John D. Haskell, University of Manchester Law School*

Title: Modern Money Theory and International Law

Abstract: This essay examines an emerging epistemological conjuncture between what might loosely be identified as two (primarily) academic camps: economists subscribing to 'modern money theory' (MMT) and international lawyers associated with 'critical' traditions within the discipline. For many legal scholars, my sense is that their current experience with MMT varies from 'I think I have heard of that before' to 'that state theory to money that pushes for a universal job guarantee'. And many progressive economists familiar with MMT have not spent a significant time with the insights and sensibility of critical international law scholarship. My aim here is to explore where there might be fruitful collaboration between these communities.

Keywords: capitalism, colonialism, critical legal studies, international law, modern money theory, neo-chartalism, political economy

* john.haskell@manchester.ac.uk; the themes in the text are influenced by conversations with Raul Carrillo, Jay Cullen, Michael Fakhri, Michael Galanis, Rohan Grey, Geoff Gordon, Andrea Leiter, Jamee Moudud, Chris McHugh, Nicolas Perrone, Akbar Rasulov, Love Ronnelid, Maria Cacilia Schweinberger, and Aleksandar Stojanovic, as well as colleagues in our legal tech reading groups and the discussions at events hosted by the Association for the Promotion of Political Economy and Law (APPEAL), Law and Political Economy project (LPE), and the Institute for Global Law and Policy (IGLP).

MODERN MONEY THEORY AND INTERNATIONAL LAW

This essay examines an emerging epistemological conjuncture between what might loosely be identified as two (primarily) academic camps: economists subscribing to 'modern money theory' (MMT) and international lawyers associated with 'critical' traditions within the discipline. Among the latter, my sense is that their current experience with MMT varies from 'I think I have heard of that before' to 'that state theory to money that pushes for a universal job guarantee', with those more familiar usually running in Anglo-American 'law and political economy' circles at more or less elite law schools. To this community, my aim is to indicate certain cultural and theoretical orientations with MMT that suggest fruitful collaboration for international lawyers, and I imagine for those interested, the next step would be to dive into the existing literature and social media to better understand its diagnoses and proposals. To the economists, my assumption is that most readers will have exposure to certain strands of legal theory, though it is probably less programmatic than linked to relatable themes (e.g., antitrust, banking, human rights, labour law) and specific authors (e.g., Christine Desan, Rohan Grey, Robert Hale, Robert Hockett, David Kennedy, Duncan Kennedy, Katharina Pistor).[1] When it comes to international law, there is probably a slightly less clear set of conceptual reference points even while the literature and readers share an at least implicit understanding that most 'domestic' analysis and concerns slip into broader questions of global governance. If my hunch is correct, one useful approach would be to attempt and provide a legal canon and to situate the texts within broader conceptual and institutional contexts (e.g., American Legal Realism) – something that, at least here, will have to be left for another day.[2] My aim here is instead to try and flesh out the disciplinary sensibility within the contemporary academic circles of more critical international law that might reveal some potential blind spots within law and economic approaches to governance and identify sites of collaborative possibility and shared vision with modern money theory. In short, less a manifesto and more an interested third party introduction.

How We Met (an International Law Perspective)

MMT economists and critical international lawyers share a sequence of overlapping professional affinities, though expressed through distinct rhetorical economies, tacit knowledge, and institutional mechanics. One open question is the extent to which these unique professional backgrounds create cultural obstacles to productive collaboration. We might begin by paying attention to these triggers for discomfort and miscommunication alongside agreement.

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[1] See e.g., Christine Desan (2014), *Making Money: Coin, Currency, and the Coming of Capitalism*, Oxford University Press; Rohan Grey (forthcoming 2020), 'Administering Money: Coinage, Debt Crises, and the Future of Fiscal Policy', *Kentucky Law Review*; Robert Hale (1923), 'Coercion and Distribution in a Supposedly Non-Coercive State', *Political Science Quarterly* (38:3) 470; David Kennedy (2006), 'The "Rule of Law," Political Choices, and Development Common Sense', in David Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal*, Cambridge University Press, p. 95; Duncan Kennedy (1985), 'The Role of Law in Economic Thought: Essays on the Fetishism of Commodities', *American University Law Review* (34) 939; Katharina Pistor (2013), 'A legal theory of finance', *Journal of Comparative Economics* (41:2) 315.

[2] See e.g., David Kennedy and William Fisher III (eds.)(2006), *The Canon of American Legal Thought*, Princeton University Press.

Perhaps the most immediate question here is, why only now? It cannot be simply that international lawyers are uncomfortable with anything that reminds them of mathematics or numbers. After all, economic and legal experts with an international perspective, both in and out of the academy, have experimented with cooperation throughout the 20th century. The thing is, the majority of these projects and people subscribed to 'conservative' agendas: Cold War Austrian and Ordoliberal economists writing reflections on the nature of law within and between nations,[3] interwar international lawyers committed to the doctrinal defence of private property in wartime and (at least by the 1950s) the development of various soft law mechanisms and international organisations within the profession to preserve the sanctity of foreign investment,[4] the rise to prominence of law and economics and neo-institutionalism in universities and foreign affairs by the late 70s,[5] and in the aftermath of the Berlin Wall and the Soviet Union, the emphasis on 'rule of law' metrics and programmes by Bretton Woods institutions and other international financial and trade monitoring bodies in the name of good governance.[6]

Left-of-liberal economists and international lawyers simply have not traditionally exercised significant direct influence on each other. Aside from the first generation of institutional economics in the American interwar years, more progressive economists have tended to treat law primarily as a means to formalise policy choices over the allocation of claims and distribution of resources (e.g., the legal right for collective union action). On the international law front, as far as I can tell, it is only within the last two decades or so that more critically-oriented international legal academics have begun to focus explicitly on questions of capitalism and political economy. And even so, this shift in the literature is highly stylised.[7] Authors overwhelmingly favour issues of property, labour, and trade, and prefer filtering these regimes in relation to the political legacies of colonialism and neoliberalism, rather than any real engagement with the institution of 'money' and the practices of international financial systems. References tend to remain limited to sources within the classical political economy canon (e.g., Marx, Polanyi, Smith, Weber), authors with broad cross-disciplinary appeal writing about capitalism at large (e.g., Harvey, Stiglitz, Wood), or field studies with only one foot in economics (e.g., American Legal Realism, dependency theory, development studies, Marxism/neo-Marxism, world systems theory). One might occasionally see a mention to Keynes, but not in terms of specific theoretical claims or referencing any specific work (and never referring to others, such as Innes, Lerner or Minsky). Right wing economists are increasingly discussed – most commonly Hayek and von Mises – but again, to stand in for the turn into the neoliberal era or 'late stage capitalism'.[8] While development experts or economist historians are occasionally invited into projects, the critical project within international law seems to prefer to speak primarily to other legal academics, or occasionally colleagues in anthropology, development studies, history and international relations. So economics shows up, but rarely in any comprehensive or programmatic style that would entail working with economists or demonstrating literacy outside some central tenets from the 'classics' of political economy. Progressive

[3] See Quinn Slobodian (2018), *Globalists: The End of Empire and the Birth of Neoliberalism*, Harvard University Press.
[4] See Amr Shalakany (2000), 'Arbitration and the Third World: Bias under the Specter of Neo-Liberalism', *Harvard International Law Journal* (41:2) 419.
[5] See Yves Dezalay and Bryant Garth (1996), *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*, University of Chicago Press.
[6] See Andrew Lang (2011), *World Trade Law after Neoliberalism: Reimagining the Global Economic Order*, Oxford University Press.
[7] See John D. Haskell and Akbar Rasulov (2018), 'International Law and the Turn to Political Economy', *Leiden Journal of International Law* (31:2) 243.
[8] Economic historians like Philip Mirowski have extensively unpacked these institutions and ideas, but even here, the literature rarely find their way into international law scholarship. See e.g., Philip Mirowski (2008), *Machine Dreams: Economics Becomes a Cyborg Science*, Cambridge University Press.

economists and their ideas have yet to crack the market, at most an occasional footnote with a half-sentence parenthetical.

On its face, this (largely unacknowledged) reservation to taking progressive economists seriously is difficult to explain, especially when the histories and future of capitalism is trending within the field and critical international lawyers are not strangers to disciplinary infidelity. It also might suggest that there is no point in going further; perhaps, when we are all feeling ourselves living on narrow bandwidths of time and energy, it is a sunk cost. Perhaps academics within the critical traditions of international law just don't feel comfortable with economics straight without some interdisciplinary chaser. But then why this essay in this journal issue? Or the presence of Randall Wray and Fadhel Kaboub at annual gatherings put on by the Institute for Global Law and Policy at Harvard Law School? How do we account for Stephanie Kelton's writing showing up in international law discussion groups and MMT literature discussed in flagship journals like the Leiden Journal of International Law? The scene just feels different than even five years ago; so we are back to our original question, why now? The explanation requires we briefly take a closer look at the contemporary sociology of the international law field, and which helps us begin to unpack what a meaningful relationship might look like moving forward.[9]

The current field of critical international law academics are comprised of a relatively narrow set of institutional, intellectual and intergenerational characteristics. Depending on one's vantage point, the field simultaneously represents a relatively homologous theoretical edifice and exhibits a distinctly WASP-y inclination toward sublimated but regular splintering into new enclaves. On one end of the spectrum are international law academics in their 60s and 70s: Phillip Allott (retired from University of Cambridge), Antony Carty (teaching in China), James Crawford (retired from University of Cambridge and now an ICJ judge), David Kennedy (teaching at Harvard Law School), and Martti Koskenniemi (semi-retired from University of Helsinki). Crawford and Koskenniemi previously ran prestigious international law centres in the UK and Europe, Kennedy is currently the director of the Institute for Global Law and Policy (IGLP). All three men, in various ways, have served to create hubs for hundreds if not thousands of emerging and established scholars to spend time together and train in carefully curated interpretative perspectives and codes of professional good behaviour. While academics, all of these men have also practiced law, primarily in various diplomatic roles and have varying degrees of strong ties to European culture and non-legal intellectual traditions.

In the middle generation, are academic scholars in their late 40s to early 60s, most of whom have a strong connection with Harvard Law School, either having studied there in the 80s and 90s or becoming affiliated with its research activities from abroad in the early 21st century. A few in this cohort have been successful in founding new theoretical enclaves (e.g., Antony Anghie and Third World Approaches to International Law) or (at least for a period of time) creating departments friendly to critical traditions and producing new generations of scholars (e.g., American University of Cairo, London's LSE and SOAS, Northeastern, Sciences Po, University of Melbourne, and University of Toronto), while others have made successful careers as academics at mid-to-top tier law schools within (primarily the Eastern seaboard of) the United States.

At the other end of the spectrum are scholars in their 30s to mid-40s, usually with direct links to the IGLP but less frequently with Harvard degrees and whom now work primarily in

[9] See e.g., Akbar Rasulov (2012), 'New Approaches to International Law: Images of a Genealogy', in Jose Maria Beneyto and David Kennedy (eds.), *New Approaches to International Law: The European and the American Experiences*, TMC Asser Press, p. 151.

Australia, Canada, Europe and the UK. Among the middle and younger tier of academics, the cohort is significantly more likely to have spent the majority of their career solely in academia without government or private sector experience.

The more senior generation of scholars came of professional age in the 1970s and early 80s. This was an era marked by the collapse of left wing movements at home and abroad and a subsequent retreat from collective political action into cultural representation and identity rights (e.g., cultural New Left), a disenchantment with political metanarratives and strong ideological commitment (e.g., Marxism), a wariness toward establishment authority (Nixon, Vietnam), an interest in European linguistic-oriented theories (e.g., Frankfurt School, structuralism and post-structuralism), and within law schools, a general dislike of the neo-formalism of an older generation of law teachers whose ideas of law seemed at once intellectual unsophisticated (e.g., overly deductive) and all too often involved a "morally delicate refusal to respond to the call for justice" and to "depoliticize the drama" of the era.[10] Probably the most visible expression of this sensibility was what became known as the 'critical legal studies' movement, primarily based at Harvard Law School, which rose to national attention in the late 70s and early 80s, fuelled by a crew of young (primarily white upper-middle class male) scholars with prestigious pedigrees willing to disrupt the internal operations of the established curriculum, hiring processes and industry get-togethers, as well as cast dispersion on the intellectual merit and political commitments of their peers.[11] By the mid-80s the movement was on the wane due to a combination of internal and external pressures: internally, its inability to mesh with critical race studies and feminist legal theory, and externally, a concerted effort by US law schools to stigmatise scholars as nihilistic and to deny tenure or positions to anyone closely associated. To survive, one would shift gaze from the inner politics of the academy to focus on safer external topics – courts, legislatures, and of course, international law. And it was exactly in this moment and its aftermath that the international law cohort from the middle-generation were entering adulthood and coming to Harvard. If one was not caught up in the Manhattan death march of the Reagan era (graduate Harvard, make partner at a Manhattan firm, retire in the Hamptons) and felt the heady excitement of world affairs with the collapse of the Cold War and the rise of human rights, or if one wanted to come to study in the US and found the newly inaugurated postgraduate degrees within the US law schools open to foreign candidates, studying at Harvard toward a career in international law could be a very attractive option.[12] But importantly, for our story, this was largely an orientation toward public international law and framing inequality in terms of cultural and identity – and all with the aim not to go into the administrative bureaucracies of the government (wasn't that exactly what was wrong with the Soviet experience), but to join NGOs, advise governments, and travel the world as an intellectual. In short, to be part of the new management class assessing political risks through the prism of law with a cosmopolitan (interdisciplinary) sensibility. In this world view, economists were the enemy: either the handmaidens of Reagan/Thatcher or the accountants within human resources pushing monotonous audits and paperwork.[13]

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[10] See Duncan Kennedy (2001), 'Legal Formalism', in Neil Smelser and Paul Baltes (eds.), *Encyclopedia of the Social and Behavioral Sciences*, Elsevier, p. 8634.

[11] See Gerald Clark (1994), 'A Conversation with Duncan Kennedy', *theAdvocate: The Suffolk University Law School Journal* (24:2) 55; Duncan Kennedy and Karl E. Klare (1984), 'A Bibliography of Critical Legal Studies', *Yale Law Journal* (94) 461.

[12] See David Kennedy (2000), 'When Renewal Repeats: Thinking Against the Box', *New York University Journal of International Law and Politics* (32:2) 335.

[13] A separate strand of international legal theorists in the UK also branded as 'Critical Legal Studies' developed in the 1990s, with a much more post-modern streak (e.g., Derrida) and graduate school orientation that did not engage

By the 2000s, however, the younger generation of public international law scholars within the critical tradition were responding to a very different set of anxieties and influences, even while being steeped in the existing literature and continuing to often express an aesthetic more akin a graduate student than a big firm attorney or state department official. This was a generation attracted to international law in response to the War on Terror and coming into academic adulthood in the midst of the Seattle protests against globalisation and the financial crisis beginning in 2007 (and often with less financial entitlement). And, if the international law academy was slow on the uptake, other legal and non-law academic cohorts were now fast retraining their gaze to 'the question of capitalism'. As the older generation of international lawyers began to return to classical political economy texts within the left-of-liberal tradition (e.g., Polanyi, Weber) and American Legal Realism (e.g., Hale, Hohfeld), an eclectic dispersion of group affinities emerged within the younger generations of international law academics and more broadly across generations within the legal academy, keen to understand how the financial system could be simultaneously so unequal, fragile and entrenched.[14] For some, especially trained in Australia, Canada and the UK, Marxist political philosophy and Marx's economic texts were a source of inspiration.[15] For a larger cohort, the action was in understanding international trade law and, in more recent years, international investment regimes.[16] Many colleagues began to follow economic histories of thought to try and understand how the welfare state, labour gains and the decolonization movement all seemed so distant. Law was part of the story, but the action seemed to be with the right wing economists who had seized power. At an intellectual and organisational level, how had they been so successful? And while critique was important, the stakes seemed too high for some aesthetic resistance or permanent heterodoxy; the chaos of the world – of losing one's mortgage, one's job, one's health care, watching one's society disintegrate – all felt on our doorsteps. The tragedy of international law abroad was now an immanent domestic reality. And so, international law academics began returning to economic theories that might offer answers and found that their fellow legal academics outside international law were doing something similar. Over the last five years, loose networks of legal scholars keen to understand the nuts and bolts of capitalism began to emerge.[17] And at the centre of this inquiry was the question of how to understand the heart of capitalism, the logic of its markets – in short, the world of accounting and finance, the people who designed and dealt in money.

A Common Problem

Despite the fact that these economic and international law families do not have a long history together, at the most general level they share some important predispositions: engaged in myth-busting supposedly 'natural' private-oriented barriers to advocate collective political decision-making, inclined toward anti-formalist and qualified functionalism, and finding inspiration in 'forgotten' intellectual traditions.[18] At the heart of their comradery is a common

economic aspects of governance. See Costas Douzinas (2014), 'A Short History of the British Critical Legal Conference or, the Responsibility of the Critic', *Law and Critique* (25) 187.

[14] See e.g., Ugo Mattei and John D. Haskell (eds.)(2015), *Research Handbook on Political Economy and Law*, Edward Elgar.

[15] See *Legal Form: A Forum for Marxist Analysis of Law*, accessed 1 December 2020 at https://legalform.blog/.

[16] See e.g., John D. Haskell and Akbar Rasulov (eds.)(2020), *New Voices and New Perspectives in International Economy Law*, Springer.

[17] Some of the more exciting forums of recent years, the Association for the Promotion of Political Economy and Law (APPEAL), JustMoney project, Law and Political Economy project (LPE), Summer Academy on Law, Money and Technology, as well as slightly older efforts, such as the Institute for Global Law and Policy (IGLP) and the Institute for New Economic Thinking Young Scholars Initiative (INET YSI).

[18] Within MMT, insights are primarily resuscitating a mix of forgotten economic traditions - Lerner's Functional Finance, Innes' Credit Theory, Knapp's State Theory of Money, Ingham's sociology, Godley's Sectoral Balance

stance against the reigning orthodoxy, to which we now turn. While it is common, at least within the Western experience, to view international law as a relatively progressive set of social and political agendas, its historical and mainstream presence seeks to cement a world order deeply hostile to democratic control.[19]

Conventional accounts in economics and international law subscribe to naturalist accounts of human behaviour and organisation, designating actors, fields and objects to either the realm of deliberate political governance or decentralised private coordination. In the literature, this is often framed as a discussion over the proper allocation of decision making between top down control-command planning (state; political) and more spontaneous bottom up ordering (individual; market). Here, for example, is how a leading scholar writing on global law and economic governance describes the field of choices for countries:

> "Central Planning is a way of making law, as well as commodities… [T]o possess this power [to allocate resources], the orders issued by planning officials at the top must trump the rights of property and contract enjoyed by people and enterprises at the bottom. Thus, public law crowds out private law… An advanced economy involves the production of too many commodities for anyone to manage or regulate... [E]fficiency demands more decentralised lawmaking, not less."[20]

At least two (interrelated) claims are visible: a quasi-normative statement about how life should be organised and a slightly more descriptive statement about how the world actually works. On this first claim, the implicit progress narrative is often drawn out in stark terms, invoking the possibility that nothing less than democracy, human rights, and peaceful relations between nations hang in the balance. "Questions of legitimacy loom large; today there is often a focus on 'democratic legitimization'," explains the late John Jackson (a household name in international economic law circles), "[S]overeignty is gravitating away from ideas of 'sovereignty for the benefit of the nation-state' and toward ideas of 'sovereignty' of the people."[21] Such a commitment requires, in the eyes of the international economic law regimes, an "ever-thickening network of commercial treaties"[22] and constitutional protections that allow for a "liberal trading system" that "reallocate[es]… government powers to democratic people, indigenous people, international organisations and individual human beings as legal subjects of inalienable human rights" – a "normative individualism" that stretches "across frontiers in a globally integrated world."[23] In keeping with the 1980s human resources mantra that there is no difference between the interests

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analysis, and a mix of Keynes and other post-Keynesian economic thought (e.g., Minsky) - and targeted to replace supply side, naturalist theories of money and markets and the belief that there is an inherent tension between full employment and price stability (e.g., Milton Friedman, NAIRU). See L. Randall Wray, 'From the State Theory of Money to Modern Money Theory: An Alternative to Economic Orthodoxy' (2014), *Levy Economics Institute Working Paper* No. 792.

[19] See Antony Anghie (2005), *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press; see John D. Haskell (forthcoming 2021), 'A Case in the Politics of Form: Yearbooks of International Law', *Netherlands Yearbook of International Law* 2019 (50) 21.

[20] Robert Cooter (1994), 'Structural Adjudication in the New Law Merchant: A Model of Decentralized Law', *International Review of Law and* Economics (14) 215, 215-16.

[21] John Jackson (2008), 'Sovereignty: Outdated Concept or New Approaches', in Wenhua Shah, Penelope Simons and Dalvinder Singh (eds), *Redefining Sovereignty in International Economic Law*, Hart Publishing, p. 12.

[22] Stephen Neff (1990), *Friends but no Allies: Economic Liberalism and the Law of Nations*, Columbia University Press, p. 45.

[23] Ernst-Ulrich Petersmann, 'State Sovereignty, Popular Sovereignty and Individual Sovereignty: From constitutional Nationalism to Multilevel Constitutionalism in International Economic Law?', in Shah et al., supra note 21, at 28, 35.

of the capitalist and their labour force, all non-state actors (whether day labourer or multinational corporation) are included under this imagined individual persona, what the former president of the World Bank would declare as "perhaps the last real chance to build a world order that is less coercive than what is offered by the nation-state."[24]

The second (related) claim is that this de-escalation of state sovereignty in the interests of a decentralised international marketplace is not simply closer to the arc of freedom and justice, but that it conforms to the actual practices and rules of human and social life. In this line of argument, the development of state practice and international law is regularly depicted as originating in interpersonal commercial relationships that slowly standardised into merchant customs to culminate in formalised legal rules and treaties of both private law and public statecraft. "The law of nations is but private law writ large," writes one of the founders of modern international law, Sir Thomas Holland, the sum of "legal ideas which were originally applied to the relations of individuals."[25] "In public as in private law a contract is the law as between the parties to it," explains Georges Scelle, sitting on the UN International Law Commission, and this law of contract is not only "the foundation of all rules of formal compacts, but the primordial law of all social organization."[26] Freedom is depoliticised, flattened, individualised, moralised, and made transactional.[27] International law collapses into commercial practice, which is verified through the historical record to take on a transcendental quality of universal common sense that erases the distinctions between states and individuals and subjects them to common restraints:

> "[T]o put different standards of morality for individuals… of a corporation or of a state, is destructive both of those moral standards and of the legal values of principles which are derived from them. The moral responsibility of states is co-extensive with the moral responsibility of their citizens… It is a moral responsibility of men… [I]t takes sometimes years, or centuries, of wars and waste to give to an obvious principle of common sense the authority of a rule of law… Private law supplies its formulation, its definite shape, its justification in the world of experience… as a source of legal reason… Those general principles [of international law]… [are] built upon experience and upon infinite intellectual labour…"[28]

These claims have specific and far-reaching consequences for how orthodox legal thought and institutions anticipate interstate affairs. Since states are just another market actors in a decentralised world of competing interests over limited resources, international legal arrangements are simply a veil over self-interest maximizing economic activity. "[Using] simple game theoretical concepts… [demonstrates that states] do not comply with [customary international law] because of a sense of moral or legal obligation; rather, CIL emerges from the states' pursuit of… (usually

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[24] Neff, supra note 22, at 201.
[25] Thomas Holland (1898), *Studies in International Law*, Clarendon Press, p. 152.
[26] Georges Scelle (1911), 'Studies on the Eastern Question', *American Journal of International Law* (5:1) 144, 174.
[27] "The people of today cannot dwell in isolation linked as life is to the common cause of human progress… [E]arthly civilization becomes universal, demanding that each and every people in the world share in its benefits… [and] a higher estimate is put upon the life of man … [so] that tranquility becomes more valuable in the world, its rule controls as a supreme necessity, as the greatest of all blessings… the immovable basis of national autonomy." J.B. Scott (1908), 'The Central American Peace Conference of 1907', *American Journal of International* Law (2:1) 121, 130-31.
[28] Hersh Lauterpacht (1926), *Private law analogies in international law*, PhD Thesis, London School of Economics, p. 61-65.

short-term)… self-interested policies on the international stage."[29] Of course, it may be that in particular instances a state may lean altruistic, but because the entire international legal order is exogenous to private market dynamics, the efforts of populations to exercise sovereignty over market functions is doomed to fail – especially in relation to how the government chooses to generate and spend money. "When analysing the proper role of law… it is easy to fall into a moral trap and to justify any of the arguments based on abstract social values. [We] must avoid this trap, and rather choose… the pure logic of efficiency and stability."[30]

What this means in practice is that government must relinquish its control over market functions and aspirations for its populations in order to service the business world. "[I]n market economies no government has the power actually to guarantee everyone a job," writes LSE professor of commercial law, Hugh Collins, "Governments lack the levers to manage the economy… The system also discourage[s] capital investment since there [would be] a surplus of cheap labour… retained even if it could be replaced efficiently by mechanisation and computerisation."[31] To the extent that government retains a purpose, its competency will now be judged solely on its success protecting the ecosystem for investment (more on this in a minute). But this claim itself belies a more fundamental position that hinges on our understanding of the nature and function of money itself, of which investment is so fundamentally tied. After all, the Permanent Court of International Justice declared as far back as 1929 that "[I]t is indeed a generally accepted principle that a state is entitled to regulate its own currency."[32] Why does a state need to encourage capital investment if it ultimately controls the purse? What stops the government from driving money towards those "social values" (e.g., full employment, health care, housing) for its populations, regardless of foreign investment's priorities?

The reservation to state control over its printing press goes back to the depiction of states (and law) as exogenous to market interaction. Just as the laws of contract and "private law writ large," the advent of money among international law scholars is also situated within a "primordial" organisation of barter and exchange. "Money has become the main instrumentality of legal transactions since man has advanced beyond the barter economy," explains the prominent 20th century international law jurist Arthur Nussbaum, and as such, grounded in the "attitude of society, as distinguished from [the] state" and "subject to the economic law of supply and demand… the fiat of the lawgiver is not the essence of money and cannot ultimately determine its value."[33] This valuation is manifest not in law, but monetary prices, which are both input and output of the global marketplace that acts as a sort of computer processor or clearing house of all human interaction

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[29] Eric Posner and Jack Goldsmith (1999), 'A Theory of Customary International Law', *University of Chicago Law Review* (66) 1113, 1114-5, 1148.

[30] Federico Lupo-Pasini (2017), 'Financial Stability in International Law', *Melbourne Journal of International Law* (18:1) 45, 66.

[31] Hugh Collins, (2015) 'Is there a Human Right to Work?', in Virginia Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives*, Hart Publishing, pp. 17, 25. For an overview of existing international legislation and legal interpretation around the right to work, concluding that the field is plagued by orthodox economic thought, see Raul Carrillo (forthcoming 2021), 'Labor', in John D. Haskell and Jean d'Aspremont (eds), *Tipping Points in International Law: Commitment and Critique*, Cambridge University Press. Employment/labour legislation tends to be interpreted to only provide negative rights and full employment language is depicted as aspirational. See Gary Mundlak (2008), 'The right to work: Linking human rights and employment policy', *International Labour Review* (146:3-4) 189.

[32] *Case concerning the Payment of Various Serbian Loans Issued in France*, Permanent Court of International Justice (PCIJ), Judgement No.14, 1929. For an example of how this sovereign prerogative is qualified, see Rosa Lastra (2015), *International Financial and Monetary Law*, Oxford University Press, pp. 17-18.

[33] Arthur Nussbaum (1939), *Money in the Law*, Foundation Press, pp. 4, 10, 22.

over scarce resources.[34] "A far-reaching international division of labour among billions of people is possible only by relying, to a large extent, on the information conveyed by spontaneous market prices (as a cybernetic feedback mechanism) and on the free efforts of millions of people guided by general framework rules of private and public national and international law."[35] The "temptation to print money to finance government expenses" would distort these information signals and lead to economic, and by extension, social disruption.[36] To avoid this "abuse of sovereignty," therefore, the ruling orthodoxy within global governance holds that states and international institutions must "depoliticise the management of money."[37] In this worldview, the state's options are constrained to raise taxes, borrow from creditors or attract investors (the latter methods mitigating against tax hikes) – in short, to facilitate long term institutionalised programmes that attract private finance and prevent what might be perceived as risky or unsustainable private sector liabilities.[38] As merely one of many institutional players in a global marketplace that transcends political space and time, the core constituency of the state, in other words, is not its population per se but future returns on capital itself, and by extension those captains of industry and finance that represent its flows.[39] It is this ideational climate that gives reason to awards whereby, even in the face of "financial meltdown" and "circumstances of public emergency", states bear an "objective responsibility" to "ensure a stable and predictable business environment for foreign investors" and provide compensation that would preserve such a climate to attract foreign capital in the future.[40] When the language is not pragmatic in tone, it can oscillate between a misplaced, almost righteous elevation of capital to the level of human rights or refugee law,[41] and downright racialized rhetoric reminiscent of formal colonialism.[42] The goal for law and politics, at the international level, is front and centre to minimise risk of domestic societies asserting themselves at the expense of investor ambition.

A Happy Union?

Most of the challenges to the orthodoxies of global governance levelled by critical traditions in international law begin with a claim shared by Modern Money Theory: "[T]he economy is always embedded in the social organization as a whole, affecting and affected by

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[34] "We recall that the term 'prevailing market conditions' … describes the generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market practice." Appellate Body Report, US-Carbon Steel (India) Case, quoted and discussed in Andrew Lang (2019), 'Heterodox Markets and "Market Distortions" in the Global Trading System', *Journal of International Economic Law* (22:2) 677, 714.

[35] Ernst-Ulrich Petersmann (1991), *Constitutional Functions and Constitutional Problems*, Routledge, p. 16. For an intellectual history contextualising this position, see Slobodian, supra note 3, 218-62.

[36] Lastra, supra note 31, at 32.

[37] Ibid.

[38] See Stephanie Blackenburg and Richard Kozul Wright (2016), 'Sovereign Debt Restructurings in the Contemporary Global Economy: The UNCTAD Approach', *Yale Journal of International Law* (41:2) 1, 2.

[39] For extensive discussion around these attitudes in international investment law, see Kate Miles (2013), *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital*, Cambridge University Press.

[40] Gus Van Harten (2008), *Investment Treaty Arbitration and Public Law*, Oxford University Press, pp. 93-94.

[41] In the post-World War Two era, international economic law protection of capital would be depicted as protecting refugees, the idea that money should be safe and free to travel, just like people. For a discussion of 'refugee money', see Slobodian, supra note 3, 140-161.

[42] "The state that refuses to contract" out its services today in this manner is, within the standing regime, "regarded as the equivalent of the light-headed juvenile who needs protection from its own foolhardy actions" and instruction in order to assume that "degree of maturity, self- and externally anchored discipline" required of the "21st century version of the 19th century club of 'civilised nations'…" Todd Weiler and Thomas Walde (2004), 'Investment Arbitration under the Energy Charter Treaty in the Light of New NAFTA Precedents: Towards a Global Code of Conduct for Economic Regulation', *Transnational Dispute Management* (1) 1, 4.

culture, politics and social institutions."[43] To put this in legal jargon: any supposedly individual, private economic phenomena (e.g., contracts, prices) always takes place against institutionalised background rules that arrange the distribution of entitlements, assign value, and influence behaviour in society.[44] "All prices are bargained in the shadow of the law and reflect the respective legal ability of different parties to mobilize the state for or against their economic interests."[45] These background rules are the result of struggle between different interests, but it is exactly these political dynamics that are engineered out of consideration through economic and legal fictions, such as the principle of formally equal at-will bargaining.[46] The scandal is not that coercion exists (politics, like ideology, is inescapable), but that the existing regime and its canonical lexicon is deeply undemocratic and results in gross inequalities – and that it could be otherwise.[47] The disagreement between more orthodox stances and these more critical voices in international law (and MMT) is not only about the dynamics of organisational change and design, but a deeply philosophical question about the capacity of collective human nature in relation to its environment: the former ascribing to a latent transcendentalism that hopes to read the tea leaves of the market and ride the wave of infinite complexity, while the latter embodying a modernist refusal to accept

[43] Randall Wray (2012), *Modern Money Theory: A Primer on Macroeconomics for Sovereign Monetary Systems*, Palgrave Macmillan, p. 197.

[44] Much of the critical legal literature of the last few decades, I think, analytically echoes (implicitly or directly) arguments raised by American Legal Realist scholars in the 1920s and 30s – in particular, Robert Hale's 1923 text, 'Coercion and Distribution in a Supposedly Non-Coercive State', see supra note 1. For a discussion of the American Legal Realist tradition, see William Fisher III, Morton Horwitz and Thomas Reed (eds)(1995), *American Legal Realism*, Oxford University Press. Too often, I think, the observation that the 'private' is a construction of the 'public', or that everything is ultimately contingent and political, is presented as a conclusion rather than a starting off point.

[45] David Kennedy (2011), 'Some Caution about Property Rights as a Recipe for Economic Development', *Accounting, Economics, and Law* (1:1) 21. "[C]ollective, organizational decisions play a central role in manufacturing and moving prices. Examples of the impact of public decisions on the price system range from the obvious to the more subtle, but most are straightforward enough to mention here without detailed elaboration. On the obvious side, public employment and procurement effectively benchmark prices for some of the most important goods and services in the putatively privately ordered economy. Similarly, changing background rules make all the difference in pricing many of the most important market interactions. It is hard to imagine pricing pharmaceuticals without patent law; impossible to make sense of real estate prices without local zoning ordinances; incoherent to consider the price of medical care without insurance law." Robert Hockett and Roy Kreitner (2018), 'Just Prices'*, Cornell Journal of Law and Public Policy* (27) 771, 783. The decisive factor between what is a regular or distorted market activity comes down to the assumption of what counts as normal market operations and the legitimate institutional competency of the state – and when this is turned over to investors, the scope of public sovereignty shrinks. See Lang, supra note 34, 689-697.

[46] The straightforward critique here is that the parties do not actually occupy equal bargaining positions due to other implicated rights allocations (e.g., labour, property). But the formal rhetorical economy of the profession is clever and actually offers up multiple solutions to mute this critique: for instance, procedural formalism sets out general criteria that help verify the aims of the parties and which should be interpreted in light of equity, good faith, reasonableness, and so forth. The role of the judge in this instance is to exercise discretion, interpreted as the (ever-evolving) enlightened 'common sense' of the profession(think Dworkin). To challenge the capacity of the law to exercise this discretion as political biased merely reinstates the initial problem. If the critique is that this bias is not endemic, then on is sent back to reform the very same formal procedural standards and interpretative protocols with the aim to again 'read out politics'. Or, if the critique is that there is no unbiased interpretative standpoint, then one is left either justifying the function of law or falling back on claims that in the event of strong disagreement there are some overarching deductive principles or process that allows for the right commitments to be determinative. Once we enter the game of domestic or international contract law, it is difficult to stop playing versions of privity. For a general discussion moving in this direction, see Akbar Rasulov (2014), 'Theorizing treaties: the consequences of the contractual analogy', in Christian Tams, Antonios Tzanakopoulos, and Andreas Zimmerman (eds.), *Research Handbook on the Law of Treaties*, Edward Elgar, p.74.

[47] See Roberto Mangabeira Unger (2004), *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy*, Verso.

a politics of deferral and holding to a belief that technical skill and collective political will can move most mountains[48] – at least within the ecological constraints of the planet.[49]

There are also distinct blind spots and insights to each of these critical economic and law traditions that suggest productive collaboration. Perhaps the most pronounced omissions within international law is that - for all its analytical rigour to displace the neo-formalist market fundamentalism within international legal regimes and instil a nuanced sensibility to the indeterminacy of legal reasoning and a commitment to a more democratic and equal global political economy through some form of more activist development state - authors rarely challenge the orthodox characterisation of money itself as a creature of the economy.[50] This might simply be that the disciplinary sensibility within international law at large is firmly oriented around viewing money explicitly as non-state, decentralised individual interaction and that the profession tends to tell stories about itself that are deeply oriented around relational exchange.[51] At the same time, this still seems a curious omission because other legal institutions – contract, property, rights – are so often common targets for demonstrating underlying distributive policy designs. Beyond criticising Bretton Wood institutions and foreign investors for harsh contractual clauses, the world of accounting and finance is more often than not kept out of the text. Most of the time, reading the literature, it feels as if money is simply an afterthought to resource allocation of existing capital, with capital contemplated in terms of natural resources (land, labour), fixed productive assets (factories), or possibly pre-accumulated wealth (which might be subject to redistribution or taxes).

The closest readers get to a direct attempt to analyse money as an institution is from a relatively small but vocal cohort of (usually public) international law academics that self-identify with some variety of Marxism. To recall, Marx speaks to the origins of money, that it "necessarily crystallizes out of the process of exchange, in which different products of labour are in fact equated with each other, and thus converted into commodities… [and in the] historical broadening and deepening of [this] phenomena… one particular commodity is transformed into money."[52] The process of commodification, of creating products to exchange for profit, is at odds with the promise of market society to maximize human desire and liberty. The purpose of labour is no longer based on the use of what is created but its pecuniary value on the market so that the commodity is internalised as if it has its own intrinsic value (e.g., a price) detached from the

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[48] For a meditation on the politics of deferral versus now, see David F. Noble (2005), *Beyond the Promised Land: The Movement and the Myth*, Between the Lines Press; John Haskell (2018), *Political Theology and International Law*, Brill, pp.76-81.

[49] See Cornelius Castoriadis (2003), *The Rising Tide of Insignificancy: The Big Sleep*, Liberty Press.

[50] Jakob Feinig (2018), 'Beyond Double Movement and Re-regulation: Polanyi, the Organized Denial of Money Politics, and the Promise of Democratization', *Sociological Theory* (36:1) 67. As intimated earlier in the text, the neglect with theorising money is possibly part of a broader discomfort about speaking to any systematic fiscal politics. Committed to demystification and wary of any totalising claims, many (especially post-liberal) legal academics simply bracket questions of how to speak about the system at large (at best, a hodgepodge of 'people with projects' that might be loosely identified as the 'status quo') and focus instead on mapping the conceptual legal vocabularies of their more conservative cohort or judicial decisions to demonstrate the impasse to any certainty of legal analysis or deductive reasoning from guiding principles. Speaking to 'capitalism' or getting too normative is just bad intellectual/professional form. See e.g., Duncan Kennedy (1985), 'The Role of Law in Economic Thought: Essays on the Fetishism of Commodities', *The American University Law Review* (34) 939, 995-1001.

[51] An orthodox version frames the history and ongoing tensions of international legal affairs as a problem of anarchy due to formally equal nation-states without any overarching authority, and falling back on the sanctity of consent and customary international norms. More critical traditions (e.g., TWAIL) highlight the cultural hegemony baked into the conceptual and institutional architecture of international law, but rather than move away from an exchange-theory of social order tend to reinstate its protocols albeit on more egalitarian, reflective terms.

[52] Karl Marx (1973), *Capital* Volume 1, Penguin, pp. 181-187.

labourer, their time, and the "links to family, land and community."[53] Society becomes increasingly alienated; the "sacred unity between man and nature" severed.[54] And in contrast to its promise of liberating humans, it takes on a rapacious "vampiric quality" by being "dead labour (i.e. accumulated surplus-value)… [that] lives only by sucking living labour, and lives the more, the more labour it sucks."[55]

The law is essential in these operations because the commodity mode of production presupposes the juridical concepts of private property and contract and a relational context where subjects understand each other as 'owners' (e.g., of labour, goods)[56] capable of entering into non-coercively negotiated reciprocal obligations (e.g., at-will contract).[57] International law plays an important historical and contemporary role in this story: the exchange of commodities, for Marx, only begins with external relations between bounded communities, which then through long custom of exchange becomes internalised as a social individuated process,[58] and it is international legal institutions and rules that are said to carry this market logic across the far-reaches of the globe "flattening out differences and reformulating state-society relations in a uniform way."[59] So, like their conservative peers, Marxist international law scholars see the commodity form (especially the money commodity) as a legal institution rising out of primordial exchange, and like their critical post-liberal counterparts, engage in an effort to demystify the claimed neutrality of market institutions with the twist that money itself is not ancillary but a core legal mechanism to how exploitation operates in the political economy of contemporary global governance. In this story, finance capital represents the apex of capitalist development, possessing a "magic quality" that "sells what are pieces of paper to make money generating bubbles of growth 'out of nothing'" to the detriment of "spaces for politics" that are "collective, but not state-centered, private but not profit-oriented… solidarity-oriented."[60] Money both enables and masks capitalist exploitation, the mother and handmaiden to the transnational capitalist class.

MMT flips this account to position money as a core legal institution for democratic planning and an essential analytical window into understanding the nature of global capitalism.[61]

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[53] Ntina Tzouvala (2020), *Capitalism as Civilization: A History of International Law*, Cambridge University Press, pp. 22-26.

[54] B.S. Chimni, (2012), 'Capitalism, Imperialism, and International Law in the Twenty-First Century', *Oregon Review of International Law* (14) 17-46, 22.

[55] Susan Marks (2008), 'Exploitation as an international legal concept', in Susan Marks (ed.), *International Law on the Left: Re-examining Marxist Legacies*, Cambridge University Press, pp. 281, 285.

[56] "The guardians must therefore recognize each other as owners of private property. This juridical relation, whose form is the contract, whether as part of a developed legal system or not, is a relation between two wills which mirrors the economic relation." Marx, supra note 49, 178. For an elaboration of this theme, see China Mieville (2004), *Between Equal Rights: A Marxist Theory of International Law*, Haymarket Books, p. 87.

[57] The law, in short, is part of the 'base', part of the fundamental DNA to power constellations in capitalist development and not an appendage or simple performing an ideological obfuscation. See Louise Althusser (2005), *For Marx*, Verso, pp. 49-128. This insight is not specific to the Marxist tradition. "Every expansion of power, whether economic or not, produces a certain justification. It requires a certain principle of legitimation, a whole inventory of legal concepts and formulas, of stock phrases and slogans that are not only 'ideological' simulations, and serve not only the purposes of propaganda, but are an indication of a simple truth: all human activity in some sense has an intellectual character, and politics, imperialistic as well as any other historically meaningful kind, is not essentially non-intellectual… there has never been an international law without such justifications." Carl Schmitt (2003), *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, Telos Press, p. 163.

[58] See Kennedy, supra note 1, 978.

[59] A. Claire Cutler (2014), 'New constitutionalism and the commodity form of global capitalism', in Stephen Gill and A. Claire Cutler (eds.), 'New Constitutionalism and World Order', Cambridge University Press, p. 45, 46.

[60] Chimni, supra note 46, 40.

[61] For a general discussion of the Marxist limitations to thinking about money, see Scott Ferguson (2018), *Declarations of Dependence: Money, Aesthetics, and the Politics of Care*, University of Nebraska Press, pp. 1-66. A number of progressive

First, MMT (and neo-chartalist approaches more generally) emphasises that money did not grow out of private exchange or commodity relations; rather, the reverse trajectory: first there was credit, then money tokens and finally barter.[62] And implicit with systems of credit and monies of account, centralised deliberate authority and enforcement are required for effective mass coordination.[63] The history (and actual architecture) of money, in other words, is ultimately collective rather than individual, public not private, and deeply political in the structuring and assignment of social organisation and value.[64] All of which should be familiar territory for critical international law scholars and provide a new inroad to debates over international economic law and the global architecture of development and trade. Suddenly capital and money markets are not simply reservoirs of investment grounded in accumulated private savings sui generis, with the role of international organisations and governance regimes tasked to facilitate the efficient and safe mediation of private creditors and public debtors. Instead, "[l]arge sovereign debt markets are effectively prerequisites to the emergence and sustenance of large private debt and equity markets" – not only because they create the demand, but because the private markets are themselves underwritten by the sovereign public's monetised full faith and credit.[65]

Second, to speak of public credit, intimates a revised definition of money, one that takes up a rather functionalist perspective (in the American Legal Realist tradition, we might think of this as "A thing is what it does").[66] While money is a bundle of functions, at its core it expresses a balance sheet operation representing a social credit(asset)-debt(liability) relation – or as MMT scholars sometimes describe it, money is an IOU that the state compels its constituencies to accept for settling obligations through its power to tax.[67] Unlike a household that maintains its budget as a currency-user, the state can exercise authority as a fiat currency issuer to run its economies with far greater policy space (as a principle: spending not savings drives economic growth) since its spending power is not reliant on pre-accumulated investment capital, but only its real resource constraints (e.g., agriculture, energy, labour).[68] For international lawyers, this is important because it reverses the claim that international law is hopelessly fragmented by private interests (since those

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legal scholars not necessarily associated directly with MMT share this insight into the constitutive role of money in society and its possible importance in future democratic planning. See e.g., Desan, supra note 1; Roy Kreitner (2015), 'Toward a Political Economy of Money', in Ugo Mattei and John D. Haskell (eds.), *Research Handbook on Political Economy and Law*, Edward Elgar, p. 7.

[62] See Pilkington, Philip (2011), 'What is Debt? An Interview with Economic Anthropologist David Graeber', accessed 1 December 2020 at https://www.nakedcapitalism.com/2011/08/what-is-debt-%e2%80%93-an-interview-with-economic-anthropologist-david-graeber.html.

[63] See A.M. Innes (1913), 'What is Money', *Banking Law Journal*.

[64] See e.g., Grey, supra note 1; Nathan Tankus (2020), *Notes on the Crises: The Pandemic-Induced Depression from a Monetary Political Economy perspective*, accessed 1 December 2020 at https://nathantankus.substack.com/.

[65] See Robert Hockett and Saule Omarova (2017), 'The Finance Franchise', *Cornell Law Review* (102) 1143-1218, 1163. Most of this private activity is also premised on investor activity with banks in security markets – again, the very stuff of the public-private finance franchise, and not some non-state market exchanges. The spectre of how we account for risk is important here. When financial markets disperse funds, they commonly seek a range of assurances, often in the form of approved collateral, to satisfy creditor 'exposure' concerns. At the international level, the 'collateral' often takes the form of the government contracting away the public constituency's right to legislate domestic regulation and design over all sorts of productive social life. But as with any collateral or initial investment decision, the valuation of its future potential earnings is always subject to unknowable contingency and simply stacking additional possible collateral does less to guard against insolvency than create the very conditions for instability to domino out of control. See Annalise Riles (2010), 'Collateral Expertise: Legal Knowledge in the Global Financial Markets', *Current Anthropology* (51:6) 795.

[66] Felix Cohen (1935), 'Transcendental Nonsense and the Functionalist Approach', *Columbia Law Review* (35:6) 809, 826.

[67] See L. Randall Wray (2010), 'Money', *Levy Economics Institute Working Paper* No. 647.

[68] See Stephanie Kelton (2020), *The Deficit Myth: Modern Monetary Theory and the Birth of the People's Economy*, Public Affairs, pp. 15-40.

private interests are literally reliant on the public purse) and opens the door for thinking concretely about new programmatic alternatives of international social reform that might counter today's orthodoxy.[69] In particular, MMT economists suggest a state-funded but administratively decentralised universal bottom-up job guarantee, which would act as an automatic fiscal stabiliser to allow for full employment and guard against inflation: when times are good, the private sector would scoop up labour; when times are poor, the guarantee would act as a safety net and ensure spending on necessities in the economy.[70] With spending overtly rooted in the public sovereign authority, the aims of finance are significantly more open to many of those progressive objectives that so often seem all-too-distant: addressing racial disparities and gender imbalances, institutionalising a care economy for the disabled and elderly, acclimating markets to real climate constraints, and so forth.

Thinking of money in terms of financial accounting, as a balance sheet operation, also helps us rethinking what we mean when we speak about capitalism. Rather than thinking of a real (production) versus fictional (speculative finance) economy, we could think of these dynamics as mutually reinforcing operations with the creation of value not in pre-accumulated wealth, nor labour, nor information and technology, but instead in capitalization: the assignment of pecuniary value to a legal asset in the present based on its expected future predicted earnings (discounted for replacement costs and other risks above the going interest rate).[71] The expansion of this process over all aspects of social life is the story of capital, and for too long, progressives have allowed the constellation of power in business and finance to exercise this sovereignty over (literally) our future. Capitalism is a real and extremely necessary - but not itself sufficient – explanation to confront the nature of our suffering. As international lawyers continue to turn toward 'political

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[69] See e.g., (2006) Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, A/CN.4/L.682; John Ruggie (2014), 'Global governance "New Governance Theory": Lessons from Business and Human Rights', *Global Governance* (20) 5-17; Peer Zumbansen (2010), 'Transnational Legal Pluralism', Transnational Legal Pluralism (10:2) 141-189. While often perceived as progressive intellectual efforts, most of the transnational literature relies on a deeply conservative set of tropes that discount political hierarchy and curtail democratic sovereignty through the state model. This should be troubling to international lawyers, whose bread and butter is tied not to the market, but ultimately to the state as the fiat enforcer and legislator of last resort. To reassert the public over the decentralised, privatised conceptions of expert rule is to augment legal cache in governance writ large.

[70] See e.g., Pavlina Tcherneva (2020), *The Case for a Job Guarantee*, Polity Press. The orthodoxy in the last few decades holds that private market actors should self-regulate their operations and the collective behaviour of their respective industries. The state should opt for a role of passive oversight rather than 'command-control' because it is subject to regulatory capture, it lacks sufficient expertise and information to direct economic activity, it deprives private actors the motivation to internalise the costs of regulatory compliance, and the preference for centralisation depresses competition and innovation. The MMT job guarantee proposal illuminates the fallacy of these justifications for privatizing market design and regulation. First, a country-wide effort can be centrally financed but implemented and overseen through a largely decentralised framework (e.g., localities determining the required jobs to prioritise). Second, as we have seen with the breakdown of union power and robust collective regulation, decentralisation/privatisation means an initial expansion of market actors, that in turn requires standardisation to efficiently manage diversification, and this standardisation then perversely actually cuts down on innovation – not only by increasingly bureaucratic one-size-fits-all guidelines and processes, but also especially amenable to consolidated industry interests capturing what will count as best interests, which themselves are rarely about destabilising existing markets as they are about entrenching and expanding existing market share and ensuring predictability. Third, as the last decade has demonstrated, the markets have been incapable of reading the situation on the ground nor adequately responding to market needs (e.g., creating jobs to fuel consumption), and when faced with insolvency, have been forced to turn overtly to the public purse. By saying the quiet part loud (the markets rely on the government backstop), the job guarantee actually directly cuts out the middle man (e.g., trickle-down economics) to explicitly insulate private markets from needing bailouts in the first place. And it is exactly these safety valves, these institutionalised backstops that allow for failure to not mean catastrophe – the very condition for true experimentation and innovation.

[71] See e.g., Jonathan Levy (2014), 'Accounting for Profit and the History of Capital', *Critical Historical Studies* (1:2) 171; Jonathan Nitzan and Shimshon Bichler (2009), *Capital as Power: A Study of Order and Creorder*, Routledge.

economy', these lines of thought offer new analytical sources for understanding what we talk about when we talk about capitalism.[72]

Collaboration also would allow critical legal scholars to inform MMT economists, especially when it comes to international law. First, much of the economic literature focuses on first-world domestic financial architectures to develop policy analysis. When transporting their insights to former colonial states with weaker international bargaining power, scholars often hold that the basic assumptions for great power countries hold true abroad so long as those weaker states are mindful of implementation challenges (e.g., small formal sectors may create difficulties collecting taxes) and preserve the policy space to implement various protectionist measures (e.g., tariffs, imports, capital and exchange controls).[73] A challenge with these prescriptions is that unless there is significant buy in from the ruling countries, current international investment and trade law is stacked again any systematic programme in this direction[74] and would likely result in costly and resource-time intensive adjudication,[75] state-imposed countermeasures and 'soft' diplomatic

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[72] In the progressive scholarly attention to capitalism and political economy, the intellectual villains are usually identified as cohorts of 20th century Anglo-American and European economists thought to have ushered in 'neoliberalism'. See e.g., Honor Brabazon (ed.)(2016), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project*, Routledge; Philip Mirowski and Dieter Plehwe (eds.)(2009), *The Road from Mont Pelerin: The Making of the Neoliberal Thought Collective*, Harvard University Press; Slobodian, supra note 3. Thinking of money as a balance sheet operation, however, expands our gaze in important methodological/theoretical and tactical respects. While economists are important to the story of conservative 20th century governance, the balance sheet is a tool of corporate accounting and financial technique: in short, the stuff of accountants, trained in business schools, and carried out through professional cadres trained in managerial studies. The history and theory of capitalism, especially in law, has almost completely avoided these fields of organisation and thought, at most disparaging bureaucracy in general. But bureaucracy in itself is not good or bad, just the stylised description of any routinized mechanisms in an organisation and more often than not a term of art to constrain the legitimacy of public governance. The point is not to expand the critique of bureaucracy to the private sector, but to stop operating within this mode of criticism. And to begin develop alternative accounting practices and new ways of reading value and time into our financial instruments. It is something ironic that Foucault, whom probably more than anyone highlighted the 'neoliberal' break from neoclassicism in economics, did not include those managerial cadres responsible for implementing the daily accounting and reporting (confessional) routines that would build the 21st century data panopticon.

[73] See e.g., Fadhel Kaboub, (2008) 'Elements of a Radical Counter-movement to Neoliberalism: Employment-led Development', *Review of Radical Political Philosophy* (40:3) 220-227; Kelton, supra note 60, 142-155; Wray, supra note 39, at 229-232. Sufficient skill capacities, necessary capital imports, and careful reform sequencing and mediation of informal/formal social domains all raise the possibility of reliance on external 'first world' expert regimes, which raises a host of problems that originate in wealthy countries and which would potentially have significant sway on reform efforts in former colonial countries.

[74] The disciplinary sensibility and institutional regime, as echoed directly in the language of bilateral investment treaties, is aimed to provide a "stable framework for [foreign] investment and maximum effective utilization of economic resources" in the home country. See Nicolas Perrone (2017), 'The Emerging Global Right to Investment: Understanding the Reasoning Behind Foreign Investor Rights', *Journal of International Dispute Settlement* (8:4) 673, 681. To secure these 'legitimate expectations' of the international business community, market distortions and barriers to trade have been significantly expanded to include a growing range of formerly basic government regulatory competencies. See Andrew Lang (2019), 'Heterodox markets and 'market distortions' in the global trading system', *Journal of International Economic Law* (22:4) 677. In practice, this means almost any regulation will be subject to compensation. See Miles (2013), supra note 39, pp. 75-77, 156-174.

[75] A trade dispute between Canada and the United States over lumber imports resulted in 6 different venues, which themselves lack hierarchy. "[These] international tribunals can present overlapping jurisdictional opportunities to aggressive disputants… [In this case, the claims] played out in the U.S. Court of International Trade, the Claims Court, the D.C. Circuit, special binational panels set up under Chapter 19 of the North American Free Trade Agreement (NAFTA), arbitrational tribunal set up under chapter 11 of that Agreement, and the Dispute Settlement Body of the World Trade Organization. After a new agreement between the two countries purported to settle all outstanding claims, later disputes went to the London Court of International Arbitration, a body that normally handles private commercial disputes." Paul Stephan (2011), 'Privatizing International Law', *Virginia Law Review* (97) 1573-1664, 1590-93.This forum shopping is particularly challenging in terms of time and resources for less wealthy countries. See Beth Simmons and Andrew Breidenbach (2011), 'The Empirical Turn in International Economic Law', *Minnesota Journal of International Law* (20:2) 198, 216. Investors are often resistant to restructuring debt and often willing to pursue even

pressure (e.g., embargos on necessary capital goods),[76] or even military intervention.[77] While various blocs might be established between former colonial states, the historical record indicates that these coordination efforts are usually unsustainable, whether due to external lobbying or different internal pressure points.[78] International law scholars working in development, investment and trade would be essential for beginning to think through the phasing and risk portfolios of different economic programmes to anticipate standing opportunities and downsides. At the end of the day, perhaps the pragmatic constraints of these development plans say less to their itinerary and more to the very hierarchies of political struggle in the world today – but even if correct as a matter of first principle, these anti-democratic legacies remembered by international legal scholars might suggest room for further reflection where to direct change and how it looks. The lesson of critical international law – that global governance reflects great power politics – is closely aligned to MMT's proposal that radical change must begin at the apex of these global hierarchies.

Second, critical traditions in international law have developed a rich literature of historical studies into the various methods the Anglo-American and European cultures have used to exercise control over countries abroad. Though this rule was often wrapped in racist prejudices, its visionaries and builders usually saw themselves as humanitarian reformers, seeking to better the moral and material well-being of disadvantaged people and bring them into regimes of abundance and affluence.[79] Only in hindsight, judged by the subsequent generations, do their projects appear biased and clumsy, if not anxiety ridden fever dreams that hid the dark sides to their virtue. Even more troubling in relation to proposals centred on universal job guarantees around a sovereign driving its fiat currency through tax obligations is that 19th century colonialism in Africa often sought to transform alternative cultural attitudes toward consumption, production and wealth specifically through coercively impose wage labour and taxation schemes.[80] Their motivations were often well-meaning, but they were also driven (implicitly and explicitly) by the concern that without

more unlikely claims. For instance, a dispute between Egypt and a French company, Veolia, that focused in part on the country's decision to raise wage standards (claimed to violate a stabilisation clause obligation) resulted in the claimant's losing, but only after more than 6 years litigation and somewhere between 8-30 million US dollars in costs. See Lacey Yong (June 2018), 'Veolia's claim against Egypt rubbished, as it turns focus to Italy', accessed 1 December 2020 at https://globalarbitrationreview.com/veolias-claim-against-egypt-rubbished-it-turns-focus-italy.

[76] Wealthy countries, such as the United States, regularly open international organisations to private lobby interests and influence private investment disputes. In a dispute between Exxon Mobile and Indonesia, for instance, the the company successfully lobbied for the US. State Department to halt the law suit. See e.g., Miles supra note 31, pp. 137-143. The substantive parameters in international contracts and the constitutional provision in international investment law are also regularly crafted in private law firms at the bequest of capital interests. See Katharina Pistor (2019), *The Code of Capital: How the Law Creates Wealth and Inequality*, Princeton University Press, pp. 132-145. A range of legal doctrines have also become entrenched in this field to provide significant leverage for wealthy investors and companies over former colonial countries: limited liability, separate legal personality, forum non-convenien (where only have to show potential alternative forum), comity, and so forth. See Miles, supra note 39, pp. 128-150.

[77] See James Thuo Gathii, (2009) 'War's Legacy in International Investment Law', *International Community Law Review* (11) 353.

[78] For studies into the efforts (and failures) of African, Central Asian, and Latin American states to collectively organise in the wake of decolonization, see chapters by Cyra Akila Choudhury, Julio Faundez, Priya Gupta, Liliana Obregon, Umut Ozsu, and Akbar Rasulov in Luis Eslava, Michael Fakhri, and Vasuki Nesiah (eds.)(2017), *Bandung, Global History and International Law: Critical Pasts and Pending Futures*, Cambridge University Press. The vagueness of the solidarity between countries was often its strength in uniting polities with very different economic and social vulnerabilities, but it also proved fragile to internal conflict between elites, private foreign investment coordination, and diplomatic and military pressure from powerful northern states. See Umut Ozsu, 'Let Us First Have Unity among Us', in Eslava et al. (eds), supra note 75, 293.

[79] See Nathaniel Berman (1999), 'In the Wake of Empire', *American university International Law Review* (14) 1515; Martti Koskenniemi, (2002), *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1872-1960*, Cambridge University Press.

[80] See Antony Anghie (2005), *Colonialism, Imperialism and the Making of International Law*, Cambridge University Press, pp. 115-195.

the markets and resources of the colonized populations, the living standards and economic project within the colonial powers' home countries would be substantially diminished.[81] To assist bringing countries out of poverty meant bureaucracies to extract and process data, to (often implicitly) steer reform through alliances with local stakeholders, to enforce coordination efforts with arms and diplomatic persuasion – in short, a subtle but real surveillance and disciplining apparatus that reshaped the life experiences and meaning of its local subjects to fit the utopian dreams of Western reformers.[82] These histories and the ongoing colonial legacies raise shadows that have not yet been sufficiently internalised within MMT scholarship.

Where do we go from here?

To date, progressive economists and international lawyers have only begun to engage in conversation. The last time they really came together in domestic affairs, it produced the most progressive governance for working families in modern history. But it also left out major sectors of the population (e.g., non-beige/pink people at home and in the peripheries)[83] and never realised any profound advance to workers' control over the work process or the social distribution of power and resources.[84] While it squeezed out the productivity gains for a Fordist model of white men in wealthy countries,[85] it never really got control over the design and focus of investment.[86] In hindsight, it offered a social compact that relied too heavily on economic growth at the cost of steep environmental degradation.[87] In the name of sensible reform and (justifiable) concern of authoritarian excess, it often compromised too much with power. Maybe that is always the limit

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[81] Ibid; Mathew Forstater, (2005) 'Taxation and Primitive Accumulation: The Case of Colonial Africa', in Paul Zarembka (ed), *The Capitalist State and Its Economy: Democracy in Socialism,* Emerald Group Publishing, p. 51. "[While the] conditions of paid labor are… not unattractive - good and prompt payment… the absence of any need for taking thought; and freedom from anxiety as to rainfall, locusts, and the other cares which beset the small farmer…", writes the British colonial administrator, Sir Frederick Lugard, "Our rule is not popular… They care less for our impartial justice than we like to think they do. It is at least arguable that they are not yet fitted for the full measure of individual liberty which has taken us centuries to evolve." And yet this century old rule was itself dependent on the productivity of the colonies. "It is no doubt that the control of the tropics, so far from being a charge on the British taxpayer, is to him a source of very great gain… [The] products of the tropics have raised the standard of comfort of the working man, added to the amenities of his life, and provided alike the raw materials on which industry and wealth of the community depends, and the market for manufactures which ensure employment… [T]he Empire… is the greatest engine of democracy the world has ever known… It has infected the whole world with liberty and democracy." Sir Frederick Lugard (1922), *The Dual Mandate in British Tropical Africa*, William Blackwood and Sons, pp.417-418, 608. While the foreign political rule of empire is not legitimate today, its logic remains at a functional level largely intact; remove the word 'empire' from the colonial language and the text mirrors the contemporary orthodoxy.

[82] Anghie, supra note 18. This is the current state of affairs, with international bodies such as the IMF exerting increasing 'transparent' oversight over domestic borrower accounts and scholars continuing to develop new means to shift scrutiny over state budgets to 'soft law' arbitral forums. See e.g., Michael Waibel (2007), 'Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E', *Leiden Journal of International Law* (20:3) 637-648. This is increasingly an explicit mandate for international financial and trade institutions.

[83] See Anne Orford (ed.)(2006), *International Law and Its Others*, Cambridge University Press; Sundhya Pahuja (2011), *Decolonising International Law: Development, Economic Growth and the Politics of Universality*, Cambridge University Press; Balakrishnan Rajagopal (2003), *International Law from Below: Development, Social Movements and Third World Resistance*, Cambridge University Press.

[84] See Karl Klare (1978), 'Judicial Deradicalisation of the Wagner Act and the Origins of Modern Legal Consciousness: 1937-1941', *Minnesota Law Review* (65) 265, 295-303.

[85] See Angela P. Harris (2017), 'Where is Race in Law and Political Economy?', accessed 1 December 2020 at https://lpeproject.org/blog/where-is-race-in-law-and-political-economy/?fbclid=IwAR36prLR6SlVx5B7PS2edtq_rfBuZxxr0Aq1_E43SH3E1-hpx2cVDACxXH0.

[86] See Jonathan Levy (5 February 2019), 'Instability and Inequality: American Capitalism after the Volcker Shock of 1980', Dartmouth College Political Economy Project, accessed 1 December 2020 at https://www.youtube.com/watch?v=h022h4dhXzc&t=1s.

[87] See Michael Galanis (2019), 'Growth and the Lost Legitimacy of Business Organisation: Time to Abandon Corporate Law Reform', *Journal of Corporate Law Studies* (20:2) 291.

of expert rule, that power never concedes anything without struggle and experts usually have too much too lose.[88] But then again, populist rule is ultimately driven by experts as well and there is no alternative to making political choices with technical considerations. Looking to our current situation, working together, scholars in modern money theory and critical traditions to international law seem to promise whole new vistas of progressive futures to our present.

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[88] This seems to me the implicit acknowledgment in much of David Kennedy's work; see e.g., David Kennedy (2004), *The Dark Sides of Virtue: Reassessing International Humanitarianism*, Princeton University Press.

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