

Theorizing the Normative Significance of Critical Histories for International Law

Damian Cueni | ORCID: 0000-0002-6117-0949

Early Career Fellow, Bonavero Institute of Human Rights, Faculty of Law,
University of Oxford, Oxford, UK
damian.cueni@law.ox.ac.uk

Matthieu Queloz | ORCID: 0000-0001-6644-9992

Junior Research Fellow, Wolfson College, Faculty of Philosophy,
University of Oxford, Oxford, UK
matthieu.queloz@wolfson.ox.ac.uk

Received: 18 February 2021; Revised: 18 June 2021; Accepted: 02 December 2021

Published online: 27 July 2022

Abstract

Though recent years have seen a proliferation of critical histories of international law, their normative significance remains under-theorized, especially from the perspective of general readers rather than writers of such histories. How do critical histories of international law acquire their normative significance? And how should one react to them? We distinguish three ways in which critical histories can be normatively significant: (i) by undermining the overt or covert *conceptions* of history embedded within present practices in support of their authority; (ii) by disappointing the normative *expectations* that regulate people's reactions to critical histories; and (iii) by revealing continuities and discontinuities in the *functions* that our practices serve. By giving us a theoretical grip on the different ways in which history can be normatively significant and call for different reactions, this account helps us think about the overall normative significance of critical histories and how one and the same critical history can pull us in different directions.

Keywords

History of International Law – International Legal Theory – Historical Critique – Normative Significance

1 Introduction

International law has a history, and that history is often far from flattering. As the recent turn towards writing critical histories has shown, colonial domination, racial discrimination, cultural subordination, and economic exploitation loom large in it. But what does this tainted history mean for international lawyers today? Do critical histories – that is, historiography that subjects the past, and dominant narratives about the past, to critical scrutiny¹ – possess any real normative significance? In other words, can critical histories properly affect our evaluation of present-day ideas, practices, or institutions of international law?

Critical histories can give rise to countervailing intuitions. On the one hand, there is some plausibility to the idea that critical histories of international law cannot possess any real normative significance; for what do the origins of international law have to do with what it does for us now? To be sure, the fact that international law was often used for bad ends is regrettable, but if we are interested in what international law is today and what it can become, why should we care about its history?² Human rights, for example, may have a complex and chequered history, but this does not yet tell us what attitude to take towards them in the future – just as someone who values the contraceptive pill as an instrument of female emancipation might justifiably think no less of it upon learning that its origins are entangled with the eugenics movement.³ This suggests that what matters is what things have become, not how they originated.

But equally, there is some plausibility to the contrary idea that our understanding of international law's tainted history can and should profoundly

-
- 1 Prominent examples of the kinds of critical histories we have in mind include Koskenniemi, Martti. *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2001); Anghie, Antony. *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005); Pitts, Jennifer. *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France* (Princeton: Princeton University Press, 2009); Orford, Anne. *International Authority and the Responsibility to Protect* (Cambridge: Cambridge University Press, 2011); Pahuja, Sundhya. *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011); Moyn, Samuel. *The Last Utopia: Human Rights in History* (Cambridge: Harvard University Press, 2012); Bell, Duncan. *Reordering the World: Essays on Liberalism and Empire* (Princeton: Princeton University Press, 2016).
 - 2 An example of such a reaction can be found in Tasioulas, John. 'Towards a Philosophy of Human Rights'. *Current Legal Problems* 65(1) (2012), 1–30, 26.
 - 3 Watkins, Elizabeth Siegel. *On the Pill: A Social History of Oral Contraceptives, 1950–1970* (Baltimore: Johns Hopkins University Press, 1998).

inform our present evaluative attitudes. If international law has a history of being used to buttress various forms of domination, exploitation, and subordination, then surely our evaluative attitudes cannot appropriately remain insensitive to the realization of that fact. Presumably, it is this belief in the normative significance of historiography that animates the recent turn towards writing critical histories of international law. But despite the proliferation of critical histories of international law, their normative significance remains under-theorized, especially from the perspective of general *readers* rather than writers of such histories. How do critical histories of international law come by their normative significance? And how should one react to them?

In this article, we theorize the normative significance of critical histories for international law. This will allow us to articulate a range of ways in which critical histories can be normatively significant and account for the countervailing reactions they provoke. Of course, writing and thinking about critical legal histories goes back at least to the mid-1980s.⁴ Here we aim to develop a fresh perspective by drawing constructively on various tools and insights from recent philosophical work on the significance of historiography and genealogy to develop an *audience-centred* approach to critical histories.

We proceed as follows: in the next section, we situate our audience-centred approach in relation to the extant literature and introduce the distinction that forms the backbone of this approach: a tripartite distinction between *three different kinds of normative significance* that critical histories can have in the eyes of their readers. The three sections that follow each explore one branch of that distinction. In the final section, we then turn to the complication that while these three kinds of normative significance can be analytically distinguished, they often occur together in practice, forming what we call the *overall normative significance* of critical histories. But as we show, our tripartite distinction allows us to understand how the normative significance of one and the same critical history can pull in different directions at once and give rise to tensions in the resulting normative assessment. What this article hopes to achieve is to give us a grip on these tensions by theorizing three different ways in which history can be normatively significant and call for correspondingly different reactions on our part.

4 See, e.g., Gordon, Robert W. 'Critical Legal Histories'. *Stanford Law Review* 36(1/2) (1984), 57–125.

2 Towards an Audience-Centred Approach to Critical Histories: A Tripartite Distinction

To situate our discussion in relation to the vast literature on critical histories of international law,⁵ we can start by drawing a contrast between what we might term ‘juridical’ and ‘genealogical’ approaches to the normative significance of critical histories for international law. Many international lawyers understand whatever normative significance such critical histories might have in ‘juridical’ terms, as affecting the nature and character of present-day legal arguments. Because they rely on authoritative ‘sources’, international legal arguments – like all legal arguments – are always partly oriented towards the past.⁶ For that reason, a lot of methodological reflection on the normative significance of critical histories within the discipline of international law has centred on exploring the ways in which new understandings of the past may be relevant to this argumentative practice of international law, broadly understood. For example, Anne Orford has contrasted the contextualist style of the Cambridge School, which situates past concepts in their own time and place, with an approach to the past that views it as ‘a source of rationalisation of present obligations’.⁷ International legal histories, she suggests, should be written *by* international lawyers *for* international lawyers as part of present-day legal arguments *within* the discipline of international law. And while most international lawyers who write critical histories of international law thereby aim to question the assumptions of their discipline and thus *expand* the range of permissible legal arguments,⁸ there is nevertheless a continuing concern to integrate their historical writings into the traditional forms of international legal argument, for example by opening up the sources doctrine to more diverse ends.⁹ For this strand of scholarship, then, critical histories must affect the moves we can make within the argumentative practice of international law in order to be normatively significant.

5 See, for example, Craven, Matthew. ‘Introduction: International Law and its Histories’, in *Time, History and International Law*, eds. Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (Leiden: Martinus Nijhoff, 2007), 1–25; Skouteris, Thomas. ‘The Turn to History in International Law’. *Oxford Bibliographies* (2017); Rasilla, Ignacio de la. *International Law and History: Modern Interfaces* (Cambridge: Cambridge University Press, 2021).

6 Craven, ‘Introduction’ 2007 (n. 5), 6–7.

7 Orford, Anne. ‘The Past as Law or History? The Relevance of Imperialism for Modern International Law’. *NYU ILJ Working Paper 2* (2012), 1–17, 9.

8 Craven, ‘Introduction’ 2007 (n. 5), 9.

9 Arvidsson, Matilda and Miriam Bak McKenna. ‘The Turn to History in International Law and the Sources Doctrine: Critical Approaches and Methodological Imaginaries’. *Leiden Journal of International Law* 33(1) (2020), 37–56, 38.

Contrasting with this ‘juridical’ strand of theorizing the normative significance of critical histories for international law, there is also a growing emphasis on less legalistic ‘uses and abuses’¹⁰ of historiography. In particular, scholars who identify with the tradition of Foucauldian genealogy have highlighted the emancipatory potential of historical explanations. Genealogy may show us, in Foucault’s words, that ‘what exists is far from filling all possible spaces.’¹¹ As Kate Purcell has recently argued, this type of critical history may thus be therapeutic by showing us that our ‘ways of understanding and engaging with the world ... are unnecessarily and even dangerously constrained, in part by exposing those constraints as both unnecessary and dangerous.’¹² For this strand of thought, the writing of critical histories of international law should emancipate itself from the requirement to provide ‘*judgment based on normative criteria*’.¹³ Instead of seeking to allow us to *judge* and provide normative guidance, a critical history may also seek to *problematize* by calling ‘into question the “constellations of power” or “collection of ideas on display” to which judgment would simply have recourse’.¹⁴ But such genealogical approaches have tended to shy away from claiming normative significance for their historiography, preferring to emphasise ambiguity and leave the normative upshot open, as something for the reader to determine.

We develop a sense of normative significance that aims to occupy a middle-ground between these two approaches. While we reject the ‘juridical’ picture that identifies the normative significance of critical histories with their immediate significance for international legal arguments, we also reject the Foucauldian picture of genealogical histories as pure problematizations that

10 The phrase originally stems from Nietzsche, one of the central figures for the genealogical tradition. See the second essay of Nietzsche, Friedrich. *Untimely Meditations* (Cambridge: Cambridge University Press, 1997 [1873–1876]). See also Foucault, Michel. ‘Nietzsche, la généalogie, l’histoire’, in *Hommage à Jean Hyppolite*, ed. Suzanne Bachelard (Paris: Presses Universitaires de France, 1971), 145–172.

11 Foucault, Michel. ‘Friendship as a Way of Life’, in *Ethics: Subjectivity and Truth (Essential Works of Foucault, 1954–1984, Vol. 1)*, ed. Paul Rabinow (New York: The New Press, 1997), 135–140, 140. For discussion, see Lorenzini, Daniele. ‘Genealogy and Critique in Foucault and Fricker’. *The Monist* 105(4) (2022) (forthcoming).

12 Purcell, Kate. ‘On the Uses and Advantages of Genealogy for International Law’. *Leiden Journal of International Law* 33(1) (2020), 13–35, 14.

13 *Ibid.*, 32 (emphasis in the original).

14 *Ibid.*, 32, quoting Butler, Judith. ‘What is Critique? An Essay on Foucault’s Virtue’, in *The Political: Readings in Continental Philosophy*, ed. David Ingram (Oxford: Blackwell, 2002), 212–228, 212. For illuminating overviews of various uses of genealogy, see also Owen, David. ‘Genealogy’, in *Encyclopedia of Political Theory*, ed. Mark Bevir (Thousand Oaks: Sage Publications, 2010), 549–551; Srinivasan, Amia. ‘Genealogy, Epistemology and Worldmaking’. *Proceedings of the Aristotelian Society* 119(2) (2019), 127–156.

merely highlight new possibilities and refrain from claiming any clear normative upshot. Even where a critical history merely problematizes its object, the question remains *why* it manages to problematize – why the revelation of contingency should be seen *as a problematization* of international law; for even problematizations depend on prior assumptions (such as the belief that the present state of international law reflects some sort of teleological necessity). Historiography that gives us reason to question these assumptions thereby evinces a form of normative significance that itself stands in need of further elucidation.¹⁵

The key to understanding this and related forms of normative significance, we suggest, is to consider them from the point of view of the general *reader* of such histories, and in particular in relation to what the reader brings to such histories. Much theoretical reflection on critical histories has focused on providing guidance for how to *write* critical histories – notably by flagging the danger of ‘anachronism’.¹⁶ We propose to shift the focus of the debate from an author-centred to an *audience-centred* approach: our question is not how to *write* critical histories, but how to *react* to them.¹⁷ What we seek to charac-

15 As we will explain in more detail in the next section, while it has often been noted that critical histories are important because they undermine more traditional evolutionary histories of international law, the *normative* significance of undermining these evolutionary narratives by way of critical histories has not yet been elucidated by the kind of theoretical account we provide here. That is, other scholars have noted *that* the fact that these critical histories undermine evolutionary histories is normatively significant, but they have not really explained *why* it can be so.

16 On the issue of ‘anachronism’ in particular, see Hunter, Ian. ‘Global Justice and Regional Metaphysics: On the Critical History of the Law of Nature and Nations’, in *Law and Politics in British Colonial Thought: Transpositions of Empire*, eds. Shaunnagh Dorsett and Ian Hunter (Berlin: Springer, 2010), 11–29, 11–13, 20, 24; Orford, Anne. ‘On International Legal Method’. *London Review of International Law* 1(1) (2013), 166–197, 170–177; Koskenniemi, Martti. ‘Vitoria and Us: Thoughts on Critical Histories of International Law’. *Rechtsgeschichte-Legal History* 22 (2014), 119–138, 122–123. On author-centered approaches more generally, see also Bell, Duncan. ‘Writing the World: Disciplinary History and Beyond’. *International Affairs* 85(1) (2009), 3–22; Moyn, Samuel. ‘Substance, Scale, and Salience: The Recent Historiography of Human Rights’. *Annual Review of Law and Social Science* 8 (2012), 123–140; Altwicker, Tilmann and Oliver Diggelmann. ‘How is Progress Constructed in International Legal Scholarship?’. *European Journal of International Law* 25(2) (2014), 425–444.

17 The relevant sense of audience is not restricted to the group of people who will actually read these critical histories; nor is it restricted to the group of people that are explicitly addressed in the text. To use an illustrative example from political theory: Machiavelli’s *The Prince* purports to provide instruction to a prince and was actually mostly read by other scholars, but his intended audience was clearly the populace at large. Similarly, while the actual readership of many critical histories may be small and they are often

terize is how not just international lawyers, but people at large should react to certain kinds of unflattering histories of international law: how these histories should affect people's attitudes towards international law given their present-day concerns.¹⁸ But, in line with our audience-centered approach, we do not so much defend the role of present-day concerns in *writing* critical histories as chart the normative implications of present-day concerns for how to *react* to them. What is distinctive about our approach is thus that we harness ideas from philosophy to develop an audience-centred understanding of the normative significance of critical histories for international law that is broader than the 'juridical' conception and more normatively ambitious than the Foucauldian 'genealogical' conception.

In particular, we offer what Ludwig Wittgenstein called an *übersichtliche Darstellung* – a surveyable or perspicuous representation¹⁹ – of three notable ways in which critical histories can be normatively significant for those who read them:

- (i) by undermining the overt or covert *conceptions* of history embedded within present practices in support of their authority;
- (ii) by disappointing the normative *expectations* that regulate people's reactions to critical histories;
- (iii) by revealing continuities and discontinuities in the *functions* that ideas, practices, or institutions serve.

This tripartite distinction is, inevitably, a simplifying model, but simplification and idealization can be of help in thinking clearly about the normative significance of critical histories. As Wittgenstein suggested in advocating the use of surveyable representations, one form of intellectual advance consists in achieving a clear overview and a firm analytical and theoretical grasp of something elusively complex, in coming to *know one's way about* – in this instance, in the tangle of ways in which critical histories can affect how we think normatively about international law.²⁰ Of course, the tripartite distinction in itself is abstract enough to be applicable to more than just critical international legal

addressed to members of specific academic disciplines, their audience in the relevant sense may nevertheless be a lot larger, such as all the people who have overt and covert conceptions of the history of international law. See section 3 below.

18 Our treatment here partially coincides with the literature on 'presentism', see the points of contention between Hunter, 'Global Justice and Regional Metaphysics' 2010 (n. 16), and Orford, Anne. 'International Law and the Limits of History', in *The Law of International Lawyers: Reading Martti Koskenniemi*, eds. Werner Wouter, Marieke de Hoon and Alexis Galán (Cambridge: Cambridge University Press, 2015), 297–320.

19 Wittgenstein, Ludwig. *Philosophische Untersuchungen = Philosophical Investigations* (Chichester: Wiley-Blackwell, 2009 [1953]), § 122.

20 Wittgenstein, *Philosophische Untersuchungen* 2009 (n. 19), §§ 122–123.

histories. We thus apply to international law a distinction which might also be fruitfully applied elsewhere. In elaborating the distinction in the next three sections, we first articulate each of the three strands of normative significance in general terms before illustrating what form it takes in the particular context of the history of international law.

3 Undermining Overt and Covert Conceptions of History

Critical histories can undermine received conceptions of the past. But how can the fact that historiography puts pressure on received conceptions of the past then exert *critical* power and be normatively significant beyond the way in which it unsettles beliefs about history?

Even if we start from the assumption that the history of international law is not in itself normatively significant, the past can *acquire* normative significance when present-day conceptions of the past are put in the service of normative claims to authority or legitimacy. Authority for religious or political views, for example, is often claimed by conceiving of their history in a certain way. Where this is the case, it renders those views vulnerable to having their justifications undercut by truthful historical inquiry.

Conceptions of the past that support normative claims to authority or legitimacy are more widespread than one might think. For alongside the various ways in which claims to authority or legitimacy can rest on *overt* conceptions of the past, there are also various *covert* ways in which descriptions of present practices in ostensibly non-historical terms can entail certain conceptions of history. In saying that things happened a certain way, one commits oneself to more than the literal content of what one said; one also undertakes commitments about the *presuppositions* and *implications* of saying it, commitments which may themselves involve particular conceptions of history. And each of these commitments will in turn be vulnerable to subversion through truthful historical inquiry. This is a point which the liberal philosopher Bernard Williams presses against those who maintain that ‘the values of contemporary liberalism cannot possibly be criticized in terms of their history’. On Williams’s view, many advocates of the values of contemporary liberalism render themselves vulnerable to critical histories because they often conceive of these values in terms that either overtly maintain or more covertly presuppose or imply that ‘they have emerged from the spread of reason and represent a cognitive achievement’.²¹

21 Williams, Bernard. ‘Why Philosophy Needs History’, in *Essays and Reviews 1959–2002*, ed. Michael Woods (Princeton: Princeton University Press, 2014), 405–412, 410. For a history

Similarly, insofar as the present-day practice of international law claims authority for itself *in terms of* certain conceptions of history, undermining these conceptions of history can undermine the rational basis for a continuing concern with the practice. And since international law relies on such conceptions of history to a greater extent than other branches of law, this helps explain how critical histories of international law can exert critical power beyond what they tell us about history.

In international law, the conceptions that are most susceptible to being undermined by critical histories are conceptions of international law's history as a history of progress.²² There are two main forms that these conceptions take. The first is the conception of international law as *constitutive of* progress: on this picture, international law simply *is* the slow unfolding of reason, the gradual realization of a set of rational principles. As Martti Koskenniemi has remarked, 'most histories of international law were written as evolutionary narratives about jurists and philosophers carrying out a transhistorical conversation contributing to the ever fuller realization of "great principles" and exploration of "perpetual themes extending from the origins of Western political thinking in Greek and Roman antiquity to the present".'²³ These progressive or Whiggish views are no doubt less dominant now than they were in past.²⁴ Yet they remain prominent in textbook narratives even today. These textbook narratives do not just involve explicit descriptions of key historical events, but also paint a picture of international law as a continuing transhistorical conversation.²⁵

This idea that international law is constitutively progressive is susceptible to being undermined by critical histories, for, at least on some understandings of 'transhistorical conversation', the history of international law can only be seen as such a conversation if earlier contributors shared with later contributors a

of liberalism that contrasts with the spread-of-reason account of it, see Bell, *Reordering the World* 2016 (n. 1); Pitts, *A Turn to Empire* 2009 (n. 1).

22 For the argument that much writing in international law still exhibits a commitment to a history of progress, see Altwicker/Diggelmann, 'How is Progress Constructed' 2014 (n. 16). For an example of the type of response given by the targets of such allegations, see Howse, Robert and Ruti Teitel. 'Does Humanity-Law Require (or Imply) a Progressive Theory or History? (and other Questions for Martti Koskenniemi)'. *Temple International and Comparative Law Journal* 27 (2013), 377–397.

23 Koskenniemi, 'Vitoria and Us' 2014 (n. 16), 120.

24 Cf. Nys, Ernest. *Les origines du droit international* (Brussels: Castaigne, 1894); Redslob, Robert. *Histoire des grands principes du droit des gens depuis l'Antiquité jusqu'à la veille de la Grande Guerre* (Paris: Rousseau, 1923).

25 Koskenniemi, Martti. 'Foreword: History of Human Rights as a Political Intervention in the Present', in *Revisiting the Origins of Human Rights*, eds. Pamela Slotte and Miia Halme-Tuomisaari (Cambridge: Cambridge University Press, 2015), ix – xviii, ix.

sense of what the conversation was *about*, and what forms and standards of arguments were acceptable.²⁶ It is this shared frame of reference – this shared sense of what is at issue and what counts as a good argument – that allows later views to appear as *advances* over earlier views, as having *won an argument*, and thus as instantiating the spread of reason.²⁷ But one thing that critical histories tend to show – in addition to the contingency, incoherence, and self-interested nature of much international legal thought – is that the historical changes involved were simply too radical for there to have been the kinds of enduring standards and concerns that would allow us to conceive of the history of international law as a transhistorical conversation about perpetual themes.²⁸

The second form that histories of progress take involves conceiving of international law as *instrumental to* progress. These conceptions of international law as instrumentally progressive entail commitments regarding the *effects* of international law in the course of its history: they present international law as having been a force for good, either always or on balance. In 1908, for example, the German jurist Lassa Oppenheim still had high hopes that a ‘master-builder’ would soon come along and recount the history of international law as ‘a branch of the history of Western civilization’ culminating in the ‘ultimate victory of international law over international anarchy’.²⁹ Oppenheim had no doubt that this history was going to vindicate international law as a force for peace and prosperity in international relations.

26 Strictly speaking, this formulation remains ambiguous between a weaker and a stronger requirement. The weaker requirement is one for what might be called ‘non-transitive progress’: it demands only that the earlier conversant A and the later conversant B share a frame of reference while the conversant B and the even later conversant C share a frame of reference, but not that A and C share one. The stronger requirement is one for ‘transitive progress’: it demands in addition that A and C share a frame of reference as well. We take it that progressive views of international law typically claim that there is progress in the stronger, transitive sense.

27 See Williams, Bernard. ‘Philosophy as a Humanistic Discipline’, in *Philosophy as a Humanistic Discipline*, ed. Adrian William Moore (Princeton: Princeton University Press, 2006), 180–199, 189–191; Williams, Bernard. ‘The Last Word, by Thomas Nagel’, in *Essays and Reviews 1959–2002*, ed. Michael Woods (Princeton: Princeton University Press, 2014), 371–387, 385; Williams, ‘Why Philosophy Needs History’ 2014 (n. 21), 410.

28 See Skinner, Quentin. ‘Meaning and Understanding in the History of Ideas’. *History and Theory* 8 (1969), 3–53.

29 Oppenheim, Lassa. ‘The Science of International Law: Its Task and Method’. *American Journal of International Law* 2(2) (1908), 313–356, 317.

As is well-known to people who specialize in writing the history of international law, that master-builder of course never arrived.³⁰ But as Randall Lesaffer emphasizes, the narrative of international law's victory over international anarchy continues to have broad purchase today.³¹ Insofar as that narrative is still part of the disciplinary imagination, it too survives most explicitly in textbooks initiating students into the discipline. Yet non-specialists also have views about the instrumental historical role of international law, even if these only consist of 'broad and vague assumptions'³² about the long-term effects of key events, such as the Peace of Westphalia of 1648 or the founding of the United Nations.

Given the prevalence of such conceptions of international law as instrumentally progressive, it is no surprise that many critical histories exert pressure on the contemporary practice of international law by painting its history as being, in Nathaniel Berman's phrase, 'pockmarked by a series of catastrophes and mutations' and 'rocked by the countless forms of colonial conquest and anti-colonial resistance'.³³ Conceptions of international law as instrumentally progressive have been challenged by numerous historical accounts revealing international law to have been deeply implicated in past atrocities. For example, Jörg Fisch studied the many ways in which international law regulated and perpetuated colonial relations,³⁴ while Sundhya Pahuja questioned whether the years after 1945 saw a true universalization of international law.³⁵ Another potentially unsettling finding for those who thought of international law as a force for good was Antony Anghie's presentation of the history of international law as a never-ending story of colonial domination starting with Francisco de

30 Compare Craven, 'Introduction' 2007 (n. 5), 2. There were of course histories in the realist style of Grewe, Wilhelm. *The Epochs of International Law* (Berlin: De Gruyter, 2001). But while this book was sweeping in scope, it was still nothing like the scholarly vindication of the grand narrative that Oppenheim had in mind.

31 Lesaffer, Randall. 'International Law and its History: The Story of an Unrequited Love', in *Time, History and International Law*, eds. Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (Leiden: Martinus Nijhoff Publishers, 2007), 27–41, 34.

32 Lesaffer, 'International Law and Its History' 2007 (n. 31), 34.

33 Berman, Nathaniel. *Passion and Ambivalence: Colonialism, Nationalism, and International Law* (Leiden: Martinus Nijhoff, 2004), 44.

34 Fisch, Jörg. *Die Europäische Expansion und das Völkerrecht: Die Auseinandersetzung um den Status der überseeischen Gebiete vom 15. Jahrhundert bis zur Gegenwart* (Stuttgart: Steiner, 1984).

35 Pahuja, *Decolonising International Law* 2011 (n. 1).

Vitoria.³⁶ This threatened to undermine the justification for many versions of the instrumentally progressive view.³⁷

This first branch of the tripartite distinction, then, depends on our now describing and claiming authority for our practices in terms that overtly or covertly conceive of history as being a certain way. In the examples we considered, thinking of international law as constitutively or instrumentally progressive already conceives of history in a certain way. Other examples include conceptions of human rights as something *inevitable*, which also carries historical implications that truthful historiography might undermine. As Samuel Moyn's history of human rights shows, driving ideas behind human rights, such as that of a shared humanity, do not render the modern understanding of human rights from the 1970s onwards inevitable; rather, they leave concrete legal questions so open that almost anything – including Stoicism, Christianity, and the advent of human rights as tools for piercing the veil of sovereignty – is compatible with them.³⁸ To explain why human rights came to be understood as they now are, one has to draw on far more contingent factors, such as a general dissatisfaction with the internal performance of new states that were granted sovereignty during the process of decolonization, as well as the state of American domestic politics around that time. Such a critical history does not necessarily undermine the idea of human rights as such; but it carries normative significance insofar as it casts aspersions on one dominant justification for human rights, namely their inevitability given ideas such as that of a shared humanity.

We do not want to suggest that the contextualist way of writing history favoured by critical historians like Moyn is the only legitimate one.³⁹ There is

36 Anghie, *Imperialism* 2005 (n. 1), 13–21. Much the same point could again be made with reference to Hugo Grotius, the other main candidate for the title of 'founding father' of international law. Tuck, Richard. *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 2001), 78–108.

37 See Brown, James Scott. *The Spanish Origins of International Law: Lectures on Francisco de Vitoria (1480–1546) and Francisco Suárez (1548–1617)* (Washington: Georgetown University, 1928).

38 See Moyn, *The Last Utopia* 2012 (n. 1), at 9–10, 15–17, 39, 69. For a discussion of the normative significance of Moyn's contribution to the history of human rights, see Alston, Philip. 'Does the Past Matter? On the Origins of Human Rights'. *Harvard Law Review* 126 (2013), 2043–2081; McCrudden, Christopher. 'Human Rights Histories'. *Oxford Journal of Legal Studies* 35(1) (2014), 179–212.

39 For a critical discussion of contextualist histories that questions whether their delimitation of contexts is the only respectable one, see Koskeniemi, 'Vitoria and Us' 2014 (n. 16), 123–9. See also LaCapra, Dominick. *Soundings in Critical Theory* (Ithaca: Cornell University Press, 1989), 203.

a place for truthful tellings of history that work with grand narratives and foreshadowings; the point is that even if they do not profess to tell the one and only truth, they must still be *truthful* narratives, and that can be a fierce constraint – both on historians that seek to proffer truths and on the society that lets them. There are claims about the past that history will simply not bear out.⁴⁰ As the French Prime Minister Clemenceau is said to have retorted at Versailles to a German wondering what historians would later write about WWI: ‘They won’t say that Belgium invaded Germany’.⁴¹

As emerged already in this brief discussion, more conceptions of the past are woven into our present practices than meet the eye. Insofar as critical histories contradict or undermine these conceptions, they will exert pressure not just on these conceptions, but also on the claims to authority or legitimacy that rest on them. In its claims to authority, international law relies to a considerable extent on certain conceptions of its own history, and the more it does so, the more there is a question whether these conceptions are stable under historical reflection or risk being undermined by it. Where they prove unstable under reflection, we might see whether we can replace them with conceptions that are less vulnerable to critical history. This is what Bernard Williams proposed to do by replacing the progressive historical narratives told to vindicate liberalism with a narrative that makes fewer presuppositions vulnerable to being debunked by truthful historical inquiry.⁴² In much the same way, one can seek conceptions of international law’s history that are stable under reflection and can provide a robust basis for its claims to authority.

4 Disappointing Normative Expectations

Often, people neither overtly nor covertly conceive of history as being a certain way at all; yet history can retain its normative significance even then. Many experience as subversive the revelation that a certain practice or institution

40 See for example Diggelmann, Oliver. ‘“The Internationalists” as Grand Narrative: Key Elements and Dilemmata’. *Global Constitutionalism* 7(3) (2018), 297–314, 298–304, criticizing the grand narrative of Hathaway, Oona and Scott Shapiro. *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (New York: Simon and Schuster, 2017) by pointing to the many historical facts that stand in tension with it, all the while acknowledging the general legitimacy of attempts to tell such grand narratives.

41 See Williams, Bernard. *Truth and Truthfulness: An Essay in Genealogy* (Princeton: Princeton University Press, 2002), 243.

42 See Williams, Bernard. ‘The Liberalism of Fear’, in *In the Beginning Was the Deed: Realism and Moralism in Political Argument*, ed. Geoffrey Hawthorne (Princeton: Princeton University Press, 2005), 52–61.

has a tainted history – that its historical roots are stained with blood, violence, and oppression, for instance – even without previously having had any very determinate views as to what that history looks like. One might have professed oneself ignorant on the matter if asked, and yet one's confidence in the institution is undermined once that history comes to light. How is this possible?

The answer – and this brings us to the second branch of the tripartite distinction – is that history is told not just *about* the past, but *to* people, and these people have certain *normative expectations* regarding the kind of history that something can properly have which critical histories may disappoint. While empirical expectations concern how things in fact behave, normative expectations concern how they *ought* to behave. These normative expectations are not conceptions of history, because they are often inchoate and not directed at particular objects at all; but they nonetheless shape people's reactions to history by determining how much entanglement with contingencies, lowly interests, and other unflattering aspects they are prepared to tolerate before feeling alienated from something. They regulate what kind of history people treat as being compatible with having a high normative status.

Normative expectations are not necessarily something that one consciously adopts or is aware of. They manifest themselves in one's dispositions to react to historical findings. It is through one's reactions, particularly *in treating* the revelation of a practice's origins as delegitimizing it, that one endorses certain patterns of reasoning, certain sets of proprieties governing what inferences it is proper to draw from historical observations: the inference from a practice's meriting confidence and respect to its having high-minded origins, or the inference from its failing to have high-minded origins to its failing to merit confidence and respect.

For example, most people do not have very determinate views about the role of Francisco de Vitoria within the history of international law. But they do have normative expectations of a highly general kind that determine how tainted the history of respected ideas and institutions can turn out to be before they lose their respect for them. When these normative expectations are of the highly purist kind that leads one to treat even a distant entanglement with lowly motives or problematic effects as a disappointment, this can render critical histories of international law, such as Antony Anghie's portrayal of Vitoria, rather unsettling.⁴³ If Anghie is right, international law was entangled with

43 We discuss this purist attitude according to which the highly respected must have correspondingly respectable origins in Queloz, Matthieu and Damian Cueni. 'Nietzsche as a Critic of Genealogical Debunking: Making Room for Naturalism Without Subversion.'

the justification of colonial domination already in the hands of its founding figures. To someone with high normative expectations, this will come as a significant disappointment.

As this example also brings out, this kind of normative significance depends on how demanding our normative expectations are, and one question that readers of critical histories must ask themselves is when these expectations are in fact *too* high. If one thought that the standing of institutions enabling international cooperation would be terminally impugned by the realization that they historically grew out of the pursuit of national interests, for example, one would experience as subversive even John Ikenberry's finding that the liberal order since WWII was both driven by US interests and beneficial to all in some respects.⁴⁴ By contrast, a more moderate attitude according to which the standing of some form of international cooperation is impugned only if it is *exclusively* or almost exclusively in the interest of a dominant player is far more tolerant of entanglement with national interests. The fact that people have in the past sought to use international law for their own ends is doubtless worth highlighting, and, especially when these ends are not ours, it can seem like *the* fact about international cooperation. But this fact should not blind us to others, such as the concomitant benefits of those uses. And certainly, our normative expectations should not be such that this fact, all by itself, leads us to conclude that the entire international order is in decline.

The history of the United Nations offers another example. As Mark Mazower highlights, the United Nations are often judged, in the words of former Secretary-General Boutros-Ghali, against 'the lofty goals ... originally envisaged by the charter'.⁴⁵ Far from simply expressing a commitment to universal values such as human rights, however, the United Nations have, from their earliest beginnings, been used by dominant states to further their own domestic cause, and it is illuminating to study the ideologies that led various powers to define their interests as they did.⁴⁶ How should one react to the revelation that the United Nations were originally envisioned to protect the interests of empire? On Mazower's view, the common reaction that treats this revelation as subversive matches the tendency of many 'historians [of the United Nations to]

The Monist 102(3) (2019), 277–297. For a philosophical critique of this purist attitude, see Williams, Bernard. *Ethics and the Limits of Philosophy* (Abingdon: Routledge, 2011), ch. 10.

44 Ikenberry, G John. *Liberal Leviathan: The Origins, Crisis, and Transformation of the American World Order* (Princeton University Press, 2011), xi, 10.

45 Mazower, Mark. *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton: Princeton University Press, 2009), 4.

46 *Ibid.*, 10, 14.

confuse the utopianism of their subject with their own'.⁴⁷ The looming problem is that if one's normative expectations become too demanding or 'utopian', this can make a universal acid of historical inquiry. If one's normative expectations are such that one would lose faith in any institution that depended on tainted money at any point in its history, for example, this, in conjunction with the historical fact of colonialism, renders one's faith in a great many institutions vulnerable to being shaken by historical inquiry. One need not be a pessimist of the bleakest sort to believe that enough digging will unearth a shameful story nearly everywhere. As Nietzsche somewhat hyperbolically observed, all good things come from bad things, and this need mean no more than that great creativity often grew out of great suffering, that humanity's greatest achievements are often inextricably entangled with its least glorious moments, and that most venerable practices and institutions could not have been established or upheld without some coercion and bloodshed along the way.⁴⁸

Once normative expectations exceed a certain threshold, therefore, the standing of nearly every practice is bound to be impugned by truthful historical inquiry, and the critical edge of history is blunted as a result: history becomes *indiscriminately* subversive. This means that *if* historiography is to retain its capacity to help readers of history *discriminate between* practices – to *teach us differences*, as King Lear put it – those readers' normative expectations must not be so high as to render history indiscriminately subversive. How high is too high will depend on what the history of our practices and institutions actually looks like. What we should normatively expect history to look like cannot be entirely independent of what we in fact know it to be.

This second kind of normative significance thus turns not on the conceptions of history themselves, but on the normative expectations with which people encounter particular conceptions or descriptions of history. How we react to historiography – whether we experience it as vindictory, neutral, or subversive – of course depends on a variety of factors, including notably the substantive details of what is revealed, how far back the events in question lie, and on how closely these past events are taken to constrain or inform what now goes on. But our reaction *also* depends on the often unexamined

47 Ibid., 6.

48 Nietzsche, Friedrich. *Beyond Good and Evil* (Cambridge: Cambridge University Press, 2002 [1886]), 3.9. See also Williams, Bernard. 'Nietzsche: The Gay Science', in *Introductions to Nietzsche*, ed. Robert B. Pippin (Cambridge: Cambridge University Press, 2012), 137–151, 143.

normative expectations about the kind of history we are prepared to accept for given practices while retaining our confidence in them.⁴⁹

5 Revealing Functional Continuity and Discontinuity

The third kind of normative significance derives from the continuities and discontinuities in the *functions* which history reveals practices to perform. Practices can serve a variety of needs and purposes which are often not transparent to those who engage in them. Learning that a practice continues to serve a function one does not want to see discharged, or that it has ceased to serve a function one *does* want to see discharged, can have a subversive effect: it can weaken one's confidence in the practice or encourage one to move away from it. Accordingly, history can be normatively significant by bringing to light functional continuities and discontinuities, and many critical historians turn to the past precisely to that end.⁵⁰ Emmanuelle Jouannet, for example, uses history to identify the present purpose of international law.⁵¹ Finding that international law initially served to replace religion in ensuring the proper ordering of mankind, she argues from this historical finding to a view of contemporary international law as a *liberal-welfarist* body of law that remains driven by this twofold initial purpose.⁵² The normative significance of this kind of historical account lies in the conclusions it yields about the functions that practices continue to perform.

Of course, insofar as international law (or some particular institution or norm within international law) is conceived as continuously serving a certain function, the use of history to reveal functional continuities and discontinuities

49 For a discussion of the idea that histories can be vindicatory, neutral, or subversive, see Craig, Edward. 'Genealogies and the State of Nature', in *Bernard Williams*, ed. Alan Thomas (Cambridge: Cambridge University Press, 2007), 181–200.

50 For a sympathetic critique of the 'functionalist' strand in the development of critical legal histories, see Gordon, 'Critical Legal Histories' 1984 (n. 4).

51 Jouannet, Emmanuelle. *The Liberal-Welfarist Law of Nations: A History of International Law* (Cambridge: Cambridge University Press, 2012), chapter 9. Jouannet identifies the function of international law by pointing to the function that writers like Emer de Vattel *intended* it to have. But of course, we can also look beyond what authors at particular times intended, and we have to be mindful of the fact that even if something originally served a certain function, it does not necessarily follow that it still does, for the conditions relative to which it originally functioned may no longer obtain. For inferences from past to current functionality to be plausible, we need some reason to think that the conditions in question still obtain.

52 *Ibid.*, 5–8.

will carry a variant of the kind of normative significance we considered in section III: the critique of certain *conceptions of historical functions* is a species of the critique of certain conceptions of history. But revealing functional continuities and discontinuities can exert critical power *even in the absence* of any such antecedent conceptions. To understand that something performs a certain function is to understand that it systematically has certain causal effects one cares about, either because those effects serve needs and concerns one wants to see satisfied, or because these effects are oppressive or unjust.

Revealing functional continuities and discontinuities through critical histories can be normatively significant in two ways. First, it can show that changes in circumstances have robbed a practice of its functionality. Even if the common narrative that presents sovereignty as a source of peace and stability within seventeenth-century Europe is true, for example, this does not mean that the advent of sovereignty everywhere and always heralds a turn towards more peaceful relations – Anghie, for one, has forcefully made the case for functional discontinuity once sovereignty was expanded beyond Europe.⁵³ If the conditions relative to which something originally proved functional change, its function might change with them.

The second way in which history can be normatively significant when functional continuity is lacking is by attuning one to new but related patterns of functionality. Being attentive to how practices proved open to being used and abused in various ways in the past, and to the subtle patterns in which they might have beneficial or pernicious effects, sharpens one's eye and judgment. It fuels and refines one's 'hermeneutics of suspicion' by cultivating alertness to potential abuse through awareness of past abuse.⁵⁴ More generally, it gives one a sense of the *functional openness* of a practice: the degree to which it lends itself to a variety of ends. Practices that arose to serve one purpose can be repurposed – what was used for good can be used for ill. But not all practices lend themselves to such repurposing to the same degree – they might exhibit functional *inertia*. History gives us a sharp sense of what purposes practices *can* be put to, and *risk* being put to, by showing us what purposes they *have* been put to in the past.

Of course, functional historical critique can alert us not just to what is bad about a practice, but also to what is good about it. When practices are as

53 Anghie, *Imperialism* 2005 (n. 1), 5–7, and in more detail at 196–244.

54 Ricoeur, Paul. *Freud and Philosophy: An Essay on Interpretation* (New Haven: Yale University Press, 1970), 32. For discussion, see Gadamer, Hans-Georg. 'The Hermeneutics of Suspicion'. *Man and World* 17(3) (1984), 313–323, 10.1007/bf01250456; Leiter, Brian. 'The Hermeneutics of Suspicion: Recovering Marx, Nietzsche, and Freud', in *The Future for Philosophy*, ed. Brian Leiter (Oxford: Clarendon Press, 2004), 74–105.

history-laden as those of international law, nuanced historical scrutiny will typically uncover a plurality of functions in any given practice. Among these functions may be genuinely valuable contributions which we would be ill-advised to renounce. If we are to revise our practices responsibly, we should not miss the achievements for the problems. Sovereignty, for example, for all its flaws, arguably also continues to perform valuable functions of ensuring peace and stability in most contexts. A nuanced historical critique will lead one to see both what needs changing and what needs preserving, and thereby help one understand, not just *that* a practice must be changed, but also where and how.

Building on the work of Anghie,⁵⁵ Sundhya Pahuja has argued that while the process of decolonization brought real change – the promise of betterment through the universalization of legal doctrines such as sovereignty and self-determination – that promise continued to be undermined by powerful functions of practices that ostensibly served quite different ends.⁵⁶ To support this claim of functional continuity, Pahuja examines three instances in which the third world tried to use international law to challenge the hegemonic position of the West: the process of decolonization, the establishment of Permanent Sovereignty over Natural Resources, and the assertion of a rule of international law after the end of the Cold War.⁵⁷ In all three instances, the new promise of universality masked a strong functional continuity with colonial power relations. Pahuja's critique is helpfully seen through a distinction – introduced by the philosopher Sally Haslanger – between *manifest* and *operative* concepts.⁵⁸ *Manifest* concepts are the explicit, public, and intuitive

55 See Anghie, *Imperialism* 2005 (n. 1), ch. 4 and 5.

56 Pahuja, *Decolonising International Law* 2011 (n. 1), 3–4. Her argument that colonialism reproduced itself by shifting power from the political to the economic sphere has been one of the animating insights behind critiques of neo-colonialism since Sartre, Jean-Paul. *Situations, V, Colonialisme et néo-colonialisme* (Paris: Gallimard, 1964) and Nkrumah, Kwame. *Neo-Colonialism: The Last Stage of Imperialism* (London: Thomas Nelson & Sons, 1965).

57 What Pahuja thereby also does, of course, is to make effective use of what Quintilian calls *paradiastolic redescription*: the technique of 'replacing a given evaluative description with a rival term that serves to picture the action no less plausibly, but serves at the same time to place it in a contrasting moral light'. Skinner, Quentin. *Visions of Politics*, vol. 1 (Cambridge: Cambridge University Press, 2002), 183. But the full critical force of her enterprise really comes out only once we see it as a functional critique, and more specifically as a functional critique identifying the operative functions performed by practices ostensibly serving quite different ends.

58 See Haslanger, Sally. *Resisting Reality: Social Construction and Social Critique* (Oxford: Oxford University Press, 2012), 370. Thus, an analysis of personhood that takes into account the social matrix in which the concept in fact operates might reveal, for example, that 'all persons are equal, but only white males are persons'. Mills, Charles W. *Blackness Visible: Essays on Philosophy and Race* (New York: Cornell University Press, 1998), 70.

understandings of what we are doing, while *operative* concepts are the implicit and hidden understandings of how our practices actually function. The prime way of identifying operative concepts, Haslanger suggests, is through historical inquiry – not out of sheer fascination with history, but because ‘there is often a significant gap between the dominant or institutional understanding of a domain and its actual workings’,⁵⁹ and because its actual workings are so deeply intertwined with complex and historically evolving practices that a historical perspective is required to fully grasp operative concepts. Thus, when Pahuja claims that post-wwII international law has both an imperial and a counter-imperial dimension,⁶⁰ she highlights that it includes the promise of betterment at the manifest level only for that promise to be stifled by functional continuity at the operative level. While the universalization of international law promised to extend to the third world all the benefits of sovereignty previously reserved for Western states – such as stability and political independence – the operative functionality of the international system continued to perpetuate the hegemonic position of the West.

The fact that international law should in principle have an emancipatory effect of course remains important for understanding why people retain faith in international law and how it can have the effects it has: were international law *manifestly* unjust, it could no longer have these same effects. Even if the contribution of the manifest function of international law is to mask its operative function – to wit, the promotion of Western interests – it has to provide people with some reason to think that international law performs the manifest function.⁶¹ But it is equally important to grasp that there is a strong correlation between the implementation of that practice and the production of these effects, even if these effects really are unintended. This alerts one to the risk of reproducing similar functional patterns going forward. Historical critique can sharpen one’s critical judgment by rendering one sensitive to functional patterns and to the subtler ways in which manifestly beneficial practices can have deleterious effects at the operative level.

59 Haslanger, *Resisting Reality* 2012 (n. 58), 368.

60 Pahuja, *Decolonising International Law* 2011 (n. 1), 41–3.

61 For a discussion of this last point, see Waldron’s interpretation of Edward P. Thompson in Waldron, Jeremy. *The Law* (London: Routledge, 1990), 21–24. As Thompson famously puts it: ‘If the law is evidently partial and unjust, then it will mask nothing, legitimise nothing, contribute nothing to any class’s hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just’. Thompson, Edward Palmer. *Whigs and Hunters: The Origin of the Black Act* (London: Penguin, 1975), 263.

The third kind of normative significance that critical histories can have thus lies in the functions and functional patterns that history can bring to light and that one might otherwise miss. This yields not just a static ascription of a certain function to a practice, but a dynamic understanding of the needs and concerns it answers to, and of the circumstances that must concur to allow the practice to function as it does – circumstances without which it becomes pointless or even dysfunctional. By revealing these dependencies as well as continuities and discontinuities of function one was unaware of, critical histories render one sensitive to the possibilities of use and abuse that ideas, practices, and institutions carry with them.

6 Overall Normative Significance

We have highlighted three ways in which critical histories of international law can be normatively significant: by undermining the overt or covert *conceptions* of history embedded within present practices in support of their authority; by disappointing the normative *expectations* that regulate people's reactions to critical histories; and by revealing continuities and discontinuities in the *functions* that our practices serve.

This allows us not only to represent the different kinds of normative pull we are subject to when confronted with critical histories of international law, but also to make sense of cases in which the normative significance of one and the same critical history pulls in conflicting directions. A practice might turn out *both* to involve conceptions of its history that a truthful historiography might reveal to be mythological, which is a subversive insight, *and* to perform a valuable function, which is a vindicatory insight. The 'Myth of Westphalia',⁶² for example, a glorifying conception of sovereignty-based international law's origins, can be shown by historical inquiry to be mythological; at the same time, some historical story along these lines can nonetheless plausibly be told to vindicate sovereignty-based international law as performing a peace-securing function under certain conditions.⁶³ While it counts *in favour* of a practice if it performs a valuable function, it also speaks *against* its authority if it partly

62 For an example of such a critique, see Beaulac, Stéphane. *The Power of Language in the Making of International Law: The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia* (Leiden: Martinus Nijhoff, 2004).

63 For the role of international law's religious orientation in escalating the Thirty Years War, see Diggelmann, Oliver. 'Die Entstehung des modernen Völkerrechts in der frühen Neuzeit', in *Völkerrechtsphilosophie der Frühaufklärung*, eds. Tilmann Altwicker, Francis Cheneval and Oliver Diggelmann (Tübingen: Mohr Siebeck, 2015), 1–26, 11–14.

rests on conceptions of its own history that do not survive truthful historical scrutiny. These countervailing reasons produce *tensions* in one's overall attitude towards the practice.

Some of these tensions might be overcome by replacing conceptions of history that proved unstable under reflection with more robust legitimization stories. Much as Bernard Williams aspires to replace the self-congratulatory progressive narrative that liberalism tells about itself with one that is more stable under critical historical reflection, international lawyers might try to replace the utopian narratives on which some parts of international law still base their authority with more reflectively stable accounts of international law's various successes and failures.

Other tensions one has to learn to live with by lowering one's normative expectations about the kind of history practices may properly have. This is what Nietzsche advocates when he criticizes his nineteenth-century contemporaries for having manoeuvred themselves into an impasse by combining a morality that encourages truthful historical and naturalistic inquiry with overblown normative expectations that lead them to consider any entanglement of the highly valued with the lowly world of power struggles, mundane needs, and historical contingency an insult, something that 'casts doubt on its value'.⁶⁴ Similarly, many of us have overly demanding normative expectations about the kind of history that the ideas, practices, and institutions we respect may properly have – expectations that an honest look at the history of international law cannot but disappoint. By adopting more realistic expectations, we can move away from an attitude that indiscriminately renders any truthful history subversive, and become able to redraw the contrast between acceptable and unacceptable histories *within* the range of histories that international law and its practices will actually turn out to have.

Finally, one might be able to alleviate tensions by adjusting the functionality of one's practices, something which can be done not just by tweaking the practices, but also by tweaking the circumstances in which they operate. Functional historical critique helps us identify the parts of our practices worth preserving and the parts worth revising – it helps us grasp not just *that* a practice must be changed, but *where* it must be changed. Many of the deleterious effects of sovereignty in a deeply unjust world might actually be due to the circumstances in which sovereignty is realized rather than to the sovereignty norm itself. Instead of sacrificing the many goods that sovereignty provides, we

64 Nietzsche, Friedrich. *Twilight of the Idols* (Cambridge: Cambridge University Press, 2005 [1889]), "Reason" in Philosophy, § 4. See Queloz, Matthieu and Damian Cueni. 'Nietzsche as a Critic of Genealogical Debunking' (n. 43), 284.

would then do better to try and tweak the circumstances that affect its functionality, such as the continual undermining of sovereign equality in the name of economic gain highlighted in Pahuja's study.⁶⁵

The countervailing intuitions about the normative significance of critical histories we started out with are thus the result of real tensions people face in dealing with the history of their practices, and it is a virtue in a theoretical account of their normative significance if it can explicitly represent and make sense of these tensions. In this article, we have sought to achieve this by theorizing three different ways in which history can be normatively significant and call for correspondingly different reactions, inviting people to replace unstable conceptions of history with more robust ones, lower normative expectations so that they cease to be indiscriminately subversive, and adjust the functionality of practices so that they truly serve the ends people want them to serve.

Acknowledgements

We are grateful to Oliver Diggelmann, Claudio Baldi, Lena Salaymeh and two anonymous referees for their constructive criticism and suggestions, which greatly improved the paper. We are also grateful to the Swiss National Science Foundation for its generous support.

Bibliography

- Alston, Philip. 'Does the Past Matter? On the Origins of Human Rights'. *Harvard Law Review* 126 (2013), 2043–2081.
- Altwickler, Tilmann and Oliver Diggelmann. 'How is Progress Constructed in International Legal Scholarship?'. *European Journal of International Law* 25(2) (2014), 425–444.
- Anghie, Antony. *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005).
- Arvidsson, Matilda and Miriam Bak McKenna. 'The Turn to History in International Law and the Sources Doctrine: Critical Approaches and Methodological Imaginaries'. *Leiden Journal of International Law* 33(1) (2020), 37–56.
- Beaulac, Stéphane. *The Power of Language in the Making of International Law: The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia* (Leiden: Martinus Nijhoff, 2004).

65 For a similar conclusion, see Kingsbury, Benedict. 'Sovereignty and Inequality'. *European Journal of International Law* 9(4) (1998), 599–625, 623–625.

- Bell, Duncan. 'Writing the World: Disciplinary History and Beyond'. *International Affairs* 85(1) (2009), 3–22.
- Bell, Duncan. *Reordering the World: Essays on Liberalism and Empire* (Princeton: Princeton University Press, 2016).
- Berman, Nathaniel. *Passion and Ambivalence: Colonialism, Nationalism, and International Law* (Leiden: Martinus Nijhoff, 2004).
- Brown, James Scott. *The Spanish Origins of International Law: Lectures on Francisco de Vitoria (1480–1546) and Francisco Suárez (1548–1617)* (Washington: Georgetown University, 1928).
- Butler, Judith. 'What is Critique? An Essay on Foucault's Virtue', in *The Political: Readings in Continental Philosophy* ed. David Ingram (Oxford: Blackwell, 2002), 212–228.
- Craig, Edward. 'Genealogies and the State of Nature', in *Bernard Williams*, ed. Alan Thomas (Cambridge: Cambridge University Press, 2007), 181–200.
- Craven, Matthew. 'Introduction: International Law and its Histories', in *Time, History and International Law*, eds. Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (Leiden: Martinus Nijhoff, 2007), 1–25.
- Diggelmann, Oliver. 'Die Entstehung des modernen Völkerrechts in der frühen Neuzeit', in *Völkerrechtsphilosophie der Frühaufklärung*, eds. Tilmann Altwicker, Francis Cheneval and Oliver Diggelmann (Tübingen: Mohr Siebeck, 2015), 1–26.
- Diggelmann, Oliver. "'The Internationalists" as Grand Narrative: Key Elements and Dilemmata'. *Global Constitutionalism* 7(3) (2018), 297–314.
- Fisch, Jörg. *Die Europäische Expansion und das Völkerrecht: Die Auseinandersetzung um den Status der überseeischen Gebiete vom 15. Jahrhundert bis zur Gegenwart* (Stuttgart: Steiner, 1984).
- Foucault, Michel. 'Nietzsche, la généalogie, l'histoire', in *Hommage à Jean Hyppolite*, ed. Suzanne Bachelard (Paris: Presses Universitaires de France, 1971), 145–172.
- Foucault, Michel. 'Friendship as a Way of Life', in *Ethics: Subjectivity and Truth (Essential Works of Foucault, 1954–1984, Vol. 1)*, ed. Paul Rabinow (New York: The New Press, 1997), 135–140.
- Gadamer, Hans-Georg. 'The Hermeneutics of Suspicion'. *Man and World* 17(3) (1984), 313–323, 10.1007/bf01250456.
- Gordon, Robert W. 'Critical Legal Histories'. *Stanford Law Review* 36(1/2) (1984), 57–125.
- Grewe, Wilhelm. *The Epochs of International Law* (Berlin: De Gruyter, 2001).
- Haslanger, Sally. *Resisting Reality: Social Construction and Social Critique* (Oxford: Oxford University Press, 2012).
- Hathaway, Oona and Scott Shapiro. *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (New York: Simon and Schuster, 2017).
- Howse, Robert and Ruti Teitel. 'Does Humanity-Law Require (or Imply) a Progressive Theory or History? (and other Questions for Martti Koskenniemi)'. *Temple International and Comparative Law Journal* 27 (2013), 377–397.

- Hunter, Ian. 'Global Justice and Regional Metaphysics: On the Critical History of the Law of Nature and Nations', in *Law and Politics in British Colonial Thought: Transpositions of Empire*, eds. Shaunnagh Dorsett and Ian Hunter (Berlin: Springer, 2010), 11–29.
- Ikenberry, G John. *Liberal Leviathan: The Origins, Crisis, and Transformation of the American World Order* (Princeton University Press, 2011).
- Jouannet, Emmanuelle. *The Liberal-Welfarist Law of Nations: A History of International Law* (Cambridge: Cambridge University Press, 2012).
- Kingsbury, Benedict. 'Sovereignty and Inequality'. *European Journal of International Law* 9(4) (1998), 599–625.
- Koskenniemi, Martti. *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2001).
- Koskenniemi, Martti. 'Vitoria and Us: Thoughts on Critical Histories of International Law'. *Rechtsgeschichte-Legal History* 22 (2014), 119–138.
- Koskenniemi, Martti. 'Foreword: History of Human Rights as a Political Intervention in the Present', in *Revisiting the Origins of Human Rights*, eds. Pamela Slotte and Miia Halme-Tuomisaari (Cambridge: Cambridge University Press, 2015), ix – xviii.
- LaCapra, Dominick. *Soundings in Critical Theory* (Ithaca: Cornell University Press, 1989).
- Leiter, Brian. 'The Hermeneutics of Suspicion: Recovering Marx, Nietzsche, and Freud', in *The Future for Philosophy*, ed. Brian Leiter (Oxford: Clarendon Press, 2004), 74–105.
- Lesaffer, Randall. 'International Law and its History: The Story of an Unrequited Love', in *Time, History and International Law*, eds. Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (Leiden: Martinus Nijhoff, 2007), 27–41.
- Lorenzini, Daniele. 'Genealogy and Critique in Foucault and Fricker'. *The Monist* 105(4) (2022) (forthcoming).
- Mazower, Mark. *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton: Princeton University Press, 2009).
- McCrudden, Christopher. 'Human Rights Histories'. *Oxford Journal of Legal Studies* 35(1) (2014), 179–212.
- Mills, Charles W. *Blackness Visible: Essays on Philosophy and Race* (New York: Cornell University Press, 1998).
- Moyn, Samuel. *The Last Utopia: Human Rights in History* (Cambridge: Cambridge University Press, 2012).
- Moyn, Samuel. 'Substance, Scale, and Salience: The Recent Historiography of Human Rights'. *Annual Review of Law and Social Science* 8 (2012), 123–140.
- Nietzsche, Friedrich. *Untimely Meditations* (Cambridge: Cambridge University Press, 1997 [1873–1876]).
- Nietzsche, Friedrich. *Beyond Good and Evil* (Cambridge: Cambridge University Press, 2002 [1886]).

- Nietzsche, Friedrich. *Twilight of the Idols* (Cambridge: Cambridge University Press, 2005 [1889]).
- Nkrumah, Kwame. *Neo-Colonialism: The Last Stage of Imperialism* (London: Thomas Nelson & Sons, 1965).
- Nys, Ernest. *Les origines du droit international* (Brussels: Castaigne, 1894).
- Oppenheim, Lassa. 'The Science of International Law: Its Task and Method'. *American Journal of International Law* 2(2) (1908), 313–356.
- Orford, Anne. *International Authority and the Responsibility to Protect* (Cambridge: Cambridge University Press, 2011).
- Orford, Anne. 'The Past as Law or History? The Relevance of Imperialism for Modern International Law'. *NYU ILJ Working Paper* 2 (2012), 1–17.
- Orford, Anne. 'On International Legal Method'. *London Review of International Law* 1(1) (2013), 166–197.
- Orford, Anne. 'International Law and the Limits of History', in *The Law of International Lawyers: Reading Martti Koskenniemi*, eds. Werner Wouter, Marieke de Hoon and Alexis Galán (Cambridge: Cambridge University Press, 2015), 297–320.
- Owen, David. 'Genealogy', in *Encyclopedia of Political Theory*, ed. Mark Bevir (Thousand Oaks: Sage Publications, 2010), 549–551.
- Pahuja, Sundhya. *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011).
- Pitts, Jennifer. *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France* (Princeton: Princeton University Press, 2009).
- Purcell, Kate. 'On the Uses and Advantages of Genealogy for International Law'. *Leiden Journal of International Law* 33(1) (2020), 13–35.
- Queloz, Matthieu and Damian Cueni. 'Nietzsche as a Critic of Genealogical Debunking: Making Room for Naturalism Without Subversion'. *The Monist* 102(3) (2019), 277–297.
- Rasilla, Ignacio de la. *International Law and History: Modern Interfaces* (Cambridge: Cambridge University Press, 2021).
- Redslob, Robert. *Histoire des grands principes du droit des gens depuis l'Antiquité jusqu'à la veille de la Grande Guerre* (Paris: Rousseau, 1923).
- Ricoeur, Paul. *Freud and Philosophy: An Essay on Interpretation* (New Haven: Yale University Press, 1970).
- Sartre, Jean-Paul. *Situations, V, Colonialisme et néo-colonialisme* (Paris: Gallimard, 1964).
- Skinner, Quentin. 'Meaning and Understanding in the History of Ideas'. *History and Theory* 8 (1969), 3–53.
- Skinner, Quentin. *Visions of Politics, Volume I: Regarding Method* (Cambridge: Cambridge University Press, 2002).
- Skouteris, Thomas. 'The Turn to History in International Law'. *Oxford Bibliographies* (2017).

- Srinivasan, Amia. 'Genealogy, Epistemology and Worldmaking'. *Proceedings of the Aristotelian Society* 119(2) (2019), 127–156.
- Tasioulas, John. 'Towards a Philosophy of Human Rights'. *Current Legal Problems* 65(1) (2012), 1–30.
- Thompson, Edward Palmer. *Whigs and Hunters: The Origin of the Black Act* (London: Penguin, 1975).
- Tuck, Richard. *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 2001).
- Waldron, Jeremy. *The Law* (Abingdon: Routledge, 1990).
- Watkins, Elizabeth Siegel. *On the Pill: A Social History of Oral Contraceptives, 1950–1970* (London: Johns Hopkins University Press, 1998).
- Williams, Bernard. *Truth and Truthfulness: An Essay in Genealogy* (Princeton: Princeton University Press, 2002).
- Williams, Bernard. 'The Liberalism of Fear', in *In the Beginning Was the Deed: Realism and Moralism in Political Argument*, ed. Geoffrey Hawthorne (Princeton: Princeton University Press, 2005), 52–61.
- Williams, Bernard. 'Philosophy as a Humanistic Discipline', in *Philosophy as a Humanistic Discipline*, ed. Adrian William Moore (Princeton: Princeton University Press, 2006), 180–199.
- Williams, Bernard. *Ethics and the Limits of Philosophy* (Abingdon: Routledge, 2011).
- Williams, Bernard. 'Nietzsche: The Gay Science', in *Introductions to Nietzsche*, ed. Robert B. Pippin (Cambridge: Cambridge University Press, 2012), 137–151.
- Williams, Bernard. 'The Last Word, by Thomas Nagel', in *Essays and Reviews 1959–2002*, ed. Michael Woods (Princeton: Princeton University Press, 2014), 371–387.
- Williams, Bernard. 'Why Philosophy Needs History', in *Essays and Reviews 1959–2002*, ed. Michael Woods (Princeton: Princeton University Press, 2014), 405–412.
- Wittgenstein, Ludwig. *Philosophische Untersuchungen = Philosophical Investigations* (Chichester: Wiley-Blackwell, 2009 [1953]).