

Radicalism and Responsibility: An Introduction to *Unbound*

By Zinaida Miller and Brishen Rogers*

It no longer seems revolutionary to say, as Duncan Kennedy did over twenty years ago, that “Law schools are intensely political places.”¹ As Kennedy himself argues in this issue of *Unbound*, today’s law professors “have correctly and honestly internalized the irreducible political element in law,” and accordingly law faculties feature a rich pluralism of overlapping and conflicting methodologies, political positions, and legal-theoretical commitments.

But has this pedagogical shift done much to make these three years a less alienating or painful experience? We’re not so sure. Law school still trains us to see ourselves as technicians rather than agents; operatives rather than entrepreneurs; managers rather than provocateurs. 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.

Our own alienation led us to seek an intellectual home in *Unbound*, and to change its subtitle and mission. In doing so, we hope not only to articulate our discomfort with the law school experience but also to establish a community for other students, academics, and practitioners who share similar political commitments. This introduction is a limited, tentative attempt to explain why we’ve chosen to rename this a “Journal of the Legal Left.” We’ll leave the heavy legal theory to the legal theorists we’ve published. In addition, we will not attempt to encapsulate the ideas of our authors here; they speak quite eloquently for themselves. Rather, we discuss how contemporary legal thought and pedagogy shape the law school experience generally and cause students to lose their sense

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A last thanks goes to the family, friends, and lovers who have tolerated our sometimes obsessive devotion to *Unbound* this year; we hope that you feel the product was worth the wait.

¹ Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. Leg. Ed. 591, 591 (1982).

of agency.

I.

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: for *Grutter* but afraid of SNCC; for *Goodrich* but afraid of Stonewall rioters; for the Earned Income Tax Credit and expanding health care but *way* afraid of the WTO protesters. Everything in moderation, pragmatism ahead of radicalism, safety first.

Yet, despite our sense that our prior political commitments were radically different from most of our peers, we ended our first year with little sense of what a left *legal* project might look like; the first year curriculum had simply left us unable to articulate one. When we took over editing *Unbound* some months later and started discussing this question with colleagues and professors, we found that many of them shared our confusion. Most loved the idea of a “journal of the legal left,” but nobody could say confidently what “the legal left” is or should be today. After all, critical legal studies, radical feminist thought, and critical race theory continue to inform legal discourse and teaching today, but they’re hardly a *movement* at this point: they don’t have all-encompassing conferences, they are no longer ubiquitous on campus, and their presence can feel muted to those of us in search of a discourse and mentors.

The concomitant disconnect between left students and professors was also apparent: many professors here and elsewhere continue to produce brilliant left critical work, but law students often lack access to both the people and their language. The haziness around what the “legal left” might be, in tandem with the lack of communication between students and professors (or between JDs and SJDs, for that matter), has prevented us from envisioning a common intellectual future. Thus, leftist JDs like ourselves often remain unable to put into words the uneasy intuitions of our first tiptoed steps into the tepid water of law school. 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—not only to familiarize our generation with the voices of those who had preceded us, but also to provide a forum for a new set of theories on the left.

II.

Here goes: In fact, the pluralization of legal teaching that Kennedy identifies *contributes to* or even *causes* the felt loss of agency by today’s law students. The first cause is the tendency in modern legal education for professors to latch onto one discourse and critique the others, with the result that as 1Ls we simultaneously learn multiple modes of analysis

(rights discourse, efficiency analysis, institutional competence) *and* the critiques of those modes of analysis (rights “run out” when two rights compete; efficiency’s instrumental rationality threatens to overwhelm humanistic goals; procedural schemes often themselves embed and obscure substantive goals).

After a year of this, it’s remarkable to sit in a classroom of 2Ls and listen to the wide variety of argumentative styles at play. In a sense, this is instrumental professional training: one day our job will be to convince a judge using whatever analysis is most useful at the moment. Start with a close textual reading, thrust with a fundamental rights analysis, parry with an efficiency critique. Sometimes argue for strict rule rigidity, other times for ad hoc equitable balancing. This is indeterminacy on steroids. The argumentative structures depend on questionable assumptions, so they often feel indeterminate *ex ante*. Each structure at times underdetermines outcomes in particular cases. Eventually, each seems so plastic that it can be used to advance any position whatsoever.

There is nothing new here in terms of legal theory. What’s so devastating to students is the combination of this indeterminacy with a second phenomenon: that being a lawyer still requires us to argue constantly as if legal outcomes are derived rather than decided. So while law students can advance devastatingly effective internal critiques of legal reasoning, we constantly act as if our arguments are in fact unassailably well-founded, even while we shift without signals or breaks between various forms of legal analysis. This often leads to deep anxiety, as we suspect we are *performing* an argument rather than *believing* it, which can feel like an act of bad faith if one has not accepted that the performance matters more for the system than the belief does.

In other words, law schools today are “Lynchian” places. As novelist and essayist David Foster Wallace put it in a brilliant analysis of the aesthetics of David Lynch:

An academic definition of Lynchian might be that the term ‘refers to a particular kind of irony where the very macabre and the very mundane combine in such a way as to reveal the former’s perpetual containment within the latter.’ But like postmodern or pornographic, Lynchian is one of those Porter [*sic*] Stewart-type words that’s ultimately definable only ostensibly—i.e., we know it when we see it. Ted Bundy wasn’t particularly Lynchian, but good old Jeffrey Dahmer, with his victims’ various anatomies neatly separated and stored in his fridge alongside his chocolate milk and Shedd Spread, was thoroughly Lynchian A hideously bloody street fight over an insult would be a Lynchian street fight if and only if the insultee punctuates every kick and blow with an injunction not to say fucking anything if you can’t say something fucking nice.²

Our mundane (endless neo-formalist arguments, moral appeals, efficiency analyses) coexists with our macabre (reason eating itself, the viral tendency in American legal thought). Bridging this gap is a *learned* behavior: the processes of legal education push us

² David Foster Wallace, “David Lynch Keeps His Head,” *Premiere*, (September 1996), available at <http://www.lychnet.com/lh/lhpremiere.html> and republished in Wallace’s book *A Supposedly Fun Thing I’ll Never Do Again: Essays and Arguments* (1997).

to ignore this internal self-division such that amidst radical self-doubt (“can I *really* make this argument in good faith?”) we argue as if we have no such doubt.

It’s great aesthetics, but it can be a lousy way to live. It’s tempting and perhaps natural to give up on coherence, shrug off the internal contradictions, and adopt a blasé half-ironic attitude towards the whole enterprise, kvetching the entire time. Once we’ve learned how to argue any point to anyone in any way, it’s remarkably easy to convince ourselves that defending toxic tort suits is somehow morally equivalent to prosecuting them. While this may seem in some ways liberating—who wouldn’t want to be able to dominate *any* argument?—it is in fact also limiting in a deeply frightening way. Trapped in this self-imposed straitjacket, we deny responsibility for making the choice and refuse to see the consequences thereafter. Thus we no longer act as *agents*, in the sense that we no longer see ourselves as affecting the world with each decision.

This is not only about “going corporate” or not; it is also about “doing human rights” or working for civil liberties or being involved in any field that self-consciously promotes reform. These choices too have consequences, which may be just as insidious in their tendency to limit action (by favoring judicial decision-making over democratic grassroots change, or by emphasizing incremental government reforms rather than radical land redistribution) or to constrain the conceptual field (by focusing exclusively on rights discourse, for example, to the exclusion of class relations as an analytic). Evading the distributive or intellectual consequences through self-righteous rhetoric and congratulating ourselves for “doing good” ultimately results in the same lack of agency as the rest of legal education promotes.

We’d like to resist this tendency, and we would like to develop a language *law students can use* which understands at all times that we are indeed making *choices*: We choose to go to law school, to master the dominant modes of legal analysis, and to “perform” as lawyers. We asked our authors (and the community forming around *Unbound*) to deconstruct not just the tropes of legal thought but also the ways in which we are all implicated within them, in particular how our decision to use the law as a means of social transformation alters our understanding of what is just and possible.

III.

In closing, we’d like to express our gratitude to a series of people who made *Unbound* happen this year. First, our authors, who generously offered up their writing and who fundamentally supported not just the intellectual mission of *Unbound*, but our goal to reach outside the norm of law reviews and work with authors as colleagues. Second, the students—from the JD, LLM, and SJD programs—who devoted themselves to a journal that was, when they entered the process, a mere kernel of an idea. They gave up their days and nights, they contributed ideas and content, they edited, they wrote, they read, and they continually reminded all of us why it was that we were doing this in the first place. The surprise on the faces of SJDs discovering a set of JDs interested in critique contrasted beautifully with the nonchalance of a series of 1Ls this year who were bril-

liantly critical on arrival.

Third, we'd like to thank the many professors who have supported the project of *Unbound*, and four in particular: Christine Desan, Janet Halley, David Kennedy, and Duncan Kennedy did everything from writing for *Unbound* to throwing unparalleled parties to patiently mapping our leftist predecessors and contemporaries for us. In their own quirky ways, they continually teach us not just the analytics and tools of critique but also how to have a good time in the process. Their support and their friendship have been extraordinarily necessary and graciously proffered. Our anger at the systems of power in the world is our own, but our moments of revelation—learning that others have before us given words to similar anger—have in large part been due to them.