

False Contingency

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In his text *The Eighteenth Brumaire of Louis Bonaparte* Karl Marx writes of the ‘circumstances and relationships that [as he saw it] made it possible for a grotesque mediocrity to play a hero’s part’.¹ The grotesque mediocrity was Louis Bonaparte, later the Emperor Napoleon III, and 18 Brumaire was, of course, the date in the revolutionary calendar when Louis’s uncle, the first Emperor Napoleon, seized power in 1799. For Marx the story of Louis Bonaparte’s own later *coup d’état* in 1851 showed how tragedy may repeat itself as farce. But it also showed, more generally, how historical processes are at once open and determined. The course of events is not fixed; indeed, it is very often strange and unexpected. On the other hand, to be unexpected is not necessarily to be inexplicable, since the past shapes the possibilities of the present. As Marx famously put it, ‘[men] make their own history, but they do not make it just as they please in circumstances they choose for themselves; rather they make it in present circumstances, given and inherited’.² My argument in this paper can be summarized with reference to that passage. It concerns what I have come to see as a problematic tendency in my own work and in that of others in the international legal field writing in a similar register. This is that we are very alert to the issue Marx highlights in the first part of the statement I just quoted—that men make their own history—but we are rather less focused than we should be on the issue he highlights in the second part—that they do not make it just as they please in circumstances of their own choosing but rather in circumstances they inherit.

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¹ K Marx, *The Eighteenth Brumaire of Louis Bonaparte* (3rd edn, Lawrence and Wishart: London, 1954) 6.

² K Marx, ‘*The Eighteenth Brumaire of Louis Bonaparte*’ in T Carver (ed), *Marx: Later Political Writings* (Cambridge University Press: Cambridge, 1996) 32. (I use a different edition here from that cited in the previous footnote, as this contains the more familiar English rendering of this passage.)

To be clear at the outset, I believe it is quite right to hammer the point that history is a social product, not given but made. For if it has been made, then it can be remade differently. This is surely a cardinal principle of all progressive thought, and the work of drawing out its multifarious implications is as urgent as it is endless. The worry I want to explore here, however, is that we may be undertaking this work in a way which causes us to neglect the equally important progressive point that possibilities are framed by circumstances. While current arrangements can indeed be changed, change unfolds within a context that includes systematic constraints and pressures. In general terms, what I wish to re-voke is the idea that things can be, and quite frequently are, contingent without being random, accidental, or arbitrary. From another angle, there is a kind of necessity which must be reckoned into, rather than always contrasted with, our sense of what it is to be an artefact of history. I will use the term ‘false contingency’ to denote the failure to take that idea adequately into account. In the discussion that follows I will explain more precisely how I intend this phrase, and will try to illustrate something of its significance and ramifications. Along the way I will also offer some speculative comments on why false contingency may need, as I suggest, re-evoking—why this second half of the critical equation seems to have got forgotten or put aside. But first, I need to begin with the backstory.

False Necessity

The inspiration for my term ‘false contingency’ comes from the established concept of false necessity. As is, I think, well known, this is the subject of an eponymous book by Roberto Unger, first published in 1987.³ Part of his multi-volume study entitled ‘Politics: A Work in Constructive Social Theory’, *False Necessity* is in every sense of the word a colossal work, and its analysis is at times rather recondite. When it comes to the exposition of this central concept, however, Unger expresses himself with great clarity and concision. ‘The illusions of false necessity arise’, he writes, ‘because we surrender to the social world, and then begin to mistake present society for possible humanity, giving in to the ideas and attitudes that make the established order seem natural,

³ R Unger, *False Necessity* (2nd edn, Verso: London, 2004).

necessary, or authoritative.⁴ Yet ‘what seems to be given and presupposed is merely what we have temporarily refrained from challenging and remaking’.⁵ Far from representing a natural order of things, social reality is best understood as characterized by ‘permanent incompleteness, perennial conflict and inescapable choice’.⁶ Unger explains that, as an analytical concept, false necessity helps to bring into focus the ‘fatalistic myths’⁷ which mask the historicity of existing arrangements and prevent us from grasping their contingency, provisionality and hence, most importantly, their mutability. He invites his readers to join him in a ‘campaign against false necessity’,⁸ dedicated to subverting these resignation-inducing myths one by one.

The basic idea of false necessity, then, is that things do not have to be as they are. Actuality is not destiny, and we need to search out and expose the various forms of thought which obscure that fact and lend an aura of solidity and self-evidence to what must instead be revealed as precarious and contingent. Although Unger develops his arguments in his own very distinctive way, he does not, of course, claim this as an original insight; his project is to recover it, and imbue it with new emphasis and new meaning. Certainly the basic idea here long predates the name Unger gives to it. A defining theme of social theory in a ‘critical’ mode, it has a history in many different disciplines and today carries the banner of many different traditions and concepts, or indeed none. To take the case of writing about international law, the phrase ‘false necessity’ has to my knowledge rarely, if ever, been used, but the claim it is meant to express serves as the premise or explicit argument of much contemporary scholarship. Thus, scholars highlight the contested character of what appears as beyond dispute—the humanitarianism of humanitarian intervention, for example, and indeed its categorization as intervention. Or they point up the political stakes behind technical-legal description—what happens when having foreign students in your class becomes trade in services, for instance, or when soya bean seeds become intellectual property. Or yet, to mention just one other familiar move, they show how analyses—in areas such as development policy—can work as ‘progress narratives’ that encourage us to assume that all is for the best in this best of all possible worlds. The idioms, projects and

⁴ Ibid, xx. My citations are mostly to Unger’s ‘Introduction to the New Edition’, where his argument is summarized.

⁶ Ibid, xxix.

⁷ Ibid, xxx.

⁸ Ibid, xx.

⁵ Ibid, xxviii.

fields of study vary widely, but the ambition of challenging what Unger terms false necessity is very widely shared.

Standing behind the concept of false necessity is obviously an idea of necessity and its postulated alternative, contingency. In philosophy, and especially the philosophy of history, debates about necessity and contingency have mostly revolved around determinism, accident and the 'role of the individual in history'. It will be instructive for my later argument if we review something of these issues. As a starting point for doing so, we can take Isaiah Berlin's influential essay entitled 'Historical Inevitability'.⁹ Writing in 1953, Berlin criticizes what he sees as the renewed currency of determinism in approaches to historical enquiry. By determinism he means, as he somewhat archly puts it, the effort 'to bring us to our senses by showing where the true, the impersonal and unalterable machinery of life and thought is to be found'.¹⁰ That is to say, it refers to the notion that history obeys laws, that these laws set us on an irresistible course with inevitable outcomes, and that events are accordingly to be attributed to impersonal forces beyond the control of individual human beings. Berlin observes that this kind of approach is both inaccurate and dangerous. It is inaccurate because there are no such laws: individual will and action, not to mention accident, are in fact, and have always been, at the heart of historical processes. And it is dangerous because, where individual agency is denied, so too is the basis for personal responsibility. In his words:

. . .if the history of the world is due to the operation of identifiable forces other than, or little affected by, free human wills and free choices, then the proper explanation of what happens must be given in terms of the evolution of such forces. . . [W]hat can a single individual . . . be expected to do?¹¹

Berlin is worried about the weakening of our capacity to evaluate conduct, and ascribe praise or blame where it is due.

Is he right to worry about this? A notable riposte to Berlin was delivered by EH Carr in his book *What is History?* first published in 1961.¹² It is always easier, Carr remarks, to blame catastrophes on individual wickedness and credit achievements to individual genius than to study historical processes at the level of deeper causes and wider contexts.¹³ He agrees with Berlin that 'the facts of history are indeed facts about individuals', but counters that these facts are not generally

⁹ I Berlin, *Four Essays on Liberty* (Oxford University Press: Oxford, 1969) 41.

¹⁰ *Ibid.*, 106. ¹¹ *Ibid.*, 63.

¹² EH Carr, *What is History?* (London: Penguin, 2nd edn, 1990).

¹³ *Ibid.*, 46.

about 'actions of individuals performed in isolation', and nor are they only about conscious motives and willed outcomes.¹⁴ For Carr, any adequate theory of history has to take into account that people's actions often have results they do not intend or even desire. This is not to maintain that they are the unconscious tools of some all-powerful force, but it is to note that social circumstances matter in historical explanation. In this regard, Carr contends that determinism is a 'red herring'.¹⁵ Clearly, we can no longer imagine that history obeys laws. But historians can, and most do, imagine that causation can be investigated, and for Carr, determinism refers simply to the belief underpinning this that everything that happens has a cause and could not have happened differently without some difference in that antecedent cause. Or rather, most things that happen have multiple causes, so that the key issue is to establish the relative significance of various determining factors. If the most significant factors generally have more to do with institutions and policies than with the actions and wishes of particular individuals, then Carr insists that this is not to negate the reality or relevance of the latter. As he recalls, one who studies the causes of crime does not by that fact alone deny the moral responsibility of individual offenders.¹⁶

Determinism and Determination

In the contributions of these two scholars we can see already that determinism is a complex concept with more than one meaning and more than one bearing with respect to necessity and contingency. Of course, necessity and contingency are themselves complex concepts. *Necessity* refers, in broad terms, to the phenomenon of constraint. In some usages, this is simply a matter of pointing to the existence of external forces that mould, structure or check. In other usages, the constraint rises to the level of compulsion, so that what is necessary is fixed and unavoidable, and must simply be accommodated, as it cannot be altered. Linked to that, the metaphysical doctrine of necessitarianism asserts that the world is as it must be (whether for reasons to do with God, nature, rationality, convention, or some other circumstance), in contrast to voluntarism which stresses the role in human affairs of free will and choice. For its part, *contingency* has a fascinating etymology, which brings with it a literal sense of 'touching' or 'coming into

¹⁴ Ibid, 52.

¹⁵ Ibid, 91 *et seq.*

¹⁶ Ibid, 95.

contact'. More figuratively, it denotes uncertain occurrence or fortuitousness. Something is contingent if it may or may not happen. This could be because it is dependent on some prior event, the incidence or timing of which is indefinite—as in the legal concept of a 'contingent remainder'. Or it could simply be because there is no scheme prescribing, proscribing or otherwise influencing its occurrence. But either way, the emphasis is thrown on chance, accident and all that is random, indeterminate and up in the air.

What then of *determinism*? It is clear that for Berlin determinism implies compulsion. It names the belief that dynamics are at work which are driving history inevitably and inexorably towards outcomes that are bound to result, no matter what people may do. This notion of determinism—let us call it 'fatalistic determinism'¹⁷—has wide currency, both in academic writing and ordinary speech, and is perhaps especially valued as a critical concept, invoked to challenge 'deterministic' approaches when we want to reassert the capacity of human beings to influence the conditions of their own lives. Fatalistic determinism has relevance to the analysis of many different bodies of thought. During the second half of the 20th century, however, it came to be associated for many with one body of thought in particular, seen as its pre-eminent exemplar: Marxism. Berlin appears to be among those who hold this view, for it is above all against 'Marx and Marxists'¹⁸ that he stresses the role of the individual in history. At the same time, it needs hardly to be recalled that Marxism is far from unitary as a tradition, and the problem of determinism has long exercised historical materialists as well. If Marx followed the classical economists in dubbing his theory a 'law', he also wrote (to mention again the passage I quoted at the beginning) that 'men make their own history'.¹⁹ At any rate, few Marxists today would defend the idea that the processes he describes are inevitable, predictable, or fated.²⁰ For most, Marx's 'economic law of motion of modern society'²¹ is to be understood not as a

¹⁷ I take this term from Harry Ritter, who himself draws it from William Dray. See H Ritter, *Dictionary of Concepts in History* (Greenwood Press: Westport, Conn, 1986) 105, and WH Dray, 'Determinism in History', in P Edwards (ed), *The Encyclopedia of Philosophy*, Vol 2 (Collier-Macmillan: New York, 1967) 373–6.

¹⁸ I Berlin, *Four Essays on Liberty* (Oxford University Press: Oxford, 1969) 46.

¹⁹ See Marx, n 2 above, 32.

²⁰ See R Bhaskar, 'Determinism' in T Bottomore (ed), *A Dictionary of Marxist Thought* (2nd edn, Blackwell: Oxford, 1991) 139, to which the present discussion is heavily indebted.

²¹ K Marx, *Capital, Volume 1* (Penguin: London, 1990) 92.

universal principle that can explain the past and foretell the future, but rather as a far more specific and limited set of claims about capitalism.

Fatalistic determinism is a very familiar sense of determinism. To many of us, it is what comes most readily to mind when the word is heard. But it is not the only sense. At the least, Carr reminds us that there also exists a notion of determinism which is concerned with causation. This older sense, for which a common label is 'scientific determinism', has a more neutral connotation than fatalistic determinism. It refers to the belief that events occur in accordance with observable relationships of cause and effect. To some scholars, Carr among them, the main point of scientific determinism is that it justifies the ongoing work of studying causal relations and elaborating explanatory theories. In the context of historical and other social scientific enquiry, it can also moderate a voluntarist preoccupation with the role of the individual and encourage the exploration of diverse causal factors affecting social processes, including institutional and systemic factors. As we have seen, that aspect is important to Carr. How does scientific determinism relate to fatalistic determinism? Well, philosophers remind us that causes may be sufficient without being necessary, and that effects may be conditioned on causes without necessarily being produced by them. Thus, 'because an event was caused to happen, [this does not mean] it was bound to happen before it was caused'.²² Equally, states of affairs may be explained by reference to the effects they produce in the future, as in the functional mode of explanation. All this said, scientific determinism takes many forms, and in some of them fatalistic determinism is not so very far away, inasmuch as the emphasis is on interlinked causal chains which effectively predetermine outcomes.

Let us now try another tack. What if we shift the focus from determinism (the belief) to determination (the process), or indeed determine (the action)? Perhaps that will give us a clearer view of what is in issue. The verb 'determine' has its roots in the Latin word *terminare*, meaning 'to set bounds' to something. This takes us in various directions. I may *determine* a dispute. But in doing so, I may need to *determine* exactly what happened on that terrible day. To this end, I may *determine*, or *be determined upon*, a somewhat unconventional course of action. And in turn, that course of action may *determine* my professional future—or the lack of it. Determination, then, is the

²² See Bhaskar, n 20 above, 139.

process of settling disputes, ascertaining facts, resolving upon actions, and conditioning outcomes. In some usages there is the implication of bringing things to a close, or fixing things in such a way that the end becomes a foregone conclusion. But, as Raymond Williams emphasizes in his discussion of the term as a 'keyword', the roots of determination in bound-setting mean that there has always remained another sense in which the accent is instead on limits and pressures.²³ Thus, determining conditions (or 'determinants') that 'set certain limits or exert certain pressures' are contrasted with 'accidental' or 'voluntary' factors.²⁴ Williams observes that, when determination is understood in this manner, we are able to avoid both the 'fatalism' of believing that 'everything is already decided'—in our terms, fatalistic determinism—and what he describes as a 'vague and indifferent state in which no necessary factors . . . can be admitted to exist'. To his mind, that latter attitude is 'in real terms . . . a kind of madness' which only our confidence in criticizing other views as determinist prevents us from recognizing.²⁵

This idea of determination as the setting of limits and the exertion of pressures is also useful in another way. It steers us away from reductive or over-simplified accounts of the processes involved. In debates about determinism within Marxist circles, Louis Althusser is perhaps the theorist most closely associated with the insight that determination is almost always *overdetermination*. Hence, to refer only to one aspect of this, that which is determined is generally also itself determining. In Althusser's work during the 1960s, the context for these observations is explication of the concept of base and superstructure. Against currents of economic or technological determinism, he argued that base and superstructure are to be understood as referring to determinant factors of various sorts and to their effectivity and relationship in particular circumstances. More specifically, the reference is to 'an accumulation of effective determinations', with production—the economic base—determining 'in the last instance', as Engels is said to have insisted.²⁶ What are we to make of this idea of determination 'in the last instance'? Althusser explains that it means that 'the economy is determinant . . . in the long run, the run of History'. 'But'—and he now adds a crucial qualification—'History "asserts itself" through the multiform world

²³ R Williams, *Keywords* (2nd edn, Fontana: London, 1983) 98.

²⁴ *Ibid*, 101.

²⁵ *Ibid*

²⁶ L Althusser, *For Marx* (Verso: London, 2005) 113 (emphasis omitted).

of the superstructures, from local tradition to international circumstance'.²⁷ Thus, he continues:

the economic dialectic is never active *in the pure state*; in History . . . the superstructures etc. are never seen to step respectfully aside when their work is done or, when the Time comes, . . . to scatter before His Majesty the Economy as he strides along the royal road of the Dialectic.

No, he writes, '[f]rom the first moment to the last, the lonely hour of the "last instance" never comes'.²⁸ Whilst often overlooked and easily elided, this proviso makes plain that what is in issue is not prediction, but orientation—not a vision of an end-state or teleology, but a claim about the direction and dynamics of change. To speak with a more recent scholar, analysis focuses on the 'tendencies of mechanisms rather than [on] the invariant conjunctions of events', for once again determination is seen to 'set limits, rather than [prescribing] uniquely fixed results'.²⁹

Althusser is by no means, of course, the only Marxist theorist to have challenged reductive accounts of the concept of base and superstructure, now viewed in historical perspective as belonging with the effort to rationalize Soviet economic policy. For our purposes, however, the main interest of all this is less how it affects conceptions of historical materialism than what is revealed about necessity and contingency. And what is revealed about necessity and contingency is that neither will do. If Berlin is right to criticize fatalistic determinism, Carr is also right that fatalistic determinism is a red herring which distracts us from the key issue of causation—or, I would prefer, determination. As we have seen, determination can mean different things, but in one notable definition it signals that the course of events is not necessary in the sense of being inevitable, predictable and impervious to 'modification by human intervention'.³⁰ At the same time, nor is it the case that history is 'altogether contingent, unpatterned, [and] accidental . . . only a succession of . . . events, produced by a combination of chance and will'.³¹ Rather, there exist some 'necessary factors', as Williams calls them, in the shape of limits and pressures which orient change without actually predetermining it. The issue then becomes to investigate in particular circumstances what individual and collective action can achieve, what relation is established between structure and agency, how the world works as an organic totality. Vocabularies and preoccupations vary but

²⁷ Ibid, 112. ²⁸ Ibid, 113. ²⁹ Bhaskar, n 20 above, 139.

³⁰ R Miliband, *Class Power and State Power* (Verso: London, 1983) 132.

³¹ Ibid

the common theme, expressed pithily by Ellen Wood, is that '[w]e are not obliged to accept a Manichaeian choice between determinism and contingency'.³² For Wood, '[t]he real alternative to both is *history*'.³³ Once we have rejected the inevitability of specific outcomes, while also recognizing that the range of outcomes is not indeterminate, what is left—she contends—is the category of 'possibility'. But it is '*historical* possibility, that is, the existence of . . . social and material conditions which make something possible that was impossible before'.³⁴

False Contingency

We have come quite a long way from Unger and false necessity, but hopefully the point is now clear: if we need to be on guard against false necessity, we need also to be on guard against what might correspondingly be termed false contingency. For just as things do not have to be as they are, so too history is not simply a matter of chance and will. The concept of false contingency refers to this idea, and to the limits and pressures, tendencies and orientations, over-determination and determination in the last instance, that shape both realities and possibilities. It bears underlining that the analysis of false contingency is not meant to replace the analysis of false necessity; the argument is that they must be pursued in tandem. Or rather, the argument actually goes further than that, insofar as anti-necessitarian critique depends on showing that current arrangements are not simply arbitrary or accidental, but belong with the logics of a system which must also be brought within the analytical frame. It follows that enquiry into false necessity becomes itself necessitarian when false contingency is ignored. (Note, incidentally, that in what I have just said I have referred both to the 'analysis' and simply to the 'concept' of false contingency. This is one of those concepts, like reification and indeed false necessity, which enact a critique, in the sense that to use the word is already to call into

³² E Wood, *Democracy Against Capitalism* (Cambridge University Press: Cambridge, 1995) 145. In contrast, Alexander Chryssis argues that the choice between determinism and contingency is not Manichaeian in this context, but Hegelian, insofar as Marx followed Hegel in opting for a conception of possibility as the 'maturation of conditions for transition of the Idea to next stage of its necessary development'. See A Chryssis, 'The Cunning of Production and the Proletarian Revolution' in M Cowling (ed) *The Communist Manifesto: New Interpretations* (Edinburgh University Press: Edinburgh, 1998) 97, 102.

³⁴ *Ibid*, 144 (some emphasis omitted).

³³ *Ibid*, 145.

question its referent. It is characteristic of such concepts that whether one speaks of their analysis or simply of them, the gist is roughly the same insofar as what is signalled is the existence of a problem, to be specified and explored.)

I recalled earlier that the idea behind false necessity long predates the name Unger invents for it. The same applies to false contingency. This too is no original insight, as some of the writings on which I have drawn already make clear. Indeed, its history would be hard to disentangle from that of false necessity, for which it serves as a complement and corrective. So again the project is one of recovery, not discovery, aiming to imbue an old idea with new emphasis and new meaning. An immediate question that arises is: why is this required? How is it that false necessity today names a widespread preoccupation, while false contingency does not? What has happened to make us forget the problem of false contingency, or perhaps even deliberately blot it out? No doubt many things contribute, but among them may be a tendency to elide determination with determinism. As we have seen, false contingency is concerned with determination. And determination, while obviously related to determinism, is quite distinct from it. In any event, determinism itself has many variants, of which, as we have also seen, belief in historical inevitability is only one. Despite these points, the idea appears to have taken root that to investigate 'necessary factors'—limits, pressures, systemic constraints, and so on—is to commit yourself to determinism in the fatalistic sense. Contingency—and nothing but contingency—or (fatalistic) determinism: as Wood observes, that seems to be the choice. There is also another aspect to this. Recall that for Berlin, among many others, determinism came to be associated—never exclusively, but nonetheless quite strongly—with Marxism. It may even have served at times as a code word for Marxism. This points in an obvious direction. If the investigation of false contingency commits you to determinism, and if determinism associates you with Marxism, then false contingency becomes very much a minority concern.

Something of this line of thought seems to inform Unger's work on false necessity. Unger is certainly aware of the problem of false contingency. His constant talk is of 'frameworks', 'routines' and 'formative contexts' and, in agglutinative mode, of 'context-transforming struggle', 'structure-revising capabilities', 'framework-preserving routines', and 'institutional disentanglement'. This language could scarcely be more redolent of the existence of limits and pressures. Yet we are never

invited or encouraged to scrutinize these, at least not in any sustained fashion. They remain in the background, casting long shadows but rarely coming directly into view. To be sure, the burden of Unger's story is that there are limits to the limits and pressures on the pressures—in his phrase, 'structure-defying resistance' is always possible.³⁵ But that does not explain why false necessity is allowed to occupy the whole field of analytical enquiry, for surely—and this is the burden of false contingency—you need to know what the structure is that can be resistently defied. A better explanation may have to do with the way Unger sets up his argument. The 'campaign against false necessity'³⁶ is counterposed to the 'fatalism' of what Unger terms 'deep structure social theory', and the 'most relentless and influential exponent' of deep structure social theory is identified as Marxism.³⁷ On Unger's account, 'in Marxist social theory, the apparition of fate may describe a temporary—albeit unavoidable—stage in the evolution of humanity'.³⁸ Unger is, of course, right to highlight and challenge the fatalistic determinism that characterizes notable currents within Marxism, especially those which have done duty as state socialist ideology. But, as we have seen, he is wrong to write as though the study of false contingency were tarred with that same brush.

So much for speculations and abstractions. Let me now try to make things more concrete by giving a couple of examples. I mentioned at the beginning that my subject was a problematic tendency which I have come to recognize in my own work, among other places. So my first example is offered in the spirit of self-criticism. Some time ago I wrote about the claim, current in the early 1990s and to some degree still today, that there exists under post-Cold War international law an emergent right to democratic governance.³⁹ I took issue with the conception of democracy that seemed to underpin both this claim and the arguments put forward to refute it. More generally, I objected that the meaning of democracy was being treated as given and self-evident, whereas in fact it is deeply contested. Against the false necessity that made it seem as if this one conceptualization belonged to the order of nature, I reasserted the contingency of democratic ideas. But how did that particular idea come to be privileged, and what would it take to

³⁵ Unger, n 3 above, 319.

³⁶ Ibid, xx.

³⁷ Ibid, xxx.

³⁸ Ibid. For further discussion of Unger's 'complicated relation to Marx's own ideas', see especially *ibid*, 38.

³⁹ S Marks, *The Riddle of All Constitutions* (Oxford University Press: Oxford, 2000).

dethrone it? The ‘thin’ or formal conception of democracy I criticized was not just a random choice. I examined its implications at some length, but never said anything about the extent to which there was a logic to it. I do not just mean a logic within the argument; I mean a logic stretching beyond it, a ‘bigger picture’ of which this was a part. I never provided reasons for seeing the problem of democratic ideas in international law as other than isolated, free-floating and very possibly anomalous.

My second example comes from the work of one of the most influential and inspirational people writing on international law today, David Kennedy.⁴⁰ In an important text, Kennedy sets out his critique of the international human rights movement. Is it the solution, he asks, or also itself part of the problem? He shows that, in a variety of ways, the international human rights movement is indeed itself part of the problem, and that we can begin to grasp this only if we weigh initiatives pragmatically, by considering their benefits and costs in particular contexts. Against the false necessity that makes it seem as if international human rights initiatives reflect the universal interest, Kennedy reasserts the instability of arrangements that in fact produce winners and losers. But how do people come to be winners and losers, and what would it take to alter that situation? Reading his analysis, we are left to imagine that who is a winner and who a loser is in each case entirely arbitrary, something that is just a matter of how the chips fall on that particular occasion. Early on in the text, Kennedy makes the following comment, aimed at qualifying what may seem as investment in the philosophy of rational choice:

In weighing initiatives pragmatically, it is often more useful to focus on ‘distributional consequences among individuals or groups’ than ‘costs and benefits’. The costs/benefits vocabulary suggests (incorrectly) that one could know at an abstract level what to count as a cost or a benefit. In fact, of course, the ‘costs’ and the ‘benefits’ will look different and be evaluated differently by different people.⁴¹

But the problem with rational choice is not just that it fails to register that costs and benefits will look different and be evaluated differently by different people. It is also that it fails to register that costs and

⁴⁰ D Kennedy, ‘The International Human Rights Movement: Part of the Problem?’ (2001) *European Human Rights Law Review* 245 (reproduced in slightly modified form in D Kennedy, *The Dark Sides of Virtue* (Princeton University Press: Princeton, NJ, 2004) ch 1.

⁴¹ *Ibid.*, 249.

benefits are linked, both to one another and to a larger set of systemic processes, the upshot of which is that some people always enjoy social benefits while bearing very few social costs, and the reverse applies to others. Kennedy's account has more in common with the rational choice perspective than he suggests, insofar as it does little to make us understand the relationality and systematicity of privilege and deprivation.

False contingency is a little difficult to illustrate because for the most part it is in the nature of an absent presence. But these examples are perhaps enough to illustrate the way in which, at a certain point, discussion stops and the subject gets changed. There is a great deal of talk about how things that are contingent are made to seem as if they were necessary, in virtue of being natural, universal, rational, eternal, etc, but much less discussion of voluntarist mystifications. Terry Eagleton brings out something of the significance of this omission when, writing about literary history, he asks: 'For whom exactly does experience seem like a swirl of vivid odds and ends? It might have seemed this way to Virginia Woolf, but it is unlikely that it did so to the servants who rose not long after dawn to lay her fires and polish her fenders.'⁴² To those at the less comfortable end of social relations, Eagleton implies, the patterning of privilege and deprivation will be quite plain, or at any rate of interest and worth investigation. In passing, we may note here the link with ideology critique. I mentioned a moment ago the way false necessity may be produced through practices of naturalization, universalization, and the like. These are not only modes of producing false necessity. They are also typical operations of ideology. (I use that term to refer to discursive manoeuvres that help to legitimate and hence stabilize existing configurations of power). To this extent, false necessity and ideology can be understood as overlapping concepts—overlapping, but not coextensive. For, as Slavoj Žižek explains, if ideology is the 'act of discerning some higher Necessity in a contingent occurrence', it can also be 'the opposite procedure of failing to . . . discern the hidden necessity in what appears as mere contingency'.⁴³ Žižek reminds us in this passage that ideology may manifest itself just as much in what I have called false contingency as it does in false necessity. It follows that the critique of ideology demands enquiry into both.

⁴² T Eagleton, *The English Novel* (Blackwell: Oxford, 2005) 311.

⁴³ S Žižek, 'Introduction' in S Žižek (ed.), *Mapping Ideology* (Verso: London, 1994) 4.

What false contingency puts on our agenda, then, is above all this question of how necessity gets rewritten as contingency. As with false necessity, we are confronted with a process that can take many different forms. To begin with one characteristic mode, things may be addressed in such a way that determination becomes difficult or impossible to discern. Thus, for instance, the angle of vision may be too narrow, or the time-frame too short, so that patterns and logics cannot appear. Systemic factors may also be removed from view insofar as the focus is on issues conceived as monadic and autonomous, rather than relational and interactive. Alternatively, to mention another mode, analysis may be framed by assumptions, or may start from premises, that rule out in advance the idea that necessary factors could exist. Here necessity is not so much unnoticed as repudiated. This takes us back to my earlier comments about the elision of determination with determinism, and determinism with Marxism, for most commonly the assumptions and premises that discredit the consideration of necessity or place it beyond respectable scrutiny rest on just those elisions (and just that anti-Marxism—I will return to that aspect later). Or yet, to refer to one final mode, explanatory ambitions may be disavowed, so that the existence or non-existence of determining factors becomes a matter of indifference in the discussion at hand. Rather than being unnoticed or repudiated, necessity becomes simply irrelevant. This, of course, is common practice in legal scholarship; we tend to be deeply interested in ‘how’ questions (not to mention ‘what’, ‘where’, ‘when’ and some ‘who’ and ‘whom’ questions), but distinctly reserved when it comes to ‘why’ questions. Hence indeed my own preference, indicated earlier, for using determination as a guiding concept, rather than causation. On the other hand, Carr has an important message, and not only for professional historians. This is that if we don’t ask why, and insistently so, the argument is stacked in favour of voluntarism; it is the investigation of causal relations that pushes open the compass and exposes to analysis the full range of (intentional and non-intentional) factors affecting social processes.

Falsity as a Critical Concept

In elaborating the concept of false contingency, I have dwelled at some length on the idea of contingency and on the neighbouring or related

ideas of necessity, false necessity, determinism and determination. But I have not yet said very much about the other element that goes to make up the concept of false contingency: the idea of falsity. In what sense is false contingency false? According to the familiar scholastic notion of truth, a statement is true if it accurately represents the way things are, and false if it does not. Truth is the correspondence of reality and thought. That account no doubt remains useful for many purposes, but, as is well known, it has come under severe strain in recent decades, at least among philosophers. As Alex Callinicos explains, '[i]f truth is the correspondence of reality and thought, then we could only conclusively establish the truth of a sentence by comparing discourse to the world, which presumes the existence of some Archimedean point outside discourse'.⁴⁴ Yet there is no such point. Reality is out there, of course, but thought has no unmediated access to it; knowledge has to be recognized as 'propositional', rather than 'immediate'. From this perspective, returning to my question, false contingency cannot be a straightforward error or failure accurately to represent the state of the world. It cannot simply mean that necessity matches empirical reality while contingency does not. So what can it mean?

We can get help with this by revisiting the overlapping concept of ideology I touched on earlier, as a similar issue has arisen in debates about what it might mean to characterize ideology as false consciousness. Some theorists of ideology, Callinicos among them, have concluded from the abandonment of the idea of immediate knowledge that we should reject the conception of ideology as false consciousness altogether.⁴⁵ Instead, according to him, ideology should be viewed in pragmatic or political terms as referring to the symbolic terrain of social struggle, and epistemological issues—questions of truth and falsity—should be dismissed as 'beside the point'.⁴⁶ For other theorists of ideology, however, we can hold onto the idea that ideology involves falsehood. After all, the propositional notion of truth still allows for truth and falsity; it just entails that truth claims are propositions that are answerable not to reality itself but rather to other propositions, in the shape of verifying criteria. Terry Eagleton is among those who consider that falsehood remains relevant in this context, but he shows that some care is needed in capturing it. As he characterizes the

⁴⁴ A Callinicos, *Marxism and Philosophy* (Oxford University Press: Oxford, 1983) 126.

⁴⁵ Ibid, 134–5. ⁴⁶ Ibid, 135.

situation, ideological statements are often true at one level and false at another: 'true in what they affirm but false in what they exclude', or true in their surface meaning, but false in their subtext and implications.⁴⁷ To use a different vocabulary, such statements are often true if we confine ourselves to the 'constative' dimension—the description of facts—but false if we consider also the 'performative' dimension—what the words enact and the effects they produce. Viewed in this light, ideology is not false because it is erroneous, whether under the correspondence theory or the propositional approach. Rather, it is false because it is misleading: it skews understanding, stunts enquiry and dazzles analysis. And since in each case it does so in ways that contribute to the stabilization of prevailing power, whatever illusion is involved is very much a part of reality—as much a part of reality as that otherwise fragile power itself.

Taking Eagleton's lead, we can begin to make out the sense in which false contingency can be said to be false. The point is not that necessity matches reality while contingency does not. It is that discussion is structured in such a way that necessity gets obscured. False contingency is generally true *so far it goes*, but false as to what it excludes; true in what it says but false in what it leaves unsaid, in its unarticulated assumptions, implications and effects. Thus, to return to my examples, it really is the case that the meaning of democracy is less self-evident than debates over the norm of democratic governance might have led us to believe. And it really is the case that international human rights initiatives are less universally beneficial than the international human rights movement generally admits. But to stop the discussion there is in each case silently to signal that these phenomena are isolated problems, unrelated to wider processes, tendencies and dynamics at work in the world, and that is false. Indeed, it is not only false; in leaving those processes, tendencies and dynamics unacknowledged and unexplored, we also occlude awareness of what it will take to effect change. To show how things that are necessary may be made to seem contingent is, then, to show how the assertion of contingency, whatever its validity, overwhelms the investigation of necessity, and how in the process mutability becomes an abstract claim, only tenuously related to real, historical possibilities.

There is another aspect to this. The idea of ideology as false consciousness has been controversial not only for reasons having to do with

⁴⁷ T Eagleton, *Ideology* (Verso: London, 1991) 16.

the nature of truth. It has also been controversial because of the apparent implication that an enlightened few have privileged knowledge of the truth while the rest of humanity languishes in darkness and delusion. That is plainly an arrogant and patronizing idea, but, more importantly, it is entirely implausible. Most people are unlikely to be deluded most of the time. In the case of false contingency, this could scarcely be clearer. It seems a safe bet that almost no-one actually believes that contingency is all: Williams is surely correct that when he writes that to believe that would be 'in real terms a kind of madness'. At any rate, to refer again to my earlier examples, David Kennedy and I are both, I hope, quite rational, and were certainly aware at the time we wrote those texts that phenomena in the social world are not purely random or arbitrary. We were aware of that, but it was not reflected in what we did. One is reminded here of Peter Sloterdijk's concept of 'cynical reason' or 'enlightened false consciousness'.⁴⁸ These are Sloterdijk's phrases for the experience of being 'without illusions' and yet, as he puts it, 'dragged down by the "power of things"'.⁴⁹ In his words, 'enlightened false consciousness' is that 'modernized, unhappy consciousness, on which enlightenment has labored both successfully and in vain'⁵⁰—successfully in that lessons have been learnt, but in vain in that those lessons have not been put into practice; perhaps, in some measure, they cannot be put into practice. Linked to that, 'this consciousness no longer feels affected by any critique of ideology; its [ideology's] falseness is already reflexively buffered.' Thus, we act, not in ignorance, but 'against better knowledge'.⁵¹ Does this put paid to notion of false consciousness, and hence false contingency? Slavoj Žižek, in his psychoanalytically inspired work on the concept of ideology, argues that it does not.⁵² He agrees with Sloterdijk that ideology is often, perhaps always, reflexively buffered to various degrees: the idea of ideology critique as a form of symptomatic reading designed to confront representations with their repressed truth cannot be accepted. But what if the illusion is not on the side of knowledge, but rather on the side of action? While we may know that contingency is not all, what we may still fail to recognize are the effects of acting as if it is; we may fail to see how this impacts upon lived reality. For Žižek, it

⁴⁸ P Sloterdijk, *The Critique of Cynical Reason* (University of Minnesota Press: Minneapolis, Minn, 1988).

⁵⁰ *Ibid*, 5.

⁵¹ *Ibid*

⁵² S Žižek, 'How Did Marx Invent the Symptom?' in S Žižek (ed), *Mapping Ideology* (Verso: London, 1994) 296, especially at 314–6.

is this failure to recognize the way ideology is 'structuring our real, effective relation to reality'⁵³ that constitutes the basis of false consciousness. This then clarifies another facet of the sense in which false contingency is false. Just as it cannot be equated with simple error, so too it cannot be equated with simple delusion. You may well know that history is not simply a matter of chance and will, but what counts is that you act as if it is.

Allow me to mention one final matter related to this question of falsity as a critical concept. I have so far touched only obliquely on the 'psychology' of false contingency, so to speak. By this I mean, in particular, the issue of whether it should be regarded as deliberate, or whether instead we are talking about something which is normally unconscious. The drift of most of what I have said is that it is normally unconscious. In addition to the discussion just now of ideology, recall, for instance, my reference at the beginning to Carr's insistence that any adequate theory of history has to take into account that people's actions often have results they do not intend or even desire. With this in mind, GA Cohen has remarked that the charge of 'conspiracy theory', so often levelled at those who dwell on the dimension of necessity, is a canard.⁵⁴ The point is not to expose some elite plot, but to understand the way the world around us works, in all its complexity, subtlety and contradictoriness. On the other hand, Cohen also suggests that too much sensitivity about the charge of conspiracy may be misplaced. In his words, '[t]here is more collective design in history than an inflexible rejection of "conspiracy theories" would allow'.⁵⁵ This statement can be interpreted, of course, in a variety of ways, but on one interpretation Cohen is reminding us that the psychology of false contingency is no less complex than the rest of social reality. What begins as naïveté may end up as hypocrisy, and what emerges as self-deception may get mixed up with manipulation. Assuredly, unconscious factors play a part, but they cannot be held to exclude conscious ones. For, to quote Cohen once more, '[c]onspiracy is a natural effect when men of like insight into the requirements of continued class domination get together, and such men do get together'.⁵⁶

⁵³ Ibid, 316.

⁵⁴ GA Cohen, *Karl Marx's Theory of History* (2nd edn, Oxford University Press: Oxford, 2000) 289–91.

⁵⁵ Ibid, 290.

⁵⁶ Ibid

Concluding Reflections

I should now sum up and conclude. Beginning with Marx's study of the history of post-1848 France, I have highlighted his insight that men and women make their own history, but they do not do so just as they please in circumstances they choose for themselves; they do so in present circumstances, given and inherited. The transformation of Louis Bonaparte from elected president into self-proclaimed emperor was not inevitable. But nor was it purely fortuitous. Rather, it was determined historically by a variety of factors which Marx explores in this study. I have suggested that, as scholars of law, we tend to give considerable attention to vindicating the contingency of history, but rather less attention to its necessary, or determined, aspects. As a result, a form of 'false contingency', as I have called it, is left unchallenged, according to which the injustices of the present order are made to appear as though they were random, accidental and arbitrary. And if they are random, accidental and arbitrary, then the prospects of changing them become every bit as remote as if they were fated. The category of possibility—not just abstract possibility, but real, historical possibility—drops out of sight.

What are the implications of this argument? Just as Roberto Unger's concept of false necessity prompts enquiry into the processes by which necessity is produced, so the concept of false contingency prompts enquiry into the processes by which contingency is produced. The operation of these processes can only adequately be grasped in particular contexts, but we can identify some general, or preliminary, lessons. First, the concept of false contingency urges an approach that considers phenomena not in discrete, monadic or free-floating terms, like Eagleton's swirl of vivid odds and ends, but relationally, as elements with larger social systems. Secondly, the concept of false contingency encourages explanatory ambitions. At any rate, it highlights that fighting shy of explanation constitutes a stake in the politics of knowledge. Finally, the concept of false contingency invites us to get over our debilitating fear of determinism, and begin to engage more fully with the quite distinct issue posed by its non-doctrinal cousin, determination.

I have suggested that the fear of determinism is also, in some sense, a fear of Marxism, and with that in mind, let me end now with one further thought. It will not have escaped your notice that many of authors I have cited in this paper are people closely associated with

Marxism: at the outset Karl Marx himself, of course, but then EH Carr, Raymond Williams, Louis Althusser, Ellen Wood, Terry Eagleton, Alex Callinicos, G.A. Cohen—and perhaps even Slavoj Žižek falls in that category. Clearly, one subtext of the paper is that there is much inspiration and instruction to be drawn from the Marxist tradition, and we neglect it to our detriment.⁵⁷ So is the argument of false contingency ultimately a call for the renewal of Marxist legal analysis? Within international legal scholarship there is indeed at present something of a renaissance of Marxist analysis, led by Bill Bowring, BS Chimni and China Miéville, and their work has challenged received understandings in immensely productive ways.⁵⁸ But no, the argument of false contingency is not made on behalf of Marxism. If it is made on behalf of any 'ism', it is anti-anti-Marxism,⁵⁹ along the lines of the anti-anti-communism (as distinct from communism) that emerged and helped to energize resistance during the McCarthy years in the United States.

⁵⁷ See further the essays collected in S Marks (ed), *International Law on the Left* (Cambridge University Press: Cambridge, 2008).

⁵⁸ See especially BS Chimni, *International Law and World Order* (Sage: New Delhi, 1993) and 'An Outline of a Marxist Course on Public International Law' in S Marks (ed), *International Law on the Left* (Cambridge University Press: Cambridge, 2008) 53; C Miéville, *Between Equal Rights* (Brill: Leiden, 2004); and B Bowring, *The Degradation of the International Legal Order?* (Routledge-Cavendish: London, 2008).

⁵⁹ I believe this term has been used by, or in connection with, Edward Said. See S. Howe, 'Edward Said and Marxism: Anxieties of Influence' 67 *Cultural Critique* (2007) 50, at 79. (Howe's article contains the sole reference to the phrase 'anti-anti-Marxism' I have found.)