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CRITICAL INTERNATIONAL LEGAL THEORY

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International Legal Theory: Foundations and Frontiers

Critical International Legal Theory

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Abstract

This chapter presents an account of three phases of writing and practice in critical international legal theory, after first identifying some braided historico-political fuel lines for these cycles of work. These phases correspond to successive periods of revisionism: a pre-1989 reckoning (dating from the mid-late 1970s) with the non-materialization of the promises of socialist revolution and the disappointments of the cosmopolitan, decolonization, and development projects; a 1989 to 1999 reckoning with the apparent triumph of liberalism/neo-liberalism and the Washington Consensus; and a current phase, dating from approximately the turn of the millennium, of reckoning with the post-Washington Consensus, the renewed spread of authoritarian nationalism/nativism, and the prevalence of casualization and automation. In each of these, critical international legal theory has been marked by certain persistent commitments and proclivities which this chapter will briefly examine, before speculating about some possible galvanizing themes of international legal work in this vein in the future.

Key words

International law, legal theory, critical theory, critical legal studies, post-structuralism, law and politics, history of international law, feminist legal theory

I Introduction

To write of critical international legal theory (CILT) is to hunt a snark. As in Lewis Carroll's famous poem, there is something important to be captured, but there lingers a very real possibility that its distinctive charms and potency might "vanish… away" in the telling.[1] For like many of the bodies of work by which it has been informed, CILT does not denote any single movement, school or approach. Those identified with CILT are quite likely to reject such a label, or to opt for some alternative ("New Approaches to International Law" (NAIL), for instance, flourished during the 1990s).[2] Those so identified often disagree about what it is that they may be up to in the international legal field, and what it is that they should aspire to achieve, even as they often collaborate with and support others so identified. As a consequence, it is far from clear that CILT exists in any consistently recognizable form. To the extent that it does, it is better grasped in the doing than in the description. For purposes of this chapter, however, let us bracket these bumps, cracks and holes and write something approximating a map—and not, as in Carroll's poem, a blank one—to aid navigation to, within and from CILT.

[1] LEWIS CARROLL, THE HUNTING OF THE SNARK: AN AGONY, IN EIGHT FITS (New York, Macmillan Co. 1899).

[2] David Kennedy & Chris Tennant, *New Approaches to International Law: A Bibliography*, 35 HARVARD INT'L L.J. 417 (1994).

This chapter begins by identifying two, braided historico-political fuel lines for work in the field of CILT (namely, Critical Legal Studies (CLS) and global critiques of liberalism). It then explores three overlapping phases of CILT scholarship: a pre-1989 reckoning (dating from the 1980s) with the non-materialization of the promises of socialist revolution and the disappointments of cosmopolitan, decolonization, and development projects; a 1989 to 1999 reckoning with the apparent triumph of liberalism/neo-liberalism and the Washington Consensus; and a current phase, dating from approximately the turn of the millennium, of reckoning with the post-Washington Consensus, the renewed spread or entrenchment of authoritarian nationalism, and the prevalence of casualization and economic inequality. In each of these phases, CILT has been marked by certain persistent commitments and proclivities. Broadly, CILT theorizing has been concerned with understanding and addressing the persistence of bias, the ambivalent operations of power, in global order, and the role of international law and lawyers within these. This chapter will briefly examine how CILT scholars have addressed these persistent themes, before speculating about some possible future key themes of scholarly work in this vein.

II Fuel Lines

Despite its eclecticism, CILT has drawn inspiration from, or otherwise reacted to, certain predecessors more or less in common. The first of these is CLS. The second spans a range of global critiques of liberalism. Each of these "sources" warrants brief explanation, to set the stage for an account of CILT.

1) Critical Legal Studies

CILT is not, contrary to some accounts, a straightforward application of CLS to international law.[3] Nonetheless, most projects in CILT have drawn, directly and indirectly and in varying degrees, upon a corpus of texts identified with CLS. It is, accordingly, appropriate to offer a brief précis of CLS, its provenance, and its various manifestations.

The term CLS offers a shorthand for the diverse and often internally conflicted body of work generated by a group of scholars in common law jurisdictions (primarily in the United States) who turned to critical theory and structuralism from the 1970s onwards in order to revisit and renew legal thought. In the aftermath of American Legal Realism, they sought to extract from that tradition something other than a commitment to socially- and economically-attuned empiricism in legal thought and practice (breaking, in so doing, with the law and economics and the law and society movements).[4] They did so in order to work through a more or less shared sense of

[3] *See* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE 248, 253–4 (1997) (Kennedy "cannibalize[s]" the work of leading scholars in CILT for his own project by casting that work as one among a number of "extensions" of critiques developed for the most part elsewhere.) For a rather arch rejection of that way of locating or characterizing CILT, *see* Martti Koskenniemi, *Letter to the Editors of the Symposium*, 93 AM. J. INT'L L. 351 (1999).

[4] The relationships of CLS to the law and society and law and economics movements, respectively, are lucidly discussed in David Kennedy, *A Rotation in Contemporary Legal Scholarship*, *in* CRITICAL LEGAL THOUGHT: AN AMERICAN-GERMAN DEBATE 353–96 (Christian Joerges & David M. Trubek eds., 1989).

difficulties then facing legal scholars, and the constituencies they purported to address or serve.[5] Mainstream legal scholars of the day were, in a famous formulation of the CLS charge, "like a priesthood that had lost their faith and kept their jobs."[6] The failures of legal formalism and objectivism to deliver any "universal legal language of democracy and the market" had been elucidated at length and widely acknowledged, but much legal scholarship remained "devoted to containing the subversive implications of this discovery."[7]

This invocation of legal formalism and objectivism recalls two key arguments advanced by CLS scholarship, drawing variously on the lineages just identified (critical theory, structuralism, and American Legal Realism), which have also been features of CILT. The first entailed critique of a particular version of formalism identified (accurately or inaccurately) with nineteenth century legal thought.[8] Legal formalism, for these purposes, comprised not just formalism as otherwise understood (belief in the capacity of deductive modes of reasoning to yield determinate answers to particular questions). It also signified a commitment to methods of legal analysis and justification that were understood to stand apart from "open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary."[9] In the legal formalist tradition so understood, the former entailed the *application* or *interpretation* of law, while the latter constituted an extra-legal basis for the *making* of law. Against legal formalism, CLS scholarship broadly contended that legal doctrine and legal concepts were too internally incoherent to yield general rules capable of consistent application. As a result, the distinction between rule-making and rule-application could not hold; every application entailed a "making" of law for the particular case out of resources both internal and external to law, with neither the internal nor the external being wholly determinative. Attendant upon CLS efforts to collapse this distinction was the discrediting of the identity of the legally authorized decision-maker (the judge in particular) as an ideologically neutral and disinterested figure.[10] Also discredited was the aspiration, to which much Legal Realism had up to that point held fast, to advance a scientistic understanding and practice of law.[11]

As a target of CLS, objectivism consisted similarly of something more specific than, albeit related to, the generic meaning of the term (the belief that certain moral, scientific and philosophical truths exist, and can be established, independently of human knowledge or perception of them). It

[5] David W. Kennedy, *Critical Theory, Structuralism, and Contemporary Legal Scholarship*, 21 NEW ENG. L. REV. 211 (1986); ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986).

[6] Unger, *supra* note 5, at 119.

[7] *Id.* at 6.

[8] David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 17 QUINNIPIAC L. REV. 99 (1997).

[9] Unger, *supra* note 5, at 1.

[10] Kennedy, *supra* note 3, at 82.

[11] Although, the desire to make of law something approaching a science was not entirely dispensed with among CLS scholars, or indeed scholars of CILT: MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 617 (Cambridge Univ. Press rev. ed. 2005) (1989) (reflecting in 2005 on his work of 1989, and characterizing it as a work of "cool structuralism" that represented the discipline of international law as a "machine").

implied a "belief that the authoritative legal materials [specific to any jurisdiction] . . . embody and sustain a defensible scheme of human association"—a scheme often understood to comprise policy and principle alongside formal rule.[12] Objectivism entailed vesting that scheme with normative force independent of "contingent power struggles or . . . practical pressures" from which particular features of the scheme may result.[13] It also involved an idea that a "correct" interpretation of the law, with reference to a particular case, could be distinguished by anyone with a reasonable level of legal training, competence and experience, and enjoying access to the requisite data.[14] Against objectivism, and in close alliance with their critiques of legal formalism, CLS scholars argued that it was not possible to disclose or discern any "built-in legal content" enduring over time and space. Current social and legal arrangements could not be imputed to "the requirements of industrial society, human nature, or moral order."[15] Rather, such arrangements were traceable to historically contingent factors and highly subjective investments and struggles, as well as to recurrent patterns of privilege. This attack on objectivism was advanced by CLS scholars doctrinally and historically. Via both methodological routes, abstract categories were shown to be devoid of determinative content such that any experience of feeling "bound" by the law had to be otherwise explained.[16]

The resources upon which CLS scholars drew in advancing these claims were diverse.[17] Nevertheless, critical theory, structuralism, and American Legal Realism warrant brief identification as particular generative fields of investigation and borrowing by CLS scholars, and later by scholars of CILT.

Critical theory alludes to a loosely affiliated body of work, and a set of insights, traceable to the Institute for Social Research established at the Goethe University Frankfurt in 1923.[18] Seeking, initially, to explain the non-realization of the socialist revolution anticipated in the writings of Marx, scholars of critical theory worked to link cultural and ideological analyses to a partially-reconstructed Marxist theory of economics in order to understand "the surprising survival of capitalism" notwithstanding its endemic contradictions.[19] "Domination" was a key term for thinkers identified with critical theory. In their hands, it was a term signifying "a combination of external exploitation (e.g., the extraction of workers' surplus value – explored exhaustively [by Marx] in

[12] Unger, *supra* note 5, at 2.

[13] *Id.* at 2.

[14] David Kairys, *Introduction* to THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 1 (David Kairys ed., rev. ed. 1990).

[15] Unger, *supra* note 5, at 6, 121.

[16] *Id.* at 5–8.

[17] David Kennedy aptly observes that "[e]arly CLS work . . . continued the mainstream's eclectic method and seemed to reject only the apparent object of normal legal science – the image of a final resolution to doctrinal quandary": *supra* note 4, at 369.

[18] DOUGLAS KELLNER, CRITICAL THEORY, MARXISM, AND MODERNITY (1989).

[19] Ben Agger, *Critical Theory, Poststructuralism, Postmodernism: Their Sociological Relevance*, 17 ANN. REV. SOC. 109 (1991). *See also* Max Horkheimer, *Traditional and Critical Theory*, *in* CRITICAL THEORY: SELECTED ESSAYS 188 (Matthew J. O'Connell et al. trans., 1972).

Capital) and internal self-disciplining that allows external exploitation to go unchecked."[20] The latter was, they argued, inculcated by a whole range of cultural phenomena and social practices that appeared benign, beneficial or banal and were, in many instances, experienced as expressions of free choice. Among the phenomena implicated in this, on which critical theorists focused in particular, were "reification" ("the process whereby socially produced phenomena take on a fixed, thing-like quality" as though products of nature or necessity) and "legitimation" (the process by which certain social conditions, distributions of resources, and arrangements of power come to seem rightful by virtue of their integration with, and reproduction of, an ideological system).[21] These were terms that CLS scholars employed in order to explain and confront the imbrication of law in the production and persistence of unequal distributions of power, and vice versa. They have also been key terms for CILT scholars.

Structuralism refers to a mode of inquiry advanced in a number of fields—including linguistics, anthropology, literary theory, and sociology—during the first three quarters of the twentieth century.[22] Characteristic of structuralist approaches was an effort to discern and describe order underlying surface phenomena and events. Structuralist work tended to eschew diachronic (or historical) explanations in favor of synchronic ones. Intentional, purposive human actions, and meanings with which they are invested, were also not decisive, or of primary interest, to the structuralist. Rather, structuralist scholarship elucidated patterns of cross-reference, repetition and dependence common to a great variety of social phenomena. Roland Barthes described the "goal" of so doing as follows:

> The goal of all structuralist activity, whether reflexive or poetic, is to reconstruct an "object" in such a way as to manifest thereby the rules of functioning (the "functions") of this object. Structure is therefore actually a *simulacrum* of the object, but a directed, *interested* simulacrum, since the imitated object makes something appear which remained invisible, or if one prefers, unintelligible in the natural object.[23]

For some CLS scholars (and later CILT scholars), structuralist techniques and ideas offered a powerful way of decoding both the highly plastic and remarkably resilient properties of legal doctrine, without recourse to arguments of cause and effect or narratives of origin.[24] In this respect, CLS scholars' structuralist borrowings were in tension with their critical theory appropriations, as David Kennedy has highlighted:

> Unlike critical theory, which constantly sought to identify and make responsible the agents of history, structuralism sets aside any question of agency. The structuralist asks how language can explain its puzzling flexibility and coherence without reference to either the

[20] Agger, *supra* note 19, at 108.

[21] ALAN HOW, CRITICAL THEORY 188 (2003); JÜRGEN HABERMAS, LEGITIMATION CRISIS (1976). On the multivalent concept of "ideology", *see* TERRY EAGLETON, IDEOLOGY (1991).

[22] *See generally*, JOHN STURROCK, STRUCTURALISM (2d ed. 2003).

[23] Roland Barthes, *The Structuralist Activity*, *in* CRITICAL ESSAYS 213, 214–5 (Richard Howard trans., 1972).

[24] *See, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 88 HARVARD L. REV. 1685 (1976).

> object world described by words or the subject world which invents and deploys language.[25]

Critical theory set aside the intricacies and dynamic properties of text or doctrine, while structuralism set aside historical explanation and questions of origin. Each sought to escape the other. As a result, their combined legacy to scholars of CLS and others was more that of "a problem or a caution than a method."[26] Acknowledging this, an eclectic body of later work in various fields—work broadly designated post-structuralist—drew techniques and insights from both traditions to problematize the stable antinomies of structuralism and to call into question some key referents of critical theory (including that of a coherent historical subject).[27] Tracing processes of differentiation, mimesis and displacement whereby that which was discounted or set aside became so, poststructuralist scholarship showed just how unstable were those hierarchies upon which claims to authority have typically relied. In CILT—given its somewhat later emergence than CLS (a sequence discussed below)—it is mostly via post-structuralist work that the vocabularies and motifs of structuralism were carried forward.[28]

More widely acknowledged, as a progenitor of CLS scholarship, is American Legal Realism, with which Gregory Shaffer's chapter in this volume deals. Indeed, part of what was at stake in the battles among CLS scholars, and between CLS scholars and their critics, throughout the 1970s and 1980s was precisely what to make of the Legal Realist lode or "mood" that Shaffer explains.[29] CLS scholars sought to wrest this legacy from the hands of those who sought to press Legal Realism into a variety of rightful, reformist molds: legal process scholars; liberal constitutionalists; law and economics scholars; leftist legalists; and law reformers otherwise described.[30]

Working with this heterogeneous heritage, CLS scholars of the 1970s and 1980s were focused almost exclusively on domestic law. Only a few junior scholars of the 1980s—David Kennedy in the United States and, later, Martti Koskenniemi in Europe—took public international law as a field in which to pursue inquiries along these lines.[31] Perhaps because of the relative marginality of international law during the first phase of CLS work, work in this field was not derailed by the intense battles that ultimately brought an end to the Conference on Critical Legal Studies in the United States around 1992.[32] Those were battles that divided, in Claire Dalton's words, "theorists from practitioners, irrationalists from instrumentalists" and those who refused redemption or

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[25] Kennedy, *supra* note 5, at 249.

[26] *Id.* at 275–6.

[27] *See generally* JAMES WILLIAMS, UNDERSTANDING POSTSTRUCTURALISM (2005).

[28] For one recent reassessment of structuralism's significance for and articulation in CILT, *see* Justin Desautels-Stein, *International Legal Structuralism: A Primer*, 8 INT'L THEORY 201 (2016).

[29] On American Legal Realism as a "mood", *see* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOX 169 (1992); NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 69 (1995).

[30] DUNCAN KENNEDY, THE RISE & FALL OF CLASSICAL LEGAL THOUGHT, at xxix (2006).

[31] DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES (1987); MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (1989).

[32] For one personal recollection of the organizational practices of CLS, *see* Gary Minda, *Neil Gotanda and the Critical Legal Studies Movement*, 4 ASIAN AM. L.J. 7 (1997).

accommodation, from those committed to reconstruction in the aftermath of critique.[33] (In contrast, an annual Critical Legal Conference started in the U.K. in 1984 and has been held annually, without interruption, ever since.)[34]

Critical scholarship in international law gained in prominence throughout the 1990s, as CLS weathered something of a backlash. Scholars identified with critical race theory, third wave feminism, and queer theory took CLS to task for its parochialism and privilege, and the unacknowledged hierarchies with which this scholarship tended to be loaded, inspiring a post-CLS fracturing (and renewal) of the critical enterprise in legal scholarship.[35] During this "post-CLS" phase, it was in the fields of international and comparative law where many scholars worked to extend, problematize and diversify the CLS legacy.[36] Moreover, though the influence of CLS waned in the mainstream legal academy in the United States, it retained a foothold in graduate programs dominated by students from outside the United States, many of whom were working in public international law.[37] At the same time, those programs were expanding and becoming increasingly valuable to U.S. law schools as sources of fees and vehicles for burnishing reputation and enlarging donor bases worldwide.[38] As an affiliation with CLS became somewhat of a liability for junior scholars working in domestic law (in the United States and elsewhere), and some left the academy altogether, CILT effected generational succession by engaging a global network of

[33] Clare Dalton, *The Politics of Law*, 6 HARVARD WOMEN'S L.J. 230 (1983) (reviewing THE POLITICS OF LAW (David Kairys ed., 1982)).

[34] Costas Douzinas, *Oubliez Critique*, 16 LAW & CRITIQUE 47 (2005).

[35] *See, e.g.*, Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits go to Law School"*, 38 J. LEGAL EDUC. 61 (1988); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Culture*, 83 CALIF. L. REV. 1 (1995); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987); K.W. CRENSHAW ET AL., CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (1995). *See also* Kennedy, *supra* note 30, at xxxii ("Both [feminist legal theory and critical race theory] pushed hard against the ultra-white-male ethos of the New Left . . . [while] post-modernism (also known as post-structuralism) . . . pushed hard, from the other direction, so to speak, against the super-straightness of that same white male ethos, and against our clinging to structure, as an indispensable moment in critique.").

[36] David W. Kennedy, *A New Stream of International Law Scholarship*, 7 WIS. INT'L L.J. 1 (1988); Deborah Z. Cass, *Navigating the Newstream: Recent Critical Scholarship in International Law*, 65 NORDIC J. INT'L L. 341 (1996); Thomas Skouteris & Outi Korhonen, *Under Rhodes' Eyes: The "Old" and "New" International Law at Looking Distance*, 11 LEIDEN J. INT'L L. 429 (1998).

[37] The author is a case in point: entering the graduate program at Harvard Law School in 1995, with an idea of pursuing critical work in international law.

[38] Carole Silver, *Winners and Losers in the Globalization of Legal Services: Situating the Market for Foreign Lawyers*, 45 VIRGINIA J. INT'L L. 897, 899 (2005).

researchers.[39] CLS may have been "dead, dead, dead" by 1996, but CILT, in one form or another, lived on.[40]

As noted above, however, the life and times of CILT cannot be wholly explained by reference to CLS and its aftermath. Scholars attentive to patterns of privilege and authority in the international legal field have long quarried work that is either specific to this field or has held particular resonance for it. Some CILT scholars have entered the field along routes that more or less by-passed the United States and its crucibles of CLS writing and teaching.[41]

2) Global critiques of liberalism

Quite apart from CLS, earlier bodies of work taking aim at liberalism (either with explicit reference to international law, or otherwise with a "global", or root-and-branch aspiration) have comprised a rich intellectual and political seam for CILT scholarship to mine, and one to which CILT scholarship has repeatedly returned. These include the solidarist critiques of liberalism and formalism advanced in late nineteenth century and early twentieth century France; the "anti-" motif developed in nineteenth and twentieth century German thought; feminists scholars' and activists' engagements with international organizations over the same period and in subsequent decades; and various strains of anti-colonial and post-colonial writing. Other lines of political thought have also informed critical international legal work from time to time but escape mention here for want of space (including, for instance, various types of anti-authoritarian anarchism).[42]

Solidarism has different implications in different national and disciplinary settings. (It has, for instance, quite a distinct meaning within the English school of international relations associated with Hedley Bull.)[43] Among the variants most suggestive of antagonisms that would later become pivotal for CILT, however, was that which emerged in late nineteenth and early twentieth century France, and among French-trained lawyers based elsewhere.[44] In quite varied ways, those associated with solidarism advanced a critique of laissez-faire individualism, and the economic inequalities it propagated, while also rejecting socialist accounts of the state as a vehicle of the capitalist class.[45] They did so both empirically and normatively. Empirically, they posited a particular understanding of "social reality"—a reality characterized by interdependence—as

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[39] On the most infamous departures from the academy in connection with CLS-related battles, *see* Robert W. Gordon, *Law and Ideology*, 3 TIKKUN 14 (1988).

[40] Robert C. Ellickson, *Trends in Legal Scholarship: A Statistical Study*, 29 J. LEGAL STUD. 525 n. 21 (2000) (attributing the "dead, dead, dead" statement to a Duncan Kennedy, speaking in 1996).

[41] The United States nonetheless remains a crucial training ground for CILT scholars, especially since the establishment by David Kennedy of the Institute of Global Law and Policy at Harvard Law School in 2009-2010.

[42] *See generally* K. Steven Vincent, *Visions of Stateless Society*, *in* THE CAMBRIDGE HISTORY OF NINETEENTH-CENTURY POLITICAL THOUGHT 433 (Gareth Stedman Jones & Gregory Claeys eds., 2011).

[43] Nicholas J. Wheeler & Timothy Dunne, *Hedley Bull's Pluralism of the Intellect and Solidarism of the Will*, 72 INT'L AFFAIRS 91 (1996).

[44] For an introductory account, *see generally* J.E.S. Hayward, *Solidarity: The Social History of an Idea in Nineteenth-Century France*, 4 INT'L REV. OF SOC. HIST. 261 (1959).

[45] Margaret Kohn, *The Critique of Possessive Individualism: Solidarism and the City*, 44 POL. THEORY 603 (2016).

constitutive of legal and political order. This account of legal order implied an anti-formal understanding of law: that is, one opposed to the sufficiency or reliability of approaching law as a rationally integrated scheme within which one right answer to any legal question can be discovered by the suitably qualified and dedicated jurist.[46] This extended to the critique of rights.[47] Normatively, they advanced a reformist political program, at both the national and international levels, in support of progressive taxation, access to education, poor relief, labor market regulation, and institution-building towards these and related goals. Relatively infrequently have CILT scholars explicitly revisited the ambivalent legacies of this solidarism.[48] Nonetheless these earlier iterations of formalism/anti-formalism in international legal thought have afforded CILT something against which to lever their work in much the same way that CLS scholars levered against American Legal Realism.

Anti-moralism, anti-liberalism and other "anti-" positions (not to be confused with nihilism) advanced by the iconoclastic German thinkers of the late nineteenth and early-to-mid twentieth centuries, Friedrich Nietzsche and Carl Schmitt, have long been generative—albeit controversially so—for CILT scholarship.[49] International lawyers Nietzsche and Schmitt were not, but the scale of their political vision, and the jurisprudential and political targets of their work, have meant that their work has held particular resonance for CILT, quite apart from any filtration of that work through CLS.[50] From Nietzsche and Schmitt's brutal excoriations of liberalism and humanitarianism, in particular, CILT scholars have learned how to bring to the surface that which gets smuggled in via accounts of the good, progress, rightfulness, or other versions of the norm, and to track who wins and who loses under these terms.[51] Also highly influential in this context is

[46] Like many formulations of the "anti-"—discussed below—anti-formalism tends to be posited, and made graspable, in the negative, rather than as a stand-alone "concept". *See, e.g.*, Morton Horowitz, *The Rise of Legal Formalism*, 19 AM. J. LEGAL HIST. 251 (1975); Mark V. Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502 (1985) neither of which define the term "anti-formalism".

[47] *See, e.g.*, Kohn, *supra* note 45, at 617 ("According to Fouillée, it would be just as incoherent to say that a worker has a right to a job as to say that a poet has a right to readers.") On solidarist anti-formalism, *see further* Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19, 37–40 (David M. Trubek & Alvaro Santos eds., 2006).

[48] Exceptions include Martti Koskenniemi, *International Law as Sociology: France 1871–1950*, *in* THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960, at 266 (Martti Koskenniemi ed., 2001); Arnulf Becker Lorca, *Alejandro Álvarez Situated: Subaltern Modernities and Modernisms that Subvert*, 19 LEIDEN J. INT'L L. 879 (2006); Anne-Charlotte Martineau, *Georges Scelle's Study of the Slave Trade: French Solidarism Revisited*, 27 EUR. J. INT'L L. 1131 (2016).

[49] On the critique of liberalism, *see* JOHN P. MCCORMICK, CARL SCHMITT'S CRITIQUE OF LIBERALISM: AGAINST POLITICS AS TECHNOLOGY (1999). On the critique of morality, *see* FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL (W. Kaufmann trans., 1966); FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS (W. Kaufmann & R.J. Hollingdale trans., 1967); Maudemarie Clark, *Nietzsche's Immoralism and the Concept of Morality*, *in* NIETZSCHE, GENEALOGY, MORALITY (Richard Schacht ed., 1994).

[50] Martti Koskenniemi, *Out of Europe: Carl Schmitt, Hans Morgenthau, and the Turn to "International Relations"*, *in* THE GENTLE CIVILIZER OF NATIONS, *supra* note 48, at 413–509.

[51] *See, e.g.*, Thomas Skouteris, THE NOTION OF PROGRESS IN INTERNATIONAL LAW DISCOURSE (2010); Anne Orford, *Muscular Humanitarianism: Reading the Narratives of the New Interventionism*, 10 EUR. J. INT'L L.

one successor for whom Nietzsche was pivotal: Michel Foucault.[52] It is in debt to Foucault, as well as Nietzsche, that CILT scholars have developed counter-disciplinary ways of working with historical materials.[53] It is also thanks to Foucault's work that CILT scholars have been able to grasp and trace distinctively modern strategies of governance and operations of power that have proliferated since the eighteenth century, especially in the crafting of state and individual subjectivity.[54]

A further body of work that has long been generative for international law and lawyers of both "mainstream" and "critical" persuasions is the thinking and practice of feminism on the global plane, on which Karen Engel, Vasuki Nesiah and Diane Otto write in this volume.[55] CLS scholarship did engage with and make occasional "use" of feminist work for its own purposes.[56] However, the significance of feminist scholarship for CILT has been far more enduring and wide-ranging than it ever was for CLS. It was feminist interlocutors with CILT, for instance, that first introduced some concerns characteristic of CILT into the pages of that venerated flagship of international legal scholarship: the *American Journal of International Law*, in 1991.[57] Feminist scholars and activists have highlighted significant new routes and targets for CILT work.[58] Moreover, to the extent that CILT has generated its own presumptions about languages, experiences and aspirations being held in common, feminist scholarship has encouraged a push-back against those supposed commonalities.[59]

679 (1999); Fleur Johns, *Guantánamo Bay and the Annihilation of the Exception*, 16 EUR. J. INT'L L. 613 (2005).

[52] The literature on the relationship between Nietzsche's work and Foucault's is voluminous and includes writings and remarks by Foucault himself explicitly on point. *See, e.g.*, MICHAEL MAHON, FOUCAULT'S NIETZSCHEAN GENEALOGY: TRUTH, POWER, AND THE SUBJECT (1992); GARY SHAPIRO, ARCHAEOLOGIES OF VISION: FOUCAULT AND NIETZSCHE ON SEEING AND SAYING (2003).

[53] *See, e.g.,* David Kennedy, *Primitive Legal Scholarship*, 27 HARVARD INT'L L.J. 1 (1986). *See generally* Benjamin C. Sax, *Foucault, Nietzsche, History: Two Modes of the Genealogical Method*, 11 HIST. EUR. IDEAS 769 (1989).

[54] *International Legal Theory: Symposium on Foucault*, 25 LEIDEN J. INT'L L. 603 (2012).

[55] *See, e.g.*, KAREN KNOP, DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW 277–372 (2002), both as a record of historical engagements of this kind and an instance of such engagement in its own right.

[56] *See, e.g.*, DUNCAN KENNEDY, SEXY DRESSING ETC.: ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY (1993).

[57] Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991). Martti Koskenniemi acknowledged something of an alliance between CILT projects and feminist international legal scholarship in 1999: *see supra* note 3, at 353.

[58] *See, e.g.*, Anne Orford, *Beyond Harmonization: Trade, Human Rights and the Economy of Sacrifice*, 18 J. INT'L L. 179 (2005); Anne Orford, *Feminism, Imperialism and the Mission of International Law,* 71 NORDIC J. INT'L L. 275 (2002); Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARVARD J.L. & GENDER 335 (2006).

[59] Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT'L L. 379, 383 (1999) (citing Rosi Braidotti, *The Exile, the Nomad, and the Migrant: Reflections on International Feminism*, 15

Finally, it is important to acknowledge that, unlike CLS scholarship, CILT has long drawn insights and tactics from anti-colonial and post-colonial literature and continues to do so. This was the case even before this intersection gained greater visibility through the initiation of TWAIL (Third World Approaches to International Law), on which James Gathii writes in this volume. At least from the inter-war period onwards, international lawyers treated the colonial encounter as pivotal to the constitution of international legal order.[60] For many, effective "management" of colonialism's brutal legacies has long been a crucial test of international law's viability in the modern era.[61] By reading literatures of anti-colonialism, and engaging with postcolonial literary theory and historical work, CILT scholars elaborated upon this sense of colonialism's "centrality" to make powerful new interventions in, and reorientations of, legal scholarship. Among the contributions made by scholars so engaged have been the provocative unmooring of identity as a basis for post-critique redemption, and the furthered understanding of those strategies of avoidance and deferral on which authoritative sensibilities of international law often depend.[62] In this context, new insights have also been put forward into the role of the image, and of perspective and scale, in international legal work.[63] Perhaps most influential among these contributions has been the development of a cogent counter-narrative—or set of counter-narratives—surrounding the status, character and constitution of sovereignty in international law.[64]

With these resources, CILT has advanced, to date, in three main phases, cycling through a range of enthusiasms, disappointments, skirmishes and preoccupations. None of the phases about to be sketched has entailed some rolling-out or operationalization of a pre-formed theory in the realm of the empirical. Rather, each has been a period of CILT's making and remaking, disorientation and reorientation, dissipation and regrouping. Whereas "mainstream" international law, over the

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WOMEN'S STUD. INT'L F. 7 (1992)); Ruth Buchanan & Sundhya Pahuja, *Collaboration, Complicity and Cosmopolitanism*, 71 NORDIC J. INT'L L. 297 (2002).

[60] Nathaniel Berman, *"But the Alternative is Despair": European Nationalism and the Modernist Renewal of International Law*, 106 HARVARD L. REV. 1792 (1993); Nathaniel Berman, *Modernism, Nationalism, and the Rhetoric of Reconstruction*, 4 YALE J.L. & HUMAN. 351 (1992).

[61] *See, e.g.*, Myres S. McDougal & W. Michael Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT'L L. 1 (1968); Ved P. Nanda, *Self-Determination in International Law: The Tragic Tale of Two Cities—Islamabad (West Pakistan) and Dacca (East Pakistan)*, 66 AM. J. INT'L L. 321 (1972).

[62] NATHANIEL BERMAN, PASSION AND AMBIVALENCE: COLONIALISM, NATIONALISM AND INTERNATIONAL LAW (2012); Vasuki Nesiah, *The Ground Beneath Her Feet: "Third World" Feminisms*, 4 J. INT'L WOMEN'S STUD., May 2003, at 30; Lama Abu-Odeh, *Post-colonial Feminism and the Veil: Considering the Differences*, 26 NEW ENG. L. REV. 1527 (1992).

[63] *See, e.g.*, Edward M. Morgan, *The Imagery and Meaning of Self-Determination*, 20 N.Y.U. J. INT'L L. & POL. 355 (1988); Annelise Riles, *The View from the International Plane: Perspective and Scale in the Architecture of Colonial International Law*, 6 LAW & CRITIQUE 39 (1995).

[64] Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, HARVARD INT'L L.J. 1 (1999); ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2004). For very loosely related, but quite distinct CILT projects of "restating" sovereignty, *see* Karen Knop, *Re/Statements: Feminism and State Sovereignty in International Law*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 293 (1993); Robert Malley, Jean Manas & Crystal Nix, Note, *Constructing the State Extra-territorially: Jurisdictional Discourse, the National Interest, and Transnational Norms*, 103 HARVARD L. REV. 1273 (1990); RICHARD JOYCE, COMPETING SOVEREIGNTIES (2013).

same period, cultivated "*academica mediocritas*, that cult of the virtues of moderation and poise in things intellectual that implies the rejection of all forms of excess, even in matters of invention and originality," CILT scholarship has sometimes seemed in pursuit of *academica extremus*.[65] That is, CILT contributors have often experimented with trying to push the limits of what has appeared, at the time of writing, to be academically and politically possible.[66] The pedagogic tradition associated with CILT (which has included a practice of regularly recounting what happened when and where within CILT itself, in a wide range of patently interested ways) has been enlivening and enabling for many, but it has never been straightforward.[67] CILT work has often seemed deeply imbricated in battles waged at a place and time more or less inaccessible to the reader who encounters the work in the present. This can be dizzying (not unintentionally so) and means that the work in question defies neat periodization. Any panorama of CILT work—this one included—is best read, in this light, with caution.

III Three phases

The earliest iteration of CILT took shape in the 1980s, as briefly described above. At this time, during the waning of the Cold War, scholars informed by critical theory were reckoning still with the non-materialization of socialist revolution. They were grappling, also, with the disappointments of the cosmopolitan, decolonization, and liberal development projects—in short, with the defeat of what David Trubek and Marc Galanter termed "liberal legalism".[68] Ronald Reagan and Margaret Thatcher had redirected thinking and policy in economics and foreign affairs, such that the United States and the United Kingdom together comprised an engine of liberalizing, privatizing, militarizing and rationalizing energies projected throughout the world.[69] In the absence of "a strong liberal or left political movement open to alternative programmatic thinking," scholars who had previously found engagement with Marxist writings productive turned from revolutionary to reflexive endeavors.[70] What seemed pressing was to challenge faith in the broad architectures of thought and allegiance by which the twentieth century had, to that point, been marked. It was in this context that seminal structuralist works were produced by those two key figures mentioned

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[65] PIERRE BOURDIEU, THE STATE NOBILITY: ELITE SCHOOLS IN THE FIELD OF POWER 50–1, 23–9 (Lauretta C. Clough trans., 1998).

[66] Perhaps the best example of this kind of limit-pushing in CILT scholarship is David Kennedy, *Spring Break*, 63 TEX. L. REV. 1377 (1985).

[67] For examples of efforts to recount the "history" of CILT, and international law's disciplinary history otherwise, *see* David Kennedy, *The Disciplines of International Law and Policy*, 12 J. INT'L L. 9 (1999); Cass, *supra* note 36; Skouteris & Korhonen, *supra* note 36; Akbar Rasulov, *New Approaches to International Law: Images of a Genealogy*, *in* NEW APPROACHES TO INTERNATIONAL LAW: THE EUROPEAN AND THE AMERICAN EXPERIENCES 151 (José María Beneyto & David Kennedy eds., 2012); Outi Korhonen, *Innovative International Law Approaches and the European Condition*, *in id.* at 193; Ignacio de la Rasilla del Moral, *Notes for the History of New Approaches to International Legal Studies: Not a Map but Perhaps a Compass*, *in id.* at 225; Koskenniemi, *supra* note 3.

[68] David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062.

[69] *See generally* David Dolowitz & David Marsh, *Who Learns What from Whom: A Review of the Policy Transfer Literature*, 44 POL. STUD. 343 (1996).

[70] William H. Simon, *Fear and Loathing of Politics in the Legal Academy*, 51 J. LEGAL EDUC. 179 (2001).

earlier: David Kennedy and Martti Koskenniemi.[71] Their aim was no less than to create an "*interested* simulacrum" (recalling Barthes, above) of the entire corpus of public international law: its doctrines, its intellectual history, and its professional style.[72] And they pulled it off. The later of the two works in question – Koskenniemi's – has, in particular, attained iconic status, even if it may have been more frequently referenced, and described in generalities, than closely read.[73]

From 1989 to 1999, as the Berlin Wall tumbled and the force it had embodied seemingly shattered and dispersed, CILT rose to greater prominence within the international legal field. This aligned quite well with a pan-disciplinary fascination with "new voices" associated with the breakdown of Cold War alliances and the emergence of new public-private and sub-national configurations and constituencies.[74] It cross-fertilized, too, with prevailing scholarly emphasis on the power of ideas and language in international politics and law (although that emphasis sat rather awkwardly alongside continuing ambivalence about intellectualism in international legal work).[75] As they tried to reckon with the apparent triumph of liberalism/neo-liberalism and worry around the edges of the Washington Consensus, CILT scholars seemed to have less time or appetite for the painstaking, root-and-branch theoretical projects of the 1980s.[76] Attempting to keep up with the incessant shell game of locating global power seemed hard enough.[77] Nonetheless, the 1990s

[71] Kennedy, supra note 31; Koskenniemi, supra note 11.

[72] Barthes, supra note 23. Recalling the early years of their allied projects, Kennedy has remarked: "In some odd way, we both seemed committed…to making intellectual sense of what I would have called the 'consciousness of the establishment' we saw on display all around us". Kennedy also highlights that there are significant differences between their respective projects, noting that "it would be some time before we could begin to sort out for ourselves what made Martti's book European and mine American, and whether these differences mattered". David Kennedy, *The Last Treatise: Project and Person (Reflections on Martti Koskenniemi's* From Apology to Utopia), 7 GERMAN L.J. 983, 983-4 (2006).

[73] Kennedy observes similarly that "[a]lthough often cited, Martti's book is rarely challenged or deeply engaged". Kennedy, ibid 991.

[74] The American Society of International Law added a "new voices" panel to its annual conference program from 2005 onwards, but the call to find and embrace such voices had been circulating for at least a decade by then: FREDERIC L. KIRGIS, THE AMERICAN SOCIETY OF INTERNATIONAL LAW'S FIRST CENTURY: 1906–2006, at 554 (2006).

[75] *See, e.g.*, Kathryn Sikkink, *The Power of Principled Ideas: Human Rights Policies in the United States and Western Europe*, *in* IDEAS AND FOREIGN POLICY: BELIEFS, INSTITUTIONS, AND POLITICAL CHANGE 139 (Judith Goldstein & Robert O. Keohane eds., 1993); Shirley V. Scott, *International Law as Ideology: Theorizing the Relationship between International Law and International Politics*, 5 EUR. J. INT'L L. 313 (1994); Dino Kritsiotis, *The Power of International Law as Language*, 34 CAL. W. LAW REV. 397 (1998); Martti Koskenniemi, *International Law in a Post-Realist Era*, 16 AUSTL. Y.B. INT'L L. 1 (1995).

[76] A term first used by John Williamson appearing before a Congressional committee in 1989, "Washington Consensus" refers to a set of ten policies, based on those well-established within the OECD, that those in Washington agreed, generally, should replace Latin American economic policies which had been in place since the 1950s: John Williamson, *A Short History of the Washington Consensus*, 15 LAW & BUS. REV. AM. 7 (2009). For CILT work taking issue with the Washington Consensus and cognate ideas, *see, e.g.*, SUSAN MARKS, THE RIDDLE OF ALL CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY, AND THE CRITIQUE OF IDEOLOGY (2000).

[77] For an illustration of CILT work exploring the difficulty of "pinning down" global power, *see* Robert Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 COLUM. J. TRANSNAT'L L. 209 (2002).

did see CILT scholars advance understanding of the complex interpenetration of public and private legal and political orders (or nationalism and cosmopolitanism) on the global plane, as well as cutting through the comfort zones of global identity politics in cogent, innovative ways.[78]

Around the year 2000, CILT underwent a process of winnowing and reorientation. Annual NAIL conferences had ended, and the appellation "NAIL" had been ceremonially abandoned, with the "movement" having become bloated and fractious.[79] The discipline at large was by then filled "cheek by jowl with people calling for new thinking and renewal," and scholarship in international law was "brimming over with new angles and methods for renewing and preserving the field by escaping its past limitations."[80] It had become harder than ever to distinguish the marginal from the mainstream. At the same time, celebration of the capital-generating potential of technological disruption was in the early stages of becoming ubiquitous.[81] Financial crises in East Asia and Latin America discredited the Washington Consensus and ushered in a new phase of legal reformism.[82] And securitization intensified, as the targeted "muscular humanitarianism" of the 1990s gave way to more explicitly chauvinistic, nativist and generalized modes of global violence.[83] In this context, the continuing preoccupation of CILT scholarship with the shortcomings of liberal legalism and formalism sounded, at times, off key. Rerouting somewhat, CILT scholarship turned more attention to anti-formal, non-doctrinal forms of legitimation, and extended into a greater array of subfields of international law.[84] CILT scholars also began to confront growing economic precarity amid the financialization and securitization of more or less

[78] See, e.g., Robert Malley, Jean Manas and Crystal Nix, Constructing the State Extra-territorially: Jurisdictional Discourse, the National Interest, and Transnational Norms,103 HARVARD L. REV. 1273 (1990); DAN DANIELSEN & KAREN ENGLE (EDS), AFTER IDENTITY: A READER IN LAW AND CULTURE (1995). See further the works from the 1990s referenced above at notes 60, 62 and 63.

[79] Thomas Skouteris, *Fin de NAIL: New Approaches to International Law and its Impact on Contemporary International Legal Scholarship*, 10 J. INT'L L. 415, 417 (1997).

[80] David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT'L L. & POL. 335, 387 (2000).

[81] Jill Lepore, *The Disruption Machine*, New Yorker, June 23, 2014; Larissa MacFarquhar, *When Giants Fail: What Business has Learned from Clayton Christensen*, New Yorker, May 14, 2012.

[82] Nancy Birdsall & Francis Fukuyama, *The Post-Washington Consensus: Development after the Crisis*, 90 FOREIGN AFFAIRS, Mar./Apr. 2011, at 45. For CILT work engaging with this shift, *see, e.g.*, ANDREW LANG, WORLD TRADE LAW AFTER NEOLIBERALISM: RE-IMAGINING THE GLOBAL ECONOMIC ORDER (2013).

[83] Orford, *supra* note 51; Frédéric Mégret, *"War"? Legal Semantics and the Move to Violence*, 13 EUR. J. INT'L L. 361 (2002); Johns, *supra* note 51.

[84] *E.g.*, Tor Krever, *Quantifying Law: Legal Indicator Projects and the Reproduction of Neoliberal Common Sense*, 34 THIRD WORLD Q. 131 (2013); DAVID KENNEDY, A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY (2016); CRITICAL APPROACHES TO INTERNATIONAL CRIMINAL LAW: AN INTRODUCTION (Christine Schwöbel ed., 2014); Karen Mickelson, *Critical Approaches*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 262 (Daniel Bodansky et al. eds., 2008).

everything.[85] The post-structuralist potential of history—intellectual and imperial histories especially—became an area of particular focus, alongside continuing engagements with anthropology and sociology.[86] Meanwhile, new centers of support for, interest in, and activity around, CILT emerged beyond the United States: in Melbourne, Helsinki, Bogotá, London, Cairo and Toronto. At many of these sites, CILT scholarship maintained a productive dialogue with TWAIL (the subject of James Gathii's chapter in this volume, as noted above). So dispersed, CILT came to seem at once more resilient and less trenchant than it had in the 1980s.

In each of the phases just described, CILT scholarship has been galvanized, to varying degrees, by a sense of crisis, as well as maintaining a robust internal critique about the limits and potential of crisis thinking, or the practice of thinking of historical change episodically.[87] In the third of these phases, ongoing for the past two decades, those crises animating CILT scholarship have not been a world away from those worries by which scholarship in the mainstream has been most exercised, namely: the interminable war on terrorism (and continuing diffusion of the language and techniques of counter-terrorism); the normalization of emergency and the expanded reach of executive powers; the continuing immiseration of the many for the benefit of the few, apparent in the intractable (and, in many settings, growing) gap between the wealth and income of the world's most privileged and those of the great majority of the world's population; the desperate efforts of undocumented migrants and the intensification of nativist resentment towards them; and our seemingly incessant march towards an ever-more depleted and destructive climate.[88] However,

[85] Financialization is a term aimed at capturing various ramifications of "a gravitational shift toward finance in capitalism as a whole" underway since the 1990s: Malcolm Sawyer, *What is Financialization?*, 42 INT'L J. POL. ECON. 5, 5 (2013-14). Securitization is "a structured process that involves a bank transforming its (usually) illiquid assets, traditionally held until maturity, into marketable securities by pooling these assets and transferring them into a special purpose vehicle (SPV)… that in turn finances the purchase through the issuance of securities backed by the pool" to be offered for sale to investors (which is to say that repayment of principal and interest on those securities is dependent on revenue from the underlying pool of financial assets held by the SPV): Barbara Casu and Anna Sarkisyan, *Securitization, in* THE OXFORD HANDBOOK OF BANKING 354, 354 (Allen N. Berger, Philip Molyneux & John O. S. Wilson eds., 2nd ed., 2014). On the relationship between the two phenomena, see generally Alicia Girón and Alma Chapoy, *Securitization and Financialization,* 35:2 J. POST-KEYNESIAN ECON. 171 (2012-13). For relevant CILT work, see *e.g.*, Kerry Rittich, *Rights, Risk, and Reward: Governance Norms in the International Order and the Problem of Precarious Work*, *in Pre*CARIOUS WORK, WOMEN, AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS 31 (Judy Fudge & Rosemary Owens eds., 2006); Fleur Johns, *Financing as Governance*, 31 OXFORD J. LEG. STUD. 391 (2011).

[86] Anne Orford, *The Past as Law or History? The Relevance of Imperialism for Modern International Law*, *in* INTERNATIONAL LAW AND NEW APPROACHES TO THE THIRD WORLD (Mark Toufayan et al. eds., 2013); ARNULF BECKER LORCA, MESTIZO INTERNATIONAL LAW: A GLOBAL INTELLECTUAL HISTORY (2012); LUIS ESLAVA, LOCAL SPACE, GLOBAL LIFE: THE EVERYDAY OPERATION OF INTERNATIONAL LAW AND DEVELOPMENT (2015).

[87] Hilary Charlesworth, *International Law: A Discipline of Crisis*, 65 MODERN L. REV. 377 (2002); EVENTS: THE FORCE OF INTERNATIONAL LAW (Fleur Johns, Richard Joyce & Sundhya Pahuja & Richard Joyce eds., 2011).

[88] *See, e.g.*, Anne Orford, INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT (2011); John Reynolds, EMPIRE, EMERGENCY AND INTERNATIONAL LAW (2017); Samuel Moyn, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD (2018); Gregor Noll, *Why Human Rights Fail to Protect Undocumented Migrants,* 12(2) EUR. J. MIGRATION & L. 241 (2010); Cait Storr, *Islands and the South: Framing the Relationship between International Law and Environmental Crisis,* 27 EUR. J. INT'L L. 519-540 (2016).

what CILT scholarship does not, for the most part, share with the disciplinary mainstream is a worry that international legal order as such is undergoing crisis, whether that be a crisis of deformation, fragmentation, marginalization or de-legitimation. About such prospects, CILT scholars have not, on the whole, lost much sleep. Rather than worry about international law's declining effectiveness as a mitigant of crisis, CILT scholarship tends to cast international law as long complicit in the aforementioned crises and in sustaining and reproducing their structural pre-conditions. It is this persistent hunch that is likely to seed future CILT on a number of fronts. Before speculating about some directions that work might take, let us consider some strengths and weaknesses that CILT exhibits.

IV Strengths and Weaknesses

Now observed at "middle age", it is possible to identify certain strengths and weaknesses of CILT (internal conflicts and variations notwithstanding).

Among its strengths are the distinctive contributions that CILT scholarship has made to social and legal thought. A range of compelling ways of thinking through the hybridization of cultural, economic, and legal power, and of explaining the persistence of bias in global legal order, have been put forward in CILT scholarship.[89] This has been achieved, for instance, by elucidating the role of style and technique in shaping and entrenching dynamics of international legal order.[90] In this regard, and in others, CILT scholarship has enlarged our understanding of the constitutive effects of the work of legal professionals, and fostered greater reflexivity about law's and lawyers' role in the disparate global distribution of authority, violence, and resources. In addition, CILT has helped international lawyers become more attuned to the normative significance of background rules and quotidian practices, including those to which international legal scholars themselves subscribe. In its efforts to decode complex entanglements of public and private power, and grapple with the interdependence of the material and the ideal in global affairs, CILT scholarship has also helped ensure that those working in the field of international law are somewhat better prepared than many of their domestic law counterparts to confront dilemmas emergent in contemporary settings (about which I will say more below).

CILT's concern with the global politics of distribution has also extended well beyond the conventional repertoire of international legal reformism. It has extended, for instance, to a remarkably effective practice, on the part of a significant number of CILT scholars, of redistributing symbolic, social and economic capital on the global plane. This has been achieved through the redirection of elite institutional resources (that is, qualifications, recommendations and funding) towards researchers and research projects that (for all their strengths) might not typically be regarded, or have regarded themselves, as so entitled.[91] This has entailed, also, a longstanding

[89] Such explanations have been put forward, for the most part, without the work in question laying claim to any solution to the "mystery" of global governance. *See generally* David W. Kennedy, *The Mystery of Global Governance*, 34 OHIO N.U. L. REV. 827 (2008).

[90] *See, e.g.*, Liliana Obregón, *Between Civilisation and Barbarism: Creole Interventions in International Law*, 27 THIRD WORLD Q. 815 (2006); ANNELISE RILES, THE NETWORK INSIDE OUT (2001); Nathaniel Berman, *Modernism, Nationalism, and the Rhetoric of Reconstruction*, 4 YALE J.L. & HUMAN. 351 (1992).

[91] Perhaps the best example is David Kennedy's redistribution of the value of the Harvard brand, and enlargement of access to the considerable pedagogical and financial resources of Harvard Law School,

commitment to the forging of scholarly allegiances (and, from time to time, their fracturing and rearrangement) through organizing, gathering, pedagogy and mentoring. By these means, CILT scholars have lent support to a wide range of relatively marginalized constituencies, both within and beyond the academy, while largely avoiding the righteousness and proselytism in which such "gifts" often come wrapped.

CILT has had weaknesses too, some of which might be seen as strengths in the sense that tackling them recurrently has helped to maintain a sense of onward momentum in the field. For all its post-structuralist protestations to the contrary, for example, CILT scholarship has remained fixated on a relatively narrow range of apparent centers and subjects of power, such as the state, international organizations and multinational corporations. CILT scholars have helped see to it that "the State is reimagined as just one more institution in a complex and transnational civil fabric."[92] Yet it remains the case that there is, in many CILT narratives, somewhere or someone definitive to look to, or blame, when challenging inequity and injustice on the international plane, whether that be the World Bank, or some other avatar of all things wrong with the world. As much as it has sometimes overstated the power of its own diagnoses (of this finger-pointing kind or others), CILT scholarship has also quite frequently overestimated the newness of, and the emancipatory potential associated with, its "revelations"—the bringing to light of historical contingency, perhaps especially.[93] This is, in turn, related to a propensity of CILT writing to underestimate the sophistication, insight, and adaptability of its targets. In some CILT work, almost everyone seems a dullard about the operations of power, and their own complicity in those operations, except the author in question, her friends and allies. As Duncan Kennedy has said of "contemporary elite jurists" more broadly, they have a tendency to "work to uncover hidden ideological motives behind the 'wrong' legal arguments of their opponents [or predecessors], while affirming their own right answers allegedly innocent of ideology."[94] This has, in turn, generated, at times, an awkward and problematic relationship between the CILT critic and her "clients", or those on whose behalf she purports to write, act and teach.[95] Some CILT writing has also tended towards the overwrought and abstruse, making it stylistically poorly aligned with the worries about

through the Institute of Global Law and Policy (IGLP), established in 2009-2010. Under the IGLP rubric, Harvard affiliations and resources have been extended to many talented scholars from, and research projects initiated in, the Global South via residential fellowships, research visitorships, collaborative research grants, travel grants for attendance at IGLP events, and more.

[92] David Kennedy, *A New World Order: Yesterday, Today and Tomorrow*, 4 TRANSNAT'L L. CONTEMP. PROBS. 330, 343–4 (1994).

[93] Susan Marks, *False Contingency*, 62 CURRENT LEGAL PROBS. 1 (2009).

[94] Duncan Kennedy, *The Hermeneutic of Suspicion in Contemporary Legal Thought*, 25 LAW & CRITIQUE 91, 91 (2014).

[95] On the relationship between feminist critics and those for whom they claim to "carry a brief", and the perils of deploying theory prescriptively, *see* JANET E. HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 18 (2006). On the role of reformist legal scholarship in sustaining particular distributions of equality and inequality, including among those whose suffering that scholarship aims to redress, *see* Md. Mostafa Haider, Enacting Equality and Inequality: The Politics of Global Anti-Poverty Programs (June 29, 2015) (unpublished Ph.D. dissertation, Sydney Law School) http://hdl.handle.net/2123/14311. On the ways in which international lawyers are "invited to be part of that system of heroic managerialism" or tend to position themselves within such a system, *see* Anne Orford, *Embodying Internationalism: The Making of International Lawyers*, 19 AUSTL. Y.B. INT'L L. 1, 7 (1998).

exclusion and disentitlement often voiced within it. It is doubtless possible to fault CILT scholarship on other grounds as well, especially when that work is evaluated against aims and methods more or less alien to its terrain.[96]

V Future Directions

Any prognostication about the future direction of the diverse and unwieldy CILT "movement" is fraught with risk. Offered here are three personal hunches about what might emerge as key themes of CILT during its next phase or are already (to varying degrees) emerging as such, namely: diffusion and digitization; the remaking and hollowing out of empires; the Anthropocene and the nonhuman.

Diffusion and digitization refer to the challenge of envisioning agency and enacting critique amid the incessant gleaning, eddying, blocking, processing and pooling of digital data—much of it automated—by which every dimension of global affairs is now informed. Structuralist binaries (even those cut through with post-structuralist nuance) often seem clunky, static and cartoonish in this context, as do the ideal types of critical theory. Already, during the period of early CILT work, this was recognized as a challenge. In 1985, the influential German media theorist Friedrich Kittler wrote: "since 1973, when Thomas Pynchon's *Gravity's Rainbow* was published, it has become clear that real wars are not fought for people or fatherlands, but take place between different media, information technologies, data flows."[97] Even so, it is a challenge that has intensified during the decades since, and that CILT seems still to be only in the early stages of tackling. There is, nonetheless, much in the CILT repertoire likely to be helpful in this respect. Much CILT scholarship has drawn attention to the prevalence of glitches, automaticity and unintended consequences in the architecture and outcomes of international legal work. Those techniques that have been employed by CILT scholars to grapple with moirés of grammar and knowledge format can have purchase on digital lexica and infrastructure. So too can certain CILT tactics have continuing salience in this context, especially those of drawing out ambivalence, sharpening awareness of stakes, and highlighting points of resistance amid the informational engorgement and complexity long typical of the global plane.

The reference to the remaking and hollowing out of empires suggests the importance (and likelihood) of CILT scholarship taking fuller account of the extent and ramifications of U.S. decline, the rise of China and India, and the changing dynamics of global inequality. Phenomena of financialization, underemployment and growing casualization (the so-called "gig economy"), and the entrenchment of working poverty (often accompanied by populism) in many jurisdictions—and international law's and institutions' historic and contemporary implication in these phenomena—demand greater attention from CILT scholars. In this context, recent efforts to revisit

[96] *See, e.g.*, historians' charge of anachronism, and one leading CILT scholar's response to it, in Martti Koskenniemi, *Histories of International Law: Significance and Problems for a Critical View*, 27 TEMPLE INT'L & COMP. L.J. 215 (2013).

[97] FRIEDRICH A. KITTLER, GRAMOPHONE, FILM, TYPEWRITER, at xli (Geoffrey Winthrop-Young & Michael Wutz trans., 1999).

and extend work in law and political economy sound a promising note.[98] These are, moreover, calls to which CILT scholars are well-positioned to respond, given prior work along this axis.

Finally, thinking through the place and potency of international law amid epochal shifts—specifically, the "shock" of the Anthropocene—is already of concern to CILT scholars and likely to remain so.[99] CILT scholarship is increasingly attentive to the significant role of nonhuman (or hybrid human-nonhuman) actants on the global plane and the collapse of nature/culture distinctions in an everywhere-already-impure world. These mark important new fronts in CILT scholars' ongoing efforts to call into question international law's productive effects and material instantiations.[100]

In short, the snark is still very much at large.

[98] RESEARCH HANDBOOK ON POLITICAL ECONOMY AND LAW (Ugo Mattei & John D. Haskell eds., 2015); The IGLP Law and Global Production Working Group, *The role of law in global value chains: a research manifesto*, 4 LONDON REV. INT'L L. 57 (2016). *See also* David Singh Grewal and Jedediah Purdy, *Why Law and Political Economy?*, LAW & POL. ECON. (Nov. 6, 2017), https://lpeblog.org/2017/11/06/why-law-and-political-economy/.

[99] CHRISTOPHE BONNEUIL & JEAN-BAPTISTE FRESSOZ, THE SHOCK OF THE ANTHROPOCENE. THE EARTH, HISTORY AND US (2017).

[100] On the ongoing struggle to gain new (and not so new) angles on "the old problem of [international law's] effect[s]", *see* Matt Craven, *On Foucault and Wolff or from Law to Political Economy*, 25 J. INT'L L. 627, 645 (2012). On nature/culture in international law, *see* Stephen Humphreys & Yoriko Otomo, *Theorising International Environmental Law*, *in* THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 797 (Florian Hoffmann & Anne Orford eds., 2016).