

# A Journal of the Legal Left?

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In 2005, the editors of *Unbound: Harvard Journal of the Legal Left* began their new legal journal with a call to arms. On a campus where political discussion seldom strays beyond genuflection to the twin gods of neo-liberalism and a virtually sacred charter of 1787, editors sought to stake out a place for an explicitly Left politics, as distant from the pieties of liberalism as those of the Right. The journal was to provide a home for Left-legal intellectual discussion and ‘a forum for a new set of theories on the left’.<sup>1</sup>

Some ten years have passed since the journal’s first issue and it seems appropriate to reflect on how that project has taken shape and to take stock of the journal’s strengths, as well as its failures and shortcomings. The latter is perhaps the more important task: self-criticism has long been a valuable tradition of the critical Left, albeit one that does not always come easily. This short essay, then, I hope will be taken in the spirit with which it is intended: not as denunciation or angry philippic, but rather, in the traditional spirit of polemics, as spur to lively debate.

## I

What can one write of a journal as yet so short-lived? That such a journal exists at all might itself be worn as a badge of honour. The law school campus, for all its pretence to intellectual openness, is hardly a nurturing home for the Left. Even moderately critical interventions leave little imprint on *bien pensant* opinion, such is the hegemony of liberalism. This was already the situation faced by *Unbound*’s founding editors.

Arriving at law school with relatively intact political commitments—redistribution generally, peace, anti-racism and anti-sexism, etc.—we envisioned a campus dominated by corporatized peers eager only to make money, but we still expected a certain core group of comrades-in-arms. But again and again, during mixers on campus, we found self-defined ‘liberals’ taking political positions that reflected a sanitized, deradicalized, staid politics.<sup>2</sup>

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<sup>1</sup> Zinaida Miller and Brishen Rogers, ‘Radicalism and Responsibility: An Introduction to *Unbound*’ (2005) 1 *Unbound* i, ii.

<sup>2</sup> Miller and Rogers, ‘Radicalism and Responsibility’ ii.

Radicals lacked any sense of intellectual community. ‘Seeing that conservatives and progressives have both vibrant student organizations and active student-faculty collaboration through law reviews, we decided it was time for us to create our own,’ Zinaid Miller and Brishen Rogers explain in their introduction to *Unbound’s* first issue.<sup>3</sup> To Miller and Rogers’ credit, the journal has established itself as an important cynosure for Left activity at Harvard Law School. The value of *Unbound qua* activist organisation cannot be downplayed. Immanuel Wallerstein on the modern world system, Tariq Ali on US foreign policy and imperialism in the Hindu Kush, panel discussions on sex work, the financial crisis, the public interest establishment, and the Iraq war and imperialism: *Unbound* has provided an often singular voice of dissent from establishment culture. Intergenerational discussions on the nature of Left-legal scholarship and the history of Critical Legal Studies (CLS) have continued the journal’s mission of educating a new generation of Leftist law students. When financial crisis provided the rationale for a systematic attack on labor—in particular janitors, security guards, dining hall workers, librarians—*Unbound* partnered with other student groups to organise a ‘No Layoffs’ campaign, calling on the university to:

suspend layoffs and recall all workers, full-time and temporary, who lost their livelihoods due to budget cuts since October 2008; the President, the Corporation, and relevant administrators should meet with students and staff to discuss alternative solutions to layoffs; Harvard should ensure that its workers receive a living wage by not reducing their hours; Harvard should not ask its workers to assume an unsafe amount of additional work due to hiring freezes or layoffs. We demand that Harvard treat its workers with dignity and respect.<sup>4</sup>

The journal went so far as to vocally protest Harvard’s labor practices during the 2009 Commencement exercises and purchase a ‘No Layoffs’ advertisement on the *New York Times* website to coincide with the ceremony. The campaign was not merely symbolic: leading into Commencement, Harvard had set a target of a 30 to 40 per cent reduction in staffing levels for janitors, 35 of whom had been laid off prior to the graduation exercises; not a single janitor was laid off following the protests (although the university succeeded in dramatically cutting many workers’ hours).<sup>5</sup>

While such activities have been important contributions to campus politics, text is the lifeblood of an intellectual journal. Here too *Unbound* has distinguished itself from mainstream legal journals, welcoming precisely that scholarship unsettling to ‘black-letterism’ and legal orthodoxy. It has embraced the task of all serious Left-intellectual projects, what Marx described as ‘a ruthless criticism of all that exists,

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<sup>3</sup> Ibid.

<sup>4</sup> ‘Harvard can afford to save jobs, share sacrifices’, *The Record* (Cambridge, M.A. 30 April 2009).

<sup>5</sup> Thanks to Daniel Becker for the details on redundancies.

ruthless both in the sense of not being afraid of the results it arrives at and in the sense of being just as little afraid of conflict with the powers that be.”<sup>6</sup>

In *Unbound's* case, that criticism has been directed, in the first place, at legal education. In founding the journal as an explicit reaction to their own experiences of law school, *Unbound's* early editors established those very experiences as the defining problematic with which the journal has continued to grapple. Why is it, in Miller and Rogers' words, that so many students

who arrive with visions of using the law as a tool for social transformation become quickly disillusioned and pessimistic about the possibilities for change, eventually leaving with a diminished sense of agency and an undefined sense of loss for ideals that, in the context of an inflexible system, have come to seem naïve?<sup>7</sup>

*Unbound*, in short, was conceived, in part, as a vehicle through which editors could ‘articulate our discomfort with the law school experience.’<sup>8</sup> The law school and legal education has been one of *Unbound's* defining concerns; no single intellectual thread has been more continuous through its issues. This is to be valued, especially in an intellectual milieu in which pontification, not thoughtful critique, is the norm.

More broadly, targets of critique in *Unbound* have ranged from identity politics<sup>9</sup> to legal fetishism<sup>10</sup> to ‘absolutist claims about the rule of law’.<sup>11</sup> Authors have engaged with Wittgenstein and legal language,<sup>12</sup> immigration,<sup>13</sup> race,<sup>14</sup> and even taxation.<sup>15</sup> In recent issues, Dean Spade’s cautionary note to potential law students should be compulsory reading for all starry-eyed undergraduates enchanted with liberal lawyering.<sup>16</sup> Janet Halley continues her seminal work in family law.<sup>17</sup> Itamar Mann and Omer Shatz provide a timely intervention in the face of Israel’s institutionalized

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<sup>6</sup> Karl Marx, Letter to Ruge, September 1843  
<[http://www.marxists.org/archive/marx/works/1843/letters/43\\_09.htm](http://www.marxists.org/archive/marx/works/1843/letters/43_09.htm)>.

<sup>7</sup> Miller and Rogers, ‘Radicalism and Responsibility’ i.

<sup>8</sup> Ibid.

<sup>9</sup> Richard Thompson Ford, ‘Political Identity as Identity Politics’ (2005) 1 *Unbound* 53; Janet Halley, ‘The Politics of Injury: A Review of Robin West’s *Caring for Justice*’ (2005) 1 *Unbound* 65.

<sup>10</sup> Julieta Lemaitre, ‘Legal Fetishism at Home and Abroad’ (2007) 3 *Unbound* 6.

<sup>11</sup> Noa Ben-Asher, ‘Legal Holes’ (2009) 5 *Unbound* 1.

<sup>12</sup> Louis E. Wolcher, ‘How Legal Language Works’ (2006) 2 *Unbound* 91.

<sup>13</sup> Saskia Sassen, ‘The Limits of Power and the Complexity of Powerlessness: The Case of Immigration’ (2007) 3 *Unbound* 105.

<sup>14</sup> Samuel R. Sommers, ‘On Race, Judgment, and Ideology’ (2007) 3 *Unbound* 116.

<sup>15</sup> Anthony C. Infanti, ‘*Homo Sacer*, Homosexual: Some Thoughts on Waging Tax Guerrilla Warfare’ (2006) 2 *Unbound* 27.

<sup>16</sup> Dean Spade, ‘For those Considering Law School’ (2010) 6 *Unbound* 111.

<sup>17</sup> Janet Halley, ‘Behind the Law of Marriage (I): From Status/Contract to the Marriage System’ (2010) 6 *Unbound* 1.

practice of torture.<sup>18</sup> The symposium issue on *Local 1330, United Steel Workers v. U.S. Steel Corp* is a welcome reminder of labor's past battles.<sup>19</sup>

A survey of contributors also suggests an impressive generational sweep: established figures of the Left—Slavoj Žižek<sup>20</sup>—and legal Left—Duncan Kennedy,<sup>21</sup> Janet Halley,<sup>22</sup> Karl Klare<sup>23</sup>—but also young scholars, recent graduates and even students. The support from senior scholars willing to publish articles that would have found a home in more established journals is to be applauded. Halley, in particular, continues to publish major works of scholarship in what remains a largely unknown journal. Unfortunately, thematic and generational pluralism have not been accompanied by geographic diversity: contributors are overwhelmingly from the United States and many enjoy ties specifically with Harvard. A handful of contributors can be found on campuses in England or Canada, but of non-Western interventions little is to be found.

## II

Pluralism alone, of course, is no substitute for trenchant analysis or politically-engaged scholarship. If few authors have any truck with standard liberal pieties, their interventions nonetheless are often not easily identifiable with an explicitly Left politics, that is, one that seeks radical emancipatory change and the transformation of the juridico-political and economic structures of contemporary society. Such political confusion was already apparent at the journal's founding. As Miller and Rogers recall, while most colleagues and professors 'loved the idea of a "journal of the legal left" . . . nobody could say confidently what "the legal left" is or should be today.'<sup>24</sup> Moreover, the idea of an explicitly Leftist intellectual project was itself controversial: editors were divided over the inclusion of 'Left' in the journal's subtitle.<sup>25</sup> Some authors too appear uncomfortable identifying with the Left, their use of scare quotes—'left'; 'legal left'—providing an insight into their political ambivalence.<sup>26</sup> Indeed, characteristic of many interventions is an almost reflexive retreat into the comfortable terrain of reformist liberalism. One early contributor, Kristina Brittenham, thus writes:

I tell myself that my job next year at an entertainment litigation firm will train me to be a top-notch civil rights litigator someday. Plus, we

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<sup>18</sup> Itamar Mann and Omer Shatz, 'The Necessity Procedure: Laws of Torture in Israel and Beyond, 1987-2009' (2010) 6 *Unbound* 59.

<sup>19</sup> See Vol 7 (2011).

<sup>20</sup> Slavoj Žižek, 'Legal Luck' (2008) 4 *Unbound* 2.

<sup>21</sup> Duncan Kennedy, 'The Social Justice Element in Legal Education in the United States' (2005) 1 *Unbound* 93.

<sup>22</sup> Halley, 'Behind the Law of Marriage'; Halley, 'The Politics of Injury'.

<sup>23</sup> Karl Klare, 'Teaching Local 1330—Reflections on Critical Legal Pedagogy' (2011) 7 *Unbound* 58.

<sup>24</sup> Miller and Rogers, 'Radicalism and Responsibility' ii.

<sup>25</sup> Thanks to Janet Halley for bringing this to my attention.

<sup>26</sup> See for example Thomas M. Franck, 'Is Anything "Left" in International Law?' (2005) 1 *Unbound* 59; Sommers, 'On Race'.

represent artists as a general rule, not corporations, so I am not really working for The Man. I do love my firm—the people are smart and supportive, the work is challenging and fun—but it is a private firm that does excellent work in its field, not a hotbed of radical social change in the public sector. I may indeed take the skills I learn there and litigate the constitutionality of gay marriage all the way to the Supreme Court someday, but only a very weak thread connects these two versions of my life.<sup>27</sup>

Brittenham is quick to acknowledge the inherent conservatism of even the non-corporate law firm: if she is not ‘working for the Man’, she hardly finds herself in ‘a hotbed of radical social change’. But in what does such radicalism inhere? Alas, in this vision of a Leftist politics, the horizon of ‘radical social change’ is limited to litigating ‘the constitutionality of gay marriage’. Subaltern of the world unite, throw off your chains, and petition the Supreme Court for a writ of certiorari.

The sole contribution engaging with international law, by Thomas Franck, reflects a similarly atrophied notion of Left politics.<sup>28</sup> (The lacuna of international legal work is itself striking given that this has been one of the most fertile terrains of Left-legal criticism in the last decade.<sup>29</sup>) Franck is a one-time ad hoc judge in the International Court of Justice and a towering figure in U.S. international legal academia, but is hardly a figure of the Left, of which he is rather critical. The hallmark of the Left, for Franck, is an unhelpful deconstruction: of laws, legal regimes, and legal institutions. ‘[H]ow is one to defend the binding authority of international law if one has been insisting that the law and its institutions are but thinly-disguised stagings of raw political theatre’, he asks.<sup>30</sup> The task of the Left should be to defend the authority of international law; if it is to play any sort of constructive political role, it must abandon its critical stance. In the face of challenge to the sanctity of international law from the Right, ‘the correct tactic of the . . . left ought to be to defend embattled international institutions and law, with a vigor not at all debilitated by the law’s imperfections’.<sup>31</sup> The only tenable stance for the Left, in short, is to join international law’s liberal boosters. Of course, the signal achievement of Left critique of international law in the last two decades has been to show precisely the danger of liberal faith in international law as a

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<sup>27</sup> Kristina Brittenham, ‘In Pursuit of the Gold Star: Diary of a Law Student’ (2005) 1 *Unbound* 15, 19-20.

<sup>28</sup> Franck, ‘Is Anything “Left”’.

<sup>29</sup> See for example Susan Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology* (OUP, Oxford 2000); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, Cambridge 2004); China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Brill, Leiden 2005); Bill Bowring, *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics* (Routledge-Cavendish, New York 2008); Susan Marks (ed), *International Law on the Left: Re-examining Marxist Legacies* (CUP, Cambridge 2008); Robert Knox, ‘Strategy and Tactics’ (2010) 21 *Finnish Yearbook of International Law* 193.

<sup>30</sup> Franck, ‘Is Anything “Left”’ 62-63.

<sup>31</sup> *Ibid* 63.

necessarily progressive institution. Left scholarship has been at the vanguard of work shedding light, for instance, on the ways in which imperial power relations have structured, and continues to structure, international law.<sup>32</sup> And as China Miéville has shown in a trenchant analysis of the 2004 UN Security Council-backed occupation of Haiti, multilateralism and a commitment to international law is perfectly compatible with imperialism and state terror.<sup>33</sup>

One of the few occasions in *Unbound* where legal analysis is linked to a concrete political project is Anthony Infanti's call for 'tax guerrilla warfare'. A tax strike by lesbians and gay men, he argues, could serve to 'educate the masses about their tax grievances' and catalyse popular mobilisation behind *extra-legal* means to advance a political agenda so as to 'destabilize heterosexual privilege'.<sup>34</sup> For the most part, however, a haughty distance from the world of politics has been the journal's norm.

This perhaps has less to do with conscious reaction on the part of contributors as with the prominence of post-structuralist and post-modernist trends in the journal's pages: Foucault and Derrida are the recurring points of reference in *Unbound*, with a concomitant preoccupation with text, discourse and deconstruction. One consequence has been a slippage from considered reflexivity to simple naval gazing. If, as one author has it, '[n]o one person has access to a meta-view, or the Truth',<sup>35</sup> we are left with mere personal reflection on one's own subjective experience of lived reality. The journal's early volumes, in particular, seem to have invited an unfortunate degree of personal narrative and solipsism.<sup>36</sup>

If critical attention is deflected from concrete institutions with material effects, so too does such a view militate against any sustained critique of the systemic logics behind the violence, inequality and injustice of contemporary capitalist social relations. The elision of any engagement with the structural character and defining features of our present political-economic system—features, it goes without saying, in which law is deeply implicated—has, of course, immediate effects on political praxis. After all, if we are to believe *Unbound* contributor Kambiz Behi, 'the division between domination and resistance is illusory':<sup>37</sup> power is a mystical force, diffuse and immaterial; resistance is futile.<sup>38</sup> As Akbar Rasulov has written powerfully of the influence of post-structuralism on legal critique:

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<sup>32</sup> See for example Anghie, *Imperialism, Sovereignty and the Making of International Law*.

<sup>33</sup> China Miéville, 'Multilateralism as Terror: International Law, Haiti and Imperialism' (2008) 19 *Finnish Yearbook of International Law* 63.

<sup>34</sup> Infanti, '*Homo Sacer*' 50.

<sup>35</sup> Brittenham, 'In Pursuit of the Gold Star' 18.

<sup>36</sup> See for example Brittenham, 'In Pursuit of the Gold Star'; Jennie Lin, 'We Who Are About to Die?' (2005) 1 *Unbound* 105; Libby Adler 'Rage and Critique: One Jewish Girl's Story' (2005) 1 *Unbound* 1; Lemaitre, 'Legal Fetishism'.

<sup>37</sup> Kambiz Behi, 'The "Real" in Resistance: Transgression of Law as Ethical Act' (2008) 4 *Unbound* 30, 30.

<sup>38</sup> For a similar criticism of denials of any concentration of power in the global economy, see Ellen Meiksins Wood, 'A Manifesto for Global Capital?' in Gopal Balakrishnan (ed), *Debating Empire* (Verso, London 2003).

By romanticizing the practice of endless questioning and denouncing the act of closure as such, does poststructuralism not risk becoming just another strand of intellectual anarchoterrorism whose only real achievement is to inoculate the Established Order against any effective challenges from the left?<sup>39</sup>

Complacency and fatalism are the inevitable concomitants of a critique that, to borrow Walter Benjamin's words, 'enjoy[s] itself in a negativistic quiet'.<sup>40</sup> Liberal democracy and capitalism, needless to say, remain the unsurpassable horizons of this thought-world.

One corollary has been a silence also about class and exploitation. In their introduction to the journal, Miller and Rogers had warned against a focus 'exclusively on rights discourse, for example, to the exclusion of class relations as an analytic'. Resist this tendency, they urged. Yet little more than lip service has been paid to class by the journal's authors: a passing reference,<sup>41</sup> a nod to law as the product of class struggle,<sup>42</sup> even an acknowledgment that law can 'protect the powerful'<sup>43</sup>—but no engaged analysis. The 2011 volume of the journal marked a welcome change with the publication of a symposium on *Local 1330, United Steel Workers v. U.S. Steel Corp.*, an 'important chapter', as Harris Freeman observes, 'in the struggle between labor and capital in the Rust Belt.' But even here many contributors pass over class almost entirely in their discussion of the dispute—a mere reference to working class identity and Bruce Springsteen in the case of Rogers.<sup>44</sup> Mike Stout is exceptional in drawing an explicit link to present efforts to 'dismantle the working class'.<sup>45</sup> He is also, perhaps

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<sup>39</sup> Akbar Rasulov, 'International Law and the Poststructuralist Challenge' (2006) 19 *Leiden Journal of International Law* 799, 807.

<sup>40</sup> Walter Benjamin, 'Left-Wing Melancholy' in *Selected Writings* Vol 2 Part 2 (Harvard, Cambridge MA 2005) 425.

<sup>41</sup> Christine Desan, 'Out of the Past: Time and Movement in Making the Present' (2005) 1 *Unbound* 39, 39; Ford, 'Political Identity' 54; Jarna Petman, 'Human Rights, Democracy and the Left' (2006) 2 *Unbound* 63, 66, 77; Stephen J. Fortunato, Jr., 'The Historical Amnesia of Samuel Alito: A Review of *The Lost World of Italian American Radicalism: Politics, Labor and Culture*' (2006) 2 *Unbound* 19, 25; Maria Rosaria Marella, 'Radicalism, Resistance, and the Structures of Family Law' (2008) 4 *Unbound* 70, 72-73; Mladen Dolar, 'Freud and the Political' (2008) 4 *Unbound* 15, 20; Žižek, 'Legal Luck' 11-12; Maneesha Deckha, 'Holding onto Humanity: Animals, Dignity, and Anxiety in Canada's *Assisted Human Reproduction Act*' (2009) 5 *Unbound* 21, 24, 29, 31-32, 49, 52; Michelle A. McKinley, 'Conviviality, Cosmopolitan Citizenship, and Hospitality' (2009) 5 *Unbound* 55, 55, 82; Libby Adler, 'Just the Facts: The Perils of Expert Testimony and Findings of Fact in Gay Rights Litigation' (2011) 7 *Unbound* 1, 15-17.

<sup>42</sup> Lemaître, 'Legal Fetishism' 8.

<sup>43</sup> Brittenham, 'In Pursuit of the Gold Star' 36. Wolcher cites Bentham's observation that law tends to serve ruling class interests, but again only in passing. Wolcher, 'Legal Language' 92.

<sup>44</sup> Brishen Rogers, 'Dead Man's Town: Violence and Legal Interpretation in *Local 1330*' (2011) 7 *Unbound* 83, 87.

<sup>45</sup> Mike Stout, 'Remembering Pittsburgh' (2011) 7 *Unbound* 50, 55.

tellingly, a non-academic and former steelworker union activist. The workers, at least, are clear-sighted.

If class and exploitation have been absent from the journal's pages, race, gender, and sexual orientation have been constant themes. Authors have excelled at peeling back the obfusatory rhetoric of legal equality to reveal the discrimination reproduced by the legal system, while also undermining the very analytical categories so reified in liberal legal scholarship. But it is curious that *Unbound* has had little to say about the greatest source of inequality and injustice in the United States and the world today. Unprecedented levels of inequality are not the product merely of racial or sexual discrimination, but rather of capitalism. Martin Luther King Jr. spoke not only of dreams but also of class and imperialism; he was killed while in Memphis to support a public sanitary workers' strike. Racism, sexism, homophobia are all very real, but identity-based critiques need to be oriented within a larger structural critique of capitalism.

What of the present conjuncture, when inequality and exploitation seem finally to have reared their heads as subjects even of mainstream political discourse? As the Global Financial Crisis shook the heart of the capitalist system and states haemorrhaged trillions of dollars in bailouts of financial institutions, what acute analysis of the crisis did *Unbound* have to contribute? In its 2009 volume, the journal published articles on 'legal holes',<sup>46</sup> cosmopolitanism,<sup>47</sup> and humanity's 'cultural species identity'.<sup>48</sup> As hundreds of thousands of Americans saw their homes foreclosed upon, readers of *Unbound* could learn of such pressing juridico-political issues as the 'species prejudice' undergirding the fragile legal demarcations between humans and nonhuman animals. The political upheaval of the Arab Spring? Western intervention in Libya, as always behind the legal fig leaf of 'humanitarianism'? The beating of the war drums in Tel Aviv? Only silence from the Journal of the Legal Left.

### III

Some of my criticisms may seem better directed not at *Unbound* specifically but rather at the 'critical' legal field more generally. As a former editor, I am well aware of the peculiarities of U.S. law reviews where students must solicit and edit scholarship from career-minded law professors working in a discipline in which radical or subversive theoretical novelty is not rewarded. There is certainly a disconnect between the call for reinvigorated Left legal scholarship—made by students who are often not yet in a position to produce it themselves—and the bulk of scholarship that is actually produced.<sup>49</sup> One solution might be to cast a wider net, beyond the United States or the legal academy altogether. But this is easier said than done: what junior scholar in, say, the United Kingdom, already on the margins of the legal academy

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<sup>46</sup> Ben-Asher, 'Legal Holes'.

<sup>47</sup> McKinley, 'Conviviality'.

<sup>48</sup> Deckha, 'Holding onto Humanity'.

<sup>49</sup> Carl Lisberger has rightly chided me for placing too little weight on this in my earlier criticisms of *Unbound*.



there, will prioritise publishing in a subversive U.S. journal? Publishing in *Unbound* is simply not the priority for a young academic seeking tenure (for whom, at least in the United States, the theoretically sterile, conventional 100-plus page law review article with overly pedantic apparatus of footnotes remains *de rigueur*), even one pursuing a more theoretically Left scholarship.

In part, then, *Unbound* is a product of a particular conjuncture in U.S. legal academia. At one time CLS was a serious intellectual current and, at its height, offered jurists an explicitly Leftist theoretical project in which to participate. Its life as a movement, however, was short-lived and always fragmentary: early disagreements over the utility of large-scale social theories (framed by some in terms of ‘rationalism v. irrationalism’<sup>50</sup>) were followed by further splits between class-oriented and identity-based critiques (the latter group including most notably the so-called ‘racecrits’ and ‘femcrits’). With the turn to post-modernism in U.S. academia, CLS’s theoretical orientation shifted towards eclecticism rather than any radical political critique. Philosophy, critical theory, anthropology, literature, sociology, psychiatry, Legal Realism, anarchism, Sartrean existentialism, and of course ‘the now-ubiquitous postmodern social and linguistic theory, in both Foucauldian and Derridean variants’ have all contributed to a heady mix of at times contradictory influences.<sup>51</sup> In Alan Hunt’s words, CLS was ‘a movement in search of a theory, but at the same time it [was] a movement which has not agreed that such a theory is either possible or desirable’.<sup>52</sup> This, of course, has much to do with the specificity of the U.S. political scene; it is no accident that across the Atlantic, British CLS contained an explicitly Marxist strain from the outset—one that, although marginal, remains an important influence there.<sup>53</sup>

With the U.S. ‘Crits’ abjuring the mantle of Leftist politics (or whatever dubious claim they had to it in the first place), the Left space on U.S. law school campuses has been occupied largely by a heterogeneous collection of methodological approaches—feminist legal theory; critical race theory; law and literature; law and mind sciences; law and humanities—and the practice-oriented ‘clinical’ wing of left-liberal legalism.<sup>54</sup> The latter, in particular, has become the intellectual home for most Left-identifying law students. The streets and courtroom, rather than theory, has become the domain of progressive students. Alas, when human rights reporting and public interest advocacy become synonymous with the Left and the only alternative to the world of the corporate law firm, the space for a serious Left politics is radically narrowed.

To say this should be lamented is not to dismiss the tactical value of Left lawyering. Lawyers can play a valuable role in advancing specific Leftist goals within a broader political struggle. But to invest the law with an emancipatory potential without

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<sup>50</sup> See Mark Tushnet, ‘Some Current Controversies in Critical Legal Studies’ (2011) 12 *German Law Journal* 291.

<sup>51</sup> Miéville, *Between Equal Rights* 47.

<sup>52</sup> Alan Hunt, ‘The Critique of Law: What is “Critical” about Critical Legal Theory?’ in Peter Fitzpatrick and Alan Hunt (eds), *Critical Legal Studies* (Basil Blackwell, London 1987) 5.

<sup>53</sup> I owe this point to Rob Knox.

<sup>54</sup> See Tor Krever, ‘Calling Power to Reason?’ (2010) II/65 *New Left Rev* 141.

understanding its necessary limits would be no less incautious. As Lenin argued, '[w]ithout revolutionary theory there can be no revolutionary movement. This idea cannot be insisted upon too strongly at a time when the fashionable preaching of opportunism goes hand in hand with an infatuation for the narrowest forms of practical activity.'<sup>55</sup> Without a theoretical account of law, so that we may understand both how it may be deployed to advance Leftist emancipatory goals, but also how its very form—the legal form through which Leftist goals are articulated—may limit the emancipatory nature of those goals, the horizon for Left-legal activity will remain the defensive activities of the public interest lawyer.

Unfortunately, *Unbound* appears to have inherited late CLS's hostility towards the tradition best placed to provide the analytic tools for a Left critique of law, the state and the conjuncture. In the journal's first 2005 volume, Duncan Kennedy suggested:

There is no possible organization of the politics of law school based on the idea of a confrontation between Marxism and capitalism, because Marxism has disappeared from the political and intellectual landscape altogether. There is the new right, which is still relatively coherent and ideologically powerful. There is a disintegrated left. The new right and the disintegrated left have the same apparatus, which is rights and social science.<sup>56</sup>

Not one contributor to *Unbound* has questioned Kennedy's diagnosis. But to what extent has Marxism really disappeared from the political and intellectual landscape? Even the briefest survey of politics and the world of intellectual production belies the idea that it has disappeared 'altogether'. It remains a visible, if marginal, current across academic disciplines. What specifically of legal academia? Here, too, Kennedy's proclamation seems overly sweeping, too quick to conflate marginality with intellectual closure *tout court*. One need only look to Europe to find a vibrant and very much alive *Marxisant* culture. In the United Kingdom, in particular, one sees a renaissance, albeit in its infant stages, of Marxist legal theory.

This is not the occasion to explicate a rigorous defence of the Marxist tradition or the value of its contribution to legal analysis. It will suffice to note that it is, of course, much richer than the caricature of anti-Communist polemics familiar to Americans. One need not regard law simply as the blunt instrument of force, the handmaiden of the ruling class. As Evgeny Pashukanis explained in an intervention characteristically both trenchant and nuanced:

Law is simultaneously the form of external authoritarian regulation and the form of subjective private autonomy. In the one case, the fundamental, substantive characteristic is that of unconditional obligation, of absolute external coercion, while, in the other, it is the

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<sup>55</sup> Vladimir Il'ich Lenin, *What is to Be Done: Burning Questions of Our Movement* (International Publishers, New York 1969 [1929]) 25.

<sup>56</sup> Kennedy, 'The Social Justice Element' 102.

characteristic of freedom, guaranteed and recognised within certain limits. Law appears sometimes as a principle of social organisation, and at other times as a means of enabling individuals to 'define themselves within society'. On the one hand, law merges completely with the external authority, while on the other, it is just as completely opposed to every external authority which does not acknowledge it. Law as a synonym for official staidness, and law as the watchword of revolutionary struggle: this is a field of endless controversies and the most unimaginable confusion.<sup>57</sup>

A hypostatized base-superstructure opposition in which law is wholly determined by economic relations is likewise remote from the richest of Marxist jurisprudence. But nor is law a neutral apparatus standing outside class struggle. Pashukanis famously grounded the dominant role assumed by law in modern capitalist society in concrete material relations, while Marx himself insisted that 'legal relationships as well as types of state are to be understood neither on their own terms nor in terms of the so-called general development of the human intellect, but are rather rooted in the material relations of life'.<sup>58</sup> Others have drawn on Marx's insights to stress the ideological and mystifying role of law. The Marxist tradition, regardless, still has much to offer; as Fredric Jameson has remarked, 'Marx remains as inexhaustible as capital itself'.<sup>59</sup>

An engagement with Marxism implies transformative politics, which requires tactical and strategic thinking.<sup>60</sup> It also necessarily requires us to rethink the relationship between politics and law, as well as our own relationship with political praxis. Are we primarily lawyers who happen to also be 'critics', who use certain analytical tools to solve our disciplinary problems? Or are we Leftists who happen to work in a particular discipline, law? The answer will necessarily have deep implications for what our critique seeks to achieve: do we operate within the legal field and take its coordinates as our horizon or do we seek to overturn the structural conditions in which law itself is implicated? It is perhaps telling that *Unbound* is a Journal of the Legal Left and not a Legal Journal of the Left.<sup>61</sup>

#### IV

Today we are witnessing an unprecedented attack on the welfare state and a radical rewriting of the social contract, concomitant with the further hollowing out of liberal democracy. In Europe, the victories won by the working classes over two

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<sup>57</sup> Evgeny Pashukanis, *The General Theory of Law and Marxism* (Transaction Publishers, New Brunswick, N.J. 2002) 97.

<sup>58</sup> Karl Marx, 'Preface to a Contribution to the Critique of Political Economy' in Terrell Carver (ed), *Marx: Later Political Writings* (CUP, Cambridge 1996) 158, 159.

<sup>59</sup> Fredric Jameson, *Representing Capital: A Reading of Volume One* (Verso, London 2001) 1.

<sup>60</sup> Knox, 'Strategy and Tactics'.

<sup>61</sup> My thinking here is greatly influenced by discussions with Rob Knox.

centuries of battles with capital have been swept away in the name of economic necessity. The truncheon of austerity is wielded against labor with an attendant immiseration of the popular classes. Record levels of unemployment, dramatic new forms of authoritarianism, a rapidly disintegrating social order: what of these will *Unbound* have to say? 'At a time at which the vast majority of the people in the world are being buffeted and tormented by social and economic forces that appear to be beyond their control or comprehension,' Paul O'Connell recently argued, 'the role of critical legal inquiry should be to make explicit the concrete causal forces, and to play a role in articulating alternatives.'<sup>62</sup> Quite. One hopes that *Unbound* will be equal to the task.

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<sup>62</sup> Paul O'Connell, 'Trouble in the Garden: Critical Legal Studies and the Crisis', *Critical Legal Thinking* (30 April 2012) <<http://criticallegalthinking.com/2012/04/30/trouble-in-the-garden-critical-legal-studies-crisis/>>.