

## THEORISING LAW AND POLITICAL ECONOMY

### A Seminar on Law, Markets and Culture

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This article describes a seminar titled ‘Law, Markets, and Culture’, which addressed the role of law in constructing economic relations and in portraying markets and economic relations as natural facts, distinct from the realms of politics and culture. The goal of the seminar was threefold: to get the students — and ultimately the next generation of US lawyers — to see the political and the economic not as two different realms subject to wholly different kinds of governance, but rather as intimately intertwined with one another; to help students develop critical perspectives on the relationships among state law, markets and culture, integrating both the insights of traditional economic analysis and the insights of critical theory; and to foster a new discipline of law and political economy that would take as its central problem not the allocation of scarce resources, but rather the development of institutional methods of promoting human flourishing.

#### Introduction

This essay describes a seminar called ‘Law, Markets, and Culture’, which I taught in the Fall of 2004 at my home institution, the Law School of the University of California at Berkeley (Boalt Hall). For several years (sometimes on my own, sometimes with Professor Emma Coleman Jordan of Georgetown Law Center in Washington, DC), I have been teaching courses and developing teaching materials designed to engage students in a critical discussion of markets, culture, state power, and the role of law in shaping all three. This project has several goals. First, we hope to get our students, and ultimately the next generation of US lawyers, to see that the political and the economic are not two different realms subject to wholly different rules of governance, but that they are intimately intertwined with one another, and that both are created and maintained by law. The second component of the project is to begin developing critical perspectives on the relationships among state law, markets and culture, integrating both the insights of traditional economic analysis and the insights of critical theory. The third, and most ambitious, component is to develop from this analysis a new discipline of law and political economy — a discipline that would take as its central problem not *the allocation of scarce*

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*resources*, as does neoclassical economics, but rather *the development of institutional methods of promoting human flourishing*.

Very few American lawyers, and even fewer American lawyers who identify themselves as left-wing, have a language for talking about economic institutions and their relationship to political institutions or to law, although we are in the midst of dramatic upheavals in both the US domestic and the global political economy. Fortunately, this is a promising intellectual moment for founding a discipline of law and political economy. The discipline of economics (and its spin-off, 'law and economics') is undergoing tremendous upheavals from within; at the same time, critical legal theory, carried by the continuing vitality of critical race feminism, has gathered strength and begun to turn its attention to economic analysis and economic institutions. The law students I have worked with in various incarnations of the seminar have been keenly aware of the political and intellectual need for a language that can integrate critical theory with institutional analysis, and have often been engaged in practical work that illuminates and furthers the project: human rights, economic development, environmental justice and intellectual property, as well as the law of anti-discrimination.

### **Structural Liberalism and 'The Classical Perspective'**

We began the seminar with the concept of 'structural liberalism,' a phrase I use to describe an ideology that dominates American law. Its various legal elements — the so-called 'public-private distinction', the primacy of contract and property rights over constitutional rights, the primacy of 'negative' over 'positive' rights, the shallow foundation of economic and social rights as compared to political and civil rights — have been identified and criticised by generations of legal theorists, from legal realism through critical legal studies and feminist legal theory, and into mainstream constitutional theory (see, for example, Sunstein 1993). The intellectual incoherence of structural liberalism, however, has not prevented it from providing the basic framework for legal and political debate about governance throughout the twentieth and into the twenty-first century.

Structural liberalism assumes, first, that the human social world is divided into at least three distinct spheres — state, market and family; second, that there are distinct forms of governance appropriate to each sphere; and third, that governance in each sphere must both promote the liberty of every individual, and construct and maintain the social relations necessary to permit every individual to pursue his or her own vision of the good, rather than engaging in a war of all against all.<sup>1</sup> Structural liberalism assumes further a public/private distinction, imagining the 'private' realm of markets, property and contract as not primarily created or maintained by law, but by the mutual consent of individuals — unlike the 'public' realm of law and the state which is created and maintained by coercion. Because the ultimate goal of governance is to promote individual liberty, one of the central concerns of structural liberalism is how to prevent undue 'state intervention' in either the

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<sup>1</sup> Dean (1999).

market or the family, and how to build adequate safeguards against tyranny in the realm of the state.

I introduced structural liberalism to the students through two essays in the critical legal studies tradition. The first of these was Seidman's 'Contract Law, the Free Market, and State Intervention: A Jurisprudential Perspective'.<sup>2</sup> Seidman's essay discusses, under the label 'the classical perspective', elements of what I would call 'structural liberalism': the view, for example, that 'the market' is associated with freedom of choice and 'the state' with coercion; and that 'command law' or 'repressive law' is associated with the state and 'facilitative law' with the market. Seidman argues that the classical view identifies two distinct — indeed opposed — forms of governance: state/repressive law versus market/facilitative law. He notes that, from the point of view of liberty, governance by market institutions looks infinitely better because it is less coercive. Seidman then gives a version of the classic legal realist/critical legal studies critique of this view, naming his critique the 'anticlassical perspective'. From the anticlassical perspective, governance by the state and by the market, or by repressive law and by facilitative law, is six of one, half a dozen of the other. Both forms of governance are governance by law, and both systems of governance can institutionalise oppression. After making the point theoretically, the second half of Seidman's essay provides an historical example, comparing the political economies of Kenya — a settler colony governed by Britain, and of the Gold Coast (now Ghana) around the turn of the twentieth century.<sup>3</sup>

I paired Seidman's essay with Frances Olsen's classic essay, 'The Family and the Market: A Study of Ideology and Legal Reform'<sup>4</sup> so that the students could see that structural liberalism operates not only through a dichotomy of state versus market, but also at times through a triad of state–market–family (perhaps a square, if one counts 'civil society' as another sphere), in which the state is always 'public' but sometimes the family and sometimes the market are featured as 'private'. Olsen deftly shows how typical arguments about 'state intervention' in the market and in the family use the same ideological and rhetorical structures, as do the typical responses to those arguments.

### **Disciplinary and Method in an Anti-Political Economy**

Structural liberalism has not only shaped the way lawyers in the United States think and talk about law; it has shaped intellectual inquiry into politics and

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<sup>2</sup> Seidman (1989).

<sup>3</sup> In this period Kenya was colonised by the English, and its economy dominated by settlers who used direct state coercion, in the form of repressive law, to turn the indigenous Africans into a labor force for their commercial farms. In the non-settler territory of the Gold Coast, the cocoa industry was run largely by African growers, but marketing was controlled by a handful of European factors. Despite very different configurations of market and political institutions, the indigenous Africans in both countries quickly found themselves 'underdeveloped', without the power to effectively control their own political and economic fortunes.

<sup>4</sup> Olsen (1983).

economics. Lisa Iglesias observes that the United States has an ‘anti-political’ economy: not only under law, but in the wider culture, markets are imagined as somehow outside of, and prior to, state power.<sup>5</sup> The split between economic and political spheres is reflected in the split between the languages of ‘efficiency’ and ‘equity’, where efficiency is thought to be the province of economists and equity the province of politicians. More deeply, the split between the economic and the political is mirrored in a methodological split that CP Snow referred to decades ago as the problem of the ‘two cultures’ of the sciences and the humanities.<sup>6</sup> As a matter of intellectual history, the trajectory of economic analysis, and law and economics in its footsteps, has been to seek the prestige of science — not just any ‘soft’ science, moreover, but the beauty and rigor of mathematics and physics.<sup>7</sup> (The figures within the discipline who left this path have been cut out of the pantheon: not only Marx, but Veblen, Galbraith, and much of Adam Smith himself are gone from the contemporary economics curriculum.) Meanwhile, the path of critical legal theory has been toward discourse analysis and into the ‘theory’ revolution that swept the post-new criticism disciplines of the humanities. Economics and theory are, perhaps, equally ‘theoretical’ in the sense of anti-empirical: both are more concerned with manipulating formulas and texts than with the messiness of the world. Nevertheless, they arrive at their anti-empiricism from very different directions, and have come to see each other as opposites: efficiency versus fairness; certainty versus ambiguity; objectivity versus subjectivity; masculinity versus femininity, science versus poetry.<sup>8</sup> Seeing the political and the economic as one subject rather than two, then, immediately raises problems of method and of epistemology. If the goal is to explore institutional methods of promoting human flourishing, in what register should that exploration be undertaken — the moral? The pragmatic? Is it possible to talk about efficiency and equity in the same breath? Are the languages we have available — critical theory and economic analysis — each deformed by the absence of the other?

These questions of method wound through the seminar. The very first reading, for example, was a polemic by Anthony Taibi attacking critical race theory for its obsession with state institutions to the exclusion of market institutions, and for its focus on morality and rights-talk to the exclusion of

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<sup>5</sup> Iglesias (2002).

<sup>6</sup> Snow (1998).

<sup>7</sup> Of course, seeking is one thing and achieving, another. McCloskey (1993) argues that economics is a deeply rhetorical discipline, despite its pretensions to objectivity and hence its assumptions about the transparency of language. Farber (2001) suggests that economics ought to give up its aspirations to resemble mathematics or physics, and seek instead to emulate the much messier biological sciences.

<sup>8</sup> The opposition is less acute if one takes the realm of the ‘political’ to be governed by moral philosophy generally rather than critical theory, and still less if ‘political’ is to be governed by political science, itself a discipline with mathematics envy. Critical theory, however, was a natural starting point for thinking about the political for my left wing students and myself.

interest in the pragmatic and the local.<sup>9</sup> Taibi observes that those lawyers who profess themselves most committed to social justice are frequently those who know and understand the least about economic analysis and market institutions, and insists that this state of affairs is no longer acceptable given the collapse of the US welfare state, the pre-eminence of second-generation, covert racism over the old-fashioned kind, and the realities of globalisation.

Later in the seminar, we came back to the question of method through an examination of the history of economics and law-and-economics as disciplines. In a short lecture on contemporary movements in jurisprudence, I argued that, although we are used to thinking of law and economics and critical legal theory as fundamentally distinct and opposed, there are in fact commonalities between the two. Both law and economics and critical legal theory can be viewed as undermining structural liberalism, by collapsing the boundaries between its spheres of social life. Economic analysis collapses the spheres of state, market and family by suggesting that one kind of human activity — wealth maximisation through bargaining and exchange — characterises all of them. Critical analysis collapses the spheres by suggesting that the threat of coercion is ever-present in all of the spheres, not only the realm of the state.<sup>10</sup>

At the philosophical level, moreover, I argued that both law and economics and critical legal theory are committed to the same founding value: liberty. Law and economics, of course, is famously friendly to political libertarians; I suggested to the class that critical legal theory might be libertarian as well. Although critical legal theorists tend to use 'equality' rather than 'liberty' as their banner, equality is famously empty, and the attack on subordination that critical legal theorists find themselves perpetually mounting can be read, at bottom, as a defence of individual liberty. Are there substantive values embedded in critical theory beyond ending subordination viewed as constraints on liberty, and if so what might they be? The students and I talked about promoting 'human flourishing', and whether there is any content to this concept beyond the value of anti-subordination as non-coercion.

Still later in the seminar, we came back to the question of method at a less abstract level. Following an introduction to basic concepts in economic analysis and law and economics, we sampled a variety of the writings in law and economics that have begun to challenge and erode some of the sacred cows of neoclassical economics, such as price theory and the theory of rational

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<sup>9</sup> Taibi (1995).

<sup>10</sup> Both critical legal theorists and legal economists deplore coercion and are concerned with the problem of power. But legal economists see the problem of coercion mainly in the realm of the state; critical legal theorists find 'power relations' everywhere, and therefore see no refuge in the market or the family. This gives legal economists a bit of an edge when it comes to the normative questions lawyers must answer. Legal economists can answer the question 'What should we do?' with the exhortation to promote voluntary exchanges and to eradicate restrictions on such exchanges. Critical legal theorists, though more thoroughly committed to normative critique, paradoxically have less to offer as a normative agenda, since power is everywhere and freedom possibly an illusion.

choice. The new institutional economics, behavioral economics, social norms theory, information-based theories of market failure, transaction cost economics, and the emerging movement of 'socio-economics' all indicate a revolution from within that may in turn make it possible to bridge the gap between the languages of efficiency and equity. Meanwhile, recent efforts at connections between critical race theory and law and economics<sup>11</sup> involve an even more ambitious methodological leap across the chasm between the humanities and the social sciences. As we sampled these literatures, we asked what questions could and could not be posed within the intellectual frame of each one, and whether these literatures might serve as foundations for a discipline of law and political economy, or whether an entirely new kind of analysis might be necessary.

Because my students were for the most part better versed in critical theory than economics, to explore this question of disciplinary integration we needed to educate ourselves about economics. We therefore spent several weeks familiarising ourselves with the history and some basic principles of economic analysis, and then the history and basic principles of the influential 'Chicago School' of law and economics.<sup>12</sup> For an introduction to the use of economic analysis in American law, we examined the debate between Cass Sunstein and Lisa Heinzerling on the value of cost-benefit analysis in environmental law and policy.<sup>13</sup> In this unit, my job was to defend economic analysis and to challenge the students who simply tried to deny that resources could ever be scarce or that people act self-interestedly a good deal of the time. It was hard going, however, and there was a nearly palpable sigh of relief from my non-economist, social justice-oriented students when we turned to readings in the critical theory tradition.

We used Antony Anghie's essay 'Civilization and Commerce: The Concept of Governance in Historical Perspective'<sup>14</sup> as a central text for thinking both about the methods and preoccupations of critical theory, and for bringing to bear some of the insights of critical theory on economic analysis. Anghie's analysis suggests two central problems with traditional economic analysis, both emerging from the fact of history: the problem of identity and the problem of distribution. The history of both government and market institutions as we know them is also the history of colonialism and

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<sup>11</sup> Carbado and Gulati (2003); Roithmayr (2003).

<sup>12</sup> We read excerpts from Michael Bernstein's *A Perilous Progress* (2001) on the history of the economics profession, and an essay by Ron Harris on the relationship (or lack thereof) between law and economics and history (Harris, 2003). We read a generous excerpt from Richard Posner's classic (if now perhaps idiosyncratic, considering where the field is moving) statement of the goals and subjects of law and economics (Posner, 1990). For an introduction to theories of markets and market failure, we read a chapter from Robert Kuttner's *Everything for Sale* (1996). One of my colleagues trained in economics was also kind enough to give a guest lecture on old and new theories of market failure and the limits of price theory.

<sup>13</sup> Sunstein (2002); Heinzerling (2002).

<sup>14</sup> Anghie (2000).

imperialism. Colonial and imperial powers, using all the institutional tools they could, sought to systematically extract land, natural resources and labour from their possessions and use them to their own benefit. Although government and market institutions are now supposed to be identity-neutral — ‘the rule of law’, ‘good governance’ and *laissez-faire* capitalism are said to be universal goods — do the rules (or the application of them) nevertheless systematically benefit the historical winners, the ‘developed’ countries of the North?<sup>15</sup>

The problem of distribution is related but distinct. Even if the political and economic rules of the game were in fact perfectly neutral and universally applied, the problem is that capitalism did not begin with everyone at the same starting line. As Marx pointed out, the massive project of forcing European peasants off the land and into wage labour, followed by the massive systems of resource and labor exploitation that characterised colonialism and imperialism, meant that certain groups began the capitalist enterprise with an advantage that has only compounded over time. Yet economics has traditionally been uninterested in this effect of history, considering it a technical problem of ‘distribution’. Here the contrast between economics and critical theory is stark: economics scarcely notices history, while critical theory worries about nothing else.

### Some Problems in the Political Economy of Law

The next, and longest, unit of the seminar was spent examining a number of different legal issues that seemed congenial to both economic and critical analysis, and trying to bring the two kinds of analyses to bear on one another.<sup>16</sup> Two large themes ran through these discussions. First, the problem of governance: as the economists put it, when and in what ways do governments and markets fail, and are there ways to compensate for those failures? Though my students, as I have said, were remarkably resistant to the notion that markets could be good for anything, they also admitted when pressed that governments were deeply problematic as well. Eyal Benvenisti’s<sup>17</sup> essay outlining how well-organised, repeat-player groups like multinational corporations are able to use domestic and international institutions and

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<sup>15</sup> One form this systematic benefit for the winners might take is what economists call ‘rent-seeking’ — those who possess wealth also tend to possess political power and have an incentive to use it to get better outcomes for themselves than would be possible through bargaining on an equal footing.

<sup>16</sup> Toward this end, for example, we did a set of readings on the problem of income and wealth inequality in the United States, ending with a lively discussion of Anne Alstott and Bruce Ackerman’s (1999) proposal to create a ‘stakeholder society’. We did a set of readings on the problem of racial discrimination, looking at how critical race scholars have begun to borrow the language and tools of economic analysis to explain how discrimination perpetuates itself in market relations. We also did a set of readings on race and space, focusing on David Dante Troutt’s attempt to define what human flourishing should look like for purposes of economic development projects, and the dilemmas of economic development in a highly race- and class-stratified society like the United States (Troutt, 2000).

<sup>17</sup> Benvenisti (1999).

procedures to their own advantage set the stage for a good discussion of government failure and democratic values. A related issue involved the debate between believers in 'private' market solutions and believers in 'public' rights-based solutions to various social problems, from environmental damage to discrimination.<sup>18</sup>

The second large theme that ran through our discussions was commodification. Michael Sandel's Tanner Lectures on Human Values were extremely lucid and helpful in sorting out the possible moral objections to creating new markets in things.<sup>19</sup> Sandel identifies two possible kinds of objections: 'coercion' and 'corruption'. The argument from coercion is the easy one, because it builds on the libertarian roots of both economic and critical theory: markets in certain kinds of goods are immoral if people cannot exercise real freedom in choosing to participate in them or not, or if bargaining will occur on hopelessly unequal terms. The argument from corruption is a much harder one to make in a liberal society: it insists that there are moral values intrinsic to particular things that would be corrupted or destroyed were the things in question to be bought and sold.

A second strand of the commodification discussion had to do with the culture of commodification: how one ought to morally judge the experience of life in a highly commodified world. Here we read Sut Jhally's polemic against advertising,<sup>20</sup> with its somewhat neo-Frankfurt School attack on mass society, and Thomas Frank's deeply dark look at market society's ability to instantly commodify rebellion and even anti-commodification itself.<sup>21</sup> I gave a lecture on 'forgotten giants of economic theory' that touched on a number of other critiques of the culture of capitalism, from Marx's theory of alienation to Veblen's theories of conspicuous consumption and Galbraith's theory of social balance.<sup>22</sup> My students found Yochai Benkler's suggestion that there are forms of production organised around individual pleasure, creativity, and self-motivation rather than coercion from without particularly intriguing.<sup>23</sup>

About two-thirds of the way through the seminar, one student stopped a conversation in its tracks by suggesting that we needed to do some reading and thinking about the possibilities of violence and insurrection in response to both capitalist and state power. My first reaction was one of trepidation. I feared a

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<sup>18</sup> Our reading of Ertman (2003), who likes markets, and Fineman (2001), who likes rights, led to a lively discussion of the role of the state and of markets in family creation and maintenance. Another high point in this ongoing conversation was a heated discussion of Jane Larson's provocative essay, 'Informality, Illegality, and Inequality' (2002), in which Larson asks whether equality rights should sometimes yield to accommodate the fact of market-produced inequalities, in order to preserve some access to goods for the poor.

<sup>19</sup> Sandel (1998).

<sup>20</sup> Jhally (nd).

<sup>21</sup> Frank (1997). Students who argued for the value of living simply were reminded that there is a magazine you can buy called *Simple Living*.

<sup>22</sup> I found Sackrey and Schneider (2002) a valuable resource for preparing this lecture.

<sup>23</sup> Benkler (2002).



group wallow in romantic postures of rebellion, the desire my friend Norma Alarcon once described as 'to be out in the jungle with Che'. The students, however, liked the idea, so I agreed that if they would put together some readings, I would distribute them for discussion.

I need not have worried. The readings my students submitted turned out to be excellent, and set the stage for one of the most thoughtful, self-critical and searching conversations we had all semester. The readings concerned various facets of contemporary 'globalisation', but were anchored by two complementary pieces written well before the current wave of globalisation began: an excerpt from Franz Fanon's *The Wretched of the Earth* on the necessity of revolutionary violence,<sup>24</sup> and a speech by Malcolm X called 'The Ballot or the Bullet'.<sup>25</sup> In this discussion, we came back to the place where my students were politically and emotionally anchored — with the subordinated — and back to ground zero for economics and the problem of history: colonialism and postcolonial struggle. Then and now, the problem of history seems an insoluble one: as events post both Fanon and Malcolm X have demonstrated, neither market nor state institutions, national revolution nor domestic insurrection, civil rights nor human rights, have seemed able to make adequate reparations for the injustices of slavery and colonialism. Yet, like it or not, we live in an interconnected world both politically and economically: to isolate oneself, Cuba-style, seems no longer possible. History has happened, and here we are.

The best we can do might be to work for something that cannot yet be articulated because it has not yet come into being. Naomi Klein describes Subcomandante Marcos of the Zapatista movement as calling for 'a revolution that would make revolution possible'.<sup>26</sup> Marcos's style — playful, inclusive, non-violent yet uncompromising — provided an ethos of engagement that suited the class. We were even able to end the seminar on a cautious note of hope.

### **Conclusion: Towards the Revolution that Makes Revolution Possible**

Structural liberalism is not peculiar to US legal and political culture. In some of its characteristic forms, it seems endemic to the common law tradition, and conversations with scholars from civil law countries at the RULCI/LatCrit conference where this paper was presented indicate that it influences legal culture in those countries as well. But in the United States there are remarkably few legal resources with which to identify and challenge this ideological formation. Unlike South Africa, for example, where constitutional values now pervade the entire fabric of the law, the United States is heir to a tradition in which 'private' law is treated as preexisting constitutional and statutory 'public' law. The United States is heir, as well, to an eighteenth century constitution — a constitution designed to shield rights of property from

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<sup>24</sup> Fanon (1963).

<sup>25</sup> X (1965).

<sup>26</sup> Klein (2001).

redistribution; a constitution that assumed, at least at the outset, that its citizens would be economically and socially already homogenous. Finally, the United States (like the rest of the world) is heir to the political economy of colonialism. In US political culture, as a result, racial and economic relationships have become so tightly entangled that at times racial supremacy and class privilege, property and whiteness, can scarcely be distinguished; and racial divisions have characteristically been used by elites to disrupt or obscure US class consciousness and class struggle.

For these reasons and others, a democratic public engagement with questions of political economy in the United States — much less a legal struggle over such questions — seems unlikely without a prior shift in legal and political culture. Unfortunately, as Frank Valdes has observed, it is the political right that has been most successful in setting the terms of the political and legal ‘culture wars’ in the United States during the past quarter-century.<sup>27</sup> The right wing has largely been successful in its attempt to get citizens to vote their ‘values’ (like being against same-sex marriage and for patriotism and working-class masculinity) over their material interests (like wages, benefits and macroeconomic growth and security).<sup>28</sup> The right is also making great strides in its systematic attacks on the US social welfare state and on international institutions that seem to pose a challenge to the political and economic power of US elites.<sup>29</sup> The project to substitute governance by markets for governance by government is international as well as domestic. Thus, for example, the institutions of the neo-liberal ‘Washington Consensus’ use trade policy, the pressure of unmanageable debt and other available means (including, when deemed necessary, force) to pressure under-developed nations to adopt ‘structural adjustment programs’ that starve the public sector, privatise national industries, welcome foreign investment and lower trade barriers, and adopt multinational corporation-friendly legal regimes, such as intellectual property regimes. The Bush II Administration also works to delegitimize international humanitarian law and international human rights and labour regimes, and to undermine international institutions to which the United States might find itself subject, such as the World Court, as well as those, like the United Nations, which occasionally show signs of failing to fall into line with US policy. Moreover, although the right wing’s explicitly ‘cultural’ themes — protection of ‘family values’ against feminists, sexual minorities;

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<sup>27</sup> Valdes (2004).

<sup>28</sup> Frank (2004).

<sup>29</sup> A recent example is the Bush II Administration’s proposal to partly ‘privatise’ social security. This policy move promises to do little or nothing to address the funding crisis the program is facing, but it furthers one of the right wing’s central projects in the culture wars: to delegitimize government as a form of governance, and to replace, wherever possible, political institutions with market or quasi-market institutions (McCluskey, 2003). As Grover Nordquist — president of Americans for Tax Reform and dubbed by the left-wing magazine *The Nation* ‘arguably Washington’s leading right-wing strategist’ — has colourfully put it: ‘My goal is to cut government in half in twenty-five years ... to get it down to the size where we can drown it in the bathtub.’ (Dreyfuss, 2001)

protection of the intellectual 'canon' against people of colour — have animated the American public, its political economy themes — despite the threat of radical changes that would leave the majority of US citizens worse off — have not.<sup>30</sup>

Given the absence of textual legal resources for identifying and challenging structural liberalism, and given the success of the right's political project to replace governance by government with governance by 'markets' without much public outcry, progressive changes in the US political economy cannot begin in the courts or legislatures. The project of building a discipline of law and political economy, then, is a left-wing intervention in the culture wars. It is also a project to which critical race theory is central, for critical race theory more than any other current left-wing legal movement has made the predicament of postcolonialism central to its work.<sup>31</sup>

In his talk at the symposium where I originally gave this paper, Judge Dennis Davis fleetingly invoked the ghost of Marx, and I want to end this essay by doing the same. Marx, above all, understood the importance of political economy and infused his economic analysis with a passion for social justice. I bear no nostalgia for twentieth century authoritarian socialist regimes, but I do believe we badly need a new Marx — a new way of either infusing capitalism with democratic and egalitarian values or finding an alternative to it. The struggle for a new way of thinking and talking about markets, states, law and culture is, I hope, a small part of the revolution that makes revolution possible.

## References

- Bruce Ackerman and Anne Alstott (1999) 'Your Stake in America' 41 *Arizona Law Review* 249.
- Antony Anghie (2000) 'Civilization and Commerce: The Concept of Governance in Historical Perspective' 45 *Villanova Law Review* 887.
- Yochai Benkler (2002) 'Coase's Penguin: Or, Linux and the Nature of the Firm' 112 *Yale Law Journal* 369.
- Eyal Benvenisti (1999) 'Exit and Voice in the Age of Globalization' 98 *Michigan Law Review* 167
- Michael A Bernstein (2001) *A Perilous Progress: Economists and Public Purpose in Twentieth-Century America*, Princeton University Press.

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<sup>30</sup> Frank's (2004) account of changes in US political culture since the Progressive Era surely explains much of the reason why. As this essay suggests, I think structural liberalism provides another reason.

<sup>31</sup> As Lisa Iglesias writes: 'the most critical task for Critical Race Theory is to develop a compelling account of the way law constructs these institutional arrangements; the way these institutional structures demobilize and disorganize the collective political identities through which subordinated groups might seek to transform the political economy, for example, as community members, consumers, workers, racial minorities, or welfare recipients; and the kinds of institutional arrangements that should replace them.' (Iglesias, 2002)

- Devon Carbado and Mitu Gulati (2003) 'The Law and Economics of Critical Race Theory' 112 *Yale Law Journal* 1757.
- Mitchell Dean (1999) *Governmentality: Power and Rule in Modern Society*, Sage.
- Robert Dreyfuss (2001) 'Grover Nordquist: "Field Marshall" of the Bush Plan', *The Nation*, 14 May 2001, [www.thenation.com/doc.mhtml?i=20010514&s=dreyfuss](http://www.thenation.com/doc.mhtml?i=20010514&s=dreyfuss)
- Martha M Ertman (2003) 'What's Wrong with a Parenthood Market?' 82 *North Carolina Law Review* 1.
- Frantz Fanon (1963) *The Wretched of the Earth*, Grove Press.
- Daniel A Farber (2001) 'Toward a New Legal Realism' 68 *University of Chicago Law Review* 279.
- Martha Albertson Fineman (2001) 'Contract and Care' 76 *Chicago-Kent Law Review* 1403.
- Thomas Frank (1997) 'Why Johnny Can't Dissent,' in Thomas Frank and Matt Weiland (eds), *Commodify Your Dissent*, Norton Books.
- Thomas Frank (2004) *What's The Matter With Kansas? How Conservatives Won the Heart of America*, Henry Holt & Co.
- Ron Harris (2003) 'The Uses of History in Law and Economics' 4 *Theoretical Inquiries in Law* 659.
- Lisa Heinzerling (2002) 'Markets for Arsenic' 90 *Georgetown Law Journal* 2311.
- Lisa Iglesias (2002) 'Global Markets, Racial Spaces, and the Role of Critical Race Theory in the Struggle for Community Control of Investments: An Institutional Class Analysis' in Francisco Valdes, Jerome McCristal Culp and Angela P Harris (eds), *Crossroads, Directions, and a New Critical Race Theory*, Temple University Press.
- Sut Jhally (nd) 'Advertising at the Edge of the Apocalypse', [www.sutjhally.com/onlinepubs/apocalypse.html](http://www.sutjhally.com/onlinepubs/apocalypse.html).
- Naomi Klein (2001) 'The Unknown Icon' in Tom Hayden (ed), *The Zapatista Reader*, Nation Books.
- Robert Kuttner (1996) *Everything for Sale: The Virtues and Limits of Markets*, University of Chicago Press.
- Jane E Larson (2002) 'Informality, Illegality, and Inequality' 20 *Yale Law & Policy Review* 137.
- Deirdre N McCloskey (1993) *The Rhetoric of Economics (Rhetoric of the Human Sciences)*, University of Wisconsin Press.
- Martha T McCluskey (2003) 'Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Social Welfare State' 78 *Indiana Law Journal* 783.
- Melvin L Oliver and Thomas M Shapiro (1997) *Black Wealth/White Wealth: A New Perspective on Racial Inequality*, Routledge Press.
- Frances Olsen (1983) 'The Family and the Market: A Study of Ideology and Legal Reform' 96 *Harvard Law Review* 1497.
- Richard A Posner (1990) 'The Economic Approach to Law,' in *The Problems of Jurisprudence*, Harvard University Press.
- Daria Roithmayr (2003) 'Locked in Inequality: The Persistence of Discrimination' 9 *Michigan Journal of Race & Law* 31.
- Charles Sackrey and Geoffrey Schneider (with Janet Knoedler) (2002) *Introduction to Political Economy*, Economic Affairs Bureau.
- Michael Sandel (1998) 'What Money Can't Buy: The Moral Limits of Markets', The Tanner Lectures on Human Values, [www.tannerlectures.utah.edu/lectures/sandel00.pdf](http://www.tannerlectures.utah.edu/lectures/sandel00.pdf).

- Robert B Seidman (1989) 'Contract Law, the Free Market, and State Intervention: A Jurisprudential Perspective' in Marc R. Tool and Warren J. Samuels (eds), *State, Society and Corporate Power*, Transaction Publishers.
- CP Snow (1998) *The Two Cultures*, Cambridge University Press.
- Cass R Sunstein (1993) *The Partial Constitution*, Harvard University Press.
- Cass R Sunstein (2002) 'The Arithmetic of Arsenic' 90 *Georgetown Law Journal* 2255.
- Anthony Taibi (1995) 'Racial Justice in the Age of the Global Economy: Community Empowerment and Global Strategy' 44 *Duke Law Journal* 928.
- David Dante Troutt (2000) 'Ghettos Revisited: Antimarkets, Consumption, and Empowerment' 66 *Brooklyn Law Review* 1.
- Francisco Valdes (2004) 'Culture, "Kulturkampf," and Beyond: The Antidiscrimination Principle Under the Jurisprudence of Backlash' in Austin Sarat (ed), *The Blackwell Companion to Law and Society*, Blackwell.
- Malcolm X (1965) 'The Ballot or the Bullet' in George Breitman (ed), *Malcolm X Speaks*, Grove Weidenfeld.