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BOOK REVIEW

WHAT'S LEFT?

A REVIEW OF *INTERNATIONAL LAW ON THE LEFT* BY SUSAN MARKS

BARBARA J. STARK*

A 2005 BBC poll declared Marx “the greatest philosopher of all time,”¹ but he has few fans in the United States. As U.S. scholars Thomas Hale and Anne-Marie Slaughter wrote that same year: “Marxism may be out-dated, oversimplified and wrong.”² Although the roots of this peculiarly U.S. antipathy are complex,³ its influence, especially since the Cold War, is easy to track. Before Senator Joseph McCarthy became an embarrassment, his blacklists and purges gutted the U.S. left.⁴ Disillusionment with the Soviet brand of Marxism finished the job.

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1. Susan Marks, *Introduction* to *INTERNATIONAL LAW ON THE LEFT: RE-EXAMINING THE MARXIST LEGACIES* 24 (Susan Marks ed., 2008) [hereinafter *INTERNATIONAL LAW ON THE LEFT*].

2. Thomas N. Hale & Anne-Marie Slaughter, *Hardt & Negri's 'Multitude': The Worst of Both Worlds*, *OPENDEMOCRACY* (May 25, 2005), http://www.opendemocracy.net/globalization-vision_reflections/marx_2549.jsp; see also LORI FISLER DAMROSCH ET AL., *INTERNATIONAL LAW*, at xxxiii (5th ed. 2009) (“[Marxism] influenced Soviet Communism and was proclaimed by Maoist China, but ceased to be heard in the last half of the 20th century, long before the demise of Soviet Communism.”). See generally Mark Leibovich, ‘Socialism!’ *Boo, Hiss, Repeat*, *N.Y. TIMES*, Mar. 8, 2009, <http://www.nytimes.com/2009/03/01/weekinreview/01leibovich.html> (noting that “the socialist bogey-mantra has made a full-scale return after a long stretch of relative dormancy” as conservatives attack “bank bailouts, budget blowouts and stimulus bills”). Even U.S. liberals mock Marx. See Gail Collins, *So Much for Civility*, *N.Y. TIMES*, Sept. 10, 2009, at A43 (“You might have expected Wilson to hold his tongue and wait to see if Obama would yell ‘Marxism is a good thing!’ and send the commerce committee racing off to give workers control over the means of production.”).

3. See Jon D. Michaels, *To Promote the General Welfare: The Republican Imperative to Enhance Citizenship Welfare Rights*, 111 *YALE L.J.* 1457, 1459 (2002) (noting that “substantive welfare rights are completely anathema to Lockean tradition”). See generally LESZEK KOLAKOWSKI, *MAIN CURRENTS OF MARXISM* (2005).

4. See Harold Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599, 2615 (1997) (describing the view that, “utopian moralizing about world government . . . like the

As the anti-globalism activist Naomi Klein explains:

My grandparents were pretty hard core Marxists, and in the thirties and forties they believed fervently in the dream of egalitarianism that the Soviet Union represented They had their illusions shattered by the reality of gulags, of extreme repression, hypocrisy, Stalin's pact with Hitler"⁵

But the demonization of Marxism has been costly. It has chilled debate; prevented labor, civil rights activists, and feminists from taking bold positions; and generally inhibited the development of any robust, homegrown U.S. socialism.⁶ As David Richard observed almost twenty-five years ago:

The painfully evident bankruptcy of coherent political philosophy of the American left may have both political and legal consequences. To address this problem . . . the left must understand and publicly acknowledge both its continuities and discontinuities with the socialist and Marxist perspectives on political philosophy. Unfortunately, these perspectives have traditionally been excluded from serious political discussion in this country. This lacuna, exacerbated by recurrent red-baiting, deprives us of serious discussion of the full range of democratic political alternatives on the left.⁷

Europeans have not been hobbled in the same way. In 2004, in response to the U.S. invasion of Iraq,⁸ a group of prominent Euro-

strategy of appeasement, played into the hands of the Communist bloc"). See generally RICHARD M. FREELAND, *THE TRUMAN DOCTRINE AND THE ORIGINS OF MCCARTHYISM* (1972); THOMAS C. REEVES, *THE LIFE AND TIMES OF JOE MCCARTHY: A BIOGRAPHY* (1982).

5. Larissa MacFarquhar, *Outside Agitator: Naomi Klein and the New New Left*, NEW YORKER, Dec. 8, 2008, at 62. As Klein notes, "The left has been held accountable for the crimes committed in the name of its extreme ideologies, and I believe that's been a very healthy process" *Id.* Many seem to expect an explicit acknowledgement of these crimes to accompany any discussion of Marxism. See David Lodge, *Goodbye to All That*, N.Y. REV. BOOKS, May 27, 2004, at 6 (noting that in *After Theory*, Terry Eagleton fails to "explicit[ly] acknowledge . . . that Marxism, as implemented in Russia and Eastern Europe, was inimical to people's free development"). If such an acknowledgement is expected here, this is it.

6. See, e.g., Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1075 (1989) (explaining the impact of McCarthyism on the civil rights movement: "The fear that the movement's program would be vulnerable to attack from the right as somehow . . . communist-inspired, and the frequent efforts to head off any such attacks by preemptive disavowals and self-censorship have seriously inhibited the movement.").

7. David A.J. Richard, Book Review, 60 N.Y.U. L. REV. 1188, 1188 (1985).

8. See Matthew Craven et al., 'We Are Teachers of International Law', 17 LEIDEN J. INT'L L. 363 (2004); Anthony Chase, Review Articles, 15 HISTORICAL MATERIALISM 227-37 (2007) (reviewing the Leiden Journal symposium on Marx and international law). Many had hoped that international law would be more effective in preventing such wars. See, e.g., David D. Caron & Galina Shinkaretskaya, *Peaceful Settlement of Disputes Through the Rule of Law*, in BEYOND CONFRONTATION: INTERNATIONAL LAW FOR THE POST-COLD WAR ERA 309 (Lori Fisler Damrosch et al. eds., 1995) [hereinafter BEYOND CONFRONTATION]. But see

pean legal scholars convened a symposium, *Marxism and International Law*, to explore the causes of the “material economic woes of international society.”⁹ Cambridge published a revised and expanded version of that symposium, including five new essays, in 2008, as *International Law on the Left: Re-examining the Marxist Legacies*.¹⁰ The book addresses “the contemporary relevance of Marxism for the study of international law.”¹¹

The global economic crisis¹² makes this review especially timely.¹³ The current crisis has toppled some of the mighty,¹⁴ but the worst-off are even worse off,¹⁵ and many are likely to join them.¹⁶ Even before the bubble burst, economists warned of unprecedented economic polarization. As a recent U.N. study explains, global wealth is distributed “as if one person in a group of ten takes 99% of the total pie and the others share the remaining

generally Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005) (arguing for an extremely expansive executive role); Julian G. Ku, *Gubernatorial Foreign Policy*, 115 YALE L.J. 2380 (2006) (arguing for an expansive view of executive power); John Yoo, *Using Force*, 71 U. CHI. L. REV. 729 (2004) (defending the Bush Administration’s use of force).

9. Anthony Carty, *Marxism and International Law: Perspectives for the American (Twenty-First) Century?*, 17 LEIDEN J. INT’L L. 247, 247 (2004).

10. INTERNATIONAL LAW ON THE LEFT, *supra* note 1.

11. Marks, *supra* note 1, at 1.

12. Nomenclature is still an open question as of the date of this review. See, e.g., William Safire, *Name That Plunge: Coming—The Great Whatever*, N.Y. TIMES MAG., Feb. 1, 2009, at 12 (describing the difficulty of labeling the ongoing “debacle,” “crash,” “collapse,” “recession”).

13. “Thanks to globalism’s discontents and the financial crisis that has spread across the planet, Karl Marx and his analysis of capitalism’s dark, wormy side are back in vogue.” Dwight Gardner, *Fox Hunter, Party Animal, Leftist Warrior*, N.Y. TIMES, Aug. 19, 2009, at C1 (reviewing TRISTRAM HUNT, *MARX’S GENERAL: THE REVOLUTIONARY LIFE OF FRIEDRICH ENGELS* (2009)).

14. See, e.g., Vikas Bajaj, *Household Wealth Falls By Trillions*, N.Y. TIMES, Mar. 13, 2009, at B1 (noting that while U.S. households lost \$5.1 trillion in the last quarter of 2008, “the loss was concentrated among the most affluent”); David Leonhardt & Geraldine Fabrikant, *After 30-year Run, Rise of the Super Rich Hits a Sobering Wall*, N.Y. TIMES, Aug. 21, 2009, at A1 (noting that the thirty-year period during which the super-rich became wealthier and more numerous may be ending, as indicated by the 27 percent drop last year in the number of U.S. residents with a net worth of at least \$30 million); see also Andrew E. Kramer, *The Last Days of the Oligarchs?*, N.Y. TIMES, Mar. 8, 2009, at B1 (noting that “few businessmen anywhere have fallen as hard or as fast in recent months” as Russia’s richest men, the top twenty-five of whom lost \$230 billion between May and October).

15. Edmund L. Andrews, *Report Projects a Worldwide Economic Slide*, N.Y. TIMES, Mar. 9, 2009, at B1 (citing economists for the World Bank, who predict that “the global economy and the volume of global trade would both shrink this year for the first time since World War II” with grim consequences for the world’s poor).

16. See, e.g., Donald G. McNeil Jr., *Global Fund Is Billions Short as Downturn Cuts Pledges From Donor Nations*, N.Y. TIMES, Feb. 3, 2009, at D6 (noting that pledges from donor states to the Global Fund to Fight AIDS, Tuberculosis and Malaria “are running about \$5 billion short of what is needed through 2010”).

1%.”¹⁷ These are Marx’s people. As Tony Judt points out, “from first to last, Marxism’s strongest suit was . . . ‘the moral seriousness of [its] conviction that the destiny of our world as a whole is tied up with the condition of its poorest and most disadvantaged members.’”¹⁸

Second, “globalization’s discontents,” as Joseph Stiglitz calls them,¹⁹ seek alternatives to a global economic system that may work for Goldman Sachs, but not for them.²⁰ Some denounce world trade regimes that enrich the global north at the expense of the global south.²¹ Some demand jobs.²² Some demand food.²³ Some just demand “change.”²⁴ Judt’s claim that “Marxism . . . is

17. Press Release, World Institute for Dev. Econ. Research, U.N. Univ., *Pioneering Study Shows Richest Two Percent Own Half the World’s Wealth* 4 (Dec. 5, 2006), available at http://www.countdownnet.info/archivio/analisi/world_economy/516.pdf; see also Anthony Shorrocks et al., *The World Distribution of Household Wealth* (World Institute for Dev. Econ. Research, U.N. Univ., Discussion Paper No. 2008/03, 2008).

18. Tony Judt, *Goodbye to All That?*, 53 N.Y. REV. BOOKS, Sept. 21, 2006, at 9; see also PETER SINGER, *ONE WORLD: THE ETHICS OF GLOBALIZATION* 81 (2d ed. 2004). There are, of course, concerned liberals. See, e.g., THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS: COSMOPOLITAN RESPONSIBILITIES AND REFORMS* 7 (2002); Note, *Never Again Should a People Starve in a World of Plenty*, 121 HARV. L. REV. 1886, 1892 (2008) (urging law students—and presumably everyone else—to “do the right thing at every moment,” that is, “if you can ‘save a child’s life . . . with a donation of \$200,’ you have a moral obligation to do so”).

19. See generally JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2003).

20. See, e.g., Op-Ed., *Betting Against All of Us*, N.Y. TIMES, Dec. 29, 2009, at A30 (explaining how “Goldman Sachs and other financial firms created complicated mortgage-related investments, sold them to clients and then placed bets that those investments would decline in value [enabling it] to profit handsomely as its clients tanked . . . [and] spreading the losses to pretty much everyone”). See generally Galit A. Sarfaty, *The World Bank and the Internalization of Indigenous Rights Norms*, 114 YALE L. J. 1791, 1796–1800 (2005) (explaining how the World Bank shapes the domestic law of borrowing states); Rogers M. Smith, *Beyond Sovereignty and Uniformity: The Challenges for Equal Citizenship in the Twenty-First Century*, 122 HARV. L. REV. 907, 911 (2009) (book review) (noting that international financial institutions have “restricted and sometimes restructured” domestic institutions and policies).

21. See, e.g., DAVID HARVEY, *THE NEW IMPERIALISM* 167 (2003) (describing “literally hundreds of protests against IMF-imposed austerity programs”). See generally Eleanor M. Fox, *Globalization and Human Rights: Looking Out for the Welfare of the Worst Off*, 35 N.Y.U. J. INT’L L. & POL. 201 (2002).

22. Nelson D. Schwartz, *Unemployment Surges around the World, Threatening Stability*, N.Y. TIMES, Feb. 15, 2009, at A1 (describing protests in Latvia, Chile, Greece, and Iceland).

23. See, e.g., Asif Mehdi, *The 21st Century’s Bleak Harvest*, ALJAZEERA.NET (May 23, 2009), <http://english.aljazeera.net/focus/globalrecession/2009/05/20095161253214553.html> (describing food riots in “at least 15 countries”); see also Barry Bearak, *Renewing a Tradition of Protest, South Africa’s Poor Demand Basic Services*, N.Y. TIMES, Sept. 7, 2009, at A4 (describing recurring protests by the poor complaining about the lack of running water, electricity, and jobs); *Discussion of Poverty, Class, and Economic Justice Between Frances Fox Piven and Stephen Loffredo*, 11 N.Y. CITY L. REV. 1, 15–16 (2007) [hereinafter *Piven & Loffredo*] (noting mass protests in Europe and Canada when social welfare benefits are threatened).

24. Schwartz, *supra* note 22, at A1 (quoting the U.S. director of national intelligence, who warned Congress that “instability caused by the global economic crisis had become the

now once again, largely for want of competition, the common currency of international protest movements,"²⁵ may be overstated, but not by much.

Finally, as world leaders desperately seek to break the downward spiral of "casino capitalism,"²⁶ Marx's warnings seem oddly prescient.²⁷ As Susan Marks observes, "Marx and his interpreters have produced some of the most sustained and penetrating analysis we have of capitalism as an economic system with globalizing tendencies."²⁸ As a U.S. President promises to reduce economic inequality,²⁹ and *Newsweek* announces, "We Are All Socialists Now,"³⁰ this rigorous reassessment of Marxism by a new generation of theorists is both welcome and illuminating.

This Review analyzes the provocative, scholarly, and occasionally electrifying essays in this volume in two parts, each addressing a version of the question: "What's Left?" Part I asks, "What's 'Left'?: that is, is there a coherent "Left" in international law and, if so, what does it look like? Part II asks, "What's left?" in the sense, "What remains?" This Part has two sections. First, it addresses what remains of the Marxist legacies after the Cold War and the implosion of the Soviet Union. Second, more poignantly, it asks

biggest security threat facing the United States, outpacing terrorism"). *But see* Dmitry Chubashenko & Ron Popeski, *Moldova President Says Protests Amount to a Coup*, REUTERS (Apr. 7, 2009), <http://uk.reuters.com/article/idUKTRE5364YX20090407> (describing violent protests against Communist victory).

25. Judt, *supra* note 18, at 1; *see also* Hale & Slaughter, *supra* note 2 (describing Hardt's disappointment that "many in the global justice movement [at the World Social Forum in Porto Alegre, Brazil] failed to adopt his 'discontents of the world, unite!' call").

26. "Casino capitalism" refers to a global economy in which "the value of stock markets has lost all ground in materiality," as opposed to earlier forms of capitalism grounded in more concrete property, such as the scarcity of gold or the discovery of oil. MILLENNIAL CAPITALISM AND THE CULTURE OF NEOLIBERALISM 7-8 (Jean Comaroff & John L. Comaroff eds., 2001).

27. *See* Chase, *supra* note 8, at 231 ("Jeffery Sachs . . . asks not why did Marx's predictions fail but, rather, what took so long for them to prove accurate?"); Rowan Williams, *Face It: Marx Was Partly Right About Capitalism*, SPECTATOR (Sept. 24, 2008), <http://www.spectator.co.uk/essays/all/2172131/face-it-marx-was-partly-right-about-capitalism.thtml>. *See generally* John F. Burns & London Thomas, Jr., *English-Speaking Capitalism on Trial*, N.Y. TIMES, Mar. 29, 2009, at WR1 (describing efforts to create a new global financial system that "curbs the rampant and often conscienceless free-marketing of the past 20 years"); Richard Stevenson, *Capitalism After the Fall*, N.Y. TIMES, Apr. 19, 2009, at WR1 (noting that "market forces are now so powerful and fast-moving that they cannot be counted on to be self-correcting when things go wrong").

28. Marks, *supra* note 1, at 1.

29. Senator Barack Obama, *Our Common Stake in America's Prosperity* (Sept. 17, 2007), *available at* http://www.barackobama.com/2007/09/17/remarks_of_senator_barack_obam_24.php.

30. Jon Meacham & Evan Thomas, *We Are All Socialists Now*, NEWSWEEK, Feb. 16, 2009, at 23 (cover story).

"What's left?" of what Martti Koskenniemi calls "international law's emancipatory promise."³¹

I. WHAT'S "LEFT"?

All of the essays in this volume wrestle with this question, rather than definitively answering it. As Marks explains in her *Introduction*, they all reject orthodoxy in favor of a Marxism that is "active, developing, unfinished, and persistently contentious."³² If there is a "Left" in international law, it offers neither simple solutions nor grand plans, but sharp tools for deep and ongoing critique. In addition to Marks's *Introduction*, B.S. Chimni's chapter, *An Outline of a Marxist Course on Public International Law*,³³ and Anthony Carty's bracing, *Marxism and International Law: Perspectives for the American (Twenty-first) Century?*,³⁴ demonstrate the range and power of these tools.

Marks's *Introduction* is the cornerstone, holding the volume together. As she explains:

Against expectations that the turn away from state socialism would likewise initiate a turn away from Marxist thought, the trend has been rather the reverse . . . the collapse of Eastern bloc communism clearly released the grip of orthodox Marxism as an unchallengeable body of doctrine, and created an opening for fresh consideration of Marxist texts by a new generation of readers.³⁵

While noting the "richness and complexity"³⁶ of the Marxist tradition, and more particularly, "the differences of forms, standpoint, analysis and style" of the essays that follow, Marks distills five features that the essays share. First, they focus on those "seeking emancipatory change," the discontents, those with no stake in the

31. Martti Koskenniemi, *What Should International Lawyers Learn From Karl Marx?*, in *INTERNATIONAL LAW ON THE LEFT*, *supra* note 1, at 30.

32. Marks, *supra* note 1, at 17 (quoting RAYMOND WILLIAMS, *MARXISM AND LITERATURE* 3 (1977)).

33. B.S. Chimni, *An Outline of a Marxist Course on Public International Law*, in *INTERNATIONAL LAW ON THE LEFT*, *supra* note 1, at 53.

34. Anthony Carty, *Marxism and International Law: Perspectives for the American (Twenty-First) Century?*, in *INTERNATIONAL LAW ON THE LEFT*, *supra* note 1, at 169.

35. Marks, *supra* note 1, at 1. The contributors to this volume are as unsurprised by the triumph of capitalism as Ronald Reagan was. See generally PETER SCHWEIZER, *VICTORY: THE REAGAN ADMINISTRATION'S SECRET STRATEGY THAT HASTENED THE COLLAPSE OF THE SOVIET UNION* (1994) (claiming that the "resource crisis" that faced the Soviet leadership in the 1980s was a leading cause of the downfall of the Soviet Union). As Bowring observes, "capitalism has—as it must, and as Marx predicted—spread to every corner." Bill Bowring, *Positivism Versus Self-Determination: The Contradictions of Soviet International Law*, in *INTERNATIONAL LAW ON THE LEFT*, *supra* note 1, at 133, 166.

36. Marks, *supra* note 1, at 16.

status quo. Second, they are skeptical about claims of universality; they ask who, precisely, benefits from such claims. Third, they recognize that international law shapes, and is shaped by, global economic and political forces. Fourth, they view Marxism as a useful lens through which to analyze “law,” as it has been for other social phenomena. Finally, they are all unorthodox.³⁷ The classic question was: “Are his ideas Marxist or not?”³⁸ These essays pose questions Marx never imagined.³⁹

All of the contributors draw on a set of Marxist “legacies,” or conceptual frameworks, to challenge mainstream international law. First, Marx’s insistence that history be “understood in materialist terms,” means that we need to consider the actual, concrete origins of international legal ideas and the on-the-ground conditions that continue to support them. Second, Marx puts capitalism on the agenda,⁴⁰ a particular economic arrangement to be questioned rather than an unchallenged backdrop. This highlights the ubiquity of the “commodity form,” the premise that everything has a price, and can be bought and sold. In a capitalist world, international law itself becomes a commodity, “a set of rules, a thing, rather than a social interpretative process.”⁴¹

Third, Marx exposes the role of ideology in international law, how ruling powers legitimate themselves through rhetoric and ideas.⁴² As Marks succinctly observes, “the problem with ideology is not that it involves error, but that it sustains privilege.”⁴³ Categorizing states as “uncivilized,” for example, is a useful first step in subjugating them.⁴⁴ Fourth, Marx’s followers argue that “underdevelopment,” the persistent, immiserating poverty of the global south, is neither inevitable nor accidental.⁴⁵ It is, rather,

37. *Id.*

38. *Id.* at 17.

39. As Koskeniemi puts it, “I am using Marx in an instrumental and heretic fashion, in order to assist in a project that can scarcely be called Marxist in any traditional sense.” Koskeniemi, *supra* note 31, at 31.

40. See Marks, *supra* note 1, at 4.

41. *Id.* at 6.

42. *Id.* at 7; see also KARL MARX & FREDRICK ENGELS, MANIFESTO OF THE COMMUNIST PARTY 43 (Samuel Moore tr., Charles H. Kerr & Co. 1906) (1848) (“The ruling ideas of each age have ever been the ideas of its ruling class.”).

43. Marks, *supra* note 1, at 8.

44. See Susan Marks, *Empire’s Law*, 10 IND. J. GLOBAL LEGAL STUD. 449, 456 (2003). See generally ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW (2005) (arguing that international law is grounded in colonialism).

45. These include Rosa Luxemburg and “the canonical Marxist text on imperialism,” Lenin’s *Imperialism: The Highest Stage of Capitalism*. Marks, *supra* note 1, at 10–11.

grounded in colonialism and perpetuated by globalization.⁴⁶ As Marks explains, “[H]unger is not simply an objective fact of the world, but a policy option and an outcome of decisions taken by particular people in particular contexts.”⁴⁷

Fifth, and finally, Marks carefully distinguishes Marx’s concept of “totality” from “the possibility of explaining everything, still less the desirability of subsuming everything under the order of a single ruling idea.”⁴⁸ Rather, “totality” refers to “the actuality that phenomena in the world are interrelated and . . . can only properly be understood when viewed as elements within larger systems including the system of global capitalism.”⁴⁹ Like liberalism, Marxism is an Enlightenment narrative, a secular, rational project that seeks to explain the world.⁵⁰ Because its premises are different, it exposes liberalism’s unquestioned assumptions. For Marks, accordingly, although “international law was not part of [Marx’s] project,”⁵¹ Marxist theory is a vital part of ours.

For B.S. Chimni, similarly, “critical Marxist international law” (CMIL) provides a necessary corrective to “mainstream” international law, which he sees as characterized by four features.⁵² First, it is shaped by “abstract, formal, definitions of international law and its doctrines.”⁵³ Second, it assumes that the story of interna-

46. See, e.g., ARTURO ESCOBAR, ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD 21 (1995) (describing the “discovery” of mass poverty in Asia, Africa, and Latin American after World War II); see also BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE 35 (2003) (noting that international lawyers agreed that development should be centrally directed either by the state or the market). But see WILLIAM EASTERLY, THE WHITE MAN’S BURDEN 271 (2006) (“[T]here is ‘such a thing as liberal imperialism and that on balance it was a good thing In many cases of economic ‘backwardness,’ a liberal empire can do better than a nation-state.” (quoting NIAL FERGUSON, COLOSSUS: THE PRICE OF AMERICA’S EMPIRE 198 (2004))).

47. Marks, *supra* note 1, at 13.

48. *Id.* at 15; cf. KOLAKOWSKI, *supra* note 3, at 356 (describing the “orthodox majority,” which “maintained that Marxist doctrine itself contained the answers to all or most of the problems of philosophy”). See generally 50 YEARS IS ENOUGH: THE CASE AGAINST THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND (Kevin Danaher ed., 1994).

49. Marks, *supra* note 1, at 15.

50. See Judt, *supra* note 18, at 8 (noting that “[t]he Marxist project . . . was one strand in the great progressive narrative of our time: it shares with classical liberalism, its antithetical historical twin, that narrative’s optimistic, rationalistic account of modern society and its possibilities”).

51. Marks, *supra* note 1, at 16; accord Koskeniemi, *supra* note 31, at 31 (noting that Marx never gave international law “a second’s thought”); see also Noah Feldman, *Cosmopolitan Law?*, 116 YALE L.J. 1022, 1034–38 (2007) (book review) (explaining the problems of extrapolating from state-centered liberal theory).

52. Chimni, *supra* note 33, at 53.

53. *Id.*

tional law is a story of progress—the more international law, the better. Third, it assumes that “international law is a system of rules that can be objectively known, interpreted and applied.”⁵⁴ Fourth, and crucially, mainstream international law structurally precludes empowerment of “the subaltern classes,”⁵⁵ which, for Chimni, include “all oppressed and marginal groups in society; whether on the basis of class or on the basis on some other social division.”⁵⁶

Like Marks, Chimni thinks that the “demise [of state socialism] has opened up the possibility of a critical retelling, a retelling [that] is not dogmatic in anyway and is fully conscious of the enormous human costs of actually existing socialism.”⁵⁷ He proposes a radically re-conceptualized international law course grounded in CMIL, which differs from the mainstream account in four major ways. First, CMIL focuses on the historical context and the particular groups, classes, and states involved in creating international law, as opposed to mainstream international law’s “empty concept [of national interest].”⁵⁸ For Chimni, the state is not a black box, but an ever-shifting assortment of classes and groups. Second, CMIL shows that there are “structural constraints on the democratic transformation of contemporary international law,”⁵⁹ and these are grounded in its “frozen and power-driven sources.”⁶⁰ CMIL, in contrast, “seeks to embed deliberative democracy in the lawmaking process” through soft law, such as general assembly resolutions.⁶¹ Third, CMIL accepts the inevitable indeterminacy of international texts and facts.⁶² Chimni views this as a “middle ground” between the ostensible objectivity of mainstream international law and the “radical indeterminacy” of the New Haven School, which “uses this understanding to justify its (own) subjective perceptions.”⁶³

54. *Id.* at 54.

55. *Id.* at 55.

56. Marks, *supra* note 1, at 19.

57. Chimni, *supra* note 33, at 55; see *supra* note 5 (noting the self-flagellation of the left).

58. Chimni, *supra* note 33, at 56; see Piven & Loffredo, *supra* note 23, at 8 (noting the U.S. aversion to “terminology of class”).

59. Chimni, *supra* note 33, at 56.

60. *Id.*

61. *Id.* See generally Jonathan L. Charney & Gennady M. Danilenko, *Consent and the Creation of International Law*, in *BEYOND CONFRONTATION* *supra* note 8, at 23, 50–51 (discussing U.S. and Russian views on soft law after the Cold War).

62. Chimni, *supra* note 33 at 56.

63. *Id.* For a succinct introduction to the New Haven School, see generally Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in International Conflict: Toward a World Public Order of Human Dignity*, 93 AM. J. INT’L. L. 316 (1999).

Fourth, CMIL welcomes perspectives outside of the mainstream, especially critical Third World approaches.⁶⁴

Applying these principles transforms mainstream international law. Chimni shows, for example, that the "state," the basic building block of international law, is not a neutral concept. Especially since the collapse of socialism, Western powers have progressively limited the benefits of statehood to those political entities that look most like the "bourgeois democratic state (the best shell for capitalism)."⁶⁵ Thus, he explains, in 1991, the European Community adopted "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union."⁶⁶ These guidelines blandly required states to commit to "the rule of law, democracy, and human rights."⁶⁷ As a practical matter, however, doing so made them dependent on the capitalist states and allowed those states to dominate them.⁶⁸ According to Chimni, the major beneficiary of this requirement was transnational capital.⁶⁹

Although Chimni focuses on different factors, like Marks he is fundamentally concerned with the real, concrete economic and political relationships that drive the law. Chimni shows how the restrictive theory of sovereign immunity, for example, legitimates the jurisdiction of Western courts over sovereign states,⁷⁰ even as the doctrine of *forum non conveniens* is used to deny access to foreign plaintiffs seeking relief against western multinationals.⁷¹

Anthony Carty is less concerned with doctrine, and more concerned about commitment to basic principles. For him, the Iraq war is a "flagrant violation of international law that points the way

64. Chimni, *supra* note 33, at 56.

65. *Id.* at 58. *But see generally* Koh, *supra* note 4 (suggesting more benign reasons for state compliance).

66. Chimni, *supra* note 33, at 58.

67. *Id.* at 59.

68. *See id.*

69. *See id.*; JOSEPH STIGLITZ, MAKING GLOBALIZATION WORK 245 (2007) (noting that "[t]he global financial system is not working well . . . especially for developing countries. Money is flowing uphill, from the poor to the rich. The richest country in the world, the U.S., borrow[s] . . . \$2 billion a day from poorer countries").

70. *See* The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812); Chimni, *supra* note 33, at 75 (explaining why a public armed ship was entitled to sovereign immunity).

71. *See generally* Bi v. Union Carbide Chemicals, 984 F.2d 582 (2d Cir. 1993) (affirming dismissal of the Bhopal case based on doctrine of *forum non conveniens*); Chimni, *supra* note 33, at 77. Nor do the formalistic safeguards of the Vienna Convention on the Law of Treaties "prevent the quiet coercion of states." *Id.* at 67.

back to an ordered humanity based on principles of the equality of states, and economic and social justice.”⁷²

Carty argues that the post-structuralists, specifically Michael Hardt and Antonio Negri, authors of *Empire*,⁷³ are devoid of substance. They have been distracted by postmodernism, which he dismisses as “the exhausted moral spirit of the old Europeans.”⁷⁴ Lost in their own “convoluted rhetoric,”⁷⁵ they miss the simpler, more obvious explanation—which Carty sees as the U.S. project to “restore political control over the [global] South.”⁷⁶ Their account of a post-structuralist “medley of social movements—feminists, ecologists, black nationalists and so on . . . is itself a total vision that evacuates any political content from the concept of resistance.”⁷⁷ Carty concludes that, rather, “Marxist interpretations of imperialism [still] offer us the most convincing explanations as to why the violence of the United States increases by the year.”⁷⁸

These essays suggest that the “Left” is very much alive in international law, although hardly monolithic. It includes Marks’s “rich legacies,” Chimni’s re-imagined doctrine, and Carty’s commitment to the “equality of states, and economic and social justice.”⁷⁹ There are multiple “Lefts,” in short, and like Marks’s description of Marxism, they are “active, developing, unfinished, and persistently contentious.”⁸⁰

72. Carty, *supra* note 34, at 170.

73. MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* (2000).

74. Carty, *supra* note 34, at 169.

75. *Id.* at 174.

76. *Id.* at 198. See generally UNITES STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW (Michael Byers & Georg Nolte eds., 2003) (essays exploring the implications of U.S. hegemony in contexts including, among other things, sovereign equality and the use of force).

77. Carty, *supra* note 34, at 174. But see RAJAGOPAL, *supra* note 46, at 15 (drawing on Foucault to argue that a theory of resistance that focuses on social movements shows how government practices can be used to subvert the government).

78. Carty, *supra* note 34, at 174. But see Detlev F. Vagts, Book Review, 103 AM. J. INT’L L. 178, 179 (2009) (criticizing Carty’s “updated theory of capitalist imperialism” as “complicated and somewhat implausible”).

79. Carty, *supra* note 34, at 170. See generally B.S. Chimni, *Third World Approaches to International Law*, in THE THIRD WORLD AND INTERNATIONAL LEGAL ORDER 67 (Antony Anghie et al. eds., 2003) (“Socialism should not be seen as a fixed ideal or a frozen concept. It should today be perceived as expressing the aspirations of equality and justice of subaltern peoples. The idea is to be realized through non-violent means and should exclude all manner of dogmatic thinking and undemocratic practices. The ideal of democratic socialism would be actualized by way of reform and not revolution and would not exclude reliance on market institutions.”).

80. See *supra* note 32 and accompanying text.

II. WHAT'S LEFT?

A. *What remains of Soviet Marxism?*

This part draws on the chapters by China Miéville, Bill Bowring, and Obiora Chinedu Okafor to excavate what remains of the Soviet project, intellectually and politically. Miéville's brilliant, albeit dense,⁸¹ explication of classic Marxist theory, *The Commodity-form Theory of International Law*,⁸² is a *tour de force*, a vindication of theory notwithstanding the collapse of "actually existing socialism."⁸³ Bowring focuses more narrowly on the Soviet contribution to the doctrine of self-determination, and how that doctrine ironically hastened the USSR's own demise.⁸⁴ Okafor's appreciation of Upendra Baxi, *Marxian Embraces (and De-couplings) in Upendra Baxi's Human Rights Scholarship*,⁸⁵ documents the invaluable, if problematic, support provided by Marxist doctrine to Third World Approaches to International Law (TWAIL).

Miéville's chapter recapitulates the thesis of his book, *Between Equal Rights: A Marxist Theory of International Law* (2005). He draws on the Russian scholar Vevgeny Pashukanis to argue that "the conditions required for commodity exchange are the [same] conditions required for legal interaction between states,"⁸⁶ or, "the logic of the commodity-form is the logic of the legal form."⁸⁷ The first necessary condition for both is ownership, the existence of private property. The second is the formal equality of the two owners. It is the potential for dispute between sovereign and equal individuals that makes some form of regulation, or law, necessary.

International law, accordingly, begins with the emergence of territory-owning sovereign states that wanted to trade with each other. Pashukanis assumed such exchange was nonviolent; Miéville does

81. As Chase notes, Miéville is on the Editorial Board of *Historical Materialism*. See Chase, *supra* note 8, at 236–37. Even his title, *The Commodity-Form Theory of International Law*, may strike some readers as esoteric.

82. China Miéville, *The Commodity-Form Theory of International Law*, in INTERNATIONAL LAW ON THE LEFT, *supra* note 1, at 92.

83. *Id.*

84. See Bowring, *supra* note 35, at 133.

85. Obiora Chinedu Okafor, *Marxian Embraces (and De-Couplings) in Upendra Baxi's Human Rights Scholarship*, in INTERNATIONAL LAW ON THE LEFT, *supra* note 1, at 255.

86. Marks, *supra* note 1, at 20 (citing CHINA MIÉVILLE, BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL LAW (2005)); see JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 29 (noting that property held a privileged place in colonial jurisprudence); JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 97 (1986) (noting that "property" was used to refer to "rights of all kinds").

87. Miéville, *supra* note 82, at 106.

not.⁸⁸ In international law, because there is no world government, enforcement is left to “self-help,” the “coercive violence of the legal subjects themselves.”⁸⁹ For Miéville, “international law’s power . . . is the power of violent coercion,”⁹⁰ or, as Marx, put it, “[b]etween equal rights, force decides.”⁹¹ Miéville sees “no prospect of any systematic progressive political project or emancipatory dynamic coming out of international law.”⁹² Indeed, for Miéville, “progressive” international law is even less likely than “progressive” domestic law because every international legal decision represents the triumph of “at least one national ruling class.”⁹³ Thus, he concludes, “[t]he chaotic and bloody world around us *is the rule of law*.”⁹⁴

Bill Bowring respectfully distances himself from Miéville, in *Positivism Versus Self-determination: The Contradictions of Soviet International Law*.⁹⁵ Focusing on self-determination, he describes the rigid, narrow boundaries of official Soviet international law doctrine, limited to positivist rules accepted by both socialists and capitalists. In practice, however, the USSR “gave enormous material and moral support to the National Liberation Movements, and led the successful drive to see the principle and then the right to self-determination”⁹⁶ set out in the first articles of both Covenants of the International Bill of Rights.⁹⁷

88. See Marks, *supra* note 1, at 20.

89. *Id.* at 116.

90. *Id.* at 104; see Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) (“Legal interpretation takes place in a field of pain and death.”).

91. Miéville, *supra* note 82, at 121.

92. *Id.* at 130. The other contributors, while more optimistic, similarly eschew the liberal vision of a cosmopolitan future. For sophisticated and appealing introductions to that vision, see, for example, KWAME ANTHONY APPIAH, *COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS* (2006); MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* (2006); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); Anne-Marie Slaughter, *America’s Edge: Power in the Networked Century*, FOREIGN AFF., Jan–Feb. 2009, at 94; Symposium, *Envisioning a More Democratic Global Democracy*, 13 WIDENER L. REV. 243 (2007).

93. Miéville, *supra* note 82, at 131. See generally RAYMOND FISMAN & EDWARD MIGUEL, *ECONOMIC GANGSTERS: CORRUPTION, VIOLENCE AND THE POVERTY OF NATIONS* (2008) (explaining how corrupt regimes thrive).

94. Miéville, *supra* note 82, at 132; see RAJAGOPAL, *supra* note 46, at 11–12 (describing the “ease with which traditional international law sanctioned violence against non-western peoples”).

95. See generally Bowring, *supra* note 35.

96. *Id.* at 134.

97. The International Bill of Rights consists of the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976), the Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc A/RES/217 (III) (Dec. 10, 1948), and the International Covenant of Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

Bowring traces this commitment to an earlier schism between the Bolsheviks and the Austro-Marxists over the Russian Jews, who sought autonomy. The issue was whether "nationality" required territory as well as language. Lenin insisted that cultural autonomy was impossible without territory: "As long as different nations live in a single state they are bound to one another by millions and thousands of millions of economic, legal and social bonds."⁹⁸ Lenin sounds like Thomas Jefferson when he argues that national minorities would best be protected by "complete democracy . . . liberty of conscience, liberty of movement, languages, schools, etc."⁹⁹ Once a nation had territory, however, "We demand freedom of self-determination, i.e., independence, i.e., freedom of secession for the oppressed nations, because . . . we want . . . the closer unity and even fusion of nations, only on a truly democratic, truly internationalist basis, which is inconceivable without the freedom to secede."¹⁰⁰

Woodrow Wilson, who Bowring notes is generally credited with developing the concept of self-determination, advanced a comparatively pinched version, applicable only to the former holdings of the Ottoman Austro-Hungarian and Russian empires.¹⁰¹ The empires of the Western European powers were exempt.¹⁰² With Soviet support, and the momentum of national liberation movements, self-determination became a core norm of international law. This was critical for the former colonial states, leading to their recognition as legitimate sovereign states.¹⁰³

While promoting the right to self-determination abroad, the Soviets crushed it at home, beginning with Finland in 1939.¹⁰⁴ Later, under the "Brezhev doctrine," the USSR invaded Hungary, Czechoslovakia, and Afghanistan to further the interests of "proletarian internationalism."¹⁰⁵ Aptly characterizing Soviet support for

98. Bowring, *supra* note 35, at 139 (quoting 19 VLADIMIR LENIN, COMPLETE COLLECTED WORKS 503 n.30 (2d ed. 1968)).

99. *Id.* at 141.

100. *Id.* at 143.

101. *See id.*

102. *Id.*

103. Among other benefits, this legitimated Soviet support against "insurgents" backed by former colonial powers. Marx, himself, was skeptical about the sovereign state. ESSENTIAL WRITINGS OF KARL MARX 178 (David Caute ed., 1967) ("Truly one must be destitute of all historical knowledge not to know that it is the sovereigns whom in all ages have been subject to all economic conditions, but they have never dictated laws to them. Legislation, whether political or civil, never does more than proclaim, express in words, the will of economic relations.").

104. *See* Bowring, *supra* note 35, at 155.

105. *Id.* at 137.

the principle of self-determination as “thoroughly paradoxical and hypocritical.”¹⁰⁶ Bowring draws on Patricia Williams to suggest that it became a legal right through “alchemy.”¹⁰⁷ That is, self-determination became a right through the “subversion and appropriation of bourgeois legal norms.”¹⁰⁸

Okafor displays similar dexterity, filtering the legacy of Soviet Marxism through the human rights scholarship of Upendra Baxi. His chapter celebrates Baxi’s depiction of the “trade-related, market-friendly human rights paradigm (TREMf).”¹⁰⁹ Baxi’s key insight is that the human rights paradigm set out in the Universal Declaration of Human Rights is being displaced by TREMF, which assures the human rights of foreign capital, equating the protection of property with the protection of actual human beings.¹¹⁰ While Baxi is “first and foremost, a TWAIL scholar,”¹¹¹ Okafor describes how “warm ‘human life-giving’ Marxian currants flow into and circulate within [his] TREMF thesis.”¹¹² First, Baxi rejects the notion that TREMF is merely a natural development flowing from the Universal Declaration, since the Declaration deliberately left the question of property open.¹¹³ Second, Baxi notes that “the progressive Third World state is now a good host to global capital,”¹¹⁴ which it protects against political instability and market failure, regardless of the cost to its own citizens. Third, it keeps its own citizens in check.¹¹⁵ Fourth, in contrast to the redistributive role assigned the state by the Universal Declaration, under TREMF, the state is driven to “deregulate, denationalize, and disinvest.”¹¹⁶

106. *Id.* at 167.

107. *Id.* at 168. See generally PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

108. Bowring, *supra* note 35, at 168.

109. Okafor, *supra* note 85, at 266.

110. *Id.*; see, e.g., Editorial, *Intel’s Human Rights*, N.Y. TIMES, Aug. 17, 2009, at A18 (Intel, a multinational corporation with annual sales of \$38 billion, claims that it should be entitled to the same due process rights that European human rights law assures individuals.).

111. Okafor, *supra* note 85, at 280.

112. *Id.* at 268.

113. See *id.* at 267.

114. *Id.* at 267; see also Bob Sutcliffe, *The Place of Development in Theories of Imperialism and Globalization*, in CRITICAL DEVELOPMENT THEORY: CONTRIBUTIONS TO A NEW PARADIGM 135 (Ronald Munck & Denis O’Hern eds., 1999) (explaining how development affects Third World states).

115. See Okafor, *supra* note 85, at 267.

116. *Id.* at 268. See generally José E. Alvarez, *Factors Driving and Constraining the Incorporation of International Law in WTO Adjudication*, in THE WTO: GOVERNANCE, DISPUTE SETTLEMENT & DEVELOPING COUNTRIES 611 (Merit E. Janow et al. eds., 2008). For a comprehensive and groundbreaking critique, see generally FRANK J. GARCIA, *TRADE, INEQUALITY, AND JUSTICE: TOWARD A LIBERAL THEORY OF JUST TRADE* (2003).

For Okafor, these arguments show that “the heart and soul” of Baxi’s analysis are “very Marx-like.”¹¹⁷ This conviction is reinforced by Baxi’s concern with subaltern classes and his focus on the dynamics of exploitation.

At the same time, Okafor carefully elucidates the ways in which Baxi’s arguments differ from those of orthodox Marxists. Baxi, for example, is skeptical rather than hostile to the rule of law.¹¹⁸ Like Chimni, he “adopts an expanded view of class,” taking other non-economic axes of oppression, such as race and gender, seriously.¹¹⁹ Finally, Baxi expressly repudiates the human rights abuses of “Soviet-style ‘actually existing socialism.’”¹²⁰

Thus, there is more than bitterness and betrayal left of Soviet Marxism. While these three essays face its abuses and mistakes, they refuse to “throw [] out the baby of Marxist insight with the bathwater of communist practice.”¹²¹ Miéville, while “quickly dispens[ing] with the ‘official’ theories of the Soviet bloc,”¹²² builds on the “astonishingly work”¹²³ of Pashukanis to present a stunning vindication of Marx’s commodity-form theory as applied to international law. Bowring credits the development of the principle of self-determination, now a recognized right, to the Soviet Marxists. Okafor shows how their work infuses the powerful human rights scholarship of the renowned TWAIL jurist Upendra Baxi. As Brad Roth concludes:

The twentieth century saw the refutation of a series of political experiments [ostensibly grounded in Marx] . . . [T]he refutation of these experiments, all of which occurred in circumstances that Marx never foresaw and resorted to devices that

117. Okafor, *supra* note 85, at 268.

118. *See id.* at 278; *see also* David Kennedy, “The Rule of Law”, *Political Choices, and Development Common Sense*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 95, 129 (David M. Trubek & Alvaro Santos eds., 2006) (arguing that under the Washington Consensus, “an economy was now imagined as a ‘market’ in which individual economic actors transact with one another Government is there less to manage the economy than to support the market”).

119. Okafor, *supra* note 85, at 276. *See generally* Balakrishnan Rajagopal, *From Resistance to Renewal: The Third World, Social Movements and the Expansion of International Institutions*, 41 *HARV. INT’L L.J.* 529 (2000).

120. Okafor, *supra* note 85, at 276.

121. Brad Roth, *Marxian Insights for the Human Rights Project*, in *INTERNATIONAL LAW ON THE LEFT*, *supra* note 1, at 220, 251. *But see* Judt, *supra* note 18, at 11 (“As for those who dream of rerunning the Marxist tape, digitally remastered and free of irritating Communist scratches, they would be well advised to ask sooner rather than later just what it is about all-embracing ‘systems’ of thought that lead inexorably to all-embracing ‘systems’ of rule.”).

122. Miéville, *supra* note 82, at 99.

123. *Id.* at 98.

Marx never recommended – does not invalidate the insights that prompted so many to embrace these experiments, often allowing their hopes to get the better of their reason.¹²⁴

B. *What remains of international law's emancipatory promise?*

The four chapters that address this question are breathtaking, like climbing a steep hill for an unsurpassed view is breathtaking—demanding but worth the effort. Koskenniemi begins the ascent with a question that is also a command: *What Should International Lawyers Learn from Karl Marx?*¹²⁵ What is in it for us, especially those of us yearning for the “progress and enlightenment that characterized international law's heroic period?”¹²⁶ Why *should* we learn from Marx? Is this obligatory? Koskenniemi has three answers. First, international lawyers must at least *understand* Marx if they want to transform the world.¹²⁷ Second, Marxist dialectics point the way to effective political action, especially when supplemented with the tools of deconstruction. Third, Marxist analysis offers a fresh glimpse of universalism that “avoids the equally unappealing alternatives of bureaucratic institutionalism and morally based empire.”¹²⁸

Marxist theory can revive international law's emancipatory project, according to Koskenniemi, by freeing it from the “prison house of modern political theology.”¹²⁹ The state and human rights are theologies, secular systems paradoxically sustained by faith. Human rights are a counterweight to the power of the state, but they are also distributed by the state, “the same authorities whose power they should limit.”¹³⁰ The way out, as Koskenniemi reads Marx, requires “that one start from what is, and not from what should be.”¹³¹

This demands dialectical thinking, Marx's second useful tool for international lawyers, to which Koskenniemi adds the insights of deconstruction. The familiar thesis and antithesis of Marxist dialectics, he explains, are necessarily indeterminate. There are no “givens.” Thus, “the unresolved tension . . . between self-determination and internationalism can finally be seen not as a theoretical

124. Roth, *supra* note 121, at 251.

125. See generally Koskenniemi, *supra* note 31.

126. *Id.* at 31.

127. *Id.*

128. *Id.*

129. *Id.* at 38.

130. *Id.*

131. *Id.*

failure but an openness to what can be attained through praxis."¹³² From a Marxist perspective, this tension is not a "problem to be resolved, but a *horizon of political possibility*."¹³³ The "political forces" that shape international law, he reminds us, are not abstractions; it is up to us to activate them.¹³⁴

Third, international lawyers should draw on Marx for authentic "universality," "a privileged particular that transcend[s] its own particularity [to become] a representative of the whole."¹³⁵ For Marx, this "privileged particular" was the proletariat, whose emancipation would signal the end of dialectics and the "redemption of humanity."¹³⁶ As Koskenniemi coolly points out, "the experience . . . of real socialism has made it impossible" to take this seriously.¹³⁷ Rather he finds universality in the global protests against the 2003 Iraq war, in which more people took to the streets than at any time since World War II.¹³⁸ These protests, along with graffiti in Brazil, banners in Geneva, and a sticker on a lamppost in Helsinki, explicitly condemned the war as "illegal." Thus, he concludes, "[i]nternational law may act . . . as an instrument through which particular grievances may be articulated as universal ones, and, in this way, like myth, construct a sense of universal humanity through the act of invoking it."¹³⁹

Roth draws on Marx for different but equally provocative lessons in *Marxian Insights for the Human Rights Project*.¹⁴⁰ He begins by rehabilitating Marx, noting that he was not as dismissive of rights as might be supposed from *On the Jewish Question*. Marx opposed rights because "they fail to overcome the underlying conditions that at once necessitate them and render largely illusory their benefits for the subordinate class."¹⁴¹ For Marx, when the state

132. *Id.* at 47.

133. *Id.*

134. *Id.* at 48.

135. *Id.* at 49.

136. *Id.* (quoting KARL MARX, *A Contribution to the Critique of Hegel's Philosophy of the Right*, in *EARLY POLITICAL WRITINGS* 69 (Joseph O'Malley ed. & trans., 1994)).

137. *Id.*

138. See *id.* at 51; Michael Mandel, *Opinion: Illegal Wars and International Criminal Law*, in *THE THIRD WORLD AND INTERNATIONAL LEGAL ORDER*, *supra* note 79, at 117, 123 (arguing that the U.S. attacks against Afghanistan were illegal under international law and undermined that law).

139. Koskenniemi, *supra* note 31, at 51.

140. See generally Roth, *supra* note 121.

141. *Id.* at 223.

“withered away,” so would the need for rights.¹⁴² Until then, however, rights remain important.¹⁴³

Like Koskenniemi, Roth is no Marxist. He notes at the onset that, “[i]nsofar as there remains a global activist project to secure the conditions of a dignified human existence for all, the initiative seems to be with the human rights movement.”¹⁴⁴ He concedes that much of Marx “needs to be jettisoned”¹⁴⁵ and points out that “[c]ontemporary liberalism has moved well beyond the ‘possessive individualism’ that provided such an easy target” for Marx.¹⁴⁶ For Roth, accordingly, the question is what Marx brings to the human rights table. First, Marx points out who is missing; only the privileged enjoy “equal rights” in a class-divided society.¹⁴⁷ Second, even the “rights” they enjoy cannot compensate for the self-realization as social beings that capitalism precludes.

For Roth, liberal reforms fail to recognize that the “deprivation of conditions essential to one’s life plans — like housing, education, healthcare, safety — are systematically under-realized for the subordinated class in a capitalist society.”¹⁴⁸ Poverty becomes, rather, an accepted part of the landscape. Human rights mean little unless, as Rousseau put it, “no one is wealthy enough to buy another, and none is poor enough to be forced to sell himself.”¹⁴⁹ We live in a world in which this is commonplace. By ignoring this,

142. The state, according to Marx, would “wither away” under communism. See, e.g., *ESSENTIAL WRITINGS OF KARL MARX*, *supra* note 103, at 234–35 (explaining that the “withering away” formulation was actually Engel’s, while Marx’s was “less explicit”).

143. See Roth, *supra* note 121, at 226. Many U.S. progressives take a similar position, affirming the utility of rights while recognizing their limitations. See generally Jane B. Baron, *Romancing the Real*, 57 U. MIAMI L. REV. 573 (2003); Deborah Maranville, *Building a Better Sand Castle: Fantasy, Growth, and the Enchantment of Reason*, 57 U. MIAMI L. REV. 1007 (2003); Daria Roithmayr, “Easy for You To Say”: *An Essay on Outsiders, the Usefulness of Reason, and Radical Pragmatism*, 57 U. MIAMI L. REV. 939 (2003). As Patricia Williams explains, “[f]or the historically disempowered, the conferring of rights is symbolic of all the denied aspects of humanity: rights imply a respect which places one within the referential range of self and others, which elevates one’s status from human body to social being.” Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 416 (1987).

144. Roth, *supra* note 121, at 220. See generally Melissa A. Waters, *Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628 (2007) (explaining how courts are incorporating human rights treaties despite the lack of implementing legislations).

145. Roth, *supra* note 121, at 232.

146. *Id.*

147. *Id.* at 233. But see Piven & Clough, *supra* note 23, at 12–13 (arguing that poverty can be eliminated in capitalist societies). See generally *ClassCrits*, 56 BUFF. L. REV. 859 (2008) (essays examining “law’s questions of class, economics and equality”).

148. Roth, *supra* note 121, at 235.

149. *Id.* at 242.

human rights advocates fail to realize that for the have-nots, "human rights" still mean the freedom to sleep under bridges.¹⁵⁰

Marx's second contribution, according to Roth, is an alternative vision of human flourishing.¹⁵¹ Because capitalism pits us against each other in relentless competition, it makes it impossible for us to be all that we can be. As Marx explains, "Every man comes to see in other men not the realization, but rather the limitation of his own liberty."¹⁵² Marx's premise, in contrast, is that "the free development of each is the condition for the free development of all."¹⁵³ As Roth explains, this is not necessarily an abstraction. Rather, it includes concrete benefits such as "broad and deep popular participation in collective projects, workers' control over the workplace environment, security against risks to basic material needs; and stability of the economic bases of local communities."¹⁵⁴ Thus, for Roth, Marx remains central to international law's emancipatory project, exposing the underlying tensions that liberalism normalizes and offering a vision of human flourishing beyond liberalism's egoistic, alienated consumer.¹⁵⁵

150. See, e.g., ANATOLE FRANCE, *THE RED LILY* 95 (Frederick Chapeman ed., Winifred Stephens trans., J. Lane 1910) (1884) ("For the poor, [citizenship] consists in supporting and maintaining the rich in their power and their idleness. At this task they must labor in the face of majestic equality of the laws, which forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread.").

151. The notion that human flourishing has a social and political dimension has been traced to Aristotle. See, e.g., Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 762 (2009). More recently, it has been developed in the work of Amartya Sen and Martha Nussbaum. See generally MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2000); AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999); *THE QUALITY OF LIFE* (Martha Nussbaum & Amartya Sen, eds., 1993). See also REBECCA SOLNIT, *A PARADISE BUILT IN HELL: THE EXTRAORDINARY COMMUNITIES THAT ARISE IN DISASTER* (2009), which describes the "fleeting, purposeful joy that fills human beings in the face of disasters like hurricanes, earthquakes, and even terrorist attacks." Dwight Garner, *Delighted by the Joy of Bad Things*, N.Y. TIMES, Aug. 20, 2009, available at <http://www.nytimes.com/2009/08/21/books/21book.html>.

152. Roth, *supra* note 121, at 248.

153. *Id.* It has been argued that this is a core value of democracies: "[W]e must structure our legal institutions so that each person can flourish, and that means that we have obligations to others and not only rights for ourselves." Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009, 1061 (2009).

154. Roth, *supra* note 121, at 246–47. See generally Garner, *supra* note 151. Solnit suggests that our response to disaster, "an emotion graver than happiness but deeply positive," affords "a glimpse of who else we ourselves may be and what else our society could become." *Id.*

155. As Marx puts it, "[The Bourgeoisie] has resolved personal worth into exchange value, and in place of the numberless indefeasible chartered freedoms, has set up that single, unconscionable freedom—Free Trade." MARX & ENGELS, *supra* note 42, at 16. Or, as Professor Schlag notes, "ours is a world . . . where the value of freedom implies at once

For A. Claire Cutler, similarly, Marx is the antidote to a homogenous and toxic discourse. As she explains, the classic texts on international trade assume that markets are good for everyone.¹⁵⁶ No one challenges “the promotion of a one-dimensional market civilization and the . . . commodified legal forms and institutions that work profound asymmetries in power, wealth and influence; they simply try to make it more efficient.”¹⁵⁷ For Cutler, Marx exposes the raw avarice of the market and shows how international trade law normalizes it. She describes the nineteenth-century notion of “waste,” for example, which viewed uncultivated land as “wasted” land, up for grabs to anyone who could put it to use.¹⁵⁸ She explains how this was extended to the “civilizing” project of colonialism, and how market ideology was conflated with human nature.¹⁵⁹ As a corollary, it becomes “commonsensical” that what serves the market serves humanity.¹⁶⁰

For Cutler, Marx provides the basis for a radical critique, exposing the myth of progress and the unquestioned assumption that “privatized free trade is the best, most efficient and desirable standard against which policies should be measured.”¹⁶¹ As an illustration, Cutler describes the General Agreement on Trade in Services (GATS), negotiated during the Uruguay Round of the World Trade Organization (WTO). Under the GATS, services are treated like goods and regulated by international agreement, rather than

the downfall of the Berlin Wall and the imbibing of Pepsi.” PIERRE SCHLAG, *LAYING DOWN THE LAW: MYSTICISM, FETISHISM, AND THE AMERICAN LEGAL MIND* 47 (1996).

156. A. Claire Cutler, *Toward a Radical Political Economy of Transnational Economic Law*, in *INTERNATIONAL LAW ON THE LEFT*, *supra* note 1, at 199.

157. *Id.* at 203; see Robert Howse, *The End of the Globalization Debate: A Review Essay*, 121 HARV. L. REV. 1528, 1529 (2008) (arguing that “by the end of the Cold War, the old struggle between right and left over the governance of the economy and the redistribution of wealth within the advanced liberal democracies had yielded to a new pro-market consensus”). *But see generally* James Thuo Gathii, *The High Stakes of WTO Reform*, 104 MICH. L. REV. 1361 (2006); LAURA A. DICKINSON, *OUTSOURCING WAR AND PEACE* (2007) (criticizing the privatization of military operations).

158. Cutler, *supra* note 156, at 203.

159. *Id.*

160. Fox, *supra* note 21, at 201 (arguing that “[t]he human costs of unfair trade are immense. If Africa, East Asia, South Asia, and Latin America were each to increase their share of world exports by 1% the resulting gains in income could lift 120 million people out of poverty . . . if the nations of the WTO were to adopt one and only one human welfare measure, elimination of [subsidies in trade barriers] should be the measure”); see G.A. Res. 65/1, ¶ 78, U.N. Doc. A/RES/65/1 (Sept. 22, 2010) (reaffirming a commitment to the U.N. Millennium Development Goals).

161. Cutler, *supra* note 6, at 213. *But see* DICKINSON, *supra* note 157. *See generally* Jeffrey Dunoff, *Linking International Markets and Global Justice*, 107 MICH. L. REV. 1039 (2009) (explaining how markets can be tamed); Jessica Karbowski, *Grocery Store Activism: A WTO Compliant Means to Incentivize Social Responsibility*, 49 VA. J. INT’L L. 727 (2009).

left to domestic law.¹⁶² This includes services, such as education and the provision of clean water, with social, environmental, and cultural purposes.¹⁶³ The GATS effectively converts such services from public goods to private commodities. Cutler criticizes the lawyers, journalists, and academics who normalize this process, concluding with a “Marx-like” reminder: “just as people make laws, so too can they modify and change them.”¹⁶⁴

Marks’s essay¹⁶⁵ concludes the volume, and functions as a capstone, bringing together themes introduced in the other essays. Like Roth, she notes that Marx’s cartoon capitalists, his “easy targets,” have been replaced by a “civilized” capitalism that understands the public relations importance of workers’ rights and the environment.¹⁶⁶ Like Cutler, she points out that this civilized version reverts to baser forms under globalization, as production becomes increasingly remote from consumers.¹⁶⁷ Like Chimni, she reminds us that class remains a “central relation,” an organizing principle that mediates other relations.¹⁶⁸

Marks focuses on exploitation, the “ways in which one section of society [prosper] at the expense of another.”¹⁶⁹ She exposes the ways in which exploitation is structurally embedded in the global economy, as distinguished from human rights violations, which single out innocent victims and guilty perpetrators. Exploitation, in contrast, focuses on those who benefit without getting their hands dirty. After setting out seven key features of exploitation,¹⁷⁰ Marks

162. Cutler, *supra* note 156 at 216.

163. *Id.*

164. *Id.* at 219. See generally Andrew T. Guzman, *Trade, Labor, Legitimacy*, 91 CAL. L. REV. 885 (2003) (discussing the integration of the ILO Core Rights Labor Standards into the WTO); Chantal Thomas, *Should the World Trade Organization Incorporate Labor and Environmental Standards?*, 61 WASH. & LEE L. REV. 347 (2004) (explaining some of the difficulties in modifying trade laws).

165. Susan Marks, *Exploitation as an International Legal Concept*, in INTERNATIONAL LAW ON THE LEFT, *supra* note 1, at 281.

166. See generally LUC BOLTANSKI & EVE CHIAPELLO, *THE NEW SPIRIT OF CAPITALISM* (Gregory Elliot trans., 2005).

167. Marks, *supra* note 165, at 284.

168. *Id.* at 290 (quoting Anwar Shaikh, *Exploitation*, in EXPLOITATION 74 (Kai Nielsen & Robert Ware eds., 1997)).

169. *Id.* at 281.

170. One, as noted above, it involves pursuing gain at another’s expense; two, it involves extraction of profit out of labor; three, it is “masked by an ideology that represents participants in the labor market as free and equal,” (exacerbated by “chains of interaction spanning the globe”); four, it is linked to class-based inequalities; five, it need not involve abuse, and is more likely to involve limited options; six, it is a distributive issue; seven, it may be viewed as just, but falls short when “assessed against the possibility of transformative change.” *Id.* at 292. Thus, for Marks, women working twelve-hour days in Asian factories

traces the term's usage in international law. She begins by noting its curious absence in debates about access to treatment for HIV-AIDS.¹⁷¹ Framed as a human rights issue, the focus is on those infected and their governments' efforts to provide them with treatment. Those who profit from HIV-AIDS treatment drugs' patents, Marks notes, "remain comfortably out of view."¹⁷²

Marks traces the term in actual practice, asking, "What do [international lawyers and activists] talk about when they talk about exploitation?"¹⁷³ She finds its earliest use in a 1949 treaty dealing with prostitution,¹⁷⁴ as well as in subsequent treaties and reports addressing trafficking and slavery, often involving the sexual abuse of women and girls. Thus, like the earlier "moral panic" over white slavery, the remedy is sought in "anti-trafficking initiatives . . . along with preventive measures and victim protection."¹⁷⁵

Returning to her list of seven key features, however, she shows that exploitation is not pathological or anomalous. It is not necessarily a violation of the rule of law. Rather, it is deeply embedded in capitalism. The socioeconomic conditions that breed trafficking and the most obvious forms of duress also give rise to "voluntary" employment; exploitation is "not just a category of transnational crime, but . . . a branch of business."¹⁷⁶ Indeed, she concludes, "the sale of people compelled through the force of circumstances to alienate their own energy, time, and hence life . . . is the quintessential capitalist transaction."¹⁷⁷ Exploitation is treated in international law as a "local dysfunction," she observes, because international law does not recognize it as part of the larger system: "The silence of international law's interlocutors about these systemic logics is their silence about capitalism."¹⁷⁸

may indeed be grateful to have jobs in a clean, air-conditioned factory, as Nicholas Kristof and Sheryl WuDunn argue, but that is not the end of the inquiry. See generally NICHOLAS D. KRISTOF & SHERYL WUDUNN, *HALF THE SKY: TURNING OPPRESSION INTO OPPORTUNITY FOR WOMEN WORLDWIDE* (2009).

171. Marks, *Exploitation*, *supra* note 165 at 282.

172. Marks, *supra* note 165, at 294.

173. *Id.* at 293.

174. *Id.* at 294.

175. *Id.* at 302.

176. *Id.* at 301.

177. *Id.* at 301.

178. *Id.* at 302. A recent study confirms Marks's analysis, showing that exploitation pervades the low-income workforce in the United States. See Editorial, *Workers in America, Cheated*, N.Y. TIMES, Sept. 3, 2009, at A30 (summarizing "the most comprehensive investigation of labor-law violations in years," which showed egregious, widespread violations of wage and hour laws "all across the lower strata of the urban economy," including "factories, grocery stores, retail shops, construction sites, offices, warehouses and private homes").

This is a dazzling insight. Suddenly we are above the tree line with an unimpeded view. This is Marx's contribution to international law's emancipatory project—a perspective that reveals how even well-intentioned human rights advocates are part of a larger capitalist system that promotes exploitation. Or, as Cutler shows, how international trade law transforms education from a public service governed by domestic law to a private commodity governed by an international treaty.¹⁷⁹ Or, as Roth describes, simply a broader, brighter vision of human flourishing.¹⁸⁰ Marks and Roth look to human rights, informed and expanded by Marxist critiques for the realization of international law's emancipatory promise.¹⁸¹ Cutler looks to those who can change the law.¹⁸² Koskenniemi looks to those actual, if unknown, individuals throughout the world, who, somehow, publicly expressed their opposition to "Bush's war."¹⁸³ He situates them "at the intersection of a public realm of states regulated by international law and . . . civil society reaching beyond sectarian interests."¹⁸⁴ It does not surprise him that such intersections are rare, even extraordinary. Rather, "this reflects the difficulty that any fundamental challenge to the iron laws of power must imply."¹⁸⁵

III. CONCLUSION

This review has shown that there is a Left in international law, but it is neither a club nor an ideology. Instead, it is comprised of sometimes jarringly dissonant insights, drawing on rigorous Marxist scholarship, but unconstrained by Marxist orthodoxy. It is an open and eclectic terrain, a brave new world,¹⁸⁶ especially, perhaps, for those in the United States who came of age during the Bush years and the war in Iraq that inspired this book.

The authors also show that Soviet Marxism left behind more than remorse, betrayal, and cautionary tales of totalitarianism. Its critique of the dark side of capitalism retains depressing currency,

179. Cutler, *supra* note 156, at 199.

180. Roth, *supra* note 121.

181. Marks, *supra* note 165, at 282; Roth, *supra* note 121, at 251.

182. Cutler, *supra* note 156.

183. Koskenniemi, *supra* note 31.

184. Koskenniemi, *supra* note 31, at 52.

185. *Id.*

186. This refers both to Miranda's artless exclamation, "O brave new world! That has such people in it!", WILLIAM SHAKESPEARE, *THE TEMPEST* act 5, sc. 2, and the ironic appropriation of the phrase in the anti-utopian novel, *BRAVE NEW WORLD* (1932), in which Aldous Huxley satirized both socialism and capitalism.

as Miéville demonstrates in his account of the “bloody and chaotic” world we live in. Self-determination, similarly, remains a compelling ideal. What Okafor characterizes as “Marx’s warm, life-giving”¹⁸⁷ concept of humanity still infuses Third World conceptions of human rights.

Finally, this book leaves the reader surprisingly hopeful about the emancipatory promise of international law. The authors recognize the momentum of globalization and the hegemony of the United States, and they remain undaunted. They brush off nihilism and post-structuralism. Like Marx, they refuse to wallow in “pre-modern nostalgia.”¹⁸⁸ They are *energized* by the passing of “actually existing socialism.”¹⁸⁹ Their critiques of international law are razor sharp but always constructive, exposing bad ideas to make room for better ones. They remind us, like Marx, that just as we create our own history, we create our own future.¹⁹⁰

187. Okafor, *supra* note 85, at 280.

188. Koskeniemi, *supra* note 31, at 48.

189. *Id.*

190. ERICH FROMM, MARX’S CONCEPT OF MAN 15 (1979) (explaining that this is “Marx’s fundamental idea: man makes his own history; he is his own creator”).

