

History, Literature, and Authority in International Law

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ABSTRACT:

One consequence of international law's recent historical turn has been to sharpen methodological contrasts between intellectual history and international law. Scholars including Antony Anghie, Anne Orford, Rose Parfitt, and Martti Koskenniemi have taken on board historians' interest in contingency and context but pointedly relaxed historians' traditional stricture against presentist instrumentalism. This essay argues that such a move disrupts a longstanding division of labor between history and international law and ultimately brings international legal method closer to literature and literary scholarship. The essay therefore details several more or less endemic ways in which literature and literary studies confront challenges of presentism, anachronism, meaning, and time. Using examples from writers as diverse as Anghie, Spinoza, Geoffrey Hill, Emily St. John Mandel, China Miéville, John Hollander, Pascale Casanova, Matthew Nicholson, John Selden, Shakespeare, and Dante, it proposes a "trilateral" discussion among historians, international lawyers, and literary scholars that takes seriously the multipolar disciplinary field in which each of these disciplines makes and sustains relations with each of the others.

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The lawyer saith what men have determined; the
historian what men have done.

- Philip Sidney, *Apology for Poetry* (c. 1579)

Writing "On the Interpretation of Scripture" in his *Tractatus Theologicus-Politicus* of 1670, the heretical Amsterdam philosopher Benedict Spinoza controversially proposed an uninhibited inquiry into the making of the Biblical canon: "Our historical study," he wrote, "should set forth the circumstances relevant to all the extant books of the prophets, giving the life, character and pursuits of the author of every book, detailing who he was, on what occasion and at what time and for whom and in what language he wrote. Again, it should relate what happened to each book, how it was first received, into whose hands it fell, how many variant versions there were, by whose decision it was received into the canon, and, finally, how all the books, now universally regarded as sacred, were united into a single whole. All these details, I repeat, should be available from an historical study of Scripture."¹ The passage, which neatly illustrates Spinoza's larger project to bring Revelation's fanciful and often destabilizing truth claims under the jurisdiction of philosophical reason, is the epitaph to Pascale Casanova's magisterial *The World Republic of Letters* (1999; English, 2004) and underpins her own analysis, in which Casanova, like a contemporary Spinoza, sought to pierce the celebratory myths of equal

¹ Benedictus de Spinoza, *Theological-Political Treatise*, ed. Seymour Feldman, trans. Samuel Shirley (Indianapolis, IN: Hackett Publishing, 2001), 90.

participation and literary genius by describing the true sociological procedures by which literary texts entered into the canon of world literature.

I start with Spinoza and Casanova to clear space for what I hope will be a trilateral methodological conversation among literary critics, historians, and scholars of international law. My primary concern follows from recent controversies over method among historians of international law that have exposed methodological divisions between intellectual historians, on the one hand, and legal scholars on the other. The chief matter of controversy concerns the role of anachronism, a charge leveled by a few historians at some international legal scholars but which other international legal scholars have embraced in the face of historians' evident displeasure. The controversies, in my view, offer a remarkable opportunity to examine deeply seated disciplinary suppositions within history, literature, and international law. As Johan Heilbron has written, the academy is organized "into structures of judgment and authority which are founded on a disciplinary division of labor. This division of labor is an institutional arrangement, inseparably consisting of cognitive and social structures, that is of fairly coherent sets of concepts, questions, references, and methods, and a corresponding social order of acknowledged specialists in departments, committees, and professional associations."² As we shall see, there are meaningful divisions of labor between history and international law, but part of my point here is also to insist that our understanding of those divisions of labor remains impoverished in some important respects because the cognitive and social structures of literature and literary studies have largely been absent from this conversation.³

² Johan Heilbron, "A Regime of Disciplines: Toward a Historical Sociology of Disciplinary Knowledge," in *The Dialogical Turn*, ed. Charles Camic and Hans Joas (Lanham: Rowman & Littlefield, 2004), 23.

³ A conference called "History, Politics, Law: Thinking Through the International" was held at Cambridge University in May 2016, but literary scholars and literary considerations were notably absent.

To propose a "trilateral" discussion, then, is on the one hand an effort to bring together conversations that have long taken place separately under the terms "law and literature" or "law and history" and, on the other, an attempt to pick apart the overly broad organizing framework of "law and the humanities." The recent debates occasioned by international law's "historiographical turn" help remind us that disciplines, like nations, have multiple relations.⁴ And just as the relations I'm considering cannot be reduced to the names of "law and literature" or "law and history," neither is the name "law and the humanities" fully adequate to the task. While "law and literature" leaves out history and "law and history" excludes literature, "law and the humanities" implicitly collapses literature and history into a single whole. Such tendencies mirror the ages in which they've dominated: if the equiposed double structures of "law and literature" and "law and history" that first took hold in the academy in the 1960s and 1970s exhibited the balancing relationality of the Cold War, its broader successor "law and humanities" reproduced globalization's centralizing, unifying force. My intention here is to acknowledge meaningful disciplinary boundaries among law, history, and literature by considering the multipolar disciplinary field in which each of the disciplines makes and sustains relations with each of the others.

What follows comes in two main parts: "Anachronism in History and International Law" and "Literature and Anachronism." In part I, I summarize the debates over historicism in international law, using Spinoza and the problem of legitimate authority to crystallize their stakes. In part II, I turn to discuss several examples of literature and literary scholarship in this multipolar relational field that, as I've suggested, remains underserved by the appellations "law

⁴ George Rodrigo Bandeira Galindo, "Martti Koskenniemi and the Historiographical Turn in International Law," *European Journal of International Law* 16, no. 3 (June 1, 2005): 539–59; Bernadette Meyler, "Law, Literature, and History: The Love Triangle," in *New Directions in Law and Literature*, ed. Elizabeth S. Anker and Bernadette Meyler (New York: Oxford University Press, 2017), 160–75.

and literature," "law and history," or "law and the humanities." One of my central contentions is that disputants over anachronism in international legal history can learn from literary texts and literary studies, which house an extensive and growing toolkit for transmitting meaning in and through time. The recent fissures that have emerged in international legal history between intellectual historians and historians of international law have a distinct counterpart in literary studies where a somewhat improbable coalition of traditionalists, Straussians, deconstructionists, post-colonialists, feminists, eco-critics, queer scholars and others have joined together to question dominant historical methodologies.⁵ "Restiveness with historicism," as Rita Felski puts it, "is beginning to make itself felt."⁶ But I also engage with these debates as a way to speak back to literary scholars and to illustrate how reading and contributing to these disputes might enliven literary scholarship. Tensions in literary scholarship between formalism and historicism, presentism and anachronism, post-colonialism and world literature, global North and global South approaches, and so forth are hardly literary scholars' alone, and the ways we deal with such tensions can interact with parallel dynamics in adjacent fields—if we let them.

⁵ Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 2008); Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton: Princeton University Press, 2000); Jonathan Goldberg and Madhavi Menon, "Queering History," *PMLA* 120, no. 5 (2005): 1608–17; A. D. Nuttall, *Shakespeare the Thinker* (New Haven, CT: Yale University Press, 2008); Dipesh Chakrabarty, "The Climate of History: Four Theses," *Critical Inquiry* 35, no. 2 (2009): 197–222; Evelyn Gajowski, "Beyond Historicism: Presentism, Subjectivity, Politics," *Literature Compass* 7, no. 8 (2010): 674–691; J. Hillis Miller, "Anachronistic Reading," *Derrida Today* 3, no. 1 (May 1, 2010): 75–91, <https://doi.org/10.3366/drt.2010.0006>; Paul Sheehan and Helen Groth, eds., "The Uses of Anachronism [Special Issue]," *Textual Practice* 26, no. 4 (August 2012): 571–806; Valerie Traub, "The New Unhistoricism in Queer Studies," *PMLA* 128, no. 1 (January 1, 2013): 21–39, <https://doi.org/10.1632/pmla.2013.128.1.21>; Jeffrey Insko, "Anachronistic Imaginings: Hope Leslie's Challenge to Historicism," *American Literary History* 16, no. 2 (April 13, 2004): 179–207; "Manifesto of the V21 Collective," *V21* (blog), accessed March 17, 2018, <http://v21collective.org/manifesto-of-the-v21-collective-ten-theses/>.

⁶ Rita Felski, *The Limits of Critique* (Chicago: University Of Chicago Press, 2015), 155.

I. Anachronism in History and International Law

To understand the “turf war” presently underway, one needs to know that the last two decades have seen a so-called “historiographical turn” in international law.⁷ In one sense, this is a counterintuitive development since it is difficult to imagine international law *without* history. “All law seems to be about history at one level or another and perhaps has always been,” Matthew Craven has observed.⁸ “Yet it is equally evident,” he writes—and this is the crux—“that the intellectual frame of rule-finding or policy-prescription also not infrequently involves an effacement of the historical character of the materials in question and the displacement of ‘unnecessary’ contextual factors of cause and explanation that might otherwise be of interest.”⁹ The turn to context has therefore been the most significant aspect of the historical turn. In 1999, historian of political thought Richard Tuck, for instance, published *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* and in 2004 the Finnish legal scholar Martti Koskenniemi called for an “intellectual history of international law” taking into account the “intellectual, social, and political environment[s]” of legal ideologies and especially “neighboring areas such as private law, international relations or political theory and philosophy.”¹⁰ Koskenniemi's suggestion, soon taken up with enthusiasm in the pages of the newly-formed *Journal of the History of International Law*, was that legal scholars open their canons and methods to the salutary approach of historians of political thought like Tuck, J.G.A.

⁷ Valentina Vadi, “International Law and Its Histories: Methodological Risks and Opportunities,” *Harvard International Law Journal* 58 (2017): 321; Galindo, “Martti Koskenniemi and the Historiographical Turn in International Law.”

⁸ Matthew Craven, “The Invention of a Tradition: Westlake, the Berlin Conference and the Historicisation of International Law,” in *Constructing International Law: The Birth of a Discipline*, ed. Luigi Nuzzo (Frankfurt am Main: Klostermann, 2012), 365.

⁹ Craven, 365.

¹⁰ Martti Koskenniemi, “Why History of International Law Today?,” *Rechtsgeschichte* 4 (2004).

Pocock, and Quentin Skinner, whose turn beginning in the late 1960s to speech-act theory and rhetorical contexts had proved capable of invigorating overly dry, deterministic, and ultimately anachronistic histories of ideas. As Skinner had written in a foundational essay, "classic texts are concerned with their own quite alien problems," not our own.¹¹ The scholarly task was to reconstruct historical context fully enough to understand these "alien problems" and show how authors and their texts intervened in their particular moments. Historian of international law Randall Lesaffer took this to mean "mak[ing] use of the basic rules of historical methodology" and "approach[ing] the past with proper respect."¹² The "professional commitment to context and an avoidance of cause-driven history" involved developing a keen sensitivity to anachronism and subordinating presentist legal-political concerns.¹³

In a certain sense, the growing sensitivity to anachronism was less a wholesale innovation than a return to methods that Spinoza and other writers honed in early modernity. Scholars including Peter Burke, Thomas Greene, and Constantin Fasolt have argued that it was only during the Renaissance that Europeans even began to sense the possibility of anachronism.¹⁴ Prior to that, history was too deeply attached to the project of moral instruction to engender a

¹¹ Quentin Skinner, "Meaning and Understanding in the History of Ideas," in *Visions of Politics*, vol. 1, 3 vols. (Cambridge: Cambridge University Press, 2002), 57–89.

¹² Randall Lesaffer, "International Law and Its History: The Story of an Unrequited Love," in *Time, History and International Law*, ed. Matthew C. R. Craven, M. Fitzmaurice, and Maria Vogiatzi (Leiden: M. Nijhoff, 2007), 37.

¹³ Samuel Moyn, "Legal History as a Source of International Law: The Politics of Knowledge," in *The Oxford Handbook of the Sources of International Law*, ed. Samantha Besson and Jean d'Aspremont (Oxford: Oxford University Press, 2018), 317, <http://ezaccess.libraries.psu.edu/login?url=http://dx.doi.org/10.1093/oxfordhb/9780198745365.01.0001>.

¹⁴ Peter Burke, "The Renaissance Sense of Anachronism," *Die Renaissance Und Ihr Bild in Der Geschichte*, 1998, 17–35; Thomas M Greene, *The Light in Troy: Imitation and Discovery in Renaissance Poetry* (New Haven: Yale University Press, 1982); Constantin Fasolt, *The Limits of History* (Chicago: University of Chicago Press, 2004).

sense of historical process.¹⁵ The then-dominant feeling that examples and analogies from the past could inform action in the present helped secure history from the countervailing notion of the past as a *locus* of difference.¹⁶ Yet Renaissance humanists, in the process of searching out late interpolations into the text of the Roman *Digest*, began to invest juridical thinking with a new awareness of a differentiated past. In the short term, chronology aided the project of identifying spurious legal authorities. In the longer term, Renaissance historicism helped draw historicism's most basic distinction: the one between present and past. Spinoza's biblical criticism worked similarly. To medievalism's fourfold hermeneutic schema (literal, allegorical, moral, and anagogic), Spinoza added a radically destabilizing temporal dimension.¹⁷ Early modern literature shows signs that this new forensic historicism was also opening up new opportunities for literary writers. Renaissance theater became adept, in Lorna Hutson's words, at "activating time-related topic questions such as 'when' or 'how long?' or 'how old?'" which "serve[d] as a way of both unifying the action and expanding [dramatic] representation into the past and the future."¹⁸ Shakespeare's *Julius Caesar* (1599), for instance, includes an anachronistic mechanical clock, which in dramatizing puzzling continuities between ancient Rome and early modern London also prompted theatergoers and readers to consider possible discontinuities.¹⁹ Fundamentally, historicism became a broad-based method to scrutinize

¹⁵ Reinhart Koselleck, "Historia Magistra Vitae: The Dissolution of the Topos into the Perspective of a Modernized Historical Process," in *Futures Past: On the Semantics of Historical Time*, trans. Keith Tribe (New York: Columbia University Press, 2004), 26–42.

¹⁶ Daniel R. Woolf, "From Hystories to the Historical: Five Transitions in Thinking about the Past, 1500–1700," *Huntington Library Quarterly* 68, no. 1–2 (March 1, 2005): 33–70, <https://doi.org/10.1525/hlq.2005.68.1-2.33>.

¹⁷ Donald R. Kelley, *Foundations of Modern Historical Scholarship: Language, Law, and History in the French Renaissance* (New York: Columbia University Press, 1970).

¹⁸ Lorna Hutson, *Circumstantial Shakespeare* (Oxford: Oxford University Press, 2015).

¹⁹ Jeremy Tambling, *On Anachronism* (Manchester: Manchester University Press, 2010), 4–5.

foundational sources of authority. Its forms of attention were most often meant to liberate the present from ill-grounded claims.²⁰

Accordingly, international law's historical turn was not without its own politics. As intellectual historian Peter Gordon has observed, "historicizing [an] idea *into the past* [often] serves to defeat the idea and mark [] it as no longer legitimate."²¹ Beginning in the 1980s, critical legal history had been vaunted as a method that usefully "produces disturbances in the field[,] . . . inverts or scrambles familiar narratives of stasis, recovery or progress[,] . . . advances rival perspectives[,] . . . posits alternative trajectories[, and] . . . unsettles the familiar strategies that we use to tame the past in order to normalize the present."²² In short, "history is...a form of action."²³ What the international lawyers associated with international law's historical turn understood quite well was that the formal authority of international law depends on a certain kind of useable international historiography. While rarely stated directly, the "disenchanted mode of analysis" of international law's historical turn gave the project a critical Spinozist thrust.²⁴ Bringing purportedly "unnecessary contextual factors" into view could effect disenchantment and potentially even de-legitimation.²⁵

²⁰ Fasolt, *The Limits of History*.

²¹ Peter E. Gordon, "Contextualism and Criticism in the History of Ideas," in *Rethinking Modern European Intellectual History*, ed. Darrin M. McMahon and Samuel Moyn (Oxford: Oxford University Press, 2014), 44.

²² Robert Gordon, "The Arrival of Critical Historicism," *Faculty Scholarship Series*, January 1, 1997, 1024, http://digitalcommons.law.yale.edu/fss_papers/1347; quoted in Christopher Tomlins, "After Critical Legal History: Scope, Scale, Structure," *Annual Review of Law and Social Science* 8, no. 1 (2012): 31–68, <https://doi.org/10.1146/annurev-lawsocsci-102811-173811>.

²³ Fasolt, *The Limits of History*, 14.

²⁴ Tomlins, "After Critical Legal History," 38.

²⁵ Craven, "The Invention of a Tradition," 365; Gordon, "Contextualism and Criticism in the History of Ideas," 44.

The text of Article 38 of the 1920 Statute of the International Court of Justice shows why. According to Article 38, the legitimate sources of international law are: (1.) "international conventions," meaning bilateral and multilateral treaties, (2.) "International custom" (longstanding historical practice), (3.) "The general principles of law recognized by civilized nations" and (4.) "judicial decisions and the teachings of the most highly qualified publicists of the various nations."²⁶ Historical scholarship impinges at least indirectly on each of these, and perhaps most directly on "teachings...of the various nations" and what's understood as "international custom."²⁷ But here, as Koskenniemi's earlier work had shown, the discrediting charge of *apologia* always hovers, which is why international law requires something perceived as a "pure" history, one as uncontaminated as possible by pique and prejudice.²⁸ According to Matthew Craven, "to make explicit the particularity of the context and explore the specificities of motive or cause – is to make it all the less relevant as a generalisable experience from which contemporary legal rules might be deduced."²⁹ In the preface to his 1618 book *The History of Tithes*, John Selden showed that he had intuited much the same. Declaring his work "meer narration," he renounced any rhetorical intent. *The History of Tithes*, he proclaimed, was "not written to prove *that Tithes are not due by the Law of God*; not written to prove *that the Laitie*

²⁶ ICJ Article 38

²⁷ Rose Parfitt, "The Spectre of Sources," *European Journal of International Law* 25, no. 1 (February 1, 2014): 297–306, <https://doi.org/10.1093/ejil/chu011>; Thomas Skouteris, "The Force of a Doctrine: Art. 38 of the PCIJ Statute and the Sources of International Law," in *Events: The Force of International Law*, ed. Fleur Johns, Richard Joyce, and Sundhya Pahuja (Routledge-Cavendish, 2011), 69–80; David J. Bederman, *Custom as a Source of Law* (Cambridge: Cambridge University Press, 2010); Reginald G. Marsden, *Documents Relating to Law and Custom of the Sea* ([London]: Printed for the Navy Records Society, 1915); Brian Tierney, "Vitoria and Suarez on Ius Gentium, Natural Law, and Custom," in *The Nature of Customary Law*, ed. Amanda Perreau-Saussine and James Bernard Murphy (Cambridge: Cambridge University Press, 2007), 101–24; Curtis Bradley and Mitu Gulati, "Withdrawing from International Custom," *Yale Law Journal* 120 (2010): 202–75.

²⁸ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005).

²⁹ Craven, "The Invention of a Tradition," 366.

may detain them, not to prove that Lay hands may still enjoy maintenance of the Clergie. Neither is it any thing else but it self, that is, a meer Narration, and the *Historie of Tithes*."³⁰ Selden, himself a common lawyer who would go on to compose the famous *Mare Clausum* (1635), one of the key early texts concerning the law of the sea, understood as well as anyone the law's own needs. Law needs objective inquirers, faithful servants of positive facts. The norm-laden stuff of advocates, partisans, and ideologues, of embodied rhetorical actors with subjective passions and interests, cannot credibly be made international law.³¹ A functionalist international law, that is, requires a non-functionalist history, "meer narration," a history that accepts that some legal questions endure through time.

One consequence of Article 38's reference to the "teachings of the most highly qualified publicists of the various nations" as "means"—albeit "subsidiary"—"for the determinations of rules of law" is that "the sources of international law were (and, hence, to 'subsidiary' degree still are) identified with the treatises of the 'fathers of international law' – men such as Vitoria, Suarez, Gentili, Grotius, Vattel and Pufendorf."³² International law's historical turn has therefore shown intense interest in such thinkers. As such, the disparate responses to two representative works of this turn can be instructive. In 2004, historian David Armitage published a deeply contextualized critical edition of Hugo Grotius' 1608 legal treatise *Mare Liberum*, placing a work often venerated as international law scripture by progressive international lawyers squarely within the challenging milieu of Dutch East Indies Company propaganda. And legal scholar Antony Anghie published his 2004 monograph *Imperialism, Sovereignty and the Making of*

³⁰ John Selden, *The Historie of Tithes: That Is, the Practice of Payment of Them. The Positiue Laws Made for Them. The Opinions Touching the Right of Them* (London, 1618).

³¹ I draw this wording from my *Literature and the Law of Nations, 1580-1680* (Oxford: Oxford University Press, 2015). On legal history's avoidance of normativity, see further Steven Wilf, "Law/Text/Past," *UC Irvine Law Review* 1, no. 3 (September 1, 2011): 543; Meyler, "Law, Literature, and History," 167.

³² Parfitt, "The Spectre of Sources," 298.

International Law, arguing that 16th-century Salamanca jurist Francisco Vitoria, far from being the moderating brake on Spanish imperialism, in fact inaugurated a European tradition of exploitation under the banner of legal restraint.

While Armitage's edition found positive reception, Anghie's book irked some historians of ideas including Ian Hunter and Georg Cavallar, the former of whom found the book "dogged by debilitating anachronism and presentism."³³ According to Hunter, "It is this late nineteenth-century use of state sovereignty as an instrument of trans-territorial imperial hegemony that [Anghie's] critical historiography anachronistically projects backward onto early modern jus gentium [law of nations]."³⁴ In effect, Anghie was charged with violating what Constantin Fasolt terms historians' "most basic principle of method: thou shalt place everything in the context of its time."³⁵ "Show that a historian has unwittingly infected the interpretation of the past with some particle of the present, and you have shown the historian not only to have failed at the task, but to have failed shamefully."³⁶

The criticism of Anghie's Third World Approach to International Law (TWAIL) might have passed as so much run-of-the-mill "policing of anachronism" were it not for the subsequent observations of international legal scholar Anne Orford, who came to Anghie's defense, discerning in the criticism deep methodo-political tensions long elided in international law's

³³ Ian Hunter, "Global Justice and Regional Metaphysics: On the Critical History of the Law of Nature and Nations," *Law and Politics in British Colonial Thought : Transpositions of Empire*, 2010, 11–29; Georg Cavallar, "Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?," *Journal of the History of International Law / Revue d'histoire Du Droit International* 10, no. 2 (October 1, 2008): 181–209, <https://doi.org/10.1163/157180508X359828>.

³⁴ Hunter, "Global Justice and Regional Metaphysics," 20.

³⁵ Fasolt, *The Limits of History*.

³⁶ Fasolt.

historical turn.³⁷ As Orford writes, "Law and history stand on the opposite sides of the dividing line between present obligations and archaic traditions. The self-imposed task of today's contextualist historians is to think about concepts in their proper time and place – the task of international lawyers is to think about how concepts move across time and space."³⁸ The responses to Anghie were "contextualism as containment."³⁹ Anghie had studied Vitoria and his imperialist context not to posit a break between European colonialism and contemporary structures of international law, but instead to show a troubling continuity. His intent, in his words, was "to illuminate the processes, the barely visible thoroughfares by which this colonial history insinuates itself into the discipline [of international law] with enduring and far-reaching effect."⁴⁰ Rather than implicitly constructing a bad "then" and a better "now," Anghie's book rejected any such break in favor of the disquieting impression that the moral contagion of colonialism had not, in fact, been quarantined in the past.

As Orford pointed out, there was something very lawyerly about this approach, and not only because of its inbuilt logic of offense and remedy. It also presented the past for the purposes of the present. If legal argument involves mobilizing sources, cases, thinkers, and doctrines, Anghie's too was a legal past that could authorize—indeed require—action. Anghie may have reversed the moral valance by turning the standard encomia of the "forefathers" into critique, but his "judicialization" of Vitoria was truer to the essence of international legal

³⁷ Anne Orford, "Meaning and Understanding in International Law and Intellectual History" (History, Politics, Law: Thinking Through the International, University of Cambridge, May 16, 2016), <https://vimeo.com/171268469>.

³⁸ Anne Orford, "The Past as Law or History?: The Relevance of Imperialism for Modern International Law," *International Law and Justice Working Papers*, IILJ Working Papers, no. 2 (2012), www.iilj.org.

³⁹ Orford, "Meaning and Understanding in International Law and Intellectual History." Orford is here quoting Gordon, "Contextualism and Criticism in the History of Ideas."

⁴⁰ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004), 312.

scholarship than to the discipline of history.⁴¹ "International legal method," Orford claimed, is "necessarily anachronistic."⁴² Whether consciously or not, Anghie's critics were dissolving a source of political authority by applying the very same solvent that Spinoza had applied to Holy Scripture, that Casanova had applied to the literary world system, and that Armitage had applied to the so-called "father of international law" Hugo Grotius.

II. Literature and Anachronism

Orford is surely right that Anghie brought an international legal sensibility to *Imperialism, Sovereignty, and the Making of International Law*—one of Anghie's first critical interlocutors used the distinctly juridical term "accomplice" to characterize Anghie's view of Vitoria—but we miss something critically important about the interplay of humanities methods and international law unless we recognize a slightly submerged but no less relevant literary sensibility as well.⁴³ International law's recent fascination with contexts has been oddly silent about *literary* contexts even though Ed Morgan has pointed out that "in interdisciplinary mode [international law] parallels, like a Nabokovian pale fire, the literary and aesthetic currents that surround it."⁴⁴ For much of the twentieth century, literature worked much like international law, and in part *because* of history. The traditional division of labor between international law and international history—in which history was a stable source of facts, customs, doctrines, treaties, and so forth and law the locus of norms and prescriptions—had, as a consequence, a second division of labor

⁴¹ Henry Rousso, *The Haunting Past: History, Memory, and Justice in Contemporary France*, trans. Ralph Schoolcraft (Philadelphia: University of Pennsylvania Press, 2002), 50.

⁴² Anne Orford, "On International Legal Method," *London Review of International Law* 1, no. 1 (September 1, 2013): 175, <https://doi.org/10.1093/lril/lrt005>.

⁴³ Cavallar, "Vitoria, Grotius, Pufendorf, Wolff and Vattel."

⁴⁴ Edward Morgan, *The Aesthetics of International Law* (Toronto: University of Toronto Press, 2007), 25.

involving literature and literary scholarship. Hans-Georg Gadamer was among those most eloquent in observing that "literature does not exist as the dead remnant of an alienated being, left over from a later time as simultaneous with its experiential reality. Literature is a function of being intellectually preserved and handed down, and therefore brings its hidden history into every age."⁴⁵ Literary texts, like international legal cases and doctrines have "busy afterli[ves]."⁴⁶ As such, they not only frustrate historicism's "stricture of recognizing the past in the present" but also potentially even frustrate the clear distinction between the two.⁴⁷ It was novelist William Faulker who wrote in *Requiem for a Nun*, "The past is never dead. It's not even past."⁴⁸

Such generalities are true enough for Anghie, but in Anghie's case it is possible to be even more precise. Anghie quotes novelist Joseph Conrad while citing the influence of postcolonial literary critics Edward Said, Homi Bhabha, and Gayatri Spivak among others. Postcolonial literary studies is deeply presentist "in principle if not in name," and it is noteworthy that Anghie's own intellectual formation includes an undergraduate specialization in postcolonial literature at Australia's Monash University.⁴⁹ While literary studies is of course a big and diverse tent, the postcolonialist scholars who influenced Anghie are themselves among the sharpest critics of historicist contextualism. A shared point of emphasis has been in noting the easy slippage between geographical difference and chronological difference that creates the powerful (if laughably illogical) category of "contemporary ancestors."⁵⁰ Kathleen Davis writes about the rise of historicism, for instance, that "There was no....'superstitious, feudal Middle Ages' *before*

⁴⁵ See Hans Georg Gadamer, *Truth and Method*, trans. W. Glen-Doepel, Joel Weinsheimer, and Donald G. Marshall, 2nd, rev. ed. (New York: Continuum, 2004), 154.

⁴⁶ Felski, *The Limits of Critique*, 160.

⁴⁷ Gordon, "Contextualism and Criticism in the History of Ideas," 45.

⁴⁸ William Faulkner, *Requiem for a Nun*, 1950.

⁴⁹ Hugh Grady and Terence Hawkes, "Introduction: Presenting Presentism," in *Presentist Shakespeares* (New York: Routledge, 2007), 5.

⁵⁰ Mary Nyquist, "Contemporary Ancestors of de Bry, Hobbes, and Milton," *University of Toronto Quarterly* 77, no. 3 (2008): 837–75.

colonialism, and doubtless there never would have been such without colonialism; vice versa, colonizers could not have mapped and administered foreign lands and bodies as they did without the simultaneous process of imagining such a 'Middle Ages.'⁵¹ Postcolonialists are all too aware that historicism has often been an instrument for self-congratulation on one side and domination on the other.

If Anghie's approach toward the past joins a juridical approach to history with literary postcolonialism's skepticism of historicized difference, the argument he develops about formal sovereignty doctrine further suggests the influence of literary studies. Anghie shares with literary scholars the impulse to use form to draw continuities between past and present. In the sense that the formal sovereignty doctrine first developed by Vitoria in the sixteenth century in Anghie's view retains at the structural level the colonial impulse that modern international law habitually disclaims, Anghie's approach bears comparison with genre theorists in literary studies for whom literary genres like epic, tragedy, novel, and so forth are durable diachronic structures. Frederic Jameson, for instance, argues that literary "form, secreted like a shell or exoskeleton, continues to emit its ideological message long after the extinction of its host."⁵² The formal aspects of genre and doctrine, in other words, counteract the contextualist impulse to draw a sharp line between present and past, creating instead cross-pollinating methodological affinities between what Orford terms "international legal method" and literary studies.⁵³

It is worth mentioning for any readers from other disciplines that historicism is no less troublesome in literary studies than it is in international law. Postcolonialists and presentists

⁵¹ Kathleen Davis, *Periodization and Sovereignty: How Ideas of Feudalism and Secularization Govern the Politics of Time* (University of Pennsylvania Press, 2008), 20.

⁵² Fredric Jameson, *The Political Unconscious : Narrative as a Socially Symbolic Act* (Ithaca N.Y.: Cornell University Press, 1981), 151; Jonathan Gil Harris, *Untimely Matter in the Time of Shakespeare* (University of Pennsylvania Press, 2008), 10; Caroline Levine, *Forms: Whole, Rhythm, Hierarchy, Network* (Princeton: Princeton University Press, 2015).

⁵³ Orford, "On International Legal Method."

exist on one side of a spectrum that also includes new historicists and historical materialists, themselves vigorously attentive to "circumstances relevant to all the extant books ... giving the life, character and pursuits of the author of every book, detailing who he was," etc. In my own subfield of early modern literary studies, historicism over the last forty years has been closely associated with efforts to pierce myths of otherworldly genius—frequently Shakespeare's. The generation-long dominance of historicism has meant that anachronism continues to "serve as a cudgel with which to beat other scholars."⁵⁴ The claims that all literary texts are composed in a particular time and place and that those times and places are relevant to interpretation find relatively few detractors in today's literary studies, but the field tends to bifurcate there. The problem is, literary meaning is synchronic *and* diachronic, and both axes are available for study. Some scholars dig deeply into intellectual and material contexts while others attend to further meanings and pleasures unexhausted by synchronic contextualization. For the latter, models based on sound waves (Dimock), ghosts (Derrida), tradition (Jarvis), composting (Mentz), wormholes (Charnes), genetics (Moretti), palimpsests (Gil Harris), networks (Liu), and influence (Bloom) have been developed in Gadamer's footsteps.⁵⁵

What thoughtful readers of literature know, in addition, is that literary writers have their own rich set of techniques for making meaning move through time. A non-exhaustive list of

⁵⁴ Steve Mentz, "The Two Anachronisms: An Ecocritical Response to a Review," *Glasgow Review of Books* (blog), February 27, 2017, <https://glasgowreviewofbooks.com/2017/02/27/the-two-anachronisms-an-ecocritical-response-to-a-review-by-steve-mentz/>.

⁵⁵ Wai-chee Dimock, "A Theory of Resonance," *PMLA* 112, no. 5 (October 1997): 1060; Jacques Derrida, *Specters of Marx: The State of the Debt, the Work of Mourning and the New International* (New York: Routledge, 1994); Simon Jarvis, "Prosody as Tradition," *Dalhousie Review* 79, no. 2 (Summer 1999): 151–72; Steve Mentz, *Shipwreck Modernity: Ecologies of Globalization, 1550-1719*, 2015; Linda Charnes, "Reading for the Wormholes: Micro-Periods from the Future," *Early Modern Culture*, no. 6 (2007), <http://emc.eserver.org/1-6/charnes.html>; Franco Moretti, *Graphs, Maps, Trees: Abstract Models for Literary History* (Verso, 2007); Harris, *Untimely Matter in the Time of Shakespeare*; Alan Liu, "Friending the Past: The Sense of History and Social Computing," *New Literary History* 42, no. 1 (2011): 1–30; Harold Bloom, *The Anatomy of Influence: Literature as a Way of Life* (Yale University Press, 2011).

strategies might include genre, translation, verse, diction, and style. For dramatists, performance is recurrent renovation. Even the briefest of allusions can knit past and present in striking ways. Consider the following examples from poets Geoffrey Hill and John Hollander and novelists Emily St. John Mandel and China Miéville. The very title of Geoffrey Hill's 1996 eight-poem poetic sequence *De Jure Belli ac Pacis*, for instance, evokes the impetus for, and reception history of, Hugo Grotius' 1625 *magnum opus* of the same name. Hill's is a characteristically complex poetic sequence, dedicated to the German jurist and diplomat Hans-Bernd von Haefen (1905-44), a conspirator against Hitler whose subsequent execution by the Third Reich was preceded by von Haefen's declaration, "Legally speaking it is treason; actually it is not." In Hill's poems, 20th-century European "history ... is recurrently represented as 'poetry' – images and cadences of a lyrical power often akin to the working of music – although this 'poeticising' is not confined to the literary genre of verse but is ubiquitous in our representations of the past."⁵⁶ If, as in Hill's sequence, "our history and present time can seem a collage relieved of reasoning connection," the Grotian title suggests the role not of law but of poetry in offering "an overarching order, a codification and means of resolution" with ambitions at once as grand, necessary, and futile as Grotius' *magnum opus*.⁵⁷

In her 2014 novel *Station Eleven*, similarly, the Canadian writer Emily St. John Mandel imagines a global flu pandemic whose few survivors turn to art and theater to repair the delicate fabric of civilization. While globalization's widespread international exchange helps transmit *Station Eleven's* initial pandemic across distance, the novel distinguishes itself among the wider body of post-apocalyptic fiction using references to Shakespeare to create its own trans-temporal

⁵⁶ Jeffrey Wainwright, "History as Poetry: 'Churchill's Funeral' and 'De Jure Belli Ac Pacis' (Canaan, 1996)," in *Acceptable Words: Essays on the Poetry of Geoffrey Hill* (Manchester: Manchester University Press, 2005), 65.

⁵⁷ Wainwright, 65.

flows. Mandel's novel probes the distinctions (if any there be) between influence and influenza. While a main character, Miranda, for example, shares a name with the very character in Shakespeare's *The Tempest* who wonders about a "brave new world," the novel draws most deeply from *King Lear* and *Lear's* profound meditation on the proposition that "Unaccommodated man is no more but such a poor, bare, forked animal." The actors and musicians of *Station Eleven's* Traveling Symphony proceed on the basis of their own embodied intuitions about art's role in human flourishing: "Survival," they proclaim, "is insufficient." Patient zero in Mandel's pandemic is a Shakespearean actor named Arthur Leander, whose legacy generates the novel's three main plot lines, which follow Leander's three ex-wives *à la* Lear's three daughters. That Leander's surname contracts so easily to "Lear" emphasizes the point most clearly. Literary influence, which Mandel's novel might encourage us to call the Shakespearean flu, is ultimately a salvific contagion thankfully capable of leaping from past to present in *Station Eleven*, and not through genre—novels and tragedies are after all very different—but instead by transmitting and mutating Lear's own binaries of nature and culture through intertextual allusion.

The contemporary writer perhaps most relevant to this essay's concerns is the Marxist novelist China Miéville, who leads a second life as a well-known theorist of international law.⁵⁸ Miéville's richly imaginative novels bring into their worlds a long tradition of speculative and utopian fiction. The floating city of Miéville's *The Scar*, for example, is able to invoke nearly 500 years of mercantilism, capitalism, and colonialism through its subtle reworkings of Thomas

⁵⁸ China Miéville, *Between Equal Rights: A Marxist Theory Of International Law* (Chicago: Haymarket Books, 2006); China Miéville, "Multilateralism as Terror: International Law, Haiti and Imperialism," 2009, <http://eprints.bbk.ac.uk/783/>; Carl Freedman, "Speculative Fiction and International Law: The Marxism of China Miéville," *Socialism and Democracy* 20, no. 3 (November 1, 2006): 25–39, <https://doi.org/10.1080/08854300600950228>; Nathan Doherty, "Hybridized Possibilities: China Miéville's *The Scar* and *The Conjuring of Law*," *Law & Literature* 28, no. 2 (May 3, 2016): 233–54, <https://doi.org/10.1080/1535685X.2016.1184920>.

More's *Utopia* (1516). "Utopias are necessary," he writes in his own recent edition of *Utopia*, "but not only are they insufficient: they can, in some iterations, be part of the ideology of the system, the bad totality that organises us, warms the skies, and condemns millions to peonage on garbage scree."⁵⁹ Miéville's characters in his New Crobuzon trilogy include a group called the Remade, criminals whose Dante-esque punishments are written on their bodies through grotesque transformations intended, in Miéville's world, to aid penal labor.⁶⁰ Evoking Dante's own world to remind us of a period when "the "brutal," had not yet been veiled by the habits of civility and the pacification of modern life," the violence of such punishments both literalizes for readers the violence of a capitalist world-system in need of ever more cheap labor for its reproduction and evokes *Inferno* to link that violence to older medieval forms.⁶¹

A poem that asks questions related to Miéville's Remade, albeit using techniques native to poetry and with a more playful, sartorial tone, is American poet John Hollander's "Tailor-Made"—a poem published, notably, in a New-York based journal in October 2001.⁶² In the immediate wake of the 11 September attacks, Hollander's three ABBA quatrains ask, "How can a punishment fit a crime? / What's not ill-suited to a wrong?" before turning to an example from Dante's *Inferno* to suggest that "being light / In a heavy, dark and wrenching wind / Didn't drape" particularly well on Dante's famously lustful pair, Paolo and Francesca. Dante's tightly systematic *terza rima*, which goes hand in hand with his ostensibly systematic scheme of

⁵⁹ China Mieville, *The Scar* (Del Rey, 2004); China Miéville, "The Limits of Utopia," in *Utopia*, by Thomas More (London: Verso, 2016), 16–17. See further China Miéville, "Floating Utopias: Freedom and Unfreedom of the Seas," in *Evil Paradises: Dreamworlds of Neoliberalism*, ed. Mike Davis and Daniel Bertrand Monk (New York: New Press, 2007).

⁶⁰ See Freedman, "Speculative Fiction and International Law."

⁶¹ Paul G. Chevigny, "From Betrayal to Violence: Dante's *Inferno* and the Social Construction of Crime," *Law & Social Inquiry* 26, no. 4 (October 1, 2001): 794.

⁶² John Hollander, "Tailor-Made," October 1, 2001, <http://brooklynrail.org/2001/10/poetry/tailor-made>; "Tailor-Made," in *Poetry of the Law: From Chaucer to the Present*, ed. David Kader and Michael Stanford (University of Iowa Press, 2010), 134.

punishments, is here subjected to Hollander's scrutiny by way of Hollander's own highly self-conscious infelicities in meter and rhyme. "Fit" is precisely what rhymes like crime/overtime, wind/kind and frayed/underplayed *don't* do. Poetic regularity—*regula* is Latin for rule—is a Sisyphean task. As syntactic units overflow their lines in "Tailor-Made," syllables range irregularly between seven and nine per line, literalizing in a slightly different way the poem's concluding rejoinder to Dante at the intersection of aesthetics and penal theory: "The overkill, the underplayed / Will always have an ugly look." Examples like Hill, St. Mandel, Miéville and Hollander remind us in some very different ways of the many resources literature has at its disposal to help writers stitch time together.

That each of these more diachronic approaches continues to draw in one way or another on temporality can remind us that literary and legal studies' shared interest in what persists through time doesn't mean that literary and international legal methods necessarily must reject the critical Spinozist impulse. As Martti Koskenniemi has acknowledged, part of the appeal of international law's historical turn was the chance to craft "better narratives."⁶³ Anghie's work in particular shows how Spinozist contextualism might be avoided on one level but powerfully applied on a different plane of analysis. For this reason, I find Orford entirely convincing in noticing a difference in international lawyers' temporalities but not quite right to tie international legal method and anachronism so completely. Chronology remains as fundamental to Anghie's analysis as it is to Pascale Casanova's *The World Republic of Letters*, for example, and not simply as an organizing principle. What chronology enables for both Anghie and Casanova is detailed attention to moments of entrance, of recognition, of what theater scholars might prefer to call "entering the world stage." In Anghie's legal framework, recognition concerns

⁶³ Martti Koskenniemi, "Vitoria and Us: Thoughts on Critical Histories of International Law," *Rechtsgeschichte Legal History - Zeitschrift Des Max-Planck-Instituts Für Europäische Rechtsgeschichte*, no. 22 (2014): 127.

sovereignty—international legal personhood. In Casanova's literary sense, it means enjoying global literary prestige. But the Spinozist template renders both the international legal system and the world literary system as *made* objects akin to the canonical Bible or a stage play and as such characterized by time-stamped inclusions and exclusions and available for chronological scrutiny.

Chronology in these analyses is both a method and subject of inquiry. Global literary prestige and international legal personality are both governed by what Casanova terms a "logic of temporal competition" in which lateness is a "handicap."⁶⁴ If scripture could seem to Spinoza's contemporaries a unified whole, each book as equal in its claim to divine revelation as the next, it was largely because it had been exempted from historicist inquiry. Reason required attending to the hows and whys in the making of this privileged, putatively unified whole. For Anghie and Casanova, the Spinozist concern is less the biographical author's rhetorical intent than the historical moment of entrance--sometimes understood in literary studies as "reception."⁶⁵

And in fact, international legal personhood and literary prestige are co-constitutive. Anghie writes, "The transformation of colonial territories into sovereign states is central to the claim that international law is now truly universal because all societies whether European or non-European, participate as equal and sovereign states in the international system."⁶⁶ But this claim to equality and universal participation can never be as convincing as it would like to be due to the inescapable timeline over which the international system developed. As Casanova puts it, "the temporal law of the world of letters may be stated thus: *it is necessary to be old in order to have any chance of being modern or of decreeing what is modern*. In other words, having a long

⁶⁴ Pascale Casanova, *The World Republic of Letters*, trans. M.B. DeBevoise (Cambridge, Mass.: Harvard University Press, 2004), 89–90.

⁶⁵ See for example Charles Martindale and Richard F. Thomas, *Classics and the Uses of Reception*, Classical Receptions (Malden, MA: Blackwell Pub., 2006).

⁶⁶ Anghie, *Imperialism, Sovereignty and the Making of International Law*, 117.

national past is the condition of being able to claim a literary existence that is fully recognized in the present."⁶⁷ For Anghie, colonial international law's long delay in recognizing non-Western sovereignty, accomplished through methods such as a supposed "standard of civilization," the notion of quasi-sovereignty, and European mandates, similarly perpetuates unequal outcomes within contemporary international system's putative society of equals. Third world and postcolonial nations "late" to sovereignty do not enjoy its true privileges nor, late to what Casanova terms "Greenwich literary mean time," do they enjoy literary prestige.⁶⁸ After all, Shakespeare's Shylock converts to Christianity at the end of *Merchant of Venice*, but it matters considerably when (and why) he does so.

The point here is that, far from rejecting Spinozist historicism, many of the literary and international legal methods under discussion are in fact quite capable of adapting them to slightly different objects. Their project of demythologizing the international system relies fundamentally on a Spinozist interest in the circumstances of reception—moments of admission, membership criteria, and the procedures and circumstances of canon making.

To understand the international system as made in such ways shows—and in part facilitates—an openness to the language of poetry, for, as Philip Sidney emphasized in his great *Apology for Poetry*, the term poet "cometh of this word *poiein*, which is 'to make.'"⁶⁹ Victoria Kahn among others has encouraged us to understand "poiesis not simply as a literary question but also as an explicitly political question."⁷⁰ This is why it is striking to read recent scholars of

⁶⁷ Casanova, *The World Republic of Letters*, 89–90. Italics hers.

⁶⁸ Rose Sydney Parfitt, "The Unequal Equality of Sovereigns: A Brief History of 'Peripheral Personality,'" *Jean Monnet Working Papers Series* 20, no. 13 (2013), www.jeanmonnetprogram.org/papers/13/documents/Parfitt.pdf.

⁶⁹ Philip Sidney, *An Apology for Poetry, or, The Defence of Poesy*, ed. Geoffrey Shepherd and R. W. Maslen, 3rd ed. (Manchester: Manchester University Press, 2002), 84.

⁷⁰ Victoria Kahn, *Future of Illusion: Political Theology and Early Modern Texts* (Chicago: University of Chicago Press, 2016), 8.

international law like Ralph Michaels and Matthew Nicholson proposing “more creativity, more imagination...more willingness to depict alternative worlds.”⁷¹ Be more like poets, international lawyers are telling their colleagues. In order to “see international law anew,” Nicholson urges international legal scholars “to acquire the poet’s anxiety and write texts that re-imageine [sic] legal practice as something unlimited by ‘past texts.’”⁷² Nicholson’s allusion to the poet’s anxiety refers to the so-called “anxiety of influence” that critic Harold Bloom has long insisted leads literary writers to distinguish themselves from their precursors. In Nicholson’s view, legal scholars should treat past texts and practitioners not as models to follow but as raw materials for a quasi-literary “process of constellating fragments to form a representation of reality.”⁷³ The inspiration for this latter formulation is Walter Benjamin’s “allegorical-representational practice” rather than Philip Sidney’s Elizabethan poetics, but the rationale is not far from Sidney’s own imagistic poetics, in which the poem is conceived in part as a “perfect picture”: “The lawyer saith what men have determined; the historian what men have done,” but “only the poet, disdainng to be tied to any such subjection, lifted up with the vigour of his own invention, doth grow in effect another nature, in making things either better than nature bringeth forth, or quite anew...”⁷⁴ In recent proposals by Michaels and Nicholson, international lawyers are invited cast aside the discipline’s traditional and often feigned humility and embrace their own agency in world-making.

⁷¹ Ralf Michaels, “Dreaming Law without a State: Scholarship on Autonomous International Arbitration as Utopian Literature,” *London Review of International Law* 1, no. 1 (September 1, 2013): 62, <https://doi.org/10.1093/lril/lrt008>; Matthew Nicholson, “Walter Benjamin and the Re-Imagination of International Law,” *Law and Critique* 27, no. 1 (April 1, 2016): 103–29, <https://doi.org/10.1007/s10978-015-9170-z>.

⁷² Nicholson, “Walter Benjamin and the Re-Imagination of International Law,” 105–6.

⁷³ Nicholson, 124.

⁷⁴ Sidney, *An Apology for Poetry, or, The Defence of Poesy*, 90.

III. Conclusion - Divisions of Labor

As we have seen, literature and literary studies confront challenges of presentism, anachronism, meaning, and time in various ways. The reasons such techniques might be of interest to international law at the moment is that scholars including Anghie, Orford, Parfitt, and Koskenniemi have evidently taken on board historians' interest in contingency and context, but "Restiveness with historicism is beginning to make itself felt."⁷⁵ The examples from Antony Anghie, Geoffrey Hill, Emily St. John Mandel, China Miéville, John Hollander, Pascale Casanova, Ralph Michaels, and Matthew Nicholson offered opportunities to consider some of the distinct affordances of postcolonialist temporalities, formal analysis, allusion, character names, plot, fictional geographies, meter, rhyme, enjambment, and *poiesis*. Historians and legal scholars associated with international law's historical turn largely succeeded in "bring[ing] legal principles down from the conceptual heaven and into a real world where agents make claims and counterclaims, advancing some agendas, opposing others."⁷⁶ But a consequence of international law's historical turn has been to sharpen methodological contrasts between intellectual history and international law. In line with the Spinozist tradition, it has also raised problematic questions about the authority of international law.

One thing missing in this analysis might be called the aesthetic force of contextualism. Contextualism in most accounts is divorced from aesthetic experience, but this need not be the case. In positing a break between past and present, historicism opens a space for a kind of scholarly sublime. Meaning that somehow travels over the distance between present and past takes on an air of the mysterious—a defiant, spectral, otherworldly kind of meaning that gathers

⁷⁵ Felski, *The Limits of Critique*, 155.

⁷⁶ Koskenniemi, "Vitoria and Us: Thoughts on Critical Histories of International Law," 123.

a unique, transgressive charge precisely because the meaning of the past is ordinarily thought to stop where the present begins. This force should not be neglected in considering contextualism's long and perhaps enduring appeal.

It is appropriate to conclude by considering whether recent debates auger changing divisions of labor among history, literature, and international law. Functionalist international law's need for a "pure" past has more or less required that it devalue historical scholarship departing from a quasi-antiquarian norm. Since history that fails to obscure its presentist politics or rhetorical subjectivity cannot pass through the gates erected in ICJ Article 38, a second division of labor has long pertained between history and literature, and by extension historians and literary scholars. In effect, literary studies embraced what history disavowed. If contextualist history "evades the burden of critical engagement by retreating into the apparently disengaged stance of contextualist reconstruction," literary studies has felt freer to embrace "the fundamentally radical act of putting one's cards on the table."⁷⁷ A history that confined itself to impartial description—what Philip Sidney called the "bare was" and Selden called "meer narration"—meant that literature and literary scholarship could embrace more flexible temporalities and to wear their subjectivity, morality, and political commitments on their sleeves. In other words, law's longstanding contract with historicism—contextualism as containment—created conditions that permitted literature and literary scholarship to exhibit features that, in certain respects, share more with law than with history.

But now that explicitly political international legal scholars trouble this division of labor by doing a committed, quasi-literary legal history—now, that is, that "it is no longer believable to claim that a theory of international law (or much else) could depend on an ultimately non-

⁷⁷ Gordon, "Contextualism and Criticism in the History of Ideas," 45; Terence Hawkes, *Shakespeare in the Present* (New York: Routledge, 2003), 22.

partisan way of knowing”—what challenges and opportunities arise?⁷⁸ For one thing, an international legal field that looks more like literature and literary studies could be able to enjoy the pleasures of explicitness, inventiveness, and creativity. A field less anxious about the boundary between international law and international politics could also be able to draw from a powerful set of resources more or less endemic to literature for creating “cross-temporal community” and for moving meaning through time.⁷⁹ And it may also be able to borrow some of the moral authority that literature and literary studies often generate by openly displaying (or neglecting to cloak) their commitments. Poets, as Philip Sidney wrote, have no inherent obligations to past lives or to particular doctrines or precedents. Literary authority arises in part from this freedom. As former US President Barack Obama told an audience at Carnegie Mellon University recently, “I was an English and Political Science major ... I have probably learned more from reading novels than reading textbooks.” Literature and literary scholarship can boast a long tradition in changing hearts and minds, and “makers” can teach and delight in part because they have “no law but wit.”⁸⁰

But a note of caution is in order too. While literature and literary studies have exerted great influence, they have done the vast majority of their teaching outside the institutional frameworks of international law. ICJ Article 38 remains a powerful “tool for separating law from non-law,” and poets, novelists, and literary scholars have little reasonable expectation to be admitted through its gate.⁸¹ This is not exclusively due to lack of disciplinary training either, for historians' scholarship is cited regularly. Rather, literature and literary scholarship have largely done different jobs in the disciplinary division of labor in part because practitioners have been

⁷⁸ Moyn, “Legal History as a Source of International Law: The Politics of Knowledge,” 303.

⁷⁹ Insko, “Anachronistic Imaginings,” 190.

⁸⁰ Sidney, *An Apology for Poetry, or, The Defence of Poesy*.

⁸¹ Skouteris, “The Force of a Doctrine: Art. 38 of the PCIJ Statute and the Sources of International Law,” 77.

unwilling to pay the requisite stylistic and substantive costs. Ultimately, if international juridical method veers too close to literature and literary studies, it will find itself balancing similar risks.