Making politics of history and international law

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I come to this topic as an outsider, an avid consumer of empirical international legal history, a political scientist, an American and a scholar committed to interdisciplinary pluralism. These descriptors give me distance, empathy and a bit of frustration regarding the conversation that Anne Orford engages in her intriguing book *International Law and the Politics of History,* the title of which I invert for this contribution.[1] I am a serial disciplinary transgressor. I have reached, written and commented beyond my political science and international relations (IR) training, and been lauded and pilloried for doing so. I have also transgressed into normative, philosophical, and critical discussions where I am neither particularly skilled nor well read. Where possible I have drawn on existing scholarship, yet especially before the "historical turn" Orford discusses and the development of a truly interdisciplinary international law scholarship, there was often scant literature to draw on. Because I struggled to find scholarship on legal practice and law in action, I have been especially appreciative when I do find empirical historical and contemporary work on legal practice and legal institutions.

Having decided to change my research focus to the topic of global capitalism and law, I spent much of the COVID-induced travel moratorium reading the literature than Anne Orford engages in her book, working with a fantastic Northwestern history graduate student Ming-Hsi Chu to contextualize the literature and understand the fuss about anachronistic, presentist, Whiggish, and contextualist history. I then drew on twelve critical and empirical international law histories for a recent article exploring where and how the transformation from the colonial to the multilateral eras did and did not influence international economic law.[2] Putting to the side for the moment her critique of Samuel Moyn, I was surprised to read Orford's view that empirical historical work was somehow claiming to get beyond the politics that international legal analysis cannot escape. I did not read the work as making such a claim, nor did I see the works asserting a truth that shoddy legal scholarship cannot or had not seen. Indeed at times I felt the critique of empirical historical work was motivated mostly by a desire to push back against Hunter's critique of Koskeneimmi's and TWAIL scholarship, a frustration that critical scholarship was not incorporated more into the cited empirical work, and a bit of jealousy that the methods of empiricism garner more attention for making points that critical scholars have also made. These aspects of Orford's book were a distraction, and insofar as the target was empiricism per se, they reminded me of a frustration I feel when critical scholars suggest that their engagement and insight into politics is more profound.

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

[2] Karen J. Alter, *From Colonial to Multilateral International Law: A Global Capitalism and Law Investigation*, 19 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 798(2021).

This is where the descriptors of political scientist and American perhaps become relevant. Political science has experienced decades of methods wars, so I am very familiar with the annoying hubris of evangelizing methods purists who claim to have a corner on truth-finding and truth-telling. It is annoying. I don't know the Cambridge history scholars well enough, but I really don't think that Quinn Slobodian, Lauren Benton, Lisa Ford or Isabel Hull are making the strong case Orford is arguing against. So I was trying to figure out why she was so annoyed at empirical history as a category? I may be inured to the American-style claiming that Orford quotes, where scholars locate the contribution of their research by suggesting a gap in existing understandings. I share Orford's frustration that vast quantities of scholarship, especially scholarship by women and underrepresented groups, is systematically ignored in the academy. But I mainly see empiricist historians as investigating something specific, using the methods of their discipline. Historians may undervalue findings that are not backed by their careful methods, yet I have found the empirical historical studies she engages to offer new, original, important, useful, and revealing perspectives on the practice of international law with respect to the issues, periods, institutions and geographies the authors are studying. For me the carful empirical grounding does make the insights more convincing.

This sense that historians are just being historians, and that they are not claiming that there is no politics of history, made me wonder who Orford is arguing against? Who actually believes that history is not politics? Certainly no historians I know would make this argument. Nor would my empiricist political scientist colleagues make categorical claims about empiricism, since we know that one can muster methods and facts to substantiate various positions. Given the number of Americans who believe that the 2020 election was stolen, perhaps I need to be more credulous that there is a large group of scholars who believe that history is factually apolitical. At the same time, I wonder if it is the author's fault what others then do with their work? This is a point I will return to.

I have been discussing, as Orford does, historical scholarship. I am significantly more suspect about what goes on in the American legal academy. Even if we admit that legal politics is always at play (an issue I will also return to), I nonetheless find American law schools jaw-droppingly political in their uses of empirics and history. To name just one example: American originalist law positions, which are deeply associated with Federalist Society conservativism, are too often historically and academically selective to the point that even scholars who are not conversant in the "hermeneutics of suspicion" are naturally skeptical of American legal scholar's historical claims.[3] Meanwhile, those who tend to believe big lies and true-believer originalist and law-and-economics legal scholars) are neither going to read nor be convinced by Orford's scholarly debate about the political uses of history. Hence the question: who is she arguing against?

The rest of this contribution focuses on the politics of making history and law. Part I discusses Orford's argument about why, starting in the 1990s, scholars began to politicize the history of international law. Here I raise the question of whether we should make assumptions

[3] Orford embraces Duncan Kennedy's moniker of a hermeneutic of suspicion. As an empirical scholar, I found the following book to be especially eye-opening: STEPHEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2009).

about the intentions of empirical scholars just because their research topic is motivated by or speaks to politics? Part II discusses Orford's brilliant explication of why legal scholarship is inherently an act of politics. Here I raise the question of whether the critique applies to all narrative forms of scholarship. Part III concludes by turning down the heat. Orford suggests that holding together the cognitive dissonance of legal scholars requires an inherently adversarial approach to scholarship. Accepting this argument, I nonetheless ask whether it is helpful to take an adversarial approach to work of disciplines where tastes and practices are different? I therefore probe if Orford is actually making and promoting the very politics she is explicating.

I. Liberal hubris and the new politics of international legal history

I may well be an embodiment of the turn to international legal history that interests Orford. From the vantage point of Brexit and 2022, my dissertation book (which was admittedly replete with American Phd-style overclaiming) may appear political because I argued that the legal claims of the Court of Justice of the European Community (CJEU) were audacious and controversial, and they were never truly embraced in national legal or judicial circles.[4] To be sure, my interest the topic had been piqued by a disagreement among legal scholars and practitioners, and thus by the politics of the debate.[5] I saw my Phd thesis as analyzing the contestation of legal arguments for and against the supremacy of European law with the goal of understanding why the suspect CJEU interpretation prevailed. Neither then nor now did I see the thesis itself as enacting politics.

It may be impossible for a Phd student or assistant professor writing in another discipline to see themselves as a person with enough power to politicize let alone to make law or history. I thus found Orford's accounting of the historical turn that I was unwittingly a participant in to be of great interest.

According to Orford, the turn to the history of international law began in response to developments that formed my Phd training: the finding that democracies do not fight wars against each other,[6] the end of a political contest between socialism and capitalism which spurred an investigation into varieties of capitalism,[7] and a turn studying history to understand institutions and institutional change.[8] Later in the book Orford fingers the proliferation of international court rulings, and the neo-formalism of legal scholars who analyzed these rulings, as a contributor to the politicization.[9] In other words, everything I had studied apparently causally contributed to lawyers and historians politicizing the international law and global historical studies.

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[4] KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE (2001).

[5] I discussed the conversation and scholarship that motivated my study in KAREN J. ALTER, THE EUROPEAN COURT'S POLITICAL POWER: SELECTED ESSAYS preface, 1-5 (2009).

[6] See for example: BRUCE M. RUSSETT, GRASPING THE DEMOCRATIC PEACE : PRINCIPLES FOR A POST-COLD WAR WORLD (1993).

[7] See BOB HANCKÉ, DEBATING VARIETIES OF CAPITALISM : A READER, collecting decades of scholarship on this topic (2009).

[8] Peter Hall & Rosemary Taylor, *Political Science and the Three New Institutionalisms*, XLIV POLICY STUDIES (1996). For more see ORFEO FIORETOSTULIA G. FALLETTI & ADAM SHEINGATE, THE OXFORD HANDBOOK OF HISTORICAL INSTITUTIONALISM (2016).

[9] ORFORD, International Law and the Politics of History 315.

I agree with Orford's, and other critical scholars', critique of this scholarship. Beginning in the 1990s, international officials and an interdisciplinary group scholars embraced with too little reflexivity democracy promotion, perfecting capitalist governance, and the growing role of international courts as promising developments. By focusing our analyses on empirical questions, and by being insufficiently self-critical and skeptical, we were suggesting that spreading democracy, legalization, international judicialization, and pro-market governance were progressive and positive developments. My only defense is that I was young and Orford's demystification of international legal practice (Chapter 5, which I will soon discuss) did not exist.[10]

Oxford argues that historians and critical international legal scholars began to re-examine international legal history as a presentist historical response to the heady heydays of the International Liberal Order.[11] We can understand why a number of critical legal scholars began to connect contemporary liberal politics to IL's imperialist past as a response to liberal international scholarship. Yet Orford's claim is that empirical historical work also began, and that this work was also trying to rewrite the history of international law.

Orford's more specific argument is that liberal internationalism experienced a number of "interrelated financial, food, energy, climate, security and refugee crises of the early twenty-first century."[12] She sees these crises as creating a preference in the US and Europe for international solutions that circumvented democracy. Although I can imagine that there was not a lot of domestic support for addressing these particular challenges, I probably need to read her work on these crises to be more convinced of the general argument. Most IR scholars would say that neo-liberalism an multilateralism had deep and bi-partisan and grassroots support in the exporting states, and significant support among elites in the developing world (who were, admittedly, Western trained).[13] Rather than seeing a plot to circumvent democracy, most IR scholarship would blame the hypocrisy of Westerners, the failure of neo-liberalism to deliver economic development, and the rise of China (or maybe China's admission to the WTO) as generating the crisis of international liberalism.[14] That said, it does not really matter *why* the liberal international order is in crisis. Orford's larger point is that history became politicized because of the international liberal order and its legitimation crisis.

Even if we presume that Orford's is right, this doesn't address her argument that empirical histories were ignoring their internal politics. As I said, I think that Orford is mostly upset about a few different issues, and this frustration was for me a distraction. In targeting

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[10] See: Karen J. Alter, *Visions of International Law: An Interdisciplinary Retrospective*, 33 LEIDEN JOURNAL OF INTERNATIONAL LAW, 837, 841 (2020).

[11] Orford defines presentism as "the tendency to interpret the past in terms of present interests, values and concepts." Some historians see presentism as a methodological flaw, and Orford sees historians as wielding the presentist critique to discredit historical international legal scholarship. ORFORD, International Law and the Politics of History 83.

[12] Id. at, 44.

[13] See: YVES DEZALAY & BRYANT G. GARTH, GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY (2002);YVES DEZALAY & BRYANT G. GARTH, THE INTERNATIONALIZATION OF PALACE WARS : LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES (2002). STEPHEN C. NELSON, THE CURRENCY OF CONFIDENCE : HOW ECONOMIC BELIEFS SHAPE THE IMF'S RELATIONSHIP WITH ITS BORROWERS (Cornell studies in money. 2017).

[14] ORFORD, International Law and the Politics of History 44-56.

empirical historical work, including work that is not critical or rejecting of critical scholarship and that does not claim to be making an apolitical intervention, and in then discussing a list of empiricist scholarship including American "anti-formalist scholarship" from the New Haven School, the "international legal process" scholarship of Abraham Chayes, the "transnational legal process" scholarship of Harold Koh, Anne-Marie Slaughter's vision of a "new World Order of networked bureaucratic guilds, Jack Goldsmith and Eric Posner's rational choice scholarship, and Gregory Shaffer's and Tom Ginsburg's work on the empirical turn in international legal scholarship,[15] I see Orford as suggesting that the problem is empiricist work itself, or perhaps the value and validity that many lawyers, practitioners and scholars place in this work.

Here I disagree, and the disagreement triggers my own annoyance at the reprieve that Foucault already said the things that empiricists go on to say. The critical literature was in my mind meant to be theoretical and interpretivist. History, actions and events were part of the interpretivist discussion, but empirics were used as heurististic and anecdote. I can empathize with Orford's frustration that it took Slobodian's book *The Globalist* for mainstream scholars to discuss Ordo-liberalism's influence in European and GATT/WTO legal developments. Yet I don't think that historians need to be reading critical legal scholarship, or that everyone needs to read or be influenced by Foucault, nor do I fault Slobodian, Benton, Ford or Hull for not turning to Foucault and critical theories in their research. This is because I also empathize with the historian penchant to prioritize law in action, documents and texts from the time, as well as scholarship that is also based on the documents and texts of the time. In other words, I accept that these scholars are engaged in empirical history rather than a project to rewrite the history of international law.

This raises for me the question of how we should treat empirical scholarship that engages political debates or that becomes politicized after its publication. I value the reflexive enterprise of pointing out how scholarship may be intentionally or not part of a political agenda. Indeed I have confessed here and elsewhere to being naïve, Western centric, and insufficiently attentive to the imperial aspects of international law in the past and present, and I have worked to remedy my omissions.[16] In my mind Orford goes too far when she reads political intentions and a criticism of legal scholarship that is not voiced. Her rebukes may apply to some scholarship, but the sins of some should not be the bases to indicte the entire category of empirical history.

I do, however, agree that Samuel Moyn's historical engagement is something different. This is not meant as a criticism of Moyn's scholarship per se, yet Moyn takes great pains to challenge conventional wisdom. Moyn may not be part of the American legal assault on international law,[17] yet as a legal scholar who has spent years at Harvard and Yale Law schools, he is part of a group of American legal scholars who are seriously questioning the scholarly consensus of international law and empirical social science.[18] It is thus time to turn to Orford's arguments about international legal scholarship as a political act.

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[15] Id. at, 211-212.

[16] Alter, VISIONS OF INTERNATIONAL LAW.

[17] See: JENS DAVID OHLIN, THE ASSAULT ON INTERNATIONAL LAW (2015). DAVID SLOSS, THE DEATH OF TREATY SUPREMACY : AN INVISIBLE CONSTITUTIONAL CHANGE (2016).

[18] ERIC A. POSNER, THE TWILIGHT OF HUMAN RIGHTS LAW (2014). ADD ARTICLE ON EMPIRICS & HR.

II. (International) law as politics; as making not finding

Earlier I said in passing that international legal scholarship cannot avoid being political. Orford explains what this means. (I put international in parentheses because Orford would surely agree that her arguments are not limited to the subject of international law.)

Orford argues that legal scholars occupy a place between the academy and the legal profession. Many international legal scholars also practice law, as advisors to governments, lawyers in international legal cases, providers of scholarly opinions, expert participants in UN and national commissions and as international judges. Yet even if an international legal scholar does not directly engage the world of practice, Orford argues that there is no way to escape that legal scholarship and teaching is legal practice. Orford's discussion is both enlightening for non-lawyers and compelling. Orford explains how legal scholars are forced to grapple with politically problematic origins and usage of international and domestic laws, and many choose to ignore unsavory aspects of law's creation and usage, thereby contributing to the idealized vision of lawyers and judges as apolitical actors who merely apply the law. She also explains that many legal academic scholars "participate in creating the sense of international law as a coherent and autonomous system."[19] She illustrates these points in the extreme when she argues that "lawyers are forced to decide whether or not fascist, colonialist, or imperialist laws will be transmitted after a change or regime or a change of ideology."[20]

As teachers, legal scholars cannot avoid their engagement in legal practice. Legal teachers are helping the emergent class of lawyers become skilled advocates and adjudicators. This requires that teachers constantly engage "the many different roles and tasks involved in contemporary legal practice….[so that] [r]ather than to fetishise the law, the role of legal academics in law school classrooms requires us to engage with law as an institutional practice and make its doctrines, processes and modes of transmission intelligeable."[21] She later explains how making law intelligible is about making rather than finding law:

> We try to assemble past practices and texts into persuasive patterns, construct disparate fragments and sources into a narrative whole, bring different events or cases into relation, and choose specific precedents or analogies as part of a process of legal reasoning. Creative legal work involves creating plausible patterns, analogies or narratives by assembly past material from disparate sources in ways that are persuasive to legal audiences.[22]

This means that international lawyers are always situating their object (e.g. the law, legal rulings, and legal history) in a presentist context. With this idea, we can understand Orford's frustration with the Samuel Moyn who surely understands that he is not simply finding an empirically more accurate history of international human rights law and practice.

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[19] ORFORD, International Law and the Politics of History 186.
[20] Id. at, 205-6.
[21] Id. at, 191.
[22] Id. at, 285.

Orford does not, however, rest with the claim that legal scholars engage in narrative building. Everything she says, including the extensive quote above, have historical analogues. Still discussing lawyers, she writes: "[e]vidence, fact-finding and inference play a central role in the interpretation and practice of law more broadly, and determining which facts are relevant to legal analysis is not simply a legal process. The presentation of facts has a normative effect."[23] If history is already politicized, then this logic surely applies to the making of history. Her discussion of China's historical politics makes it clear that scholarly intervention regarding China's historical international claims are political.[24] Yet even if it is clear that governments are playing politics with history, and some scholars are knowingly aiding them in this task, does this mean that empirical work on historical topics inevitably enacts these politics?

I agree with Orford that law is different in how it uses narrative. My claim is not that this difference makes legal scholarship shoddy; any such reading says more about the reader than it does the author. Here I will convert what Orford argues into my own terminology. According to Orford, the hermeneutics of suspicion allows a lawyer to maintain a belief that liberal and conservative lawyers may be playing politics, yet that a neutral understanding of the law is nonetheless possible.[25] The cognitive dissonance solution is to cast some interpretations as ideological aberrations, or as empirically or legally mistaken. This strategy requires denigrating counter-arguments so as to maintain the fiction that law is or can be neutral. Invoking Martin Shapiro's discussion of judging, I have called this fiction the noble lie of legal neutrality.[26] Orford goes further, implicating the entire class of legal practitioners. Orford suggests that everything a lawyer, scholar or judge does to explicate or reinforce law as something other than politics is in itself a political act. Orford is also making a more adversarial argument. In her analysis, the only way for law to be neutral, and for a correct legal analysis to exist, is to identify and repudiate contrary legal interpretations for being political or otherwise mistaken.

Orford keeps her discussion specific and focused, so I am extrapolating here. But the implications are present in the text. Lawyers are engaged in politics because they are making legal narratives. By implication, is history inevitably political because scholars are per force also creating narratives? Or is this history political because history (and law) are so often politicized? And does her analysis travel to every type of narrative building? Is it limited to politicized issues, or does it apply to all historical, sociological, political science, anthropological, psychological and economic qualitative work?

The empiricist in me wants to find that at some point Orford's argument runs out. If it does not run out, then science and methodology does not exist as such. This is, I know, a viewpoint that many scholars of the history of science believe. Perhaps it is my own insufficiently critical cognitive dissonance that wants to cling to the idea that studying a

[23] Id. at, 219.
[24] Id. at, 56-68.
[25] Id. at, 310.
[26] Discussing judging, Shapiro argued that to make a legal ruling is to pick one side over another, which in itself is not neutral. Moreover, in their role as applicators of state's laws, judges help extend social control over the economy and society, and thus not even the application of the law can make judging a neutral act. See: KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS 35 (2014). Discussing MARTIN SHAPIRO, COURTS: A COMPARATIVE POLITICAL ANALYSIS (1981)..

politicized topic is not the same thing as playing politics with one's subject matter. Most scholarly empiricist— myself included— see themselves as following the data, where ever the data leads. Methodology is the mechanism through which a scholar can follow the data. While I often find the omissions of quantitative and economic work reek of politics, I don't subscribe to the view that empirical work is inevitably an act of politics. The risk is then empirical nihilism, where all knowledge is political. In other words, if all data leads to a conclusion that COVID-19 spreads via aerosolization or human behaviors cause global warming, and if these views are politicized, then an infectious disease epidemiologist and a climate scientist can never be doing *only* science.

Framed as a critique of international law scholarship and practice, I find Orford's argument compelling. Yet this is mostly because law is socially constructed (as is popular historical narrative). When the analysis slips into a condemnation of empiricism, I do not find the argument as compelling.

Circumventing academic politics: The case for interdisciplinary pluralism

My defense of empiricism is admittedly insufficient insofar as it is too forgiving of the lack of reflexivity empirical scholars often display. This makes me think that I mostly wish that Orford had been less personal, and perhaps more pluralistically empathetic in making her case. As a political scientist, I have been accused by European lawyers of seeing conflict everywhere. My answer has always been that politics is about actors with different interests jockeying to shape policy and politics, so of course I focus on contestation. My sense is that my lawyer critics see consensus as positive, and contestation as a problem. I disagree. Contestation is how the status quo is disrupted and how a political order remains accountable to the will of the people, and for these reasons political contestation is to be encouraged.

Yet when it comes to debating ideas, I would prefer that academics did not become an arena for interest-based or ideational jockeying. What follows is admittedly a liberal defense that channels the enlightenment idea that a rational debate about ideas produces a better argument. I'm not a fan of academic jousting where the goal is to topple or push an adversary to the ground. I accept and find compelling Orford's argument that law may be adversarial to its core. Legal cases involve two or more sides arguing in favor of their preferred legal interpretation, and this usually involves a claim that the other interpretation is lessor or wrong. Also, as Orford explains, the heuremeutics of skepticism holds contradictory ideas in a careful adversarial balance. But I don't think that academics or scholarship needs to be adversarial to its core.

As an interdisciplinary and pluralistic scholar, I welcome the reality that different disciplines employ different methods, as this means that we collect more evidence, refine our methods and insights, and question or recast existing understandings. This admiration makes me tolerant of disciplinary foibles. Rather than criticize international lawyers for preferring to study easily found texts, a preference that meant that for a long time international legal history was mostly if not exclusively an intellectual history of ideas, I would rather simply be happy that empirical historians and critical scholars found new ways to study international law in action.

I also accept that historians prefer to focus on what their archives, or scholarship that investigates additional or different archives, reveals. I know that historians themselves criticize the prioritization of written history, as ordinary people, marginalized groups and women are

thereby written out of the grand narratives. Fights within the family can productively generate disciplinary reflexivity. Yet as an outsider, I treat as a frustrating foible that the historian's methodological penchant has for so many years led to the understudying of global phenomenon.

In calling these foibles, I am lowering the stakes of the disagreement. I know from personal experience that maintaining a pluralistic intellectual community is truly a challenge. Because I believe that insight comes in many forms, intellectual pluralism is for me an end in itself. This end requires mutual respect, including accepting a scholar on the terms they set for themselves. I think it is fair to criticize someone who fails on the terms they set for themselves. This is not my critique of Orford; she succeeds brilliantly on the terms she sets for herself. Yet if she gets to be frustrated with empiricism, then I get to be frustrated with critical scholarship that claims to find new something that no one disputes, such as the idea that law enables and constrains, that international law subjugates as often or even more than it emancipates, or that history is political.

Let me end with praise. My student self wishes that Orford's book existed back in the day, and that I had a chance to engage her book in a graduate seminar on law, history and politics. It would have greatly aided my dissertation research and writing. I suspect that today's students may respond to Orford's argument about the politics of history with a cynical ho-hum, while surreptitiously benefiting from her explication of evergreen historical controversies she discusses (anachronism, Whiggish history, contextualism, presentism). As an empiricist and a teacher, I would defend empirical methods in the discussion, while also agreeing that all scholars build knowledge using the means and methods that they find convincing, and that they may be reinforcing politics or the status quo in doing so. I would therefore stress Orford's argument that legal scholarship is perhaps always different. Where Orford explains this difference by saying that legal scholarship *is* legal practice, I would explain this difference by arguing that law is normative all the way down. Empiricism may sometimes be normative, and important scholarship may frequently become politicized. Yet working to influence normative assessments and exploring empirical history and causality are different things. That said, we can probably all benefit from more self-reflexivity.