REVIEW ARTICLE

History, Critical Legal Studies and the Mysterious Disappearance of Capitalism

Paddy Ireland*


Not long ago the work of E.P. Thompson was widely regarded as having made an important contribution not only to the then fledgling critical legal studies movement but to legal scholarship in general. *Whigs and Hunters*, for example, probably his most famous work directly to address legal issues, was published as recently as 1975 and in the following decade provoked considerable comment and discussion.¹ Since then, however, so rapid and comprehensive have been the changes in intellectual fashion that Thompson is now, one suspects, little read, let alone understood or valued, by the current generation of legal scholars claiming radical credentials. In short, Thompson and the historical materialist tradition of which he was part have fallen from grace and are no longer considered central to critical legal studies or critical legal theory: 'not [so much] heretics but barbarians, who desecrate with [their] presence the altars of the liberal Gods', as Thompson himself put it in a slightly different context.² Thompson's brand of materialism was, to be sure, never one that people found easy to categorise. For some, it was too 'humanist', underestimating the historical importance of structure and overemphasising that of human agency; for others it was precisely its focus on ideology, culture and lived experience that made it attractive. Arguably, however, Thompson, more perhaps than any other historian, met Marx's challenge, identifying within history the formative role of modes of production while at the same time encompassing historical particularity and human agency. This essay seeks to remind us of the contours of Thompson's historical materialism and to explore how its abandonment has weakened critical legal studies, both intellectually and politically.

Theorising the relationship between economy and law

My point of departure is a recently published book examining legal developments in the eighteenth and early-nineteenth centuries to which Thompson devoted so much of his life as an historian. Ron Harris' *Industrializing English Law* is an important addition to the literature on business organisation during early industrial capitalism

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which can lay genuine claim to being the most significant contribution to the field since those made by Hunt and DuBois over sixty years ago.\(^3\) The book also endeavours to make a theoretical contribution of wider import, however, offering a more general analysis of the relationship between the legal and the economic and it is this, as much as the period that it covers, that connects it to Thompson.

Harris sets out not only to report the findings of his considerable primary-source research but to correct the many misunderstandings surrounding the history of business organisation during this period. This revisionism animates some of the best parts of the book. Drawing on the work of legal and financial historians, for example, Harris provides a highly illuminating account of the general context in which the infamous Bubble Act of 1720 was passed and of the chronology of events immediately preceding its enactment. In so doing, he identifies the interest groups responsible for the Act and their motivations, showing that far from being directed, as some have argued, at deterring the formation of joint stock companies following the bursting of the bubble, the Act was, in fact, passed while the market was still bullish and sought to stem the tide of small bubbles competing with the company. Harris concludes that the Act was neither, as often claimed, a decisive turning point in the history of the joint stock company, nor a major attempt to regulate the stock market. It was, rather, a much more parochial affair, ‘intended to have an immediate short-term impact on the events of the coming weeks rather than introduce a long-term change of course’ (pp 60–81). Harris provides similarly enlightening accounts of the revival of the Bubble Act in 1808 and of the judicial attacks on unincorporated joint stock companies in the years following (pp 235–249); of the circumstances surrounding the repeal of the Bubble Act in 1825 (pp 250–266); and of the passing of the 1844 Joint Stock Companies Act (pp 277–286).

Harris also sets out to correct the widely-held view that joint stock companies were of little economic importance in the eighteenth and early nineteenth centuries, arguing, on the basis of a series of sectoral analyses, that they were rather more numerous and important than most histories allow (pp 85–109, 168–198). He also tracks the development of the various legal forms adopted by unincorporated companies in the absence of generally available incorporation, laying bare the practical and legal problems which they faced (pp 137–167). He concludes that despite the best efforts of contemporary lawyers, and contrary to the view expressed by many subsequent historians, the multiplicity of legal forms and arrangements which emerged – generally comprising a mixture of trust, contract and partnership – never constituted a satisfactory substitute for the corporate form, even in the years before the unincorporated company began to be subjected to open and concerted judicial attack.

Good though Harris’s account is, however, it is not without weaknesses, many of which stem from his conceptual and theoretical framework. Early in the book, Harris argues that legal histories tend to adopt one of two radically different views of the relationship between the legal and the economic, either treating law as an essentially autonomous phenomenon, developing according to its own internal logic – a view, he suggests, which characterized traditional legal history in the United States up to the 1950s and 1960s, and which still underlies ‘some of the mainstream legal history literature written in Britain’ – or seeing it as an essentially functional reflection of economic development. Within the latter camp, Harris

lumps Weberians, Marxists, Morton Horwitz, Willard Hurst and the Wisconsin school, E.P. Thompson and 'other left-wing historians', as well as exponents of law-and-economics such as Richard Posner, arguing that they differ 'only on the issue of whose needs are being advanced'. Some historians, Harris adds, have tried to plot a third path between these two extremes, seeing autonomy at the top but instrumentality at the bottom and asserting that while the 'law-in-the-books' might have been autonomous, the 'law-in-action' was functional (pp 3–7).4

Harris rejects all three positions, claiming that 'neither of the two conflicting interpretations, the functionalist and the autonomous, can be reconciled with the historical process' and that the third interpretation, 'though more sophisticated, ... does not work well enough'. He advocates instead a 'pragmatic and dialectic' account, one which is 'not disciplined by general theories' but which involves a 'more context-sensitive use of insights, theories, and critical observations developed in other disciplinary discourses' (pp 8–9, 292). This is a little misleading, however, for rather than abandoning functionalism and autonomy, Harris tends simply to flip-flop between them, shifting, as he says himself, 'between these ideal types according to changing contexts' (p 4). His argument is essentially that up to 1720 law responded in a fairly straightforwardly functional manner to the economic needs of merchants and the Crown, before entering from 1720 a phase of autonomy in which it failed to adapt to economic needs ('the gap between economic development and legal stagnation seemed to widen'), functionalism returning in the early nineteenth century, when, after a series of judicial and stock market 'shocks', law started to respond once more to economic pressures, 'intensifying' the 'interaction' between law and economy (p 9).

On closer analysis, it also becomes clear that for all its shifting between ideal types and emphasis on historical particularity and the exigencies of time and place, Harris's account is, in fact, shaped by an underlying technological determinism. Hence the central place given to 'industrialization' and the 'industrial revolution', which emerge from the first page as the main sources of historical dynamism. As industry and technology advanced, Harris argues, increasing resort had (inevitably) to be made to joint stock companies, with their relatively large memberships, transferable shares and separation of ownership and management, and it is this that underlay the principal changes in the laws relating to business organization. For Harris, therefore, legal development broadly followed industrial development, albeit with law sometimes lagging behind. Throughout, 'industrialization' is characterised as an essentially neutral, technologically determined process, described in terms of 'aggregate increase[s] in production, productivity and capital formation', of population growth, urbanisation and the growth of towns, of the move from agriculture to industry, and of the emergence of new, relatively capital intensive industries in transportation and sectors such as cotton, iron and mining (pp 1–2). The rise of the joint stock company and the legal developments flowing from it are thus portrayed as reflections not only of economic (technological) forces but of essentially beneficent economic forces.

What is rather less immediately economically determined in Harris's account is the precise timing of particular legal developments and the emergence of the joint stock corporation in the specific form that we have come to know it. It is in this context that Harris lays great emphasis on 'contingency', which, he says, 'is

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recurrent in history and in the present story’ (p 12). He traces in detail the particular events and personalities surrounding the passing of the Bubble Act in 1720, its revival in the early nineteenth century, and its repeal in 1825. He also examines the multifarious legal forms that companies adopted in the eighteenth and early-nineteenth centuries in the days before incorporation by registration and general limited liability. However, although he concedes that as industrialisation spread, business organization ‘came to be dominated by the conception of the corporation, to which were attached the features of separate legal personality, transferable shares, hierarchical managerial structure, and limitation of liability’, and that this form ‘gradually gained dominance in all industrialized countries...’, in his conclusion he nevertheless insists that the disappearance of the alternative legal forms of the eighteenth and early nineteenth centuries was neither inevitable nor attributable to the latter’s ‘inherent inefficiency or inferiority’ (pp 289–291). This does not sit entirely comfortably with his own analysis, however, for elsewhere he seems to suggest that the triumph of the corporate legal model was in considerable part linked precisely to its functional superiority. Thus, although the ‘industrious work of imaginative lawyers and businessmen’ enabled the unincorporated company to ‘advance beyond the organizational characteristics of the closed partnership, and to gain some ability to handle transferable stock’, it still ‘could not offer most of the features inherent in joint-stock business corporation: separate legal entity, transferability of interest, and limitation of liability’. The alternatives to the joint-stock corporation were, therefore, ‘less satisfactory in terms of overall social costs, efficient allocation of resources, and eventually the rate of growth of the English economy’ (p 167).

Notwithstanding this, Harris’s basic point is well taken. There is, indeed, much in the development of the law relating to business organisation that is particular and contingent, turning on specific legal disputes, interest group struggles and personalities. As Harris makes clear, you cannot mechanically read off legal developments from economic developments. It is possible, as he says, to ‘conceive a slightly different historical path in earlier periods that would have led to a different outcome’: different legal forms for the joint stock company might have emerged in different regions or productive sectors; or ‘the business corporation itself could have acquired different features (p 291). However, while Harris emphasises the historical contingencies surrounding the triumph of the business corporation as-we-know-it, the triumph of the joint stock company itself and of some version of the corporate legal form are essentially treated as technologically determined. For all its attention to historical particularity and contingency, therefore, there is in Harris’s account something resembling a base-superstructure model of the relationship between the legal and the economic.

From determinism to contingency

The base-superstructure metaphor is, of course, closely connected with Marx, although he rarely used it and did so only allusively. For an aphorism, it has had to carry a heavy theoretical load. It is associated with a tendency, apparent in Harris, to compartmentalize and separate different spheres of society – the legal, the political, the cultural the economic and so on – and to assert the dominance of the economic ‘base’ over the other, separate, implicitly subordinate and passively reflexive, ‘superstructural’ spheres. It is also associated with a tendency among some Marxists to conceptualise the ‘economic’, as does Harris, largely in terms of
productive technology and to see technological change as the driving force of history.⁵ Their respective historical endpoints are, of course, very different: while this dubious brand of Marxism sees the development of the forces of production as leading society inexorably and linearly from feudalism to capitalism to socialism and communism, Harris, like many other non-Marxist historians, sees it leading, roughly, to today’s corporate economy, to where we are now, so that present legal (and other) arrangements, in their broad outlines if not in their particularities, are made to appear as in large part the result of technological development and, by implication, human progress.

There is also no doubt that base-superstructure models have an inbuilt tendency to vulgar economic determinism. Indeed, the rejection of reductionist Stalinist ‘economism’ and its political consequences was one of the major animating forces behind the rise of the so-called ‘New Left’ in Britain in the late 1950s and early 1960s. The New Left not only attributed less determinative power to ‘the economic’, it showed markedly less interest in it than its predecessor, giving much greater attention to ideological and cultural matters. It also had far fewer connections to the labour movement, gradually abandoning the idea of the working class as the leading agents of social change and emancipatory politics, substituting for them intellectuals and students. The rise of Maoism and the idea of ‘cultural revolution’ – with its voluntarism, belief in sheer political will, and dismissal of material constraints – was one wider expression of this shift. For a while, however, the determinations of the base-superstructure model were not completely abandoned and attempts were made to plot a path between mechanical determination and the alternative extreme of unstructured human agency. Drawing on the work of Louis Althusser,⁶ for example, it became very fashionable in the 1970s to retain some notion of economic determinism while asserting the ‘relative autonomy’ of the superstructural spheres of society. Within legal history, this entailed, inter alia, stressing the importance to legal development of the internal logic of law and its capacity to impact upon economic development. Despite some protestations to the contrary, Harris’s approach is essentially a variant of this. In highlighting the interactions between economy and law, and the importance of human agency and of legal, political and cultural forces in shaping history, he seeks, at least at the micro-level, to avoid reductionism, arguing that law has some autonomy from the economic base of society (hence its occasionally tardy development and the unpredictability of particular historical events) and that sometimes it even influences economic development. At the macro-level, however, law is treated as developing in a way shaped by the development of the forces of production – by ‘industrialization’.

Althusser's own attempt to find a route between mechanical determinism and absolute contingency was rather different and, ultimately, more influential. Althusser drew a distinction between rigidly structured and economically determined ‘modes of production’, which existed only in the realm of theory, and ‘social formations’, which existed in empirical reality and in which determination by the economic happened only in ‘the last instance’. In drawing this distinction, however, he did not so much resolve the determination-contingency problem as circumvent it, locating structure (theory) and agency (history) in two quite separate intellectual realms. The result was that while

⁵ See, for example, G.A. Cohen, Karl Marx’s Theory of History (Oxford: OUP, 1978).
structural determinations became absolute in the realm of theory, they were more or less expunged from actual history and the real empirical world. Freed from determination except in 'the last instance', history became a fundamentally unstructured, hopelessly arbitrary and contingent affair. Within Althusserian theory, with its emphasis on the 'relative autonomy' of the economic, political and ideological 'levels', Thompson wrote, 'the problems of historical and cultural materialism are not so much solved as shuffled away or evaded; since the lonely hour of the last instance never strikes, we may at one and the same time pay pious lip-service to the theory and take out a licence to ignore it in our practice'. For all their apparent differences, therefore, it was but a short step from Althusserian structuralist Marxism to postmodern contingency, for one of the effects of Althusserianism was to accord in the real, empirical world (as opposed to the theoretical world of rigidly structured and determined modes of production) greater and greater autonomy to ideology, politics and culture. Indeed, in this respect both Althusserianism and postmodernism were merely continuations of earlier trends. By the 1980s, the perceived autonomy of these spheres and the resulting disappearance of even 'in the last instance' determination saw many assert the essentially fragmented nature of modern capitalism and its fundamental lack of unity. In some circles, to suggest otherwise was to be guilty of 'totalising', a crime of some magnitude associated with the equally felonious 'Enlightenment' and, in less temperate versions, with the Holocaust and the Gulag. It was not long before many, in their opposition to all 'systems', were conceptualising capitalism out of existence altogether. With the passing of post-Marxism and the advent of the full-blown post-modernism which has become so influential within critical legal studies, the fundamental constitutive practice of social life ceased to be material production and became discursive construction, much to the jouissance of some academics. The paradoxical result is that although much contemporary postmodern theorising has moved decisively away from the mechanical economic determinism of Stalinism and certain versions of Marxism, it unwittingly operates within the same unfortunate theoretical grid bequeathed by Althusserianism, with its rigid separation of structure and history. It is, in short an inverted image of its antagonist. Althusserians abandoned economic determinations until 'the last instance' in order to preserve the 'relative autonomy' of the superstructural spheres of politics, culture and ideology; postmodernists have abandoned these determinations altogether, making the autonomy of these spheres absolute and all but eliminating historical causality and the idea of history as process. In place of mechanical economic determinism we have absolute contingency; one form of idealism has replaced another.

History and the logic of capitalist process

The conceptual framework with which Marx himself operated in his mature works was, however, rather different from that suggested by and associated with the base-superstructure metaphor. In a metaphor which encapsulated this framework rather more accurately, Marx argued that there was in all forms of society 'a specific kind

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7 E.P. Thompson, 'Folklore, Anthropology, and Social History' (1978) 3 Indian Historical Review 247 at 263.
8 For an elaboration of these arguments, see E.M. Wood, Democracy Against Capitalism (Cambridge: CUP, 1995).
of production which predominates over the rest, whose relations thus assign rank and influence to the others', providing 'a general illumination which bathes all the other colours and modifies their particularity', and 'a particular ether which determines the specific gravity of every being which has materialised within it'.

He was acutely aware, however, of the complex variability of empirical reality. The operation in the real world of a determinative logic derived from relations of production did 'not prevent the same economic base – from the standpoint of its main conditions – due to innumerable different empirical circumstances, natural environment, racial relations, external historical influences, etc., from showing infinite variations and gradations in appearance, which can be ascertained only by analysis of the empirically given circumstances'.

Thompson echoed this view. It was not possible, he argued, to guess the 'range and diversity' of particular social forms such as feudalism, capitalism and socialism, 'because, rich as history is, it can never exhaust possibility'. Nevertheless, 'while the number of variants may be infinite, it is infinite only within the categories of social “species”. Just as, while there may be any number of permutations of breeds of dogs, and of mongrel cross-breeds, all dogs are doggy (they smell, bark, fawn over humans, etc.), so all capitalisms remain capitalist (foster acquisitive values, must by their nature leech the proletariat, etc.)'.

Thompson was relentlessly hostile towards the theoretical reification of the base-superstructure metaphor. In his view, it sought to capture the crucial dialectic between social being and social consciousness which lay 'at the heart of any comprehension of the historical process within the Marxist tradition' but, with its mechanical overtones of construction engineering, it did so inadequately, 'congeal[ing] a fluent social process' and 'offending that very sense ... of the inter-action of social being and social consiousness' provided by Marx. We needed to admit, Thompson wrote, that 'the [base-superstructure] signpost was pointing in the wrong direction, while at the same time ... accept[ing] the existence of the place towards which it was mispointing'. In his search for a metaphor which encompassed 'the distinctively human dialectic, by which history appears as neither willed nor as fortuitous; as neither lawed (in the sense of being determined by involuntary laws of motion) nor illogical (in the sense that one can observe a logic in the social process)’, Thompson proposed a number of alternative metaphors, such as that of production relations as creating a 'societal field-of-force', metaphors which, he thought, might fruitfully co-exist with Marx's idea of production relations providing a 'general illumination'. In similar vein, he preferred the metaphor of 'logic of process' to that of 'laws of motion', as he thought that it captured the ideas of determination and causal relationship – the idea that in ‘historical analysis one may identify recurrent patterns of behaviour and sequences of events which may only be described (in a retrospective rather than in a predictive sense) as being causally related’ – without suggesting a prophetic and scientific determinism.

Indeed, for Thompson, one of Marx's achievements was precisely his recognition that different forms of society – ancient, feudal, capitalist and so on

11 n 2 above, 81–82. For a highly illuminating account of Thompson's historical materialism, see n 8 above, 49–107.
12 n 2 above, 79–81, 120; E.P. Thompson, 'Eighteenth-century English Society: Class Struggle without Class' (1978) 3 Social History 151–152.
13 n 2 above, 121–122, 350.
had their own distinctive forms of economic functioning, their own distinctive logics of process derived from property relations. And, in particular, his identification within the history of eighteenth and nineteenth century England of an empirically observable, systematic and historically specific capitalist logic manifested in and imposed by the imperatives generated by market dependence and competitive production, and characterised by a compulsive search for increasing labour productivity, relentless technological advance, the commodification of more and more goods and services, and, of course, the ruthless exploitation of labour and class struggle. For productive enterprises compliance with this logic was, and still is, a pre-requisite of survival. It was this unique logic that generated the ‘general illuminations’ which found expression in all the activities of eighteenth century English society, exerting a determining pressure upon its development and form, and justifying our talking of capitalism or capitalist society. It was this logic which gave unity to all the social forms which came within the ‘field of force’ of the capitalist mode of production, despite the many empirical differences between them.

Crucially, for Thompson (borrowing from Alasdair Maclntyre), when one spoke of a mode of production such as capitalism, one was ‘indicating ... a kernel of characteristic human relationships – of exploitation, domination, and acquisitiveness – which are inseparable from [that mode]’ and which find ‘simultaneous expression’ in all aspects of society – ‘in characteristic values and modes of thought as well as in characteristic patterns of accumulation and exchange’. Capitalism, Thompson insisted, possessed ‘an economic and a moral logic’ and it was ‘futile to argue as to which we give priority since they are different expressions of the same kernel of human relationship ...’. The logic of a mode of production and productive relationships determined cultural processes ‘in an epochal sense’: social and cultural phenomena did ‘not trail after the economic at some remote remove’ but were, ‘at their source, immersed in the same nexus of relationship’.14 In short, for Thompson, as for Marx, the determinative effects of capitalist production relations were ubiquitous. Indeed, it was precisely the ever-present logic of these relations that gave modern English history shape, notwithstanding its specificities and notwithstanding human agency, making it possible to see it as a structured process rather than as a rigidly structured whole or as a series of random events; a structured process which, while open-ended, was subject to determinate pressures. Thompson’s insistence on the determinative force and ubiquity of the logic of capitalist process did not, however, lead him to treat all small narratives as the effects of one grand narrative. On the contrary, one could hardly accuse him of failing to pay sufficient attention to the specificities of history, culture and experience, for these lay at the heart of his work. It led him, rather, to encompass human agency and the particularities of eighteenth and nineteenth century English history, while identifying and recognising within that history the specific logic of the capitalist mode of production; it led him, in other words, to recognise structural determinations within historical processes. Thompson thus sought to reveal the historically determining logic of production relations – determining in the sense, elaborated by Raymond Williams, of ‘setting bounds or limits to’ and ‘exerting pressure on’15 – not as an abstraction but as an operative principle visible in the

15 R. Williams, Marxism and Literature (Oxford: OUP, 1977) 83–89.
daily routine of social life, in concrete institutions and practices, both within the sphere of production and beyond.

From this perspective, what a genuinely historically materialist approach requires is a conception of the material ‘base’ of society as something ‘irreducibly social’\textsuperscript{16}, something embodied not only in economic forms but in legal, political and ideological forms that cannot be relegated to a spatially separate, ‘superstructural’ sphere. Hence Thompson’s claim that we needed ‘to return to the full sense of a mode of production’ and his rejection of the idea that the ‘economic’ was somehow more ‘primary’ and ‘real’ than, say, the legal and cultural. And his claim that eighteenth century production relations – relations of exploitation, domination and appropriation – found ‘simultaneous expression ... in all systems and areas of social life’. In so arguing, he explained, he was ‘not ... calling into question the centrality of the mode of production (and attendant relations of power and ownership)’; he was, rather, ‘calling into question ... the notion that it is possible to describe a mode of production in “economic” terms, leaving aside as secondary (less “real”) the norms, the culture, the critical concepts around which this mode of production is organized’.\textsuperscript{17} For Thompson, the relation between the economic and the legal, political and cultural needed to be conceptualised not as a regional separation between an economic ‘base’ and a series of superstructural forms, but as ‘a continuous structure of social relations and forms with varying degrees of distance from the immediate processes of production and appropriation, beginning with those relations and forms that constitute the system of production itself’.\textsuperscript{18}

Reflecting on his research into the eighteenth century, therefore, Thompson observed that law steadfastly refused to ‘keep politely to a “level” but was at every bloody level’\textsuperscript{19}, something he reiterated in the conclusion to \textit{Whigs and Hunters} when he wrote that analysis of the eighteenth century ‘call[ed] into question the validity of separating off the law as a whole and placing it in some typological superstructure ... [for] law was deeply imbricated within the very basis of productive relations, which would have been inoperable without [it] ...’.\textsuperscript{20} What history revealed for Thompson was that the determinative influence on law (and politics and culture) of the logic of production relations was there \textit{all the time}.

These insights shaped not only Thompson’s approach to history but his approach to knowledge and theory. The concepts utilised by historical materialists, he argued, were \textit{historical} concepts ‘arising from the analysis of diachronic process, of repeated regularities of behaviour over time’, concepts which were often misunderstood and resisted by the synchronic disciplines. Thus, class, he insisted, was not, as many sociologists would have it, a static category, measurable in positivist or quantitative terms, but a historical category, describing people in relationship over time. His was, therefore, an ‘interactionist epistemology’, in which knowledge arose from a continual dialogue between ‘conceptualisation and empirical observation, hypothesis and experiment’.\textsuperscript{21} Like Marx, he sought to maintain the tradition of open, empirical enquiry, never forgetting that ‘thought was not self-generating but was “the product, rather, of the working-up of observation and conception into concepts”’.\textsuperscript{22} Thus, whereas many of his critics

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\textsuperscript{16} n 8 above, 61.
\textsuperscript{17} n 7 above, 261, 264.
\textsuperscript{18} n 8 above, 25–26.
\textsuperscript{19} n 2 above, 288.
\textsuperscript{20} n 1 above, 260–261.
\textsuperscript{21} E.P. Thompson, ‘Caudwell’ (1977) \textit{Socialist Register} 228 at 245.
\textsuperscript{22} n 2 above, 255, 361.
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saw ‘structures as against processes, or structures that undergo processes’, Thompson saw structured processes, rejecting the view that theoretical knowledge – the knowledge of structures – was a matter of ‘static conceptual representation’ which belonged to a ‘different, empirical sphere of cognition’ from history. He favoured instead a view of knowledge in which structure and history were united rather than opposed, a view in which theory could ‘accommodate historical categories, concepts appropriate to the investigation of process’. The ‘importance of real history’, he explained, is that ‘it not only tests theory, it reconstructs [it]’.

The mysterious disappearance of capitalism

Writing in 1973, Thompson remarked that in the previous twenty-five years there had been ‘abundant occasion … to observe the working-out of [the] logic of the [capitalist] system … in social experience’. Since then, such occasions have become even more abundant. Capitalism has not only spread geographically, the totalising logic of its relations of production – expressed in the language of ‘competitiveness’, ‘efficiency’ and ‘flexibility’ rather than in the more traditional them-and-us language of profitability and class – has imposed itself on society in ever more intensive ways, increasingly penetrating every nook and cranny of existence. Curiously, however, at a time when one might therefore have thought that a critical understanding of capitalism is more than ever needed, not least to grasp the trajectory of modern law, the very idea of capitalism as a historically specific, structured process has mysteriously disappeared from most critical legal scholarship.

In some quarters, this is because under the influence of the postmodernism which has recently dominated critical legal studies, the principal characteristic of modern society is thought to be diversity and fragmentation rather than the growing dominance of a systematic capitalist logic. In highlighting oppressions other than those relating to class, oppressions often neglected by socialism, postmodernism has done much to explore and to heighten sensitivity towards the plurality of social identities and relations found in modern societies, elaborating law’s role in constituting and sustaining them, and identifying multiple sites for emancipatory struggle. But postmodernists have tended to see the existence of non-class based forms of oppression as evidence that society is nothing more than a fragmented plurality of heterogeneous, diverse and essentially autonomous social spheres and realities, reflecting the fragmentation of human identity itself; and that class is just one form of oppression among many which should not be ‘privileged’. The existence of this plurality of social identities and relations leads to an a priori, ahistorical rejection of the concept of capitalism as a systematic, unified, class-based mode of production. Indeed, the postmodern emphasis on contingency and fragmentation has generated enormous and, at times, quite vitriolic hostility towards all ideas of structure, totality and process; to what are derogatorily referred to as ‘grand narratives’. Margaret Thatcher’s ‘there’s no such thing as society’ has been endorsed and joined by ‘there’s no such thing as capitalism’.

As Ellen Wood has observed, however, for the totalising logic of capitalism to be denied it needs to be demonstrated that these other spheres and identities ‘do not

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23 n 8 above, 79.
25 n 2 above, 143.
come – or not in any significant way – within the determinative force of capitalism', within its 'system of social property relations, its expansionary imperatives, its drive for accumulation, its commodification of all social life, its creation of the market as a necessity, a compulsive mechanism of competition and self-sustaining growth'. The postmodern emphasis on oppressions other than those arising out of class and production is, Wood suggests, commonly accompanied by a confusion of the moral claims of certain oppressed groups with the determinative power of the relations upon which these different oppressions are based. Thus, the fact that the moral claims of, say, oppressed women are comparable to those suffering class oppression is confused with 'the essentially empirical question of historical and social determinations'. In conceptualising capitalism out of existence, postmodernism evades crucial questions of historical causality and political efficacy, ignoring the fact that capitalism shapes all identities and social relations. Indeed, while vigorously refuting its existence as a system with a totalising logic, many postmodernists come uncomfortably close to endorsing capitalism by default, for much of the diversity and fragmentation which they celebrate is often little more than an expression of the triumph of consumerism, in which 'the diversity of life-styles, measured in the sheer quantity of commodities and varied patterns of consumption, disguises the systematic unity, the imperatives which create that diversity itself while at the same time imposing a deeper and more global homogeneity'.

Postmodern culture is classless, Terry Eagleton remarks, only 'in the sense that consumerism is classless, which is to say that it cuts across class divisions while driving a system of production which finds such divisions indispensable'.

In other quarters, however, it is not so much recognition of the existence of capitalism as a structured process but recognition of its historical specificity that has disappeared. This is particularly evident in much of the contemporary discourse on 'globalization'. In this guise, the systematic logic of capitalism is not only recognized but commonly elevated to the status of an universal law to which all – individuals, productive enterprises, nation states – must adapt. Indeed, it is quite explicitly acknowledged and emphasised that this logic, unaffected by the intellectual changes fashioned by postmodernism, operates ever more intensively and irresistibly. Alongside the postmodern abandonment of grand narratives and material determinations, therefore, there has arisen a fiercely deterministic (in both the retrospective and prospective senses) and triumphalist grand narrative in which the universalization of the logic of capitalism represents the 'end of history' – a grand narrative which finds regular everyday expression in the increasingly politically-uncontested need for 'flexibility', 'competitiveness', 'efficiency', 'shareholder value' and so on. In this discourse, the logic of capitalism looms very large even when the concept of capitalism has been displaced. What has vanished is any clear sense of the historical specificity of this logic. Thus globalisation tends to be seen in terms of a recent, technologically-induced extension of essentially transhistorical tendencies towards free trade and market exchange, rather than in

terms of long-term historical processes rooted in the specific, class-based dynamics of capitalism. Capitalism is subjected to little in the way of deep critical scrutiny because it is seen as essentially natural and inevitable.

This 'naturalisation' of capitalism is far from new, not least in historical writing. It is manifested in the tendency to see all trade, market exchange, and profit seeking, even when occurring in manifestly non-capitalist societies, as embryonically capitalist; and to see the remorseless search for technological advance and economic growth as inscribed in human nature. The underlying, unspoken assumption is that people are naturally acquisitive and possess more or less insatiable desires; that greater material wealth is one of the keys, if not the key, to their well-being. From this perspective, exemplified by the historical sociology of Max Weber,\(^2^8\) history has always been driven by something resembling a capitalist logic, always been moving in the direction of capitalism. Capitalism, in the form of trade, markets and profit-seeking, has always been there, at least in embryo, waiting to be liberated from the (unnatural and irrational) shackles of religion, culture, and state interference. ‘Almost without exception’, explains Wood, ‘accounts of the origin of capitalism have been fundamentally circular: they have assumed the prior existence of capitalism in order to explain its coming into being. In order to explain capitalism’s distinctive drive to maximise profit, they have presupposed the existence of a universal profit-maximising rationality. In order to explain capitalism’s drive to improve labour productivity by technical means, they have presupposed a continuous, almost natural, progress of technological improvement in the productivity of labour’.\(^2^9\) From this perspective, the global triumph of capitalism is simply a product of its unparalleled capacity to foster trade and development, and to maximise productive efficiency. Capitalism has triumphed, in other words, precisely because it fosters technological development and economic growth; precisely because it has an inbuilt mechanism for filtering out ‘inefficient’ productive arrangements; precisely because of its consonance with human nature and insatiable human desire. The universalisation of capitalism is thus subsumed under a transhistorical law of technological change, growth and increasing consumption. Indeed, according to some, we have not only reached an ‘end of history’ which is capitalist, but an end of history which is capitalist in a specifically neoliberal, Anglo-American sense – more humane, ‘stakeholding’ versions of capitalism being unlikely to survive global competition.

Until relatively recently, however, history was manifestly not a story of relentless, revolutionary technological advance or of a humanity hell-bent on increasing economic growth and consumption. On the contrary, historically, the productive forces, while advancing over the long-term, have developed rather sporadically. This is because patterns of economic development and growth have been structured not by a transhistorical law of technological advance derived from human nature but by the varying and historically specific logics of process imposed by the social property relations of different modes of production. As Brenner explains, once established, these relations ‘tend to set strict limits and impose certain overall patterns upon the course of economic evolution [because] they tend to restrict the economic actors to certain limited options, indeed quite specific strategies, in order best to reproduce themselves in their established socio-economic positions’.\(^3^0\)

Indeed, through most of world history, ‘from the appearance of settled agriculture

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28 n 8 above, 146–178.
till the early modern period (and in most places well beyond that time), economies have been characterised by forms of property relations which impose on the individual economic actors patterns of economic action which, although individually rational, are nonetheless systematically subversive, in the long-run, of economic development.31 The feudal social-property system, for example, set certain limits on the development of production, which led to economic stagnation and involution, 'most crudely, because it imposed upon the members of the major social classes ... strategies for reproducing themselves which, when applied on an economy-wide basis, were incompatible with the requirements of growth'.32 For Brenner, the emergence of capitalism in England was the result not of the liberation of a transhistorical capitalist tendency but of lords and peasants, acting in class conflict with one another and operating within a particular set of legally constituted property relations, setting in motion a capitalist dynamic (and a transformation of those property relations) while trying to reproduce themselves as they were. He thus brings the specificities of capitalism into sharp relief, highlighting the fact that its remorseless drive for expansion and growth has not been ever-present in history and humanity, waiting to be emancipated, but is a product of the unique logic generated by a particular set of property relations.

In much of the contemporary discourse on globalization, then, cause and effect have been inverted. The compulsive drives for growth, for increasing the productivity (and exploitation) of labour and for maximising profits – drives manifested in the competitive need of producers constantly to revolutionise the forces of production in order to survive – are rooted in the specificities of capitalist property relations and the market dependence and market imperatives (the logic of capitalist process) that they generate. But this has been obscured: these quintessentially capitalist phenomena have been naturalised. Hence the portrayal of globalisation as little more than an extension and acceleration of universal, transhistorical, natural tendencies; and the regular subsumption of the contemporary demands for greater marketisation, competition, shareholder value and so on – demands which have seen more and more goods and services commodified, and more and more things designated private property – under fundamentally ahistorical laws of economic growth, progress and efficiency. The determining logic of capitalism is recognised, albeit under a different name, but is understood less (if at all) in terms of the historically specific characteristics of capitalist social property relations and more (if not entirely) in terms of the essentially neutral and natural forces of technology (the 'information revolution') and the market, forces implicitly attributed to a transhistorical human nature to which capitalism is a natural development and response. Shorn of its uniqueness and historical specificity and to a large extent of exploitation and class, capitalism moves out of focus and fades from view by reason of its seeming ubiquity.

Context and process: industrialisation, globalisation or capitalism?

If capitalism was 'born ... in a very specific place and very late in human history', it was also born in the countryside rather than the city.33 By the seventeenth

32 n 30 above, 214.
33 n 29 above, 69.
century, agriculture in parts of England was already operating according to a logic previously unseen; by the early eighteenth, English agrarian capitalism – characterised by concentrated land ownership and the triad of landlord, capitalist tenant and wage-labourer, and by increasing market dependence and a growing competitive pressure to increase the productivity of labour for profit ('improvement') – was already well-established. This process saw a transformation of property and property relations, and the codification of property as possessive individualism. ‘On several occasions’, Thompson wrote, ‘while I was actually watching, the lonely hour of the [Althusserian] last instance actually came. The last instance like an unholy ghost, actually grabbed hold of law, throttled it, and forced it to change its language and to will into existence new forms appropriate to the mode of production, such as enclosure acts and new case law excluding customary common rights’.34 Much of Thompson’s work was an exploration of the effects of the widening and deepening of this unprecedented logic on all aspects of eighteenth century society, from industry to culture to law. Thus, far from being a response to, or an outcome of, the dictates of human nature, Thompson argued, the transition to industrial capitalism ‘entailed a severe restructuring of working habits – new disciplines, new incentives, and a new human nature upon which these incentives could bite effectively’.35 As he showed with characteristic insight and elegance, it also precipitated, *inter alia*, the development of a new apprehension of time (‘time is money’, something which is spent not passed); radical changes in patterns of work; a much sharper demarcation between ‘work’ and ‘life’; the commodification of many of the necessities of life; major changes in law; and a transformation of the social role of ‘the market’ as it systematically ceased to be a simple mechanism for trade and exchange, and increasingly became the impersonal regulator of productive activity.36 In examining the development of industry in this period, Thompson therefore insisted, one was examining ‘not only changes in manufacturing technique which demand greater synchronization of labour and a greater exactitude in time-routines in any society; but also these changes as they were lived through in the society of nascent industrial capitalism’. One was dealing ‘simultaneously with time-sense in its technological conditioning, and with time-measurement as a means of labour exploitation’. In other words, Thompson appreciated that the changes taking place could not be ascribed to some ‘supposedly-neutral, technologically determined, process known as “industrialization”’, to ‘industrialism tout court’. The transition was, rather, to industrial capitalism, the process whereby industry became increasingly subject to the capitalist logic already established in agriculture. As such, it was a transition which impacted on ‘the whole culture’ of eighteenth century English society, including its ‘systems of power, property-relations [and] religious institutions’.37 As industrial production was subjected to the logic of capitalist process, law was once more forced to will into existence new forms appropriate to the mode of production.

The gradual subjection of industrial production to the same competitive market imperatives which had emerged in agriculture compelled producers to seek to raise

34 n 2 above, 288.
37 n 35 above, 80.
the productivity of labour. In most sectors, this did not, at least initially, result in sudden and dramatic technological transformations, rendering, as many historians have pointed out, the epithet 'industrial revolution' rather misleading. There were, however, major changes to the social organisation of production which caused costs to rise, changes aimed at increasing labour productivity and exploitation: the bringing together of previously dispersed home-based, handicraft workers, the development of more co-operative production methods, a growing division of labour and the imposition of greater labour discipline. There were also, of course, a number of sectors in which technological advances caused the costs of competitive production to rise very sharply – areas such as canals, public utilities and, later, railways. Indeed, the number of such sectors gradually rose, generating the second, and much more comprehensive, industrial revolution of the latter half of the nineteenth century. As a result, the eighteenth and nineteenth centuries saw the rapid development of the credit system and the emergence of a range of new financial instruments in the form of titles to revenue – what Marx called money or interest-bearing capital. Prominent among these was the joint stock company share. Originally conceptualised in part as direct interests in assets and in part as rights personal to the parties bound by an obligation, shares were at first considered non-assignable. Gradually, however, as they grew in number and as markets for them emerged, they were radically reconceptualised as forms of property in their own right whose value was derived not from the value of particular tangible assets in the present but from the market’s assessment of the revenue they were likely to generate in the future.\(^{38}\) Indeed, as industrial capitalism crystallised out, ownership of these new forms of property, which provided access to the surplus production of wage-labourers, became increasingly central to the possession of social wealth and power, hence the heated debates that surrounded them. As contemporaries rapidly discovered, the very intangibility of these property forms, together with the uncertainties and volatilities surrounding their value and the rentier character of their owners, was a source of many problems. And as the debates about the development and reform of the law relating joint stock companies during this period vividly show, the legal conceptualisation of these new organisational and property forms and the legal incidents, benefits and protections that should be attached to them were highly controversial topics. Indeed, not dissimilar debates are currently taking place in the so-called 'transition economies', as Western advisors and organisations such as the WTO, generally representing the interests of overseas rentier investors, advocate the enactment of bodies of law which constitute similar property forms and offer maximum protection to investors seeking to extract surplus labour with minimum risk. Today, as two hundred years ago, the rise of the joint stock company in its modern form and the emergence of new, money capital, property forms such as the share are inextricably linked to the rise, development and spread of capitalist social relations.

Despite the formal and nominal continuities, then, the nature of the joint stock company and its shares was transformed in the eighteenth and nineteenth centuries (as, eventually, was the legal meaning attached to corporate status), confirming Thompson's claim that history 'is a discipline of context and of process', in which 'every meaning is a meaning-in-context, and structures change while old forms may express new functions or old functions may find expression in new forms'.\(^{39}\)


\(^{39}\) n 7 above, 256.
Harris’ work undeniably makes an important contribution to our understanding of these new forms and functions, but the notion of joint stock company that he employs is rather static: the emphasis is on the progress and spread of an essentially fixed joint stock company form of organisation. Lacking a proper appreciation of context and process – of the dynamic of capitalist accumulation and the transformation of property relations that it set in train – Harris glosses over the emergence of industrial capitalism and the novelty of the organisational and property forms and modes of appropriation which accompanied it. Unaware of law’s ‘imbrication’ in these new, specifically capitalist relations – and, indeed, of its role in constituting them – he allows the formal continuities to disguise the substantive transformations and fails fully to grasp the true nature and magnitude of the changes taking place. Capitalism is once again naturalized, along with its distinctive social relations and organisational and property forms, leaving only the implicitly neutral process of ‘industrialization’ as the driving force of social and legal change. Today, in similar vein, many legal changes are being attributed not to the dynamics and logic of capitalism or to shifts in the balance of class forces, but to the implicitly neutral and natural (if not always beneficent) forces of ‘globalization’.

**Capitalist logic and the commodification of higher education**

The growing tendency to naturalise the systematic logic of capitalism or to deny its existence altogether poses a serious threat to our ability to forge a critical understanding of modern law. That these phenomena appear to have taken such firm root within critical legal studies over the last couple of decades is especially curious, however, for in recent years, as the stretch and intensity of capitalism has increased, many spheres of social life and many social institutions have been visibly transformed as they have been drawn ever deeper into the field-of-force of capitalism’s logic of process, higher education and universities prominent amongst them.

Accounts of the links between universities and ‘business’, and their impact on scholarship can be traced back at least as far as Thorstein Veblen, but in Britain it has been around since the time of the mid 1960s expansion that these links have become ever more obvious. Indeed, E.P. Thompson was among the first to comment upon them, when in the early 1970s, writing of ‘Warwick University Ltd’, ‘the business university’, he lamented the emergence of Vice-Chancellors who saw themselves ‘not so much as academic organizers and arbitrators [but] as the managing directors of business enterprises’. We were living in a corporate society ‘with all its ways of adapting and tailoring men to industry’s needs’, and we were witnessing the emergence of a ‘private university, in symbiotic relationship with the aims and ethos of industrial capitalism, but built within a shell of public money and public legitimation’. The resulting subordination of the interests of staff, students and education to those of business was ‘a corruption of the purpose of a university’.

Viewed by many as unnecessarily alarmist at the time, these words have proved prophetic, for the influence of business over universities has since grown. As the state has progressively sought to reduce expenditure which does not contribute in

some way to capital accumulation, there have been major cuts in both student grants and public funding, forcing universities to look to the private sector for financial support and heralding the arrival of 'academic capitalism' and the 'entrepreneurial university'.

Chairs sponsored by corporations have proliferated: at Cambridge, for example, there are chairs funded by, *inter alia*, Shell (chemical engineering), BP (organic chemistry and petroleum science), Price Waterhouse (financial accounting), ICI (applied thermodynamics), Glaxo (molecular parasitology) and Marks & Spencer (farm animal health and food science). At the same time, higher education has increasingly come to be cast by the government in the role of serving business in the 'knowledge economy'. This has underlain not only the huge government-directed increase in student numbers and the rapid move from an elite to a mass tertiary education system but also the changing character of research. The Conservative government's 1993 White Paper on science, *Realizing Our Potential*, for example, stated that its purpose was to 'produce a better match between publicly funded strategic research and the needs of industry', a view endorsed by New Labour's 1998 White Paper on competitiveness. Similarly, the aim of the Economic and Social Research Council is 'to provide high quality research on issues of importance to business, the public sector and government', including 'contributing to the economic competitiveness of the United Kingdom'. In short, funding changes have generated 'creeping commercialization'. Nowadays, writes Nicholas Maxwell, 'all too often academic research responds to the requirements of commerce and government, instead of the best interests of humanity'. Legal research has not been unaffected by these developments.

What we are witnessing, however, is not merely a growth in the influence of corporations over universities but a process in which the culture and morality of higher education is being increasingly subjected to a capitalist logic, a logic characterised by a growing commodification of teaching and the educational process, by ruthless competition (for students, RAE grades, private sector support), by the 'marketization' of relationships, and by a relentless drive for greater labour productivity. As student numbers have risen and funding has fallen, for example, with the possible exception of a minority of senior managers and professors, there has been a steady deterioration in the working conditions, remuneration and job security of university workers. The proportion of teaching undertaken by untenured, casual, part-time staff has steadily risen, a development in which women and ethnic minorities have been disadvantaged. Pay, even for full-time tenured staff, let alone the casualised workforce, has simultaneously fallen in both real and relative terms, class sizes have grown (or their frequency diminished, or both), workloads have risen, and the assessment and monitoring of teaching, research and students has been ratcheted up. If university teachers once thought of themselves as 'professionals' rather than as 'workers', they have been obliged to think again, for even if universities now offer abundant career opportunities (and still quite attractive ones for some), the great majority of university teachers have

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44 See D. Harvie, 'Alienation, Class and Enclosure in UK Universities' (2000) 71 Capital and Class 103 at 105.
46 Maxwell, *ibid*.
47 See n 44 above, 117–118.
been proletarianized, turned into labourers in an academic factory. At the same
time, while we have yet to see differential (‘top-up’) fees, relationships within
universities have been increasingly ‘marketized’, under pressure, if not direction,
from the state, as illustrated by the widespread adoption of organisational forms
and concepts drawn from the private, profit-and-market oriented sector. Ideas of
colleagiality and scholarly communities have been eroded, replaced by the
mentality of business and the language of management: ‘efficiency’, ‘value-for-
money’, administrators bearing corporate titles and the like. Indeed, not only are
universities businesses, so too are individual departments – or ‘cost-centres’ –
within them. In a world of research ratings and league tables, all must compete
ever more vigorously to maintain their market position; as Brenner might say, the
options and strategies for self-reproduction are limited.

Finally, of course, higher education itself has been, and is being, debased. It has
been commodified, with universities increasingly seeing themselves as supplying,
marketing and selling a ‘product’. We should not be surprised, then, when students,
absorbing this cultural shift, come to see themselves as consumers and treat
education as akin to a purchase, as something which, rather like a computer or a
dishwasher, is passively bought and received as a means to an end (a job), rather
than as something which is, at least in part, an end in itself. Nor should we be
surprised, given its focus on education’s value to business, that the government is
concerned that employers, the eventual purchasers and consumers of the product of
higher education, know what they are buying and are satisfied with it, something
that underlies the growing obsession with measuring achievement and monitoring
‘outcomes’, with quantifying the unquantifiable. The result is that there is growing
pressure on providers of tertiary education to focus less on intellectual and personal
development and more on the mass production of specified competencies and
relatively standardised (benchmarked) products, something which recently
prompted Tony Bradney to suggest that law schools had ‘give[n] up educating
law students and take[n] up grading them instead’.48 In short, the ‘kernel of human
relationship’ characteristic of the capitalist mode of production finds increasingly
clear expression in our universities with the curious result that many of those
working in them are currently experiencing something resembling what the
eighteenth century labouring classes experienced: the wholesale cultural
transformations wrought when institutions and practices are subjected to the logic
of the economic and social relationships of capitalism and the market.

Reviving critical legal studies

In these circumstances, the disappearance from critical legal studies of the very
concept of capitalism (let alone a critique of it) seems, at first glance, not just
mysterious but baffling. As we have seen, however, the intellectual roots of
capitalism’s increasing naturalisation run deep, dating back at least to the 1960s
reaction against Stalinism and base-superstructure ‘economism’ and the related
surge of interest in ideology and culture. It was these developments that prefaced
the gradual decline of interest in history and political economy, and the gradual
autonomisation of politics, ideology and culture from material conditions. The
intellectual road from there (via Althusserianism, post-Marxism and so on) to
postmodernism – with its emphasis on discourse, identity politics, local resistance,
contingency, fragmentation and heterogeneity, and its hostility towards notions of totalities, system and process – was relatively short and smooth. Critical legal studies has been swept away in the latter stages of this intellectual ebb-tide. As a result, just as the depressingly totalling power of capitalism began scaling new heights (and just as capital, led by Margaret Thatcher and Ronald Reagan, and using the full panoply of law, began waging something uncomfortably close to naked class war) the very ideas of class and of totalities were abandoned. Left intellectuals turned to culture just as advanced capitalism did. And while the notion that the world can be changed by discursive reconstruction, with its suggestion that one can be thoroughly radical without leaving one’s office, desk or text, has obvious attractions to academics, it has undoubtedly generated an unfortunate tendency for the politics of discourse to overshadow the real political struggles against such things as gender and racial oppression to which critical lawyers claim most passionately to be committed. Indeed, it is not entirely clear, given their rejection of ‘foundations’, precisely what kind of concrete political action postmodernists think possible. Paradoxically, they tend to reject political projects such as socialism for their ‘universalism’, while proposing and supporting equally universalistic but much more abstract political projects revolving around ideas of ‘radical democracy’, ‘justice’ and ‘ethics’ (when, that is, they are not advocating universal subversion and transgression), ideas which are actually ‘far less sensitive to social and historical specificity than the “essentialist” Marxist conception of socialism [they are] meant to [have] replaced’.49

The result, both within critical legal studies and beyond, is that just as the logic of capitalism is becoming ever more universal and undiluted, fostering ever greater national and international inequality, exploitation, destructive competition and environmental degradation, opposition to it has waned. At the very moment that it is becoming ever clearer that the material benefits that capitalism brings – its progressive side – come at tragic human and environmental cost, it is ever more accepted. At the very moment when ‘last instances’ have been coming thick and fast, grabbing hold of the law and throttling it (with ‘privatization’ in various guises taking the place of enclosure), critical legal scholars have (unlike Thompson) all-too-often not been watching, distracted from the drearily familiar material problems facing humanity in the new millennium – grotesque inequality, exploitation, poverty, famine, debt, disease – by the academic politics of discourse analysis and by the radical indeterminacies in their heads. At the very moment that the determining (and totalizing) power of capitalist logic has reached new heights, mocking aspirations to greater democracy, autonomy, justice and equality, the critique of capitalism has gone out of fashion. As, of course, has E.P. Thompson. And yet with its concepts refined and updated, the tradition of critical historical materialism – exemplified by Thompson, Ellen Meiksins Wood, Robert Brenner and others representative of the best in Marxist historiography – still provides the soundest basis upon which to build such a critique and as such should have an important role to play in critical legal studies. Indeed, a critical legal studies which lacks a concept of capitalism, let alone a critique of it, is not only not well-placed to be critical but not well-placed to grasp the nature and trajectory of modern law. Put simply, then, critical legal studies is in urgent need of a substantial reviving dose of historical materialism. Critical legal scholars need not only to become more involved in projects aimed at concrete legal and political change, but to move away from discourse towards the material side of law and life. Drawing, perhaps,

from the transformation of their own workplaces, they need to remind themselves of the logic of capitalist process and its determining force, and to focus more of their attention on the property forms and social relations which constitute and sustain it – especially those money-capital forms, those rights to revenue which enable surplus labour to be extracted in the form of interest, which are now central to social wealth and power, and to imperialist domination. As Robert Brenner’s work vividly illustrates, and as many working people worldwide have recently discovered to their cost, even modest variations in these legal and property relations – variations commonly reflecting differing balances of class forces – can, by altering the social ‘rules of self-reproduction’, lead societies in very different developmental directions.

None of this is to say that an end to capitalism would spell an end to all the many injustices and oppressions to which critical lawyers have addressed their attention. Or, indeed, that a capitalism without some of these oppressions is unimaginable. While a capitalism that did not tend towards environmental degradation is hard to envisage, despite the fact that environmental protection can itself be turned into a commodity from which profits can be made, things such as racial and gender equality are not in themselves in structural conflict with capitalist logic. As Wood points out, capitalism is not only ‘uniquely indifferent to the social identities of the people it exploits’, it actually tends, in certain respects, to undermine such differences, ‘reduc[ing] ... people to interchangeable units of labour abstracted from any specific identity’. Indeed, as is apparent at the moment, there are strong ideological pressures within capitalism for the elimination of inequalities and differences based on race and gender. On the other hand, it is equally apparent that capitalism tends to ‘co-opt whatever extra-economic oppressions are historically and culturally available in any given setting’. Any structural indifference that capitalism has to these inequalities and oppressions has tended to be overwhelmed by the ‘systemic opportunism’ which it displays in taking advantage of them. Nor is it to say that the determinative power of the logic of capitalist process on all aspects of society, including law, does not vary in different historical and social circumstances, or that a mode of production encompasses all aspects of all human relations. One might, for example, expect the determinative power on law of the logic of capitalism to be considerable, if not overwhelming, in areas which go to the heart of production and appropriation but to be somewhat weaker in other areas. It is worth remembering, however, that as he studied the history of eighteenth century England and examined the process whereby the logic of capitalist process came to dominate a society for the first time, E.P. Thompson was struck by the pervasiveness of its presence and influence, by the transformations that it wrought in all spheres of social activity, not least over law. It was, indeed, responsible for shaping many of the institutions, practices, ideas and feelings which we now consider ‘natural’. In the modern world, in which history has not simply been forgotten but has ended, the logic of capitalism has become more than a ‘particular ether’, it has become the air we breathe, permeating all aspects of our lives, and of law, without our being aware of it.

The naturalization of capitalism colours not only understandings of the past but understandings of the present and perceptions of future possibility. If capitalism is seen as the natural and inevitable expression of certain immutable features of humanity and as the telos of history, transcending it becomes unimaginable. If, on the other hand, its historical specificity is recognised, it is easier to appreciate that

50 n 8 above, 266.
there are alternatives to it and that it might have an end. The historical determinations and givens of the present might then genuinely be transformed into historical contingencies. One of the many virtues of Thompson’s historical materialism is to be found precisely in its critical reflection on capitalist practices, assumptions, and ways of thinking. He encourages us to think in non-capitalist terms, something which is indispensable if we are to fashion a better future from the present, a future, perhaps, in which ‘material satisfactions remain stable (if more equally distributed) and only cultural satisfactions enlarge’ and in which greater priority is given precisely to such things as the need for identity highlighted by postmodernism. ‘As capitalism and the market made over human nature and human need [in the eighteenth century England], Thompson observed, ‘so political economy and its revolutionary antagonist came to suppose that...economic man was for all time. We stand at the end of a century when this must now be called in doubt. We shall not ever return to pre-capitalist human nature, yet a reminder of its alternative needs, expectations and codes may renew our sense of nature’s range of possibilities’.51 Some of the recent work of critical legal scholars has helped to remind us of the diversity of this range, enriching critical legal studies along the way. The very same work has, however, seriously diminished it in other ways, both intellectually and politically.

When Althusser and his followers declared that historical research was condemned by the nature of its object to empiricism and announced that it was not only scientifically but also politically valueless, Edward Thompson expressed concern that many were closing their eyes and hoping that this ‘freak’ would go away. This, he argued, was a mistake. It had to be challenged, for it had ‘lodged itself firmly in a particular social couché, the bourgeois lumpen-intelligentsia: aspirant intellectuals, whose amateurish intellectual preparation disarms them before manifest absurdities and elementary philosophical blunders, and whose innocence in intellectual practice leaves them paralysed in the first web of scholastic argument which they encounter; and bourgeois because while many of them would like to be revolutionaries, they are themselves the products of a particular “conjuncture” which has broken the circuits between intellectuality and practical experience (both in real political movements, and in the actual segregation imposed by contemporary institutional structures)’. As a result, he argued, they were able to ‘perform imaginary revolutionary psycho-dramas (in which each outbids the other in adopting ferocious verbal postures) while in fact falling back upon a very old tradition of bourgeois elitism ...’52 Uncharitable, perhaps, but food for thought for those of us with aspirations to be critical legal scholars.

51 Thompson, Customs, n 36 above, 15.
52 n 2 above, 195.