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3

Cognitive Biases and International Law: What's the Point of Critique?

Ingo Venzke*

I Introduction

One of the main aims of critique is to work towards progressive change. What are some of critical scholarship's assumptions about how that change should happen? And do they hold? In the present chapter, I discuss three characteristic traits of critical scholarship: first, exposing law as part of the problem; secondly, emphasizing indeterminacy; and, thirdly, revealing contingencies in the course of international law. Many such practices are well received, some might even seem quaint. If the hope to facilitate progressive change is a common denominator for much critical work, it is less clear, how such change should happen, and what critical work does about that. What are reasons to hope that critique somehow matters?

Many of those reasons can be located squarely within dynamics of social cognition and knowledge production.¹ Critique can unveil and counteract a variety of dynamics that render the present state of affairs more natural, necessary, and just. Those dynamics forestall progressive change simply because they render such change impossible and undesirable.² This is arguably critique's most classic and most characteristic feature as I see it, working against alienation to unveil and regain a political understanding of the social world. It is only possible to change what is neither natural nor without alternative.³ Critique thus also offers alternative understandings and suggests that some things indeed need to be unlearned.⁴

* I thank Andrea Bianchi, Moshe Hirsch, Yahli Shereshevsky, and all the participants of the International Law Forum at the Hebrew University of Jerusalem, 4–5 December 2019, for their valuable comments.

¹ On the importance of foregrounding those dynamics see Bianchi and Hirsch in this volume.

² Duncan Kennedy, *A Critique of Adjudication (Fin de Siècle)* (Harvard University Press 1997) 241.

³ Max Horkheimer, 'Traditional and Critical Theory' in Max Horkheimer (ed), *Critical Theory: Selected Essays* (Continuum 2002) 204, arguing that critique must unravel an understanding of 'senseless wretchedness [as] an unchangeable force of nature, a fate beyond man's control'. Rainer Forst, 'Gerechtigkeit nach Marx' in Rainer Forst (ed), *Normativität und Macht* (Suhrkamp 2015) 183.

⁴ See Bianchi and Hirsch in this volume on the programme of unveiling, understanding, and unlearning.

While its strategic targets vary, critique has overall remained vague as to how change should happen, and how it should happen with the help of critique.⁵ Sometimes critical scholarship has taken comfort in abstract declarations of faith: critique *is* the practical work. Or it has remained self-assertively agnostic, suggesting that it is just not possible to further support its assumptions—at least not in a way that would be considered ‘empirical.’⁶ Some might then consider the question of how critique matters, perhaps reflecting a concern for practical impact, to be hearsay. There are good reasons for critique to resist the pull towards practical relevance, especially as it may then also be pushed to offer neat solutions. The need to offer workable, implementable insights tends to limit, if not distort, the analysis of the underlying problem—often abstracting from root causes, flattening the context, and leading to a rather *uncritical* understating of what the issue is.⁷ The question of how change should happen through critique, however, is neither new, nor necessarily blasphemous.⁸

A while ago, David Trubek drew attention to the absence of any account, as he saw it, of how critique in law is expected to unfold its effects in practice.⁹ While debates have evolved, many critical scholars continue to fear, that diving further into that question of *how* change should happen, could pull critique onto the terrain of empirical methods and their supposed commitment to positivism—that is, in short, the belief according to which facts are the arbiters about truth claims.¹⁰ Critical thinking would, also in brief, point out that facts are not just out there but the products of our own making, and thus somewhat unreliable.¹¹ Much more could be said on those theoretical commitments and remnants of the classic

⁵ Fleur Johns, ‘Critical International Legal Theory’ in Jeffrey L Dunoff and Mark A Pollack (eds), *International Legal Theory: Foundations and Frontiers* (Cambridge University Press 2021) (arguing that critical scholarship ‘has sometimes overstated the power of its own diagnoses . . . overestimated the newness of, and the emancipatory potential associated with, its “revelations”—the bringing to light of historical contingency perhaps especially”).

⁶ Kennedy (n 2); Duncan Kennedy, ‘The Structure of Blackstone’s Commentaries’ (1979) 28 *Buffalo Law Review* 209, 220. I am bracketing what empirical may mean for just a moment. It is itself a contentious term. See nn 8–10 below.

⁷ Susan Marks, ‘Human Rights and Root Causes’ (2011) 74 *Modern Law Review* 57.

⁸ Also see Thomas Kern, Thomas Laux, and Insa Pruisken, ‘Critique and Social Change: An Introduction’ (2017) 42 *Historical Social Research* 7.

⁹ David M Trubek, ‘Where the Action Is: Critical Legal Studies and Empiricism’ (1984) 36 *Stanford Law Review* 575, 610. I am using the notion of critique in a broad sense to refer to work informed by critical theories, which is notably more than critical legal studies alone, for a markers of such a broader understanding and its still distinctive features, consider the classic distinction by Horkheimer (n 3); for a sense of legal critique beyond critical legal studies as it is mostly known from debates centred in the US, consider for example Christoph Menke, ‘Law and Violence’ (2014) 22 *Law and Literature* 1; Andreas Fischer-Lescano, ‘Radikale Rechtskritik’ (2014) 47 *Kritische Justiz* 171

¹⁰ See the classic exchanges in Theodor W Adorno and others, *Der Positivismusstreit in der Deutschen Soziologie* (Luchterhand 1969).

¹¹ See eg Reymong Geuss, *The Idea of a Critical Theory* (Cambridge University Press 1981); Seyla Benhabib, *Critique, Norm, and Utopia: A Study of the Foundations of Critical Theory* (Columbia University Press 1986).

Positivismusstreit—as well as the rather commonplace caricatures often rendered of the respective other.¹²

Still now, divides between critical scholarship and more recent socio-psychological work run deep, in particular as the latter has developed further under the heading of behavioural economics, again—rightly and wrongly—conveying a commitment to positivism that critical scholars reject. While critique lost faith in rationality and drew attention to its pathologies, economics continued to stick to assumptions of rationality, something that neither the emphasis on bounded rationality nor the behavioural turn has changed.¹³ It is also the case that emerging experimental research in international law is placed—and in fact places itself—within that rationalist tradition.¹⁴ What the behavioural turn has done, to be sure, is to highlight the many ways in which human action deviates, especially due to cognitive and emotional dynamics, from what could be considered rational. ‘Who would have ever thought otherwise?’, the critic might righteously claim in reaction, pointing to a long-standing practice of critical scholarship to draw out every individual’s situatedness, paralleled with an emphasis on collective, structural biases.¹⁵

I will try to largely side-step these protracted divides, without wanting to down-play the importance of the related and anyway much more nuanced debates. I only note that some empirical—better: empiricist—legal studies assume a simplistic positivism that is indeed difficult to defend, but many others do not, and it would be critical work’s own loss if it disregarded those more promising studies’ insights. I thus indeed join the current project in its programme of bringing social cognition closer together with the classically critical work on the production of knowledge.

Social-psychological and related cognitive-sociological work has made great strides in understanding the dynamics that render the present state of affairs more natural, necessary and just, and what to do about that. In spite of scepticism in some quarters, there is a rich critical tradition that has linked up closely with such

¹² Adorno and others (eds), *Der Positivismusstreit in der deutschen Soziologie* (Fn 10).

¹³ Cf Andrea Bianchi and Anne Saab, ‘Fear and International Law-Making: An Exploratory Inquiry’ (2019) 32 *Leiden Journal of International Law* 351.

¹⁴ See Jeffrey L Dunoff and Mark A Pollack, ‘Experimenting with International Law’ (2017) 28 *European Journal of International Law* 1317; Jean Galbraith, ‘Treaty Options: Towards a Behavioral Understanding of Treaty Design’ (2013) 53 *Virginia Journal of International Law* 309; Anne van Aaken, ‘Behavioral International Law and Economics’ (2014) 55 *Harvard International Law Journal* 501; Tomer Brode, ‘Behavioral International Law’ (2015) 163 *University of Pennsylvania Law Review* 1099. Eyal Zamir and Doron Teichman, *Behavioral Law and Economics* (Oxford University Press 2018) 423–430.

¹⁵ Outi Korhonen, ‘New International Law: Silence, Defence of Deliverance?’ (1996) 7 *European Journal of International Law* 1. Johns (n 10)) (emphasizing critique’s concern ‘with understanding and addressing the persistence of bias’). Cf Anne van Aaken, ‘Rationalist and Behavioralist Approaches to International Law’ (2018) <https://ssrn.com/abstract=3237033>. (arguing that ‘[a]lthough behavioral economics has a rationalist starting point concerning its pedigree and methods, it hints at insights which were long proposed by constructivist scholars’); Moshe Hirsch, ‘The Sociological Perspective on International Law’ in Jeffrey L Dunoff and Mark A Pollack (eds), *International Legal Theory: Foundations and Frontiers* (Cambridge University Press 2020).

work. The oeuvre of Theodor W Adorno still serves as a towering example. While it is not geared towards legal practices, let alone international law, it testifies to the closely linked concerns of critical theory and socio-psychological research.¹⁶ The driving question of much of Adorno's thinking was, after all: Why do people not seek knowledge, even if they could?¹⁷ Why do they let themselves be deceived and even seek deception? Perceptions and beliefs are main targets of much critique, especially in law, and it thus makes good sense to continue to open up towards socio-psychological work.

I will focus on points of contact related to three of critical scholarship's main traits. First is the emphasis on exposing the complicity of law as part of the problem (section IIA). Critique here finds support in research on omission and confirmation biases (section IIB) as well as in psychological dynamics that respond to people's strong longing for a just world, seen as a world in which things happen for a reason. In particular, system justification theory lends itself for close conversations with critical work in law as it emphasizes the role of ideology in stabilizing attitudes towards the social world (section IIC). Secondly, I turn to the well-received work of revealing law's indeterminacy (section IIIA), the practical aims of which resonate with research on hindsight bias and counterfactual thinking (section IIIB). That research shows, in particular, how different kinds of reasoning impact perceptions of what is likely and what is just (section IIIC). Thirdly, I will discuss the search of contingency in international law's past, which also finds support in studies on hindsight bias (section IV). I will close with an outlook. While there are many points of contact between critical legal research and social psychology, and underlying concerns are sometimes quite similar, frictions do remain. More transgressing research should probe how exactly law is weaved into beliefs about our social world and how those beliefs can possibly change (section V).

II Exposing Complicity

A The Law as Part of the Problem

A first characteristic trait of critical scholarship is that it draws attention to law's complicity in injustice, that the law is also part of the problem. It is an integral part of such arguments that they place emphasis on the (unequal) distribution of

¹⁶ His *Negative Dialectics*, while difficult to penetrate for its philosophical richness, is ripe with insights about different psychological reasons for self-deception, many of which could be described as the working of ideology. Theodor W Adorno, *Negative Dialectics* (Routledge 1990). The psychology is most upfront in Theodor W Adorno and others, *The Authoritarian Personality* (Harper & Row 1950), the outcome of Adorno's collaborations at UC Berkeley.

¹⁷ The context for this question was the experience of indifference during the Holocaust. Bluntly, why did Germans in Frankfurt or elsewhere not want to know what happened to their Jewish neighbours during the Nazi-regime?

payoffs and, generally, on the question of who wins and who loses. While there are abundant examples to support this point, it suffices to draw attention to international economic law's prohibition on certain import restrictions, subsidies or capital controls, all of which play a part in favouring developed countries and 'their' economic actors over developing countries who tend to be on the receiving end of the bargain, facing the constraints of international law when they might try to build-up an internationally competitive industry or reap benefits of foreign investment, for example.¹⁸ Who would be surprised? Of course, powerful actors have a relatively strong imprint on the law and manage to align it better with their interests and convictions.

Arguments about law's complicity in perpetuating some instances of injustice not only targets prohibitions of the law but also emphasizes its enabling function, i.e. what it authorizes and allows. An example is the fact that trade law allows developed countries to arrange their tariff schemes in a way that continues to reserve valuable economic activity for them, while leaving less profitable business for others.¹⁹ Those tariff schemes are part and parcel of the fact that companies located in Germany make almost twice as much money by re-exporting roasted coffee than all of Africa makes with harvesting it.²⁰ It remains necessary to hammer the point that this is not an expression of a natural comparative advantage but the result of factors including a series of politico-legal arrangements like tariff schemes that prevent producers outside Europe to enter the market with roasted coffee. A similar dynamic is at play when it comes to fancy chocolate products that yield a significant profit while harvesting cacao beans supports a living. A steep tariff on processed cacao keeps it out of the European market and cacao-producing countries out of that more lucrative part of the production chain.²¹ Labour conditions surely vary significantly along that chain too. Similar stories could be told many times over with reference to other products and other fields of life. In their more detailed versions, they would include transnational ownership structures and value chains, among other things. The core point remains: all of that is crucially made possible by legal arrangements.

¹⁸ Cf Nicolás M Perrone and David Schneiderman, 'A Critique of International Economic Law: Depoliticization, Inequality, Precarity' in Emiliós Christodoulidis, Ruth Dukes, and Marco Goldoni (eds), *Research Handbook on Critical Legal Theory* (Edward Elgar Publishing 2018); David Kennedy, *A World of Struggle: How Power, Law and Expertise Shape Global Political Economy* (Princeton University Press 2016).

¹⁹ See, classically, Immanuel Wallerstein, *Historical Capitalism: With Capitalist Civilization* (Verso 1983).

²⁰ Calestous Juma, 'How the EU Starves Africa into Submission' (2015) <https://www.belfercenter.org/publication/how-eu-starves-africa-submission>.

²¹ Cf Monika Hoegen, 'High Duties Keep Food Imports from Poor Countries out of Europe' (2010) <http://www.dw.com/en/high-duties-keep-food-imports-from-poor-countries-out-of-europe/a-5127705>.

Now, the hope of exposing the complicity of law in injustice tends to be, with grand ambition, that it may contribute to progressive change. What are some of the reasons for such a hope? I wish to stress at this stage that the conditions and possibilities of social change are of course incredibly varied as well as contested across disciplines. They also work at different levels of abstraction. I continue to limit myself to drawing out specific points of contact between critical work in international law and social psychology.

III Omission and Confirmation Biases

A first relevant socio-psychological dynamic that underpins people's attitudes and behaviour is their frequent omission bias. According to this bias, an act of commission tends to be judged more severely than an omission to act, even if the consequences of both are the same. Differences in the assessments are associated with the belief that omissions do not *cause* outcomes.²² The omission bias is part of dynamics that underlie a more general bias towards the status quo.²³ With regard to critique in international law, it is thus important to counter the view, for instance, that some are poor and others are rich not because the rich omitted to help the poor, but because they actively contribute to the fact that they remain rich, and the poor remain poor, and that they have also been doing that through international law. Critique re-describes what is happening so that what may seem like acts of omission come to be understood as acts of commission.

Approaching the core of critical theory, a combination of psychological dynamics supports the need to continuously draw attention to instances and patterns of injustice, even if it that is not followed by suggestions for a solution. Highlighting instances and patterns of injustice that irritate prevailing narratives counters confirmation biases as well as more general social dynamics that present the world as just. It is well-documented that people tend to rely on information which is consistent with their preconceptions.²⁴ The conformation bias extends to the information that people seek out in the first place, the interpretation of pieces of information and which information is remembered down the line. This is fairly well known and relevant, but also fairly unspecific to critique. More to the point are the dynamics that render the world just.

²² Mark Spranca, Elisa Minsk, and Jonathan Baron, 'Omission and Commission in Judgment and Choice' (1991) 27 *Journal of Experimental Social Psychology* 76.

²³ Ilana Ritov and Jonathan Baron, 'Status-Quo and Omission Biases' (1992) 5 *Journal of Risk and Uncertainty* 49.

²⁴ PC Wason, 'On the Failure to Eliminate Hypotheses in a Conceptual Task' (1960) 12 *Quarterly Journal of Experimental Psychology* 129. For the legal context see Kevin Jon Heller, 'The Cognitive Psychology of Circumstantial Evidence' (2006) 105 *Michigan Law Review* 241, 292.

A The Longing for Justice

1 Just world theory

Just world theory posits that people have a strong motivation to believe that they live in a world that is in principle just. Therefore, they seek to find reasons for what would otherwise seem unjust—reasons suggesting that people get what they deserve or deserve what they get.²⁵ Melvin Lerner argued in his pioneering work that this belief in a just world has a functional, motivational basis. A world in which actions have predictable and appropriate consequences enables people to act and pursue their plans within it.²⁶ Several studies have shown how people find reasons for others' unfavourable situation, their poverty or their illness, just as they find reasons for their own favourable situation, turning luck or privilege into merit.²⁷ There is a strong, everyday longing for reasons that explain and justify what may otherwise seem unjust. The businesswomen can, for instance, step over a homeless person sleeping at her doorstep with relative ease when she thinks that this person had a fair chance in life but blew it.

Just world theory places emphasis on predictable action and their consequences, on a degree of individual control over life-circumstances. Such a belief that life-circumstances are of 'our' making may be fairly common for the powerful few, but is rare among the disenfranchised many.²⁸ This has been borne out in further research, showing that relative to the middle-class, members of the lower economic strata have a significantly weaker sense of personal control over their circumstances and, as a result, are more likely to explain social events in situational rather than systematic terms.²⁹ It requires further explanation, however, that those individuals and groups that are also systematically disenfranchised and disfavoured by the rules of the game still frequently believe in the justice of those rules.

2 System justification theory

System justification theory purports to offer that explanation, focusing especially on people's overall motivation to defend and justify the system even if it disfavours them.³⁰ The theory predicts that system justification is a strong motivational factor

²⁵ Vicky M Wilkins and Jeffrey B Wenger, 'Belief in a Just World and Attitudes Toward Affirmative Action' (2014) 42 *Policy Studies Journal* 325; Melvin J Lerner and Carolyn H Simmons, 'Observer's Reaction to the "Innocent Victim": Compassion or Rejection?' (1966) 4 *Journal of Personality and Social Psychology* 203. See already Zick Rubin and Letita Anne Peplau, 'Who Believes in a Just World' (1975) 31 *Journal of Social Issues* 65.

²⁶ MJ Lerner, *The belief in a just world: The fundamental delusion* (Plenum Press 1970). Cf Adrian Furnham, 'Belief in a Just World: Research Progress over the Past Decade' (2003) 34 *Personality and Individual Differences* 795;

²⁷ Lerner and Simmons (n 25).

²⁸ Susan Marks, 'False Contingency' (2009) 62 *Current Legal Problems* 1, 14.

²⁹ Antony SR Manstead, 'The Psychology of Social Class: How Socioeconomic Status Impacts Thought, Feelings, and Behaviour' (2018) 57 *British Journal of Social Psychology* 267.

³⁰ See the recent debate on the occasion of system justification theory's 25th anniversary in (2019) 58 *British Journal of Social Psychology* 263 ff.

for defending system outcomes in addition to ego and group justifications. It has found that self-interest (ego justification) or ingroup favouritism (group justification) both fall short of explaining many social phenomena, such as the fact that those who are most disadvantaged by a social system may end up becoming its most ardent supporters. In short, it has been shown that people find it easier to attribute their disadvantageous position to their own 'objective' shortcomings rather than to the injustice in the social system.

At the heart of system justification theory is once more the need to ease cognitive dissonance resulting from evident inequality that cries out for reasons. Denying reasons is precisely part of critical scholarship. System justification theory further highlights how winners believe themselves to be deserving and losers to be undeserving for their laziness or lack of intelligence, for instance. Remarkably, those who are disfavoured by the social system, too, tend to rationalize their situation on behalf of the social system, for example, believing that they did not work or study hard enough.³¹ Stereotypes and ideologies supply ready-made rationalizations that support and justify the social system.³² System justifications, in sum, provide a palliative function to curb feelings of discontent and anger with a system that would otherwise not only seem (and be) unjust, but also be hard and frustrating to change.³³ It is cognitively and motivationally less onerous to blame oneself than the social system. Strikingly, and consistent with system justification theory, such effects are more pronounced among the poorest and in cases of the greatest inequality, leading to the fact that a bottom-up drive towards social change is weakest where it is needed most.³⁴ At the same time, it remains crucial not to overlook the contestation and resistance that does exist, not to think, for example, that international investment law has been in a legitimacy crisis only once Western host states were on law's receiving end. Such a view would belittle earlier contestations and rightly prompt charges of Eurocentrism.

3 System justification theory and the role of ideology

System justification theory squares with critical (legal) theory's emphasis on the role of ideology in maintaining the status quo while fending off critique. It is in this vein that both Shirley Scott and Susan Marks have studied international legal practices as ideology.³⁵

³¹ Gary Blasi and John T Jost, 'System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice' (2012) 94 *Ideology, Psychology, and Law* 1119, 1130.

³² John T Jost and others, 'Social Inequality and the Reduction of Ideological Dissonance on Behalf of the System: Evidence of Enhanced System Justification among the Disadvantaged' (2003) 33 *European Journal of Social Psychology* 13; Blasi and Jost (n 31) at 1127.

³³ John T Jost, 'A Quarter Century of System Justification Theory: Questions, Answers, Criticisms, and Societal Applications' (2019) 58 *British Journal of Social Psychology* 263.

³⁴ PJ Henry and Andrea Saul, 'The Development of System Justification in the Developing World' (2006) 19 *Social Justice Research* 365.

³⁵ Shirley V Scott, 'International Law as Ideology: Theorizing the Relationship between International Law and International Politics' (1994) 5 *European Journal of International Law* 313; Susan Marks, *The Riddle of All Constitutions. International Law, Democracy and the Critique of Ideology* (Oxford University

They have both drawn on John Thompson's seminal work, whose conception of ideology,

calls our attention to the ways in which meaning is mobilized in the service of dominant individuals and groups, that is, the ways in which the meaning constructed and conveyed by symbolic forms serves, in particular circumstances, to establish and sustain structured social relations from which some individuals and groups benefit more than others, and which some individuals and groups have an interest in preserving while others may seek to contest.³⁶

Free market ideology is one of the leading cases in point, and a main target of criticism. With reference to the above examples from trade, it may be recalled that comparative advantages on the market typically do not arise in the absence of law, but through law and legal privileges. Similarly, as long as economic law is deemed to be about increasing welfare through efficiency gains, its key role in distributing, rather than creating, value gets lost.³⁷ The workings of ideology can contribute to leading the have-nots away from contesting the social system, thus stabilizing the rules of the game and allowing those rules to be mobilized in the service of the haves. Several studies in international law have zoomed in on particular parts of practice, focusing on international law not only *as* ideology, but in service of another ideology, be it service of particular great powers,³⁸ specific promises of progress,³⁹ or grand schemes of (neo-)liberalism or capitalism.⁴⁰

The practice of exposing the complicity of international law in contributing to instances and patterns of injustice—of seeing it as part of the problem—thus counters a combination of powerful cognitive and social psychological dynamics that render the world seemingly just. The persistence of those dynamics and the cognitive effects they produce demands that critique be repeated, rubbed in, as it were.

Press 2000). Also see China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005). Grietje Baars, *The Corporation, Law and Capitalism: A Radical Perspective on the Role of Law in the Global Political Economy* (Brill 2019).

³⁶ John B Thompson, *Ideology and Modern Culture: Critical Social Theory in the Era of Mass Communication* (Polity Press 1990) 72–73.

³⁷ Ingo Venzke, *International Law and the Spectre of Inequality* (Amsterdam University Press 2019); Nicolas Lamp, 'How Should We Think about the Winners and Losers from Globalization? Three Narratives and Their Implications for the Redesign of International Economic Agreements' (2019) 30 *European Journal of International Law* 1359.

³⁸ Nico Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' (2005) 16 *European Journal of International Law* 369.

³⁹ Martti Koskenniemi, 'The Ideology of International Adjudication and the 1907 Hague Conference' in Yves Daudet (ed), *Topicality of the 1907 Hague Conference, the Second Peace Conference* (Nijhoff 2008) 127–52.

⁴⁰ BS Chimni, 'Marxism and International Law: A Contemporary Analysis' (1999) 34 *Economic and Political Weekly* 337; Akbar Rasulov, 'A Marxism for International Law: A New Agenda' (2018) 29 *European Journal of International Law* 631.

It is not, as is sometimes suggested, that critique, if once expressed, it is done, or that it is at best a first step before the real work begins. Omission and confirmation biases, just world, and system justification theories are too powerful.

IV Revealing Indeterminacy at any Moment

A Law's Indeterminacy (Once More, Briefly)

A second characteristic feature of critique is that it draws attention to law's indeterminacy. Duncan Kennedy has shown for private law how decisions oscillate between party autonomy and mandatory rules, and David Kennedy as well as Martti Koskenniemi have done so similarly for the structure of international legal argument, which they see to be caught between apology (linked to state consent) and utopia (linked to some transcendent idea of justice).⁴¹ The main techniques for exposing the indeterminacy of specific choices have been those of structuralism,⁴² in particular deconstruction—peeling off layers of argument to expose the arguably groundless choice between antagonistic principles and to retain a sense that a choices could also have gone the other way. In Jacques Derrida's drastic formulation, deconstruction *is* freedom, the possibility to take full responsibility for one's decisions that cannot be derived from anything or anywhere.⁴³

Even if one does not buy into that full theoretical package, the critique of legal decisions' determining forces—be it in politics, economics, morality, or another terrain—has a strong tradition.⁴⁴ Part of that tradition is to keep the legal form free from outside interference. The critical Hans Kelsen subscribed to that programme, among others, not in defence of an implausible pseudo-formalism, as is sometimes suggested, but in favour of keeping open a space for choice within the law.⁴⁵

The main point of practicing this technique—of revealing the indeterminacy of legal decisions—has always been twofold, to show that it could have been otherwise, and to start an inquiry into why it was not.⁴⁶ If the law does not determine

⁴¹ David Kennedy, 'Theses about International Law Discourse' (1980) 23 *German Yearbook of International Law* 353; Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005).

⁴² Martti Koskenniemi, 'What Is Critical Research in International Law?' (2016) 29 *Leiden Journal of International Law* 727.

⁴³ Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"' (1990) 11 *Cardozo Law Review* 920.

⁴⁴ Jochen von Bernstorff and Ingo Venzke, 'Ethos, Ethics and Morality in International Relations' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2010).

⁴⁵ Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (Cambridge University Press 2010); Ernesto Laclau, *Emancipation(s)* (Verso 1996); Ingo Venzke, 'Legal Contestation about "Enemy Combatants": On the Exercise of Power in Legal Interpretation' (2009) 5 *Journal of International Law & International Relations* 155.

⁴⁶ See Ingo Venzke, 'What If? Counterfactual (Hi)Stories of International Law' (2018) 8 *Asian Journal of International Law* 403.

its interpretation, what does? These two sides of critique stand in a mutually supportive relationship, but they also pull into different directions. On the one hand, the critical argument suggests that an inquiry into why a legal decision went this way and not the other way must first expose how, legally, very different decisions were indeed possible. Law *as* ideology, the argument goes, hides the ‘real’ reasons. Law’s spell must first be undone, its indeterminacy be exposed, before deeper understanding and critique is possible. On the other hand, however, exposing indeterminacy is placed into the service of freedom and responsible action—it *could* have been otherwise, not only legally, but ‘really’, practically.⁴⁷ That latter argument is tangibly more difficult as it needs to counter the forces that in practice close down interpretative choices.

B Hindsight Bias and Counterfactual Thinking

There is a point to exposing indeterminacy that is backed up by social-psychological research but largely overlooked. It emerges from attention to the bias of hindsight and the potential of counterfactual thinking. Baruch Fischhoff notably placed his classic study on the phenomenon of hindsight bias within the context of historiography’s problematic tendency to rationalize what has happened, thereby leading to ‘creeping determinism’,⁴⁸ as he put it; that is, to ‘an impression that it really could not have happened otherwise’.⁴⁹ This was a couple of decades before Roberto Unger and Duncan Kennedy charged ‘rationalizing legal analysis’ with contributing to the creation of ‘false necessity’ (Unger),⁵⁰ or beliefs in the ‘false determinacy’ (Kennedy) of legal decisions.⁵¹

Research on the phenomenon of hindsight bias not only resonates strongly with Unger’s as well as Kennedy’s understanding of the problem, but also with their suggested solutions. In a classically critical fashion, Kennedy has placed his bets on deconstruction as an aide to expose legal decisions’ indeterminacy,

⁴⁷ On this difficulty see, Genevieve Painter, ‘Contingency in International Legal History: Why Now?’ in Ingo Venzke and Kevin Jon Heller (eds), *Contingency in International Law: On the Possibility of Different Legal Histories* (Oxford University Press 2021).

⁴⁸ Baruch Fischhoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty* (1975) 1 *Journal of Experimental Psychology: Human Perception and Performance* 288, 288 (speaking of ‘creeping determinism’ through hindsight bias ‘in contrast to philosophical determinism, which is the conscious belief that whatever happens has to happen’); Scott A Hawkins and Reid Hastie, ‘Hindsight: Biased Judgments of Past Events After the Outcomes Are Known’ (1990) 107 *Psychological Bulletin* 311, 313 (speaking of creeping determinism as ‘the tendency to perceive a reported outcome as virtually inevitable’).

⁴⁹ Georges Florovsky, ‘The Study of the Past’ in Ronald H Nash (ed), *Ideas of History*, vol 2 (EP Dutton 1969) 351–69 at 369; quoted in Fischhoff (n 48) 288.

⁵⁰ Roberto Mangabeira Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (Verso 2001).

⁵¹ Kennedy (n 2).

and inconsistencies in the legal order more generally. In theory and practice, underlying principles could also be flipped around to offer outcomes pointing in the opposite direction, according to Kennedy. Respect for autonomy (or sovereignty) could serve as a perfectly plausible basis for respecting individual choices just as well as overriding them.⁵² Unger, in turn, advocates institutional imagination in order to counter any resignation to the present order of things.⁵³ Social-psychological research that has rather extensively tested the effect of counterfactual thinking to work against hindsight bias, however, has gone unrecognized.

Hindsight bias refers to the excessively higher assessment of a certain outcome's likelihood *ex post* when compared to *ex ante*.⁵⁴ It may make perfect sense to update one's likelihood assessments of an outcome *ex post*, for instance when the *ex ante* likelihood of a certain outcome was thought to be zero and then it happened. More generally, it is possible to learn from what has happened and to adjust likelihood assessments in that light. However, likelihood assessments tend to be biased, exaggerated in hindsight beyond such 'reasonable' adjustments.⁵⁵ At this point, where learning stops and exaggeration begins, the presumption flares up that unbiased, rational beliefs and action are indeed possible.⁵⁶ Even if that occasional presumption is problematic, research on hindsight remains insightful and relevant for critical thinking.

It has been shown in further detail how several specific psychological dynamics—both motivational and cognitive—sustain the bias of hindsight. A first set of reasons once more connects to people's well-documented desire to live in a world that is relatively certain, predictable and just.⁵⁷ Echoing the *Dialectics of Enlightenment*, Hannah Arendt for instance noted the strong appeal of theories that explain the world in terms of general laws. In her view, '[p]eople find such theories in order

⁵² For a more concrete and detailed argument see, Kennedy, 'The Structure of Blackstone's Commentaries' (n 6). See more generally on the role of antagonisms in critical scholarship, Ingo Venzke, 'The Practice of Interpretation in International Law: Strategies of Critique' in Jeffrey L Dunoff and Mark A Pollack (eds), *International Legal Theory: Foundations and Frontiers* (Cambridge University Press 2020).

⁵³ Roberto Mangabeira Unger, *What Should Legal Analysis Become?* (Verso 1996). See also Isabel Feichtner, 'Critical Scholarship and Responsible Practice of International Law. How Can the Two Be Reconciled?' (2016) 29 *Leiden Journal of International Law* 979.

⁵⁴ Fischhoff (n 48); Baruch Fischhoff, 'For Those Condemned to Study the Past: Heuristics and Biases in Hindsight' in Daniel Kahneman, Paul Slovic, and Amos Tversky (eds), *Judgment Under Uncertainty: Heuristics and Biases* (Cambridge University Press 1982) 335 (. Also see Hawkins and Hastie (n 48) 311; Neal J Roese and James M Olson, 'Counterfactuals, Causal Attributions, and the Hindsight Bias: A Conceptual Integration' (1996) 32 *Journal of Experimental Social Psychology* 197.

⁵⁵ Fischhoff, 'For Those Condemned to Study the Past' (n 54).

⁵⁶ On the distinction between hindsight bias and leaning from the past see Stephen J Hoch and George F Loewenstein, 'Outcome Feedback: Hindsight and Information' (1989) 15 *Journal of Experimental Psychology: Learning, Memory, and Cognition* 605.

⁵⁷ Neal J Roese and Kathleen D Vohs, 'Hindsight Bias' (2012) 7 *Perspectives on Psychological Science* 411.

to get rid of contingency and unexpectedness.⁵⁸ What happens must happen for a reason.⁵⁹

Secondly, individuals want to be seen as though they knew all along what would happen.⁶⁰ Adapting the argument for the field of international law by way of example, as experts of their métier, it is plausible that international lawyers want to think that they knew judicial outcomes all along, or that they at least want to be seen that way. Acknowledging a mistaken expectation *ex ante* about the ICJ's decision in *Jurisdictional Immunities*, for instance, does not square well with claims to being an expert of international law. As a result of these motivational reasons for hindsight bias, people come to hold mistaken beliefs about the state of the world or about the subjective capacity to foresee outcomes.⁶¹ Motivational dynamics may thus lead to the fact that people wrongly remember their *ex ante* likelihood assessments.⁶²

C Beliefs in Likelihood and Desirability

System justification theory offers another insight when it comes to beliefs about law's determinacy, showing that whatever is perceived to be next to necessary is for that reason also believed to be more desirable, thus supporting the practice of exposing indeterminacy from a different angle.⁶³ Research in the context of the US Presidential elections in 2000, for instance, showed how the desirability of either the Democrat or Republican candidate increased across party affiliations when their victory became more likely—they were seen as 'sweet lemons'—and how that desirability decreased when their chances for success waned—'sour grapes'.⁶⁴ Other research has likewise found that people indeed resign themselves to what they believe to be inescapable—they are adjusting their normative beliefs about what *should be* the case to what *is* (and is bound to

⁵⁸ Hannah Arendt, interviewed by Roger Errera in October 1973, excerpts published in *New York Review of Books* (26 October 1973) 18.

⁵⁹ Jeffrey J Rachlinski, 'A Positive Psychological Theory of Judging in Hindsight' (1998) 65 *University of Chicago Law Review* 571, 582–83; Melvin J Lerner and Dale T Miller, 'Just World Research and the Attribution Process: Looking Back and Ahead' (1978) 85 *Psychiatry Bulletin* 1030; Jennifer D Campbell and Abraham Tesser, 'Motivational Interpretations of Hindsight Bias: An Individual Difference Analysis' (1983) 51 *Journal of Personality and Social Psychology* 605.

⁶⁰ See in particular Barry R Schlenker, *Impression Management: The Self-Concept, Social Identity, and Interpersonal Relations* (Brooks/Cole 1980).

⁶¹ Roese and Vohs (n 57).

⁶² See Linda L Carli, 'Cognitive Reconstruction, Hindsight, and Reactions to Victims and Perpetrators' (1999) 25 *Personality and Social Psychology Bulletin* 966.

⁶³ Jost (n 33) 285.

⁶⁴ Blasi and Jost (n 31); Aaron C Kay, Maria C Jimenez, and John T Jost, 'Sour Grapes, Sweet Lemons, and the Anticipatory Rationalization of the Status Quo' (2002) 28 *Personality and Social Psychology Bulletin* 1300.

remain so).⁶⁵ Beliefs in a legal decision's apparent necessity and their justice are thus closely aligned.

Overall, drawing attention to arguments about the law's indeterminacy may seem quaint, but persistent cognitive biases testify to its continued relevance. Counterfactual thinking—thinking how it could have been otherwise—impacts attitudes towards the law because it can decrease perceptions of both likelihood and desirability.⁶⁶

V Recovering Contingency in the Course of International Law

A third trait of critique is that it works historically to expose not only the complicity of the law in patterns of injustice but also past possibilities for a different law.⁶⁷ This work is related to revealing the law's indeterminacy in a moving present, but is less focused on specific decisions and more so on broader legal developments. The question is both whether a certain development could have gone another way at any particular moment—within and against the context—and whether this would actually have made a difference in the long run.⁶⁸ There are several modes of such historical scholarship.⁶⁹ It may proceed in an archaeological fashion in the sense of—as Foucault put it—'grasp[ing] the implicit systems which determine our most familiar behavior without our knowing it ... the constraint they impose upon us'.⁷⁰ The present state of affairs is not necessary, look at the past, it *was* different! But circumstances of course change. Knowing that the earth rotates around the sun can hardly be unlearned, nor could God easily be brought back to life to offer a basis for international law. Much of critical scholarship thus echoes a genealogical, rather than archaeological, mode of inquiry. It is concerned not with a sequence of different dominant belief systems, but with underlying conflicts within each system, and with transitions between systems. Genealogical inquiry seeks to unearth

⁶⁵ Justin P Friesen and others, 'System Justification: Experimental Evidence, Its Contextual Nature, and Implications for Social Change' (2019) 58 *British Journal of Social Psychology* 315.

⁶⁶ Other moderating and conditioning factors are of course relevant, in particular the perceived difficulty of thinking how it could have been otherwise. As might be expected, both likelihood and desirability assessments of what actually happened in fact increase when participants' find it very difficult to think of counterfactual possibilities.

⁶⁷ Nils Gilman, 'The New International Economic Order: A Reintroduction' (2015) 6 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 1. Cf Ingo Venzke, 'Possibilities of the Past? The Histories of the NIEO and the Travails of Critique' (2018) 20 *Journal of the History of International Law* 263.

⁶⁸ Ingo Venzke, 'Situating Contingency in the Path of International Law' in Ingo Venzke and Kevin Jon Heller (eds), *Contingency in International Law: On the Possibility of Different Legal Histories* (Oxford University Press 2021).

⁶⁹ Cf Painter (n 47).

⁷⁰ John K Simon, 'A Conversation with Michel Foucault' (1971) 38 *Partisan Review* 192, 201, quoted in David Garland, 'What Is a "History of the Present"? On Foucault's Genealogies and Their Critical Preconditions' (2014) 16 *Punishment and Society* 365, 369.

past conflict, to emphasize heterogeneity, to reveal the power relations on which outcomes depend and, overall, to remind us of the contingency of the present.⁷¹ ‘Experience has taught me’, Foucault wrote, ‘that the history of various forms of rationality is sometimes more effective in unsettling our certitudes and dogmatism than is abstract criticism.’⁷² What exactly is being unsettled and how?

While some international legal histories have indeed set out to reveal a sense of contingency that has been lost, most of them continue to be written in a way that loses such a sense of how it could have been otherwise.⁷³ When pushed, few authors would subscribe to a teleological understanding of history, to an understanding of history that is aimed at a specific finality.⁷⁴ They still convey precisely such a sense when they embed developments of humanitarian or criminal law into narratives of progress, for instance.⁷⁵ They recognize that there are deviations, but the course is still set—and needs to be set firmly in order not to swerve yet again.⁷⁶ Accounts that critique international law as a relentless tool of imperialism and other forms of domination also occasionally convey such a sense that it could not have come about differently—thinking that it could have been different only suggests that one has still not fully grasped all the penetrations of power.⁷⁷

Accounts of contingency further struggle to break through standards of the profession and its narrative style.⁷⁸ On another occasion, I have argued how contingency is lost in Douglas Irwin’s authoritative history on US trade policy: the demise of the International Trade Organization in the 1940s was tragic and the establishment of the North Atlantic Free Trade Organization (NAFTA) in the 1990s came as

⁷¹ Michel Foucault, ‘Nietzsche, Genealogy, History’ in Paul Rabinow (ed), *The Foucault Reader* (Pantheon 1984) 76, at 82: ‘The search for descent is not the erecting of foundations: on the contrary, it disturbs what was previously thought immobile; it fragments what was thought unified; it shows the heterogeneity of what was imagined consistent with itself.’ See also M Dean, *Critical and Effective Histories: Foucault’s Methods and Historical Sociology* (Routledge 1994).

⁷² Michel Foucault, ‘Politics and Reason’ (1979), reprinted in LD Kritzman (ed), *Michel Foucault: Politics, Philosophy, Culture: Interviews and Other Writings, 1977–1984* (Routledge 1988) 83, quoted in Garland (n 70) 373.

⁷³ Samuel Moyn, ‘From Situated Freedom to Plausible Worlds’ in Ingo Venzke and Kevin Jon Heller (eds), *Contingency in International Law: On the Possibility of Different Legal Histories* (Oxford University Press 2021).

⁷⁴ For a lasting critique of this position see Karl R Popper, *The Poverty of Historicism* (Routledge 1957).

⁷⁵ Thomas Skouteris, *The Notion of Progress in International Law Discourse* (Asser 2010).

⁷⁶ Cf Geoff Gordon, ‘The Time of Contingency in International Law’ in Ingo Venzke and Kevin Jon Heller (eds), *Contingency in International Law: On the Possibility of Different Legal Histories* (Oxford University Press 2021).

⁷⁷ Mohsen al Attar, ‘Subverting Eurocentric Epistemology: The Value of Nonsense when Designing Counterfactuals’ in Ingo Venzke and Kevin Jon Heller (eds), *Contingency in International Law: On the Possibility of Different Legal Histories* (Oxford University Press 2021); Painter (n 47), arguing that for some, ‘analysis of contingency weakens the claim that international law’s telos has been relentlessly imperial.’

⁷⁸ Moyn (n 73). Cf Jean d’Aspremont, ‘The Critical Attitude and the History of International Law’ (2019) 1 *Brill Research Perspectives in International Legal Theory and Practice* 1.

a surprise. But frequent fore- and back-shadowing produces a clear story line that did not allow for a different path.⁷⁹

There are other reasons for why contingency continuously gets lost. Here I only want to draw out three ways in which recovering a sense for possibilities resonates with psychological insights, drawing together many of the points of the previous sections.⁸⁰ First, research on the reasons for hindsight bias has placed particular emphasis on cognitive dynamics according to which people integrate outcome knowledge into pre-existing explanatory schemes, fitting them into a coherent narrative. This practice leads them to attribute outcomes to the factors they know, frequently making those factors more important than they are.⁸¹ This is precisely the dynamic that Fischhoff emphasized when he wrote of ‘creeping determinism’⁸²—the rushed attribution of outcomes to known factors.⁸³ The push of critique to reveal past possibilities has, like counterfactual thinking about specific decisions, the potential of countering such a cognitive bias, trying to keep the mind open for longer.⁸⁴ Secondly, I have highlighted many of the dynamics that lead to closely aligning assessments of likelihood and desirability. Revealing contingency may thus also work to regain a political understanding of social conditions to orient and motivate action. Relatedly, third, asking about how international law could have been otherwise (*vel non*), takes the analysis of why something happened further, often exposing agency that had remained nebulous.

VI Outlook

There are many reasons why a lot of critical research is deeply sceptical about social-psychological research, especially as it developed under the mantle of behavioural economics. Such scepticism targets the commitment to the possibility of unbiased, objective, and rational action, as well as the arguably rather late recognition that such rationality is often just not the norm. Scepticism extends to

⁷⁹ Venzke, ‘Situating Contingency’ (n 68), with reference to DA Irwin, *Clashing Over Commerce: A History of US Trade Policy* (University of Chicago Press 2017).

⁸⁰ Also see Janne Nijman, ‘An Enlarged Sense of Possibility for International Law: Seeking Change by Doing History’ in Ingo Venzke and Kevin Jon Heller (eds), *Contingency in International Law: On the Possibility of Different Legal Histories* (Oxford University Press 2021), linking up to the psychoanalytically informed work of Paul Riceur, among others.

⁸¹ NJ Roese and JM Olson, ‘Counterfactuals, Causal Attributions, and the Hindsight Bias: A Conceptual Integration’ (1996) 32 *Journal of Experimental Social Psychology* 197; Richard Ned Lebow, *Forbidden Fruit: Counterfactuals and International Relations* (Princeton University Press 2010); D Wasserman, RO Lempert, and R Hastie, ‘Hindsight and Causality’ (1991) 17 *Personality and Social Psychology Bulletin* 30.

⁸² Baruch Fischhoff, ‘Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty’ (1975) 1 *Journal of Experimental Psychology: Human Perception and Performance* 288.

⁸³ Compare the emphasis on *schema* in Bianchi and Hirsch, in this volume.

⁸⁴ Richard Ned Lebow, ‘Counterfactual Thought Experiments: A Necessary Teaching Tool’ (2007) 40 *The History Teacher* 153.

the related methods of inquiry, especially those that build on questionable positivism.⁸⁵ But certainly not all of social psychology can be cast asides like that. There is, to be sure, a strong tradition of combining insights. Such a tradition would invite the emerging body of experimental studies in international law to look beyond the law's practical operation towards its social effects: how is law weaved into beliefs about what can and cannot change of our present condition?

⁸⁵ For such scepticism see Kennedy, *A Critique of Adjudication (Fin de Siècle)* (n 2).