Introduction

I

There is a strange paradox in the contemporary literature on the use of force. While authors continue to relentlessly debate the scope and meaning of the current prohibition resort to armed force as embedded in Article 2(4) of the United Nations (UN) Charter, an element appears to enjoy relative consensus. This element is the history of the rule.

Most international law manuals indeed teach that the prohibition of the use of force is an achievement of the twentieth century and that, beforehand, States were free to resort to armed force as they pleased. Following this general narrative weave, the nineteenth century is, in particular, presented as the 'golden age of positivism'; as a time when any attempt to restrict the use of force would have been doomed to fail in face of the States' unwillingness to restrain their own sovereign prerogatives.[1] It is thus far from uncommon to read that 'in the Westphalian legal order it was admitted that the States could resort to force';[2] that 'the *ius publicum europaeum* admitted war regardless of any *justa causa*';[3] that 'the right to use force was recognised as an inherent right of every independent sovereign State';[4] or yet that 'never until the twentieth century has the use of force been banned by positive international law, nor would it even have been possible to ban it in a society without any

[1] For a critical analysis of international law's general representation of the nineteenth century in traditional historiography, see David Kennedy, 'International Law in the Nineteenth Century: History of an Illusion' (1996) 65 *Nordic Journal of International Law* 385–420.

[2] Nico Schrijver, 'Article 2, paragraphe 4', in Jean-Pierre Cot et Alain Pellet (eds.), *La Charte des Nations Unies. Commentaire articles par articles* (3rd éd., Economica, 2005) p. 440. Translation by the author.

[3] Hans Wehberg, 'L'interdiction du recours à la force. Le principe et les problèmes qui se posent' (1951) 78 *Recueil des cours de l'académie de droit internationa* 25–26 Emphasis in the original. Translation by the author.

[4] Rebecca M. Wallace, *International Law* (4th ed., Sweet & Maxwell, 2002) p. 253.

central authority to enforce the ban'.[5] In the nineteenth century, the story goes, international law was 'indifferent' to the use of armed force: it did not prohibit it but did not explicitly authorize it either. Today, this historical account – which has come to be known as the 'narrative of indifference'[6] – has become so widely and deeply accepted that some

[5] Jan Verzijl, *International Law in Historical Perspective*, 5 vols. (A. W. Stijhoff, 1968), vol. 1, p. 215. See also *inter alia* Philip C. Jessup, *A Modern Law of Nations. An Introduction* (MacMillan, 1950), p. 157; Marcel Sibert, *Traité de droit international public* (Dalloz, 1951) vol. 2, 625; Paul Reuter, *Droit international public* (Presses Universitaire de France, 1963), p. 285; Louis Delbez, *Les principes généraux du droit international public* (3rd éd., LGDJ, 1963), p. 395; Krzysztof Skubiszewski, 'Use of Force by States and Collective Security. Law of War and Neutrality', in Max Sørensen (ed.), *Manual of Public International Law* (MacMillan, 1968), pp. 741–742; Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, 2 vols. (Stevens and Sons, 1968), vol. 2, pp. 38–39; Ian Brownlie, *International Law and the Use of Force by States* (Clarendon Press, 1968), pp. 19–50; Antoine Favre, *Principes du droit des gens* (LGDJ, 1974), pp. 711–713; Hersch Lauterpacht (edited by Elihu Lauterpacht), *International Law. Collected Papers* (Cambridge University Press, 1975), vol. 2, p. 96; Philippe Manin, *Droit International Public* (Masson, 1979), pp. 333–334; J. G. Starke, *Introduction to International Law* (9th ed., Butterworths, 1984), p. 508; Anthony Clark Arend and Robert J. Beck, *International Law and the Use of Force: Beyond the UN Charter* (Routledge, 1993), pp. 16–17; Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th ed., Routledge, 1997), p. 10; Antonio Cassese, *International Law* (Oxford University Press, 2001) pp. 27 and 33; John O'Brien, *International Law* (Cavendish Publishing Limited, 2001), pp. 676–677; Ahmed Abou-Al-Wafa, *Public International Law* (Dar-Al-Nahda Al Arabia, 2002), p. 609; Slim Laghmani, *Histoire du droit des gens du jus gentium impérial au jus publicum europaeum* (Pedone, 2003), pp. 180–182; Modesto Seara Vásquez, *Derecho internacional público* (Editorial Porrúa, 2004), pp. 361–362; Martin Dixon, *International Law* (6th ed., Oxford University Press, 2007), p. 310; Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (Hart Publishing, 2008), pp. 9–10; John H. Currie, *Public International Law* (2nd ed., Irwin Law, 2008), pp. 452–453; Jean Combacau et Serge Sur, *Droit international public* (8th ed., Montchrestien, 2008), p. 619; (Nguyên Quôc Dinh), Patrick Daillier, Mathias Forteau et Alain Pellet, *Droit international public* (8e éd., LGDJ, 2009), p. 1032; Alina Kaczorowska, *Public International Law* (4th ed., Routledge, 2010), p. 689; John Duggard, *International Law. A South African Perspective* (4th ed., Juta, 2011), p. 465; Enzo Cannizzaro, *Corso di diritto internazionale* (Giuffrè Editore, 2011), p. 6; Gideon Boas, *Public International Law. Contemporary Principles and Perspectives* (Edward Elgar, 2012), pp. 310–311; Pierre-Marie Dupuy et Yann Kerbat, *Droit international public* (Dalloz, 2012), p. 615; Rebecca M. Wallace and Olga Martin-Ortega, *International Law* (7th ed., Sweet & Maxwell, 2013), p. 294; Oliver Dörr, 'Prohibition of the Use of Force' *Max Planck Encyclopedia of Public International Law Online* (last update: September 2015) par. 4; Lung-chu Chen, *An Introduction to Contemporary International Law. A Policy-Oriented Perspective* (3rd ed., Oxford University Press, 2015), p. 378.

[6] Some may dislike the word 'indifference' because of the pejorative connotation it holds and prefer terms such as 'neutrality', 'tolerance' or 'acceptance' to describe classical

authors have not hesitated to qualify any attempt to question it as 'absurd'.[7]

Yet, upon closer inspection, the narrative of indifference appears riddled with ambiguities. It more particularly seems to be at odds with 'reality' as it stems from nineteenth century sources. Most nineteenth century international lawyers, in fact, appeared to consider that the use of force was far from an unrestricted prerogative of States. In 1900, for instance, Théophile Funck-Brentano and Albert Sorel asserted that war was not a right for States because saying so would be 'tantamount to saying that there is no law but force'.[8] Johann-Caspar Bluntschli (1808–1881) likewise insisted that 'war is just when authorized by the law of nations',[9] thus inverting the idea that war is legal when it is just. In practice as well, it seems that heads of States usually felt the urge to justify their actions when they had resort to measures of a military nature. The *Caroline* incident (1837), in the course of which Great Britain claimed the destruction of the eponym American steamboat was justified as a matter of self-defence, immediately comes to mind.[10] This incident, in fact, resulted in lengthy diplomatic exchanges between London and Washington, in which the two nations came to the conclusion that, although they agreed on 'the great principles of public international law',[11] they disagreed on whether the conditions for self-defence were *in casu* fulfilled.

Faced with these conflicting elements, modern-day scholarship has brought several explanations forward in defence of the traditional narrative of indifference. As regards doctrine, it generally argues that nineteenth-century authors who claimed the use of force to be ring-fenced by

international law's attitude towards the use of force. However, for the sake clarity, to avoid a multiplication of terms and because this is how the traditional historical account has generally come to be known in the literature, the following pages will continue using the terms 'narrative of indifference'. See Paul Guggenheim, *Traité de droit international public*, 2 vols. (Librairie de l'Université de Genève, 1954), vol. 2, p. 94; Robert Kolb, *Ius contra bellum. Le droit international relatif au maintien de la paix* (Bruylant, 2009), p. 28.

[7] Albane Geslin, 'Du *bellum justum* au *jus ad bellum*: glissements conceptuels ou simples variations sémantiques?' (2009) 64 *Revue de métaphysique et de morale* 463.

[8] Théodore Funck-Brentano et Albert Sorel, *Précis de droit gens* (Plon 1900) 232. Translation by the author.

[9] Johan-Caspar Bluntschli, *Le droit international codifié* (Guillaume et Cie. 1870) 273. Translation by the author.

[10] On the *Caroline* incident see John Bassett Moore, *A Digest of International Law*, 8 vols. (Government Printing Office, 1906), vol. 2, pp. 404–414.

[11] Mr. Weber, Sec. of State, to Lord Ashburton, quoted in ibid. 412.

international law were more concerned with the law as they thought it ought to be rather than as it truly was. Said differently, these authors were naturalists, or at least still too much imbued in old natural law theories of just war for any positive law credit to be given to their writings. As Hans Wehberg put it: 'the moral influence of the theories of *bellum justum* at the beginning of the *ius publicum europaeum* era was so great that we did not dare purely and simply reject it'.[12] In what concerns practice, modern writers usually contend that, albeit States justified their actions, legal considerations were either non-existent or lost in the bulk of political and ethical arguments. The practice of justifying the use of force in the nineteenth century, in other words, was the mere reflection of a sense of moral and diplomatic propriety rather than legal duty. Justification discourses did not produce any effect in positive international law. Wilhelm Grewe, for example, was adamant that while 'it is true that States in general did not stop making solemn assurances of the justice of their cause when declaring and proclaiming war, they themselves did not normally attribute such assurances with anything more than propaganda value'.[13]

Lately, a few authors have started to express doubts regarding the overall narrative of indifference. They feel that contemporary scholarship might have been a little 'too prompt to disqualify classical international law'.[14] So far, however, these doubts have not gone beyond the stage of intuition. An in-depth analysis of the indifference narrative is, in sum, still missing. This is the gap the present book intends to fill. It will challenge international law's dominant historical account on the use of force in two ways. First, by investigating the discrepancy between the present-day narrative and historical sources further: Was international law really indifferent to the use of force before 1919, or has contemporary scholarship indeed been too quick to discard classical international law? Second, by seeking to trace the origins and understand the roots of the narrative of indifference: where

[12] Wehberg, 'L'interdiction du recours à la force', 21. Translation by the author.
[13] Wilhelm Grewe, *The Epochs of International Law* (Walter de Gruyter, 2000), p. 531.
[14] Emmanuelle Jouannet, *The Liberal Welfarist Law of Nations. A History of International Law* (Cambridge University Press, 2012), p. 130. See also Olivier Corten, 'Droit, force et légitimité dans une société internationale en mutation' (1996) 37 *Revue interdisciplinaire d'études juridiques* 89–94; Randall Lesaffer, 'Too Much History: From War as Sanction to the Sanctioning of War', in Marc Weller (ed.), *The Oxford Handbook on the Use of Force in International Law* (Oxford University Press, 2015), p. 46; Mary O'Connell, 'The Prohibition of the Use of Force', in Nigel D. White and Christian Henderson (eds.), *Research Handbook on International Conflict and Security Law* (Edward Elgar, 2013), p. 95. For a more thorough review of these authors' works, see below (8.2.3.).

does this narrative come from? Why and how did it become the discipline's standard account of the history of the use of force? Through these questions, this book not only wishes to interrogate how the discipline of international law 'remembers' its past and writes its history, but also the nature and the purpose(s) of that (hi)story. From this point of view, one could say that is not so much a study about the 'past history' of international law as it is about the 'present memory' of international law's past. Thus, defined and circumvented, the research object and problem(s) of this book suggest a critical outlook on international law and its history, the details of which shall now be presented.

II

For the past two decades or so, history of international law has boomed. Many have traced this renewed interest for history to the end of the Cold War and the need to find a new direction and guidance for the discipline.[15] International law, it in fact seems, has made a habit of revolving to the past in times of crisis and uncertainty. Unlike previous 'turns to history' however, the last one has taken distinctly critical twist. It would be beside the point here to try to anthologise critical legal histories of international law. From Martti Koskenniemi, David Kennedy and Emmanuelle Tourme-Jouannet to Anne Orford, Anthony Anghie and Samuel Moyne, these are indeed by now relatively well known by most of international legal scholarship.[16]

It is nevertheless interesting to highlight some of the main common features that these 'critical histories' assume. Thomas Skouteris identifies

[15] See, e.g., Martti Koskenniemi, 'Why History of International Law Today?' (2004) 4 *Rechtsgeschichte* 61–66; George Rodrigo Bandeira Galindo, 'Martti Koskenniemi and the Historiographical Turn in International Law' (2005) 16 *European Journal of International Law* 539–559; Randall Lesaffer, 'International Law and Its History: The Story of an Unrequited Love', in Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds.), *Time, History and International Law* (Martinus Nijhoff, 2007), pp. 27–41; Emmanuelle Tourme-Jouannet and Anne Peters, 'The *Journal of the History of International Law*: A Forum for New Research' (2014) 16 *Journal of the History of International Law* 1–8; Matthew Craven, 'Theorizing the Turn to History in International Law', in Anne Orford and Florian Hoffman (eds.), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016), pp. 21–37.

[16] Martti Koskenniemi, *The Gentle Civiliser of Nations. The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2001); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge Univerity Press, 2007); Samuel Moyne, *The Last Utopia. Human Rights in History* (Harvard University Press, 2010); Jouannet, The Liberal Welfarist Law of Nations.

three.[17] The first consists in approaching legal history as a discursive construction. Critical histories, in other words, rely on the idea that the past can never be fully accounted for and that 'historical truth' is unattainable. (Hi)stories are products of certain conscious or unconscious premises and biases and pursue some conscious or unconscious political or ideological purposes. The work of critical legal historians has thus generally been aimed at unveiling these biases and purposes. The second common feature, according to Skouteris, is a rejection of 'cause-and-effect' relationship between law and social context. This is to say that law is not an objective and quasi-automatic reaction to a determinate historical and socio-political context. Instead, law is viewed as contingent and the result of a complex nexus of factors, whether power relationships or personal games of influence. Third and last, is the proposition that humanity does not follow an evolutionary path. As we shall see, mainstream histories are in fact often built on narrative structures that highlight continuity and progress.[18] By contrast, critical legal historians have sought to emphasise contingency and discontinuity in the creation and evolution of rules of international law.

All the above is why it has become quite common to speak of critical histories as 'deconstructions' of mainstream histories. The term 'deconstruction' is then used in a generic sense rather than in a strictly 'derridean' understanding (even though Jacques Derrida's philosophy certainly had an influence on critical legal scholars). In social sciences, in fact, deconstruction has been associated with the notion of discourse. In this context, a 'discourse' is much more than a text consisting of words and sentences. It can be an attitude, an act or a speech that is the expression of a particular system of beliefs, of ideas and of values.[19] Deconstruction consists in a technique for discourse analysis that aims to show that discourse actually say more than what they enunciate. It seeks to understand the underlying meaning of a discourse, as well as process through which this meaning is created. The method advocated by Derrida supposes to identify the structures and units of a given discourse,

[17] Thomas Skouteris, 'Engaging History in International Law', Randall Lesaffer, 'International Law and Its History: The Story of an Unrequited Love', in Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds.), *Time, History and International Law* (Martinus Nijhoff, 2007), pp. 27–41, 112–116.

[18] See below (8.1.3).

[19] See Michel Foucault, 'The Order of Discourse', in Robert Young (ed.), *Untying the Text: A Post-Structuralist Reader* (Routledge, 1981), pp. 51–78.

and attempt to elucidate the relations between these different units.[20] This approach suggests that meaning is not created by reference to any elements outside of the discourse itself, but in a strictly internal and self-contained manner. A discourse, in sum, constructs its own coherence and validity. Derrida's process breaks the impression that knowledge, social practices and norms are self-evident and objective facts by highlighting the circular pattern of how they are produced.[21]

In light of this, and inasmuch as it shares the three common features evidenced above and seeks to interrogate the narrative of indifference by reference to international law's broader discourse about itself and its history, the present book also qualifies as a 'deconstruction'; a deconstruction of indifference. That said, although it follows the tide of critical histories of international law, the inspiration for the overall theoretical approach does not come from the existing legal history literature. It finds a more direct source in a body of work on the theory of history that has not really been exploited by international legal historians yet: mnemohistory.

III

Mnemohistory literally translates as the 'history of memory'. The notion was first introduced by Egyptologist Jan Assmann in his book *Moses and the Egyptian* (1997). Assmann defined mnemohistory by reference and by contrast to the concept of 'history'. He explains that 'unlike history, mnemohistory is concerned not with the past as such, but only with the past as it is remembered'.[22] Mnemohistorians are interested with the representations of the past that prevail in a given group or society: with 'collective memory' in sum.[23] They contend that the manner in which the

[20] Jacques Derrida, *Positions* (The University of Chicago Press, 1981), p. 41; and by the same author, *Margins of Philosophy* (The University of Chicago Press, 1982), p. 329.

[21] See Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (re-issue with new epilogue) (Cambridge University Press, 2005), p. 12.

[22] Jan Assmann, *Moses and the Egyptian. The Memory of Egypt in Western Monotheism* (Harvard University Press, 1997), pp. 8–9.

[23] The paternity of the concept of 'collective memory' is usually attributed to French sociologist Maurice Halbwachs, see *Les actes sociaux de la mémoire* (Librairie Félix Alcan, 1925); and *La mémoire collective* (édition critique établie par Gérard Namer, first edition: 1950) (Albin Michel, 1997). Since its apparition in 1925, the notion of 'collective memory' has, however, spurred numerous debates, in particular, regarding a group's capacity to 'remember' and have a 'memory'. See, in particular, Reinhart Koselleck, 'Gibt es ein kollektives Gedächtnis?' (2004) 19 *Divanatio* 1–6; and Susan Sontag,

past is remembered and events are believed to have taken place is more important, and therefore more interesting, than the way things truly happened.[24] Mnemohistory thus does not seek to elucidate the past, or even assess the veracity of historical narratives against historical evidence. What matters is the discourse on the past and to understand why a particular event is represented and remembered the way it is represented and remembered. The past, Assmann writes, is 'not a natural growth but a cultural creation' and 'the task of mnemohistory consists in analysing the mythical elements in tradition and discovering their hidden agenda'.[25]

As such, mnemohistory is not a fundamentally new type of endeavour. In fact, the interest of historiography for memory and the construction of historical narratives dates back at least to the mid-nineteenth century.[26] Assmann himself acknowledges that 'only the difference between history and mnemohistory is new'. This difference, he however insists, is important: 'without awareness of the difference, the history of memory, [. . .], turns too easily into a historical critique of memory'.[27] This is, in fact, where the term 'mnemohistory' has added value. It highlights the metahistorical dimension of the inquiry and, in so doing, anticipates the criticism that has regularly been addressed to memory studies. Best synthetized by Alon Confino and Wulf Kansteiner, this criticism revolves around two axes. First, is the fact that memory studies have too often consisted in describing the representations of the past that prevail in a given society without interrogating their origins and raison d'être.[28] Second, is the observation that literature has had a tendency to view the creation of collective memory solely as deliberate ideological constructions aimed at promoting a specific political agenda, while leaving

Regarding the Pains of Others (Picador 2003). In defence of the notion of 'collective memory', see Aleida Assmann, 'Transformations between History and Memory' (2008) 75 *Social Research* 49–72. Along the same lines, Philip Allott claims that 'History is public memory', in 'International Law and the Idea of History' (1999) 1 *Journal of the History of International Law* 3.

[24] Marek Tamm, 'Introduction: Afterlife of Events: Perspective on Mnemohistory', in Marek Tamm (ed.), *Afterlife of Events: Perspective on Mnemohistory* (Palgrave MacMillan, 2015), p. 3.

[25] Assmann, *Moses and the Egyptian*, p. 10.

[26] See Marek Tamm, 'Beyond History and Memory: New Perspectives in Memory Studies' (2013) 11 *History Compass* 458–473.

[27] Assmann, *Moses and the Egyptian*, pp. 12–13.

[28] Alon Confino, 'Collective Memory and Cultural History: Problems and Method' (1997) 102 *American Historical Review* 1388.

other unconscious grassroots factors (such as values and beliefs) to the side.[29] As it is, mnemohistory – and for that matter most of recent meta-historical works of deconstructionist inspiration – emphasise the dynamic process behind the construction of historical narratives. Assmann particularly stresses the role of identity in that process. Not only is the development of historical narratives influenced by pre-existing 'intellectual and cultural traditions' that frame the identity of the group, but the narratives thus created reinforce these traditions and therefore this identity.[30] As Hans Mol then argues, it is a circular 'need for identity' instead of 'theoretical curiosity' that prompts demand for history.[31] The (hi)stories told are both the reflection of how a group imagines and projects itself in the world, and a mechanism for the preservation of these collective beliefs and representations of self and others. History and identity, in fewer words, are the two sides of the same coin.

The present research draws from this idea and will emphasise the role of disciplinary identity in the creation of the narrative on the indifference. As already mentioned, it will analyse this narrative considering international law's more general discourse about itself and its history. For all that, it will not necessarily abide by all the theoretical and methodological cannons of mnemohistory as set by Assmann. The Egyptologist relinquishes any sort of positive inquiry into history and, as we saw, indeed defines his approach by opposition to it. 'Historical positivism', he writes, 'consists in separating the historical from the mythical elements in memory' but the issue is that 'history turns into myth as soon as it is remembered, narrated and used'.[32] History cannot objectively be accounted for because the raw data is necessarily selected, mediated, narrated and, as a result, deformed. As soon as historical events are told (instead of simply chronicled), the line between 'scientific history' and 'historical fiction' is blurred.[33] As Hayden White, Assmann thus appears to believe that factuality is uninteresting and that classical historical

[29] Ibid. 1393–1394; Wulf Kansteiner, 'Finding Meaning in Memory: A Methodological Critique of Collective Memory Studies'(2002) 41 *History and Theory* 180.
[30] Jan Assmann, 'Collective Memory and Cultural Identity' (1995) 65 *New German Critique* 130. See also Kansteiner, 'Finding Meaning in Memory' 180.
[31] Assmann, 'Collective Memory and Cultural Identity', 130; Kansteiner, 'Finding Meaning in Memory', 180.
[32] Assmann, *Moses and the Egyptian*, pp. 10 and 14.
[33] Hayden White, 'The Question of Narrative in Contemporary Historical Theory' (1984) 23 *History and Theory* 1–33.

methodology based on primary sources is somewhat irrelevant.[34] While agreeing that history is just a story amongst other stories (i.e., a social and literary construct), many historians have criticised this attitude as too relativistic. Roger Chartier, for instance, argues that history, unlike fiction, is guided by an intention of truth; a truth is external to the historical narrative. Although that 'reality' can never be fully grasped and accounted for, it remains that elements of 'reality' can be captured provided the tenets of historical methodology are respected.[35] Each account of history, in spite but also thanks to its own biases and preoccupations, offers a certain glimpse into the past. What is important it so be aware of the limits, caveats, and tropisms of one's own research and of the way in which these orient the story being told.

This book subscribes to this latter view. This is not only for epistemological reasons, but also because positivistic inquiry is sometimes a prerequisite of meta-historical analysis. At least, such is the case here and such is equally the case, to a certain extent, in Assmann's own work. As a matter of fact, when he examines the uses of the figure of Moses by western monotheist religions in *Moses and the Egyptian* (1997), Assmann's project hinges on the idea that these images are mythologized: that is, that they do not correspond to reality, whatever that reality might have been. Likewise, this research starts from the observation that there seems to be a discrepancy between the current narrative of indifference and 'reality' as it stems from historical sources. Unlike Assmann, however, before any meta-historical argument can be compellingly presented to explain the 'hidden agenda' of the narrative of indifference, the discrepancy needs to be demonstrated. When some authors qualify attempts to discuss 'indifference' as *ab initio* 'absurd', the presence of mythologized elements in the discourse cannot simply be stated, it needs

[34] See also Hayden White, *Metahistory: The Historical Imagination in Nineteenth Century Europe* (The Johns Hopkins University Press, 1973), pp. 1–42.

[35] Roger Chartier, *Au bord de la falaise. L'histoire entre inquiétude et certitude* (Albin Michel, 1998), pp. 16 and 18. See also by the same author, 'Le monde comme représentation' (1989) 44 *Annales. Economies, Sociétés, Civilisations* 1505–1520. See also Henri-Irénée Marrou, *De la connaissance historique* (Editions du Seuil, 1954), pp. 26–46; John H. Zammito, 'Are We Being Historical Yet? The New Historicism, the New Philosophy of History, and 'Practising Historians'' (1993) 65 *Journal of modern History* 783–814; William W. Fisher III, ''Texts and Context'. The Application to American Legal History of the Methodologies of Intellectual Histories' (1997) 49 *Stanford Law Review* 1065–1110.