) *LRIL* 131.

<sup>76</sup> Orford, *International Authority*, *supra* note 5, at 107-108.

<sup>77</sup> *Ibid.*, see e.g. 109, 161-162.

<sup>78</sup> *Ibid.*, at 112.

<sup>79</sup> Geuss, *supra* note 52, at 276 (emphasis omitted).

<sup>80</sup> See e.g. Orford, *International Authority*, *supra* note 5, at 108, 119, 132.

<sup>81</sup> *Ibid.*, at 109.

alien elements are dissolved into an apparent but misleading familiarity'.<sup>82</sup> In the context of Orford's present and future-oriented project, the danger is not that the past may be misrepresented, but that her historical work may fail in the task she sets it. Mining the past for analogues may not reveal what is at stake in the turn to protection as the ground for international authority, insofar as it obscures the 'the details and accidents'<sup>83</sup> in fact playing a part in that turn. As such, it is likely to have reduced potential as a guide to the institution of appropriate limits to the action that may be taken on this basis.<sup>84</sup>

Orford suggests that 'law is inherently genealogical', but it is instead historical in a way that genealogy directly challenges. The term 'genealogy' has, of course, different meanings, and is perhaps most familiar as 'an account of one's descent from an ancestor or ancestors...; a pedigree.'<sup>85</sup> This is closer to the sense in which Lesaffer uses the term genealogy, which he identifies with 'evolutional history of the worst kind' and the kind of history generally advanced and accepted by international lawyers.<sup>86</sup> It is also very different from genealogy in the spirit of Nietzsche and Foucault, which, as the latter insists, 'does not resemble the evolution of a species and does not map the destiny of a people.'<sup>87</sup> 'Evolutional history' takes the pedigree form which Nietzschean-Foucauldian genealogy opposes:<sup>88</sup> it attempts 'to give current ideas or practices roots in the past'.<sup>89</sup> It is the anachronism of *this* mode of historical enquiry that Lesaffer underscores—its failure to attend adequately to context, its description of the past 'in terms of similarities with or differences from the present'.<sup>90</sup>

Decrying anachronism as a historical 'sin' is undoubtedly irritating and heavy-handed. Nevertheless, an awareness of the ways in which present concerns and categories of thought may distort our understanding of the meaning of an idea, event or

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<sup>82</sup> Skinner, *supra* note 27, at 27. This goes beyond the inevitability that '[t]he problems on which historians feel it worth expending their energies will...reflect their own sense of intellectual priorities': Skinner, *supra* note 25, at 248.

<sup>83</sup> Foucault, *supra* note 17, at 144.

<sup>84</sup> Orford, *International Authority*, *supra* note 5, at 108, 137.

<sup>85</sup> "genealogy, n.1 (a)", OED Online, March 2014.

<sup>86</sup> Lesaffer, 'International Law and its History: The Story of an Unrequited Love' in *Time, History and International Law* (Brill, 2006) 27, at 34.

<sup>87</sup> Foucault, *supra* note 17, at 139.

<sup>88</sup> Geuss, *supra* note 52.

<sup>89</sup> Lesaffer, *supra* note 86, at 34.

<sup>90</sup> *Ibid.*, at 34-5.



set of practices in its context is important for anyone who wishes to trace the way an idea, event or set of practices has changed with time and place.<sup>91</sup> It is important to recognize that ‘evolutional history’ as described by Lesaffer does not exhaust the possibilities for a historical study of ideas and practices over time. Orford herself points out that certain aspects of Lesaffer’s account of what is required to ‘take history seriously’ and his criticism of a predominantly ‘functional’ approach have been challenged ‘both from within the disciplinary world of practicing historians and from more philosophically-oriented scholarship’.<sup>92</sup> It should be added that such challenges are not inconsistent with a contextual approach or an opposition to anachronism.

Orford is justifiably critical of narrow constructions of context which ignore the ways in which ideas (and practices) may have influenced later thinkers (and actors). She affirms Francis Oakley’s recognition of ‘the degree to which the authors whose texts are to be interpreted inhabited a world peopled through books with the dead’, and points to Skinner’s later clarification (not, however, a ‘reconsideration’<sup>93</sup>) that while meaning depends on context ‘[t]here is no implication that the relevant context need be an immediate one’.<sup>94</sup> At the same time, a point about the risks of anachronism remains to be made here and it is Foucault rather than Skinner who best captures it in his

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<sup>91</sup> Skinner, like most notable contextual historians, has long been concerned with the movement of ideas over time: see e.g. his study of ‘the process by which the modern concept of the state came to be formed’ in Q. Skinner, *The Foundations of Modern Political Thought* (Vols 1 & 2: CUP, 1978), at ix. It is because, not in spite of this interest that contextual historians have also been concerned to avoid anachronism, which may distort an understanding of the ideas in question and the ways in which they have changed. That Skinner now expressly describes his work as genealogy does not signal a newfound interest in tracing concepts over time: see Skinner, ‘A Genealogy of the Modern State’ (2008) 162 *Proc.Br.Acad.* 325; Skinner, ‘A Genealogy of Liberty’, UC Berkeley (15 September 2008). Rather, he appears to have found in genealogy an idea and practice appropriate to his aims as a historian, including his interest in developing a methodology that is both ‘more satisfactory as history’ and ‘serve[s] to invest the history of ideas with its own philosophical point’: Skinner, *supra* note 27, 4. Notably, Skinner’s earlier work had already drawn on both Foucault’s notion of archaeology (which Foucault’s practice of genealogy builds upon rather than replaces) and Nietzsche’s approach in his *Genealogy of Morality*: Q. Skinner, *Liberty before Liberalism* (CUP, 1998), see 112 at fn19, 116-118. While Skinner’s method does not map directly onto Foucauldian genealogy, the similarities predate his express embrace of this approach. Some of these similarities are noted by Tully, *Meaning and Context*, *supra* note 25, 7, at 16-19—another contextual historian who came to explicitly embrace a genealogical approach: see J. Tully, *Public Philosophy in a New Key* (Vol. 1; CUP, 2008), at 16.

<sup>92</sup> Orford, *supra* note 6, at 7.

<sup>93</sup> Skinner does not appear to have ever insisted that the context of an utterance should be restricted to its immediate temporal context.

<sup>94</sup> Orford, ‘On Method’, *supra* note 5, at 174. See F. Oakley, *Politics and Eternity: Studies in the History of Medieval and Early-Modern Political Thought* (Brill, 1999), at 19-20; Skinner, ‘Interpretation and the Understanding of Speech Acts’ in Q. Skinner, *Visions of Politics* (Vol. 1; CUP, 2002) 103, at 116; Skinner, *supra* note 25, at 275.

observation (in the course of his account of the ‘historical *a priori*’) that ‘[t]he men of the seventeenth and eighteenth centuries do not think of wealth, nature, or languages in terms that had been bequeathed to them by preceding ages or in forms that presaged what was soon to be discovered...’.<sup>95</sup> Though the past at any point possesses and draws upon its own past, it should not be assumed that ‘the dead’ who inhabit a given world through their books will be understood and used in the way that they were understood or used in their ‘own’ time.

Orford acknowledges Skinner’s more nuanced understanding of context. She maintains, however, that his ‘denunciation of anachronism challenged the idea that the movement of meaning beyond the context of its own time, including through the writing of history, was a core aspect of politics’—pointing to Hill and Trevor-Roper as historians who conversely ‘believed that history had a political purpose beyond amusing accounts of the past’.<sup>96</sup> If the implication is that Skinner’s critique of anachronism reduced history to ‘amusing accounts of the past’ and denied it political significance, he has been misunderstood. While he denied that the value of texts composed in the past for the present resides in their concern with ‘perennial’ problems, Skinner also argued that

The classic texts, especially in social, ethical, and political thought, help to reveal—if we let them—not the essential sameness, but rather the essential variety of viable moral assumptions and political commitments. It is in this, more-over, that their essential philosophical, even moral, value can be seen to lie.<sup>97</sup>

Interpreting past events in their context is certainly not incompatible with a study of movement and change in ideas, institutions and practices over time and space. In his both serious and notably satirical 1969 essay, Skinner’s criticism of attempts ‘to trace the morphology of a given concept over time’ is a criticism of the assumption of a concept *as given*—that is, of the type of historical enquiry which begins by ‘set[ting] out an ideal type of the given doctrine’ which is then treated ‘as if [it] was always in some sense immanent in history, even if various thinkers failed to “hit upon” it, even if it

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<sup>95</sup> M. Foucault, *The Order of Things: An Archaeology of the Human Sciences* (Pantheon, 1971), at 386.

<sup>96</sup> Orford, ‘On Method’, *supra* note 5, at 175(fn27).

<sup>97</sup> Skinner, *supra* note 27, at 52-3.

“dropped from sight” at various times, even if an entire era failed (note the implication that they tried) to “rise to a consciousness” of it.<sup>98</sup> Skinner was objecting in particular to Lovejoy’s representation of historical enquiry as a search for instances of universal ‘unit-ideas’,<sup>99</sup> as well as what Collingwood criticized as ‘scissors-and-paste’ history, where we ‘decide what we want to know about and then go in search of statements about it, oral or written, purporting to be made by actors in the events concerned’ or reliable witnesses.<sup>100</sup> This is not an objection to study of the ‘movement of meaning’,<sup>101</sup> but a call to recognize that the meaning that moves should not be presupposed.

Orford suggests that Foucault developed ‘a philosophical challenge to the clear demarcation between past and present’—a challenge she appears to identify with an embrace of anachronism.<sup>102</sup> Yet Foucault, like Skinner, objects to what he calls (after Nietzsche) the ‘Egyptianism’ that abstracts concepts from their historical context.<sup>103</sup> He insists that the task of tracing changes in practices and ideas over time requires careful attention to the difference or ‘otherness’ of the past.<sup>104</sup> This is not to say there are not important differences between the two authors, even after Skinner’s explicit embrace of genealogy. Skinner’s concern with authorial intent and his focus on linguistic and ideological context over social, cultural and economic context set his intellectual history apart from Foucault’s historical-philosophical investigations. Koopman has also suggested that Skinner’s genealogy would benefit from attending more explicitly to the questions which particular theories, such as liberalism, have attempted to answer—an approach that he (Koopman) identifies with both Collingwood’s ‘question-and-answer historiography’ and Foucault’s notion of ‘problematization’.<sup>105</sup> Notably, this approximates just one of the senses of ‘problematization’ in Foucault, who not only considers the problematization of concepts in the past and ‘the practices on the basis of

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<sup>98</sup> Skinner, *supra* note 27, at 10.

<sup>99</sup> *Ibid.*, at 10-11; see generally, A. Lovejoy, *The Great Chain of Being* (Torchbook, 1960).

<sup>100</sup> R.G. Collingwood, *The Idea of History* (OUP, 1994), at 257.

<sup>101</sup> Orford, ‘On Method’, *supra* note 5, at 175.

<sup>102</sup> Orford, *supra* note 6, at 7-9.

<sup>103</sup> See e.g. Foucault, *supra* note 17, at 152-3, 156. F. Nietzsche, *Twilight of the Idols* in W. Kaufmann (ed.), *The Portable Nietzsche* (trans. Kaufmann; Viking Penguin, 1976) 463, at 479.

<sup>104</sup> Foucault, *supra* note 17, at 152-3, 156.

<sup>105</sup> Koopman, ‘Comment on Quentin Skinner, “A Genealogy of Liberty”’, *Political Theory Reporter* <http://politicaltheoryreporter.wordpress.com/2008/09/17/quentin-skinner/> (accessed 17 September, 2008).

which these problematizations are formed',<sup>106</sup> but 'the questioning by the philosopher [or historian] of this present to which he belongs and in relation to which he has to situate himself'.<sup>107</sup>

Notwithstanding these points of difference, the suggestion that Foucault is opposed to the contextualist critique of anachronism cannot be supported. Indeed, Foucault expressly stresses that writing of a 'history of the present' does not mean 'writing a history of the past in terms of the present'.<sup>108</sup> Unlike 'evolutional' history,

Genealogy does not pretend to go back in time to restore an unbroken continuity that operates beyond the dispersion of forgotten things; its duty is not to demonstrate that the past actively exists in the present, that it continues secretly to animate the present, having imposed a predetermined form to all its vicissitudes.<sup>109</sup>

While genealogy 'begins from a question posed in the present',<sup>110</sup> it is neither 'presentist'—'reading present interests, institutions, and politics back into history...and claiming to discover that these institutions in earlier times had...[something] like their current significance'—or 'finalist'—'[finding] the kernel of the present at some distant point in the past and then [showing] the finalized necessity of the development from that point to the present.'<sup>111</sup> To develop a genealogy is to investigate historically the conditions of possibility for present ideas and practices in a manner that 'maintain[s] passing events in their proper dispersion'.<sup>112</sup>

It is important to be clear that anachronism is not merely a technical error of concern only to historical purists or methodological pedants. It is dangerous because it permits the perpetuation of particular politics in the present in the name of objective historical truth. Genealogy not only avoids anachronism, but directly exposes the way in

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<sup>106</sup> M. Foucault, *The History of Sexuality: The Use of Pleasure* (Vol. 2, trans. Hurley; Vintage, 1990), at 10-11. See also Foucault, 'Polemics, Politics and Problematizations' in P. Rabinow (ed.), *The Essential Works of Foucault* (Vol.1; New Press, 1997) 111, at 117-119.

<sup>107</sup> Foucault, 'The Art of Telling the Truth' in L.D. Kritzman (ed.), *Politics, Philosophy, Culture: Interviews and Other Writings 1977-84* (Routledge, 1990) 86, at 88.

<sup>108</sup> Foucault, *supra* note 16.

<sup>109</sup> Foucault, *supra* note 17, at 146.

<sup>110</sup> Foucault, 'The Concern for Truth' in Foucault, *supra* note 107, 255, at 262.

<sup>111</sup> H.L. Dreyfus and P. Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* (2nd edn, University of Chicago Press, 1983), at 118.

<sup>112</sup> Foucault, *supra* note 17, at 146.

which an anachronistic 'pedigree' form of reasoning limits our understanding of both the past and present possibilities. As an approach to the study of international law, it allows the anachronistic tendencies of international law's use of history to be both historicized and challenged through the enactment of an alternative way of engaging the past in the service of the present.

#### **4. Genealogy as critique and the normative deficit**

Critical histories of international law, like other critical international law scholarship, tend to be anxiously scrutinized for normative implications. Indeed, critical work is frequently dismissed as 'merely' deconstructive, with calls for a 'constructive' element sounded loudly (sometimes in place of a deeper engagement with critique and its consequences). This objection must be taken seriously; however, it is useful to reflect on the beliefs and expectations that underpin or attend it. Rather than conceding the validity of the objection and mounting a defence, it should be asked *why* scholars and practitioners of international law, including the critically minded, might take the view that the construction of an alternative ideal should accompany its critique. In order to appreciate the significance of genealogical critique, it must be recognized that the contemporary relevance and positive value of historical work need not depend upon it having the character of a ground-clearing exercise making way for a programmatic agenda for reform.

The historical study of present circumstances which explores the conditions of their possibility aims to make the present 'intelligible and, therefore, criticizable'.<sup>113</sup> Yet genealogy is itself critique and not merely a preparation for it. Though critique, as Judith Butler has observed, 'is always a critique *of* some instituted practice, discourse, episteme, institution, and...loses its character the moment in which it is abstracted from its operation and made to stand alone as a purely generalizable practice', this does not mean that generalizations are impossible.<sup>114</sup> What is distinctive about genealogy as critique is its departure from and opposition to *judgment based on normative criteria*. Criticism of Foucauldian genealogy as lacking normativity may in fact be evidence of

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<sup>113</sup> Foucault, 'On Power' in Foucault, *supra* note 107, at 101.

<sup>114</sup> Butler, 'What is Critique? An Essay on Foucault's Virtue' in D. Ingram (ed.), *The Political: Readings in Continental Philosophy* (Blackwell, 2002) 212, at 212.

what Lemke redescribes as ‘the compulsion that binds each political intervention to a proof of justification, a norm of identity, or, in [Foucault’s] words, “an investigation [of] legitimacy”.’<sup>115</sup> Rather than succumbing to this compulsion, Foucault problematizes it—that is, his critique ‘[puts] in question a theoretical practice that calls upon us to take a position in an already fixed political system.’<sup>116</sup>

Instead of judging, genealogy problematizes and puts into question the ‘constellations of power’ or ‘collection of ideas on display’ to which judgment would simply have recourse.<sup>117</sup> As Geuss argues, genealogy can be contrasted with the ordinary sense of critique as ‘a way of denying or saying no to something’.<sup>118</sup> In the latter sense generalized by Kant in particular, critique and justification are two ‘reciprocally and internally related acts’ in a ‘language game of proffering grounds and reasons’.<sup>119</sup> Genealogy as critique puts these ‘language games of grounding, critique and justification’ into question, understanding them as ‘various and contingently produced forms whose emergence and disappearance must be identified and traced historically’.<sup>120</sup> To do so is not necessarily to reject those language games or to deem them invalid. Rather, a genealogical mode of enquiry problematizes ‘the apparently self-evident assumptions of a given form of life and the (supposedly) natural or inevitable and unchangeable character of given identities’.<sup>121</sup> It refuses to take the ‘object’ of study to be a ‘unified, internally coherent, given phenomenon’, but asks why it has come to be considered as such.<sup>122</sup>

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<sup>115</sup> Lemke, ‘Comment on Nancy Fraser: Rereading Foucault in the Shadow of Globalization’ (2003) 10 *Constellations* 172, at 175.

<sup>116</sup> *Ibid.*

<sup>117</sup> Butler, *supra* note 114, at 212-213.

<sup>118</sup> Geuss, ‘Genealogy as Critique’ (2002) 10 *Eur.J.Philos.* 209, at 210.

<sup>119</sup> *Ibid.*, at 209.

<sup>120</sup> *Ibid.*, at 210-211.

<sup>121</sup> *Ibid.*, at 211.

<sup>122</sup> *Ibid.*, at 212. This approach departs in important ways from deconstruction—as Foucault cautioned, ‘any confusion between these two methods would be unwise’: Foucault, *History of Sexuality*, *supra* note 106, at 118.

Genealogy is a form of critique suspicious of efforts to ‘imagine another system’, which ‘extend our participation in the present system’.<sup>123</sup> Foucault was acutely aware of the fact that

The claim to escape from the system of contemporary reality so as to produce the overall programs of another society, of another way of thinking, another culture, another vision of the world, has led only to the return of the most dangerous traditions.<sup>124</sup>

Hannah Arendt makes a related point through her metaphor of the banister, noting that

[In totalitarianism] those who were still very firmly convinced of the so-called old set of values were the first to be ready to exchange [them]...for a new set of values, provided they were given one. And I am afraid of this, because I think that the moment you give anybody a new set of values—or this famous ‘banister’—you can immediately exchange it. And the only thing the guy gets used to is having a ‘banister’ and a set of values, no matter.<sup>125</sup>

Scholars (re)turning to ‘juridical thinking’ in critical work on international law may be clutching at a banister—and a familiar one, even if several of its balusters have been replaced. Genealogy as critique is incompatible with such a move because it aims ‘to bring into relief the very framework of evaluation itself’.<sup>126</sup>

While Nietzsche described his ‘genealogy of morals’ as ‘a transvaluation of values’, his representation of that formerly taken to be ‘good’ as ‘evil’ and vice versa was a tactic exposing, among other things, how values are produced through particular forms of historical narrative and based on historically specific interests.<sup>127</sup> Nietzsche proposed a move ‘beyond good and evil’ and he presented his genealogy as both a ‘clarification and supplement’ to the book bearing that ‘dangerous slogan’.<sup>128</sup>

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<sup>123</sup> Foucault, ‘Revolutionary Action: “Until Now”’ in Bouchard (ed.), *supra* note 17, at 230.

<sup>124</sup> Foucault, ‘What is Enlightenment?’ in P. Rabinow (ed.), *The Foucault Reader* (trans. Porter; Penguin, 1986) 32, at 46.

<sup>125</sup> Arendt, ‘Hannah Arendt on Hannah Arendt’ quoted by W. Brown, *Politics out of History* (Princeton University Press, 2001), at 91.

<sup>126</sup> Butler, *supra* note 114, at 214.

<sup>127</sup> Nietzsche, *supra* note 54, esp. 11-38.

<sup>128</sup> *Ibid.*, at 37.

Foucault, like Nietzsche, is not merely concerned with particular evaluations, but the framework upon which evaluation depends. The crucial question is as Butler puts it,

What is the relation of knowledge to power such that our epistemological certainties turn out to support a way of structuring the world that forecloses alternative possibilities of ordering?<sup>129</sup>

To engage in critique is, for Foucault, not merely to ‘object to this or that governmental demand, but to ask about the order in which such a demand becomes legible and possible.’<sup>130</sup> The genealogist investigates ‘the epistemological orderings that have established the rules of governmental validity’—an exercise that entails a ‘[departure] from the established grounds of... validity, marking the limit of that validity, which is something different and far more risky than finding a given demand invalid.’<sup>131</sup> The ‘rules of validity’ on the basis of which international law proposes to govern depend on a variety of relations between power and knowledge that it is the task of genealogy to uncover.

Objections to critical histories on the grounds of normative insufficiency are often accompanied by allegations of undue pessimism. Yet pessimism may be too readily identified with nihilism in the form of either apathy or an indiscriminating will to destroy. Foucault advocates a form of ‘hyper- and pessimistic activism’.<sup>132</sup> Rather than being ‘the premise of a deduction which concludes: this then is what needs to be done’, Foucault conceives of critique as

An instrument for those who fight, those who resist and refuse what is. [...] It doesn’t have to lay down the law for the law. It isn’t a stage in a programming. It is a challenge directed to what is.<sup>133</sup>

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<sup>129</sup> Butler, *supra* note 114, at 214.

<sup>130</sup> *Ibid.*, at 219.

<sup>131</sup> *Ibid.*

<sup>132</sup> Foucault, ‘On the Genealogy of Ethics: An Overview of Work in Progress’ in P. Rabinow (ed.), *The Foucault Reader* (Pantheon, 1984) 340, at 343.

<sup>133</sup> Foucault, ‘Questions of Method’ in G. Burchell et al (eds.), *The Foucault Effect: Studies in Governmentality* (Harvester Wheatsheaf, 1991) 73, at 84.



The genealogist does not claim to have prior knowledge of, or to uncover by way of her historical work, a clear normative framework that may be taken to support specific policy proposals and constitute an argument against others. Yet this is not a sign of weakness, but the strength and rigour of this mode of historical critique. To develop genealogies of international law (or aspects of it) is to bring into question the sense of normativity deployed within and around its discourses and practices. To ask 'what we should do next' is, as Butler notes, to '[presuppose] that the "we" has been formed and that it is known, that its action is possible, and the field in which it might act is delimited.' In genealogy, however, the 'we', its constitution, and its possibilities for action are all part of the historical field under investigation.

### **5. Genealogy as therapy: overcoming 'juridical thinking'**

'Juridical thinking' may not be defined by reasoning that is uniquely legal in form and content, but by reasoning which draws on the techniques and claims of a range of other disciplines, history in particular. Indeed, the 'legal' may be nothing other than the outcome of this historically specific process of cannibalization. In international law, certainly, there are clear traces of nineteenth-century thought and practice associated with a variety of fields from which the discipline now distinguishes itself.

The conviction that (international) law and (international) legal reasoning is unique is widely held among (international) lawyers. Though it is instilled in each new generation through a legal education, it appears to have its roots in early efforts to establish the independence and scientific character of the discipline by fixing core principles and standardising forms of argument. Nietzsche famously observed that 'convictions are more dangerous enemies of truth than lies'.<sup>134</sup> Among the truths this particular conviction obscures is the extent to which the distance between the juridical and the historical may in fact be the distance between nineteenth-century historiography and self-reflexive postmodernist approaches to history.

That international law's approach to the past displays a tendency to anachronism attributable to historically specific developments in the nineteenth century is a descriptive point. It does not mean that subsequent critique of that understanding of

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<sup>134</sup> F. Nietzsche, *Human, All Too Human* (trans. Hollingdale; CUP, 1996), at 179.

history and new ways of engaging the past should not be applied to international law. The historical relationship of the juridical with Whiggish historical methods is precisely what renders it vulnerable to historical critique employing a self-reflexive methodology informed by post-structuralism and post-colonial theory. The particular value of genealogy among other modes of historical critique is that it immediately treats with suspicion and proceeds to investigate the conviction that law generally—and international law specifically—is unique and by virtue of this fact can only be critically engaged by forms of reasoning that reflect and reproduce its distinctive character.

For the many international lawyers for whom this conviction is, if not confidently held, then deeply felt, much may be gained by adopting the attitude of suspicion and commitment to a rigorous and far ranging historical investigation of the present that genealogy requires. In his genealogical reflections on critique itself, Foucault identifies the latter above all with an ethos, which he further characterizes as a ‘limit-attitude’.<sup>135</sup> Rooted in the European Enlightenment, this ethos or attitude involves ‘analysing and reflecting on limits’—yet unlike Kantian critique, which ‘deduce[s] from the form of what we are what it is impossible for us to do and to know,’ genealogy is a study of limits that may ‘take the form of a possible transgression’.<sup>136</sup> To trace the genealogies of contemporary international law is to cultivate this critical ethos with its emancipatory potential. It is to engage in a historical-philosophical practice that allows us to ‘separate out, from the contingency that has made us what we are, the possibility of no longer being, doing, or thinking what we are, do, or think’.<sup>137</sup>

The genealogical study of ‘problematizations’ in international law—that is, situations past and present that are problematized by the genealogist or have ‘become a problem’ for others, together with the various solutions proposed<sup>138</sup>—may show how opting for ‘juridical thinking’ increases the power of law ‘at the expense of other possible modes of thinking and acting.’<sup>139</sup> This increase of law’s power hinders the ability of not just international lawyers, but all those subject to international law—or in various ways

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<sup>135</sup> Foucault, *supra* note 124, at 45.

<sup>136</sup> *Ibid.*, at 45-46.

<sup>137</sup> *Ibid.*, at 46.

<sup>138</sup> Foucault (1997), *supra* note 106, at 118; Foucault, ‘Discourse and Truth: The Problematization of Parrhesia’ in J. Pearson (ed.), *Six Lectures at UC, Berkeley, 1983*, <http://foucault.info/documents/parrhesia> (accessed 17 April, 2014).

<sup>139</sup> Adapted from Taylor, ‘Normativity and Normalization’ (2009) 7 *Foucault Studies* 45, at 58.

taken as its object—‘to negotiate power relations in ways that increase capacities and possible modes of thought and existence...’.<sup>140</sup> By actively engaging in a genealogical mode of enquiry, however, and even by following genealogies traced by others, we practice a knowledge that is foreign to us and may change our thinking. In Butler’s assessment, Foucault understands this as a ‘moral experience’.<sup>141</sup> What it might show us is ‘how not to be governed *like that*, by that, in the name of those principles, with such and such an objective in mind and by means of such procedures, not like that, not for that, not by them.’<sup>142</sup> Specifically, genealogy might show international lawyers, as well as the various subjects or objects of international law, how not to be governed by (or to govern by) the particular and limited forms of knowledge—including historical knowledge—that characterize power in contemporary international law.

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<sup>140</sup> Ibid.

<sup>141</sup> Butler, *supra* note 114, at 216.

<sup>142</sup> Foucault, ‘What is Critique?’ in S. Lotringer (ed.), *The Politics of Truth* (Semiotext(e), 2007) 41, at 44. The point is not to escape power, but to expose and challenge, rather than advance, the proliferation of its most oppressive forms.