The Metaphysics of Law: An Essay on the Very Young Marx
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“IN A WORD I HATE ALL THE GODS!” Karl Marx took this defiant cry of Prometheus, “the eminent saint and martyr of the philosophical calendar,” as the motto and point of departure of his doctoral thesis presented at the University of Jena in 1841, and in many ways it was symbolic of his entire career.¹ As a student at the Gymnasium of Trier in 1835, the seventeen-year-old Marx, still a practicing Lutheran, was already celebrating the power of man to determine his own fate and envisaging the Promethean task of re-creating the world by uncovering its first principle, its arche, and using it for the benefit of all mankind. “History calls those men greatest,” he wrote in his reflections on the choice of a profession, “who have ennobled themselves by working for the common good”⁰; and this heaven-, or rather earth-, storming goal Marx also preserved for the rest of his life.²

Too little attention has been paid to the profession first chosen by Marx, namely, that of the law. For centuries the law had been represented by its practitioners as the most direct path to the “common good” (bonum publicum). In general (and intellectually genetic) terms it was by pursuing jurisprudence—not always the substance and methods, perhaps, but certainly the ideals of jurisprudence—that Marx began the heroic task by which he hoped to attain greatness. Needless to say, his enterprise was not without setbacks, and of these one of the first was Marx’s disillusionment with conventional jurisprudence as it actually related to political and social matters. Another was the resistance of political authority, and with it professional law, to the pursuit of the social ideals embodied in jurisprudence. This resistance Marx felt most directly in the censorship legislation directly aimed at the Rheinische Zeitung, on which he served his apprenticeship in practical politics in the two

My thanks for the proddings and suggestions of friends and colleagues at the Institute for Advanced Study, who heard one version of this paper, and of those at the University of Rochester (especially Peter Linebaugh), who have shown forbearance toward still another perspective on Marxism.


years after receiving his doctor’s degree. In 1843 Marx resigned in protest, and, interestingly enough, his statement was accompanied by a representation of Prometheus with his entrails being devoured. Yet Marx’s own Prometheus enterprise continued, and it may not be too fanciful to see his system of political economy as the final metamorphosis of his first calling.

Marx’s commitment to a legal career began in the fall of 1835, when he entered upon the study of civil law at the University of Bonn. Even then, he showed distressing signs of unorthodoxy, and his father worried about his romantic notions. “In connection with the lectures on law,” Heinrich Marx wrote in November 1835, “you must not demand [that they] ... should be touching and poetic”; and he continuously urged his son to be more practical-minded. In a stream of letters father taxed son with a variety of time-honored adolescent failings that seemed to reflect idealism and rebelliousness. Most prominent among these were disorder (“One expects order even from a scholar, and especially from a practical lawyer”), financial irresponsibility (“... and you know quite well I am not rich”), selfishness (“... in your heart egoism is predominant”), and a dangerous tendency to violence (“Is duelling then so closely interwoven with philosophy?”). Karl had indeed been charged with “rowdiness and drunkenness at night.” Despite such compulsive “sermonizing,” the elder Marx tried not to insist on his authority, but the “wild goings-on at Bonn” made it clear that his son was willful and defiant and had set his sights on a goal higher than a conventional legal or cameralistic career. Academically, however, Marx was declared “diligent” and even “very diligent and attentive” (sehr fleissig und aufmerksam) in all ten of the courses he took during 1835-36, six of which dealt with branches of law and legal history.

His transfer to the University of Berlin in the fall of 1836 marked a turning point in Marx’s life and very noticeably strengthened his attachment to legal studies. Although its most eminent philosopher, Georg Wilhelm Friedrich Hegel, had been dead for five years, the university was still among the most impressive in Europe, and its faculty of law in particular was a center of intellectual ferment. The most eminent professor was Friedrich Karl von Savigny, one of the greatest legal scholars of the century and regarded as leader of the intimidating “historical school of law,” which emerged in opposition both to natural law theories and to rationalistic efforts at codification, especially that of Napoleon. The second most renowned professor was the Hegelian Eduard Gans—“a versatile Jew,” sniffed Heinrich von Treitschke, “acute rather than intelligent”—who had emerged as a leading critic of this same historical school. The tendency of the historical school was, as Sidney Hook has put it, “to nail the present upon the cross of the past”;

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4 Heinrich Marx to Marx, Nov. 18-19, 1835, in Marx-Engels Gesamtausgabe, 1, pt. 2: 186 (Collected Works, 1: 646). Also see the forthcoming biography by Jerrold Seigel.
and Savigny himself had to defend his school against the charge that it proposed to surrender to the “tyranny of the past” (die Herrschaft der Vergangenheit). In contemporary debates Savigny and Gans were at odds over the reform of Prussian law as well as the academic problem of “possession” in civil law. One concerned French scholar, who in 1827 had published a thesis on Savigny, observed, “The war is spectacular. In the historical school they are afraid of philosophy. . . . In the philosophical camp they look down with pity on purely historical jurists . . . .” In 1839 this war between the “realism” of Savigny and the “idealism” of Gans became public. At least three years earlier, however, Marx had already been exposed to this juridical and philosophical Kulturkampf. In his first year at the university he studied “Pandekten” with Savigny and “Kriminalrecht” with Gans, and there is little doubt that their altercation had a shaping effect on Marx’s own developing social views.

If the perspective here seems eccentric, it is nevertheless precisely the one that the young Marx presented in the one autobiographical statement of his prerevolutionary years. This is the famous confessional letter which he wrote to his father at the end of his first year at the University of Berlin (November 10, 1837). “There are moments in one’s life,” he began, “which are like the frontier posts marking the completion of a period but [which] at the same time clearly indicate a new direction.” Looking back, he saw the beginning of a “new life” linked with his love for Jenny von Westphalen and expressed in his efforts to write lyrical poetry. During that same year, in fact, he wrote two “wild songs” on “nocturnal love” and a Faustian “fiddler,” reflecting some of his adolescent pangs and “striving for poetic fire.” But, like Dante Alighieri, whose “new life” was also associated with passion and poetry, Marx was impelled to turn from love to learning—from the “remote heaven” of his literary art, as he put it, to more adult aims. “Poetry, however, could be and had to be only an accompaniment,” he continued in the letter to his father; “I had to study law and above all felt the urge to wrestle with philosophy.”

What is essential to understand at this point is that Marx did not distinguish at all sharply between these two disciplines, for the identification of law and philosophy was among the first lessons learned by law students. “Juristic prudence is the true philosophy” is a formula taken from the very first

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9 “Abgangszeugnis der Universität für Marx,” in Marx-Engels Gesamtausgabe, 1, pt. 2: 247 (Collected Works, 1: 703). According to the contemporary student catalogue, Marx must have taken “Privatim ius Pandectarum” from nine to eleven every morning with Savigny and “Ius criminale universale” from noon to one every afternoon except Wednesday with Gans as well as a third course on “anthropologia” with H. Steffens. See Index lectionum . . . in Universitate Friderica Guilhelm (Berlin, 1837).
sentence of the Pandects, that seminal collection of classical jurisprudence which Marx had not only studied (with Savigny the previous year) but had even begun to translate into German. The justification for this identification had been two-fold: first, that law constituted a true “science” (civilis scientia), since it was universal and viewed the world in terms of cause and effect, and, second, that unlike natural science it proposed as its principal object the common good of society. From the thirteenth century to Marx’s own time the theme jurisprudentia est vera philosophia was pursued by jurists, commentators, and systematizers of law, including contributors to the French Civil Code of 1804. Whatever the relations between mature Marxism and classical “civil science,” the young Marx, at least the very young Marx, started in the old tradition. “The two,” he wrote of law and philosophy, “were so closely linked that, on the one hand, I read through Heineccius, Thibaut and the sources quite uncritically, in a mere schoolboy fashion; thus, for instance, I translated the first two books of the Pandects into German, and, on the other hand, tried to elaborate a philosophy of law covering the whole field of law.”

In these youthful experiments Marx carried out academic assignments at the same time he was also carrying on the great tradition of systematic jurisprudence which grew out of the work of the scholastic jurists (surveyed in Savigny’s classic history of Roman law in the Middle Ages) and which gained maturity in the “reformed jurisprudence” established in the sixteenth century, most prominently at the University of Bourges. From here, especially through the efforts of Hugues Doneau (after his transferral to Heidelberg and, later, to Altdorf), the values and program of this philosophical school made their way into German academic jurisprudence; and the tradition was preserved and extended by generations of “Systematiker,” as Savigny called them, down to the nineteenth century. Among these were two distinguished


13 In this wilderness of juridical literature, almost wholly uncharted by historians except through the Hegelian connection, these are just a few of the most relevant works: the various systematic efforts of the Enlightenment jurist and historian Heineccius, notably the Elementa Juris Naturae et Gentium and the two volumes of Elementa Juris Civilis, arranged respectively according to the order of the Pandects and the Institutes of Justinian, in many editions and translations (including one by Thibaut); Gustav Hugo, Institutionen des römischen Rechts; Thibaut, System des Pandekten-Rechts; Gans, System des römischen Civilrechts;
names on Marx’s reading list, Johann Gottlieb Heineccius and A. F. J. Thibaut, and his teachers at Berlin, including A. F. Rudorff as well as Savigny and Gans. All of these scholars followed variations of the old scholastic method associated with the fourteenth-century jurist Bartolus, a method based upon civil law principles that had been correlated and rationalized by generations of “authorities” working to achieve greater consistency, generality, and equity. In particular, they directed their efforts to the creation of an intelligible (and teachable) scheme of law based upon classical principles or organization, especially the Pandects.

So, evidently, did Marx. The three-hundred-page “unhappy work” referred to in his letter has not survived, but Marx did set down a brief outline for his father’s edification. He began by making the conventional civilian distinction between private and public law, dividing the former into the equally conventional rubrics of the law of persons, things, and persons in relation to property, with special emphasis on the law of contracts. In its ramifying and trichotomizing (trichotomische) approach, Marx’s scheme could not have differed substantially from innumerable such schemes devised by students of law over the centuries, especially in connection with eighteenth-century movements for codification. What was unconventional was Marx’s reaction to his own work, and he laid bare its deficiencies in his usual intemperate language. “The whole thing is replete with tripartite divisions, it is written with tedious prolixity, and the Roman constitutions are misused in the most barbaric fashion in order to force them into my system.” Worst of all, it embodied the basic contradiction of the law of the old regime. Significantly, when Marx reached the public law section of his treatise, that is, the point at which civil rules joined up with political goals and questions of the common good, he “saw the falsity of the whole thing” and broke off the project.

The source of the error lay with what Marx was pleased to call “the metaphysics of law,” which he defined as “basic principles, reflections, definitions of concepts, divorced from all actual law and every actual form of law.” According to Marx, the “metaphysics of law” was akin to Kantian idealism and to allegedly “scientific” systems of natural law, such as that constructed by Johann Fichte, but it was even worse because of the way it manipulated social reality. The difficulty stemmed from the time-honored “opposition between what is and what ought to be,” which in turn was “the source of the hopelessly incorrect division of the subject matter.” “Mathematical dogma-

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14 See A.-J. Arnaud, *Les Origines doctrinales du Code civil français* (Paris, 1969); and Klaus Luig, “Institutionen-Lehrbücher der nationalen Rechts im 17. und 18. Jahrhundert,” *Ius Commune*, 3 (1970): 64–97. Marx’s own contribution to this tradition followed the Roman form of Justinian and Gaius, which likewise distinguished the *ius publicum* from the *ius privatum* and divided the latter into the laws of persons, things, and actions (or, in Marx’s terms for this last, persons in relation to property). In this Marxian trichotomy, the first two rubrics—persons (the basis of “subjective” law) and things (the objects in the natural world that are potentially property)—correspond in a general way to the Hegelian dialectic of subject-object but in a sequence that Marx rejected. See page 365, below.
tism” might be appropriate for the abstractions of geometry, which are bound neither by social context nor by historical change. “On the other hand,” Marx explained, “in the concrete expression of a living world of ideas, as exemplified by law, the state, nature, and philosophy as a whole, the object itself must be studied in its development; arbitrary divisions must not be introduced, the rational character of the object itself must develop as something imbued with contradictions in itself and find unity in itself.”

It seems significant that this, the first Marxian prefiguring of historical materialism, should be formulated in the context of a fundamental, and even revolutionary, critique of systematic jurisprudence. The subversive consequences were not lost on Marx’s father, and his warning was prophetic. “Your views on law are not without truth,” he wrote in response to his son’s letter, “but are very likely to arouse storms if made into a system, and are you not aware how violent storms are among the learned?”

Marx’s break-through was certainly an act of scholarly dissent, even heresy, since he was defying authorities honored as “priests of the laws” (sacerdotes legum) in the Pandects and, hence, in legal tradition. But it was also a moral epiphany attended by a deep personal crisis. Disillusionment with the law sent him back to pure philosophy “with a good conscience,” as he put it, and even to poetry; and these obsessions in turn so undermined his health that he was obliged to go to the country for a rest. The trip seemed to be effective. He returned not only with renewed strength but also with a resolve to turn away from youthful transcendentalism back to the substance of life. “I even joined my landlord in a hunting excursion,” he wrote, “rushed off to Berlin and wanted to embrace every street-corner loafer.” He returned with renewed interest in Hegel, whose works he read through for the first time in order “to bring genuine pearls into the light of day”; and this study coincided with his attendance at meetings of the radical Hegelian Doctors’ Club. Such was the emotional context of Marx’s initial revulsion from idealism. “A curtain has fallen, my holy of holies was rent asunder, and new gods had to be installed” is the way he expressed his traumatic experiences. “From the idealism which, by the way, I had compared and nourished with the idealism of Kant and Fichte, I arrived at the point of seeking the idea in reality itself. If previously the gods had dwelt above the earth, now they became its centre.”

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position it was not far to a Promethean—and materialistic—denial of the "gods" altogether.

In this way, wakened as it were from his dogmatic slumber, Marx turned from the "ideal in itself" (Begriff an sich) to the "thing in itself" (Ding an sich), to use a Kantian expression that would not have pleased him. Yet he continued to think in juridical terms and, indeed, to apply to juridical sources for enlightenment, though in a very different style from the "metaphysics of law." "Shortly after that," he wrote, "I pursued only positive studies"; and he listed a variety of works on civil law by Savigny and others as well as Gratian's twelfth-century collection of canon law and some studies in early Germanic law. Marx rejected the error, which he "shared with Herr v. Savigny," that separated legal form from content—that is, legal concepts from "positive" or "material" law. Instead, he believed that "positive law in its conceptual development" was exactly the same as "the formation of the concept of law," and so he concluded that philosophical understanding had to proceed, above all, through the jus positivum, since this law was the meeting place between legal norms and social reality. To fulfill the ideal of jurisprudence as true philosophy, in other words, one had to investigate first the material base. This train of thought quite likely led Marx not only to reject the "metaphysics of law" but also to turn to another discipline entirely as the principal vehicle of his social philosophy.

This interpretation of the very young Marx is made more plausible by examining the particular work in which he discovered the basic fallacy of the "metaphysics of law": the first book of his "positive studies," Savigny's great treatise on possession, Das Recht des Besitzes, which one authority regards as the most influential legal monograph of modern times. In this work Savigny exhibited the same enormous range of learning as in his monumental history of Roman law, but in Das Recht des Besitzes he applied it in a practical and even polemical fashion. He discussed the whole complex of problems involved in possession and property with reference to the judgments of ancient authorities, especially those included in the Pandects, and of later commentators. The latter he divided into two classes: the "interpreters," including medieval and Renaissance jurists such as Portius Azo, Accursius the glossator, Andrea Alciato, and Jacques Cujas, as well as such modern authors as his colleagues Gans and Rudorff; and the "systematists," including Hugues Doneau, Doneau's mentor François le Douaren, R.-J. Pothier, and Savigny's rival A. F. J. Thibaut. In scholastic fashion he listed, criticized, and usually rejected the opiniones of these and many other jurists before presenting his own interpretation. In later editions the collecting of opinions and controversies continued (over fifty were treated in the seventh edition, published by Rudorff).

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18 Marx mentions Savigny, System des heutigen römischen Rechts; Paul Feuerbach, Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts; C. L. W. von Grolmann, Grundzüge der Criminalrechtswissenschaft; A. W. Cramer, De Verborum Significatione; J. N. von Wening-Ingenheim, Lehrbuch des Gemeines Civilrechts; C. F. Mühlenbruch, Doctrina Pandectarum; W. A. Lauterbach, certain titles on civil process ("einezelle Titel ... Zivilprozess"); Gratian, Concordia discordantium canonum; and G. P. Lancellotti, Institutiones Juris Canonici.


The entire exercise was based on the assumption—rejected, of course, by Marx—that legal form, by which Savigny meant classification in the Roman system, could be distinguished from content, by which he meant specific formulation by Roman and modern jurists.

Even to the young Marx this book must have seemed a monstrosity of antiquarian learning without any reasonable relationship to the common good. At the outset the reader is instructed that the subject of the treatise is not the right to possess (jus possidendi), but rather the rights arising from simple possession (jus possessionis); and these rights Savigny grouped under two headings, usucapion and interdiction.21 Usucapion signified uncontested possession (in the law of the Twelve Tables for one or two years), and it was related to the legal concept of prescription (the praescriptio longae temporis of Roman and canon law). Interdiction referred to the right to repossess something that had been seized by act of violence and so arose from redress of injury. Savigny also distinguished between “natural” and “civil” possession, that is, physical possession in the state of nature and the juridical condition that created “property,” which was generally defined as “the totality of all real rights.” Although he employed such legal concepts as bona fides and justa causa, Savigny’s argument seemed to be based ultimately upon the accidents of Roman history, or prehistory, in which private property (such as the ager privatus discussed by the great Roman historian Niebuhr) arose out of the simple act of prehension, or willful seizure, and then somehow was given legal status by receiving customary acceptance and general social formulation. Out of factum, in juridical terms, came jus. Might makes right—perhaps even property is theft, if one can so render the euphemism “prehension”—so it may have seemed to a young and idealistic reader like Marx.

On this foundation, in any case, Savigny erected his theory of possession, and hence of property; and in reaction to this Gans launched an assault on the historical school of law in his own discussion of the problem of possession. This pamphlet, published in 1839, was an exercise in “scientific polemic” in which Gans bitterly attacked Savigny’s sophistical habit of transforming hypotheses into demonstrated theses with the help of strategically placed “thuses” and “in facts.” All Savigny really did was argue from Roman history, Gans charged; and for all their “practical sagacity” the Romans had no national claims to philosophical truth. “Possession is a fact, a natural condition and not a right”—so Gans stated Savigny’s position—“but nonetheless the possessor has rights because of his possession.” Such empiricist (and historicist) logic Gans totally rejected. When Savigny defined possession in terms of interdiction and usucapion, Gans complained, “he removed the subject to a field in which one cannot contend with philosophical weapons: as soon as pure theory is mentioned, he confuses the matter with terms which theory has

21 Savigny, Das Recht des Besitzes, 43.
nothing to say about . . . ."

Marx had no trouble choosing sides in this debate. Even if he had not shared Gans's Hegelian bias at this point, he would surely have been repelled by the method and, by inference, the morality of his other mentor, Savigny. In the first place, Marx had come to reject the idea of understanding and, still less, of legitimizing social institutions within the framework of an arbitrary system of civil law. Secondly, because of his concern for social justice he could have had little sympathy with Savigny's tendency to justify the entire range of property rights on the basis of the fact of possession, which is to say on the basis of an amoral and irrational state of nature. Clearly, it was a theory at odds with the view that Marx later came to adopt toward property, especially in relation to labor. For these reasons, it may be suggested that Marx's first act of academic subversion was to turn Savigny, not Hegel, on his head.

**This intellectual trauma** occurred in Marx's twentieth year, when he was still contemplating a legal career—in jurisprudence rather than cameralistics. In the next few years several things deflected him from this course. One was his immersion in traditional philosophy, not only that of ancient Greece for purposes of his thesis on Democritean and Epicurean philosophy, but also (and even more intensively) Hegelianism, which was situated at the vortex of many burning social as well as conceptual problems of the day. Another was the death of his father, whose moral pressure and financial support were both withdrawn in 1838. Finally, there was the official condemnation of the Left Hegelians, which blocked Marx from an academic career. In 1842 he began his career as a political journalist, first submitting articles to and then becoming chief editor of the *Rheinische Zeitung*. At last, he had occasion to contribute directly to the "common good" by commenting upon a variety of social issues, including freedom of the press and criminal law. Yet Marx still preserved some of his juridical-mindedness. He criticized the Prussian censorship legislation of 1841 on the grounds not merely of its injustice but also of its illegality. Again, he took up the theme of the contradictions between law and its professed ideals. "Is truth to be understood as being simply what the government decrees . . . ?"

Having overcome academic authority, Marx was setting his sights on more intimidating obstacles to the common good.

Marx kept coming back to the issues posed by his old teacher Savigny, who

22 Gans, *Ueber die Grundlage des Besitzes, Eine Duplik* (Berlin, 1839), 7, 11. Gans had offered a similar, though milder, criticism of Savigny's famous *Geschichte des römischen Rechts im Mittelalter* in a review complaining that the work was merely literary history without conceptual value and concluding that "einer innerliche Geschichte" remained to be written; see his *Vermischte Schriften* (Berlin, 1834), 1: 46. For other entries in the contemporary debate over possession, see the list (not exhaustive) by A. Rudorff in his appendix to Savigny, *Das Recht des Besitzes*, 543–62. During the years 1836–42 there were over forty publications, not including popular discussions of the problem of property such as that of Pierre Proudhon; and throughout the century the literature continued to accumulate. For a modern discussion, see Gunter Wesener, "Ius Possessionis," *Festschrift för Max Kaiser* (Munich, 1976), 715–42.

in 1842 was appointed Prussian minister of justice for the reform of laws. "Are not," he asked, "most of your court cases and most of your civil laws concerned with property?" A case in point was a recent statute concerning the theft of wood, which in effect had raised forest regulations to the level of criminal law. Even the penal code of the sixteenth century, Marx noted, had not gone so far in the protection of property. What he objected to was precisely the sort of proprietary claims argued by Savigny—"customs contrary to law," as Marx put it, and benefitting only the privileged, landowning classes. "Their origin," he added, "dates to the period in which human history was part of natural history," that is, the "spiritual animal kingdom" of feudalism. Marx celebrated universal human law above such class privilege. "We demand for the poor a customary right, and indeed one which is not of a local character but is a customary right of the poor in all countries." In this article Marx thought he had uncovered one of the basic flaws of modern "liberal legislation," which was "formulating and raising to a universal level those rights which they found already in existence," so raising de facto conditions to a de jure level. This is what came of arguing from the selfish individualism of a pre- and anti-social state of nature, instead of from the rational ideal of "the state as the great organism, in which legal, moral, and political freedom must be realized . . . ."

Turning his journalistic attention to such practical problems, Marx began to formulate more clearly his views about the relationship between law and social reality—a problem that was congruent in many ways with that of the relationship between ideology and society's material base. These views have almost invariably been interpreted in terms of Marx's Hegelianism, and with justice. Yet it is clear that he was still involved in academic jurisprudence, for he devoted to that subject the most comprehensive and aggressive statement of his philosophic position up to that time: his pivotal and, as Sidney Hook has remarked, "strangely neglected" critique of the historical school of law. This school, whose manifesto was Savigny's celebrated essay on "the vocation of our age for legislation and jurisprudence," set itself against the optimistic and rationalistic philosophy of law which had prevailed in the previous century. In his counterattack, "The Philosophical Manifesto of the Historical School of Law," Marx not only announced his abjuration of the profession of law but also suggested the premises for a more positive and critical basis for social thought and action. In part, his attack was a typical act of academic

27 Savigny, Vom Beruf unserer Zeit fur Gesetzgebung und Rechtswissenschaft (Heidelberg, 1814), reproduced with other material relating to the quarrel with Thibaut in J. Stern, Thibaut und Savigny (Darmstadt, 1959).
rebellion, although he disguised his doctrinal parricide somewhat by taking
as his ostensible target not Herr Professor and now Herr Minister Savigny
(referred to only as “the most famous historical jurist”) but rather Savigny’s
elder colleague Gustav Hugo, whom Marx called the “forefather” (Ältervater)
and “original type” (Naturmensch) of the historical school of law. In any case,
this declaration of independence was the first step in the enterprise of philo-
osophical criticism that cleared the ground for Marx’s own system of thought.

Like Savigny, Hugo affected a “reaction against the frivolous spirit of the
eighteenth century”; but, in fact, Marx charged, it was the historical school
that was frivolous and; worse still, irrational and immoral. In a sense the basic
flaw was that of professional jurisprudence, that is, the eclectic, indiscrimi-
nate, and uncritical use of sources. Marx’s complaints about Hugo (he
“knows no distinctions”) could have been applied as well to Savigny’s treatise
on possession. “Everything existing serves him as an authority, every author-
ity serves him as an argument.” Hugo’s position was a travesty of Kant’s and
had been arrived at “by supposing that, because we cannot know what is true,
we consequently allow the untrue . . . to pass as fully valid.” Although
insisting that the positive was irrational (“positive, i.e., uncritical” was
Marx’s gloss), Hugo held, nevertheless, that it, not reason, supplied the
standard of human judgment, since in a sense it embodied natural law,
undeniably and, indeed, tautologically reflecting the “natural” progression of
events. This, Marx concluded, “is the frank, naive, reckless method of the
historical school . . . . Hugo, therefore, profanes all that the just, moral
political man regards as holy, but he smashes these things only to be able to
honour them as historical relics; he desecrates them in the eyes of reason in
order afterwards to make them honourable in the eyes of history and at the
same time to make the eyes of the historical school honourable.”

What the historical school of law had accomplished, it would seem, was to
make history self-justifying, to derive right from fact, as Savigny had done for
property; and the result was the betrayal not only of reason but also of man
himself. Absolute skepticism, absolute immoralism, and absolute relativism
(if this is not a contradiction) were the foundations of the “positive” philoso-
phy according to Hugo. “The sole juridical feature of man is his animal
nature” was the proposition which Marx took to be the motto of the historical
school and in particular of Hugo’s Natural Law as a Philosophy of Positive Law,
to which Marx’s article was ostensibly devoted. Among the consequences of
Hugo’s attitude was that slavery could be at least “provisionally lawful” and
old regime jurists had indeed justified this argument for centuries, largely on
the basis of the “law of nations” (jus gentium), which was a repository for much
of the indiscriminate and immoral “positive law” of the historical school.

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29 Marx, “Das philosophische Manifest,” in Marx-Engels Gesamtausgabe, 1, pt. 1: 252, 254 (Collected Works,
1: 206, 209).
30 Hugo, Lehrbuch des Naturrechts als einer Philosophie des positiven Rechts (Berlin, 1809), 43; Hugo discussed
“Der Mensch als Thier” in an introductory chapter on “Juristische Anthropologie.” Also see Arno
Buschmann, Ursprung und Grundlagen der geschichtlichen Rechtswissenschaft, Untersuchungen, und Interpretationen zur
Rechtstheorie Gustav Hugo (Krefeld, 1963); and, most recently, Jürgen Blühdorn, “Naturrechtskritik und
What is more, Hugo argued, "slavery" was better than a state of war and "not much worse" than poverty, since the "slave-owner, even from well-understood economic considerations, is much more likely to expend something on the education of a slave who shows ability than on that of a beggar child." According to Marx, this was the import of Hugo's chapter on "freedom." The same "frivolous shamelessness" appeared in the succeeding chapters on marriage (though Marx's commentary was deleted by censors) and education, which are likewise treated on the positive and animal level. These views seemed to follow logically from the proposition that Marx extracted on civil law and cited with evident incredulity, that the "necessity of civil law in general is imaginary."

In Marx's view the full iniquity of Hugo's concept of law appeared in his chapter on constitutional law. Here the convergence between the authoritarian methods of traditional jurisprudence and the authoritarian assumptions of conservative government was complete. "It is a holy duty of conscience to obey the authorities in whose hands power lies." To this characterization of Hugo's position Marx added the gloss, "Has not Hugo proved that man can cast off even the last fetters of freedom, namely, that of being a rational being?" How, then, could his successors claim to be "the legislators of our times?" Though only Karl Haller, Friedrich Stahl, and Heinrich Leo were mentioned, Marx was again obviously thinking of his mentor Savigny, then occupied with revising the Prussian laws. In general, the historical school worked out of that great storehouse of German erudition in which Marx himself had begun, and to this they added trappings from modern fashions of mysticism, romanticism, and speculation. "Truly, however," Marx declared, "little criticism is needed to recognize behind all these fragrant modern phrases the dirty old idea of our enlightener of the ancien regime and to recognize behind all the extravagant unctuosity his dissolute frivolity." This idea, which betrayed the ideals of ancient jurisprudence as well as modern social conscience, was that law was mere animal law, not human but "positive" law, and its implication was "the right of arbitrary power."

The result of this line of criticism became clearer a year later when Marx, carrying out his resolution to place his arguments on a more philosophical basis, wrote an extended critique of Hegel's philosophy of law. These pages contain no poetry (though begun during the first months of his marriage to Jenny von Westphalen), little idealism in any sense, and a large amount of convoluted and ill-humored philosophizing; but old juridical issues figured prominently, and echoes of old scholastic quarrels can be heard. Marx was still incensed at Hugo and his progeny, that "school which legitimates the baseness of today by the baseness of yesterday . . . , a school to which history shows only its posterior . . . " (punning on the mindless empiricism, the a posteriori assumptions of the historical school).31 In the introduction to his

critique, Marx broadened his attack by criticizing both law and religion (here stigmatized with the famous phrase “opium of the people”) as obstacles to the “common good.” In this way jurisprudence seemed explicitly to fall victim to Marx’s growing hatred of “all the gods” of established society. Guilty by association, too, was the political constitution (politische Verfassung), which Marx referred to as “the religion of national life, the heaven of its generality over against the earthly existence of its actuality.”

For Marx, then, Hegelian philosophy had come to be another manifestation of the “metaphysics of law” and of the fallacies both of idealism and of the historical school. On the one hand, Hegel distorted social reality with an abstract and authoritarian system, and, on the other, he continued to accept uncritically the positive and subhuman, “animal” law of the old regime. The bases of this law were the caste divisions (Stände) that turned man, according to Marx, “into an animal that is directly identical with its functions. The Middle Ages are the animal history of human society, its zoology.”

Hegel assumed an abstract and transcendent state and a concept of “sovereignty” that led him into triviality and tautology; yet he accepted without question the status quo of German political organization. His remarks on the executive, for example, “could stand word for word in the Prussian common law.” What Hegel presented was not a system of philosophy, it might be concluded, but rather a system of “ideology” in a classically pejorative sense.

The fundamental contradiction in Hegel’s Rechtsphilosophie—that between a received juridical system and the common good that ought to inform society—had troubled Marx since his first year at the University of Berlin. In Hegel’s case it took the form of opposing the state to “the spheres of civil law and personal welfare, the family and civil society.” Once again the central question concerned private property and, particularly primogeniture, which isolated property from the family as well as from civil society. Marx pointed out that Roman law—although it provided for slavery, right of conquest, and class conflict—had never confused private property with political power. By keeping the jus privatum separate from the jus publicum, it had also prevented the sovereign will (the imperium) from becoming hereditary. Germanic law was quite different. Hegel epitomized the view that alienated private property—that is, inalienable landed property—from its “social roots” and from public wealth and that identified it with the ruling establishment. “The political constitution at its highest point is the constitution of private property,” Marx declared. “The supreme political conviction is the conviction of private property.” Here was another god to hate: “Primogeniture is private property become a religion to itself, lost in itself, elated by its own independence and power.” It was “crass stupidity.”


Marx had not, at this point, fully developed his conception of class conflict, but it is evident that he had the makings of his theory. "Private property is the general category of the general political bond," he argued; but at the same time it was separated from public wealth, which is to say the common good, and this contradiction seemed to discredit the very foundations of jurisprudence and traditional political philosophy. Marx explained the rejection of his academic heritage in this way:

The criticism of the German philosophy of state and law, which attained its most consistent, richest, and final formation with Hegel, is both a critical analysis of the modern state and of the reality connected with it, and the resolute negation of the whole German political and legal consciousness as practised hitherto, the most universal expression of which raised to the level of a science is the speculative philosophy of law itself.

This marked a watershed in Marx's thought, for as he had come to realize, "The criticism of the speculative philosophy of law turns not toward itself, but toward problems which can be solved only by one means—practice." The first problem that came to mind was the relationship between industry and the political world. Some such aspect of "modern politico-reality" Marx proposed to substitute for the philosophy of law as his proper field of investigation.

So it was that Marx came to believe that the grounds for discussion of true philosophy had to be not formal rules of law but realities of possession and property, that is, what the English and French called political economy and what the Germans, more primitively and unscientifically, called national economy. Society had to be comprehended in terms not of its legal superstructure, in other words, but of its material base. This shift in Marx's thought coincided with a physical transition from Germany, a regime which was "decaying and destroying itself," to France, the promised land of rationality and revolution. There "Charles" Marx found a new vehicle for his increasingly intemperate views, the Deutsch-Französische Jahrbücher, and from its editorial board he looked forward to "the commencement and continuance of the new era we are now entering." Marx's final rejection of the metaphysics of law and his conversion to the antithetical science of economics were accomplished in this Parisian period and are reflected especially in his critique of James Mill and the Economic and Philosophic Manuscripts of 1844, which has been the basis for so much discussion of so-called socialist humanism in Marx, a revisionist view that does not seem to have added much to the strictly historical appreciation of Marx's thought.

In any case, even in his revolutionary phase Marx had not yet finished with the old jurisprudence. "The first criticism of any science," he later acknowl-

Works, 3: 98).
This position can be seen not only in his assumptions about the social functions of property but also in his celebrated view of "alienation," a concept which again has a legal as well as a Hegelian background, relating specifically to the transfer, surrender, or loss of patrimony or (in a political context) domain. "Alienation of domain" (or of sovereignty) was one of the most bitterly resented abuses of the old regime, representing as it did the most fundamental betrayal of the commonwealth. And, as in public law, so in the private sphere the effects of what civilians called *alienatio* were destructive. As Marx expressed it, "the loss or surrender of private property [*Entäussierung oder Entfremdung des Privateigentums*] is alienation of man, as it is of private property itself."

In the Roman experience, which continued to be Marx's principal model, the consequence of such alienation was the loss of identity, of citizenship, and, indeed, of the entire basis for social "belonging." From the point of view of political economy, it signified the separation of labor from landed wealth (the first form of capital), the need for a measure of exchange value—that is, money. Alienated from the natural wealth of the tribal community, men were "bound to life" by this "universal agent of separation," as Marx called money. But the fundamental form of "alienation" was not that Hegelian state of inner isolation that has monopolized the attention of students of Marx. Rather, paralleling Marx's own shift from idealistic to materialistic premises, it was estrangement from property—a problem that was widely discussed by civil lawyers, especially with regard to the *ager publicus*, that original common land of the Romans that so fascinated Marx and that continued to concern him in *Das Kapital*.

For Marx the juridical fictions underlying such alienation were continuously reinforced by the fallacies of idealism, and he carried on the attack against this two-faced evil over the next two years, especially in the *Holy Family* and the *German Ideology*. The "critical criticism" of the neo-Hegelian brothers Edgar and Bruno Bauer preserved the errors of Hugo by confusing fact and law, objective conditions and subjective consciousness. Edgar Bauer, for example, seemed to make mystical nonsense of Pierre-Joseph Proudhon's political-economic question, "What is property?" On the other hand, Marx rejected the "illusions of the lawyers," who confused the Roman view of simple use and consumption (*jus utendi et abutendi*) with property, which was defined in terms of abstract and legalistic titles irrespective of any requirement of physical possession and which was, therefore, a major source of class
division. The "juridical illusion" was to reduce law to—or, rather, to inflate it into—an expression of abstract will, just as idealist philosophers expressed social relationships as "ideas." The Roman view of property was closer to reality: the relationship was not a legal fiction but the simple right of an individual to a piece of property, landed or movable, a right enjoyed by every Roman citizen (dominium ex jure Quiritum), stemming from possessio. To neglect this was to fall into a confusion akin to that of Hegel's phenomenology, which Marx summarized cryptically in his notebook in November 1844: "Self-consciousness instead of man. Subject—object." And alienation was similarly subjectivized: "Abolition of estrangement is identified with abolition of objectivity." For Marx, on the contrary, what needed abolishing was not the conscious state of isolation but the material condition of propertylessness, which left men open to exploitation.

In this way Marx continued to grapple with his intellectual heritage and to work on the problem that he stated in a note to the German Ideology as "Why ideologists"—including jurists, religionists, politicians, and moralists—"turn everything upside down." All of them stood in the way of the positive, materialistic, historical, and, ultimately, revolutionary view of society that Marx was seeking. Nor did political economists escape his ire. As he had rejected the "metaphysics of law," so he also turned against the "metaphysics of political economy," a phrase that he applied in particular to the views of Proudhon. What first distinguished man from animals, according to Marx, was not consciousness or speech or religion as ideologists imagined, but rather production. The subsequent emergence of property and legal distinctions attached thereto marked the true beginning of history. "Civil law developed simultaneously with private property from the disintegration of the natural community." This process also continued in the modern European context. "With the exception of England it proceeded everywhere on the basis of the Roman Codex," he continued. "Even in England Roman legal principles had to be adopted to further the development of civil law, particularly in regard to movable property." The most recent stage of this process was the transformation of movable property into capital, which has fallen into the hands of the legally dominant class with title to, though not necessarily possession of, this wealth.

At the end of this train of thought lay a number of the most fundamental elements of mature Marxism, not only concepts of class struggle and communism but also the aim of "changing the world" rather than merely interpreting it, as did the jurists, philosophers, and "bourgeois" economists. But even as communism was beginning to haunt the conscience of bourgeois Europe, Marx himself continued to be haunted by the old learning, especially that embodied in civil law. Perhaps most essential was the notion of an

41 Marx, Manuscript Note, in Collected Works, 4: 665.
42 Marx, Das Elend der Philosophie, chap. 2, in Frühe Schriften, 2: 738 (Collected Works, 6: 161).
43 Marx, Die Deutsche Ideologie, in Frühe Schriften, 2: 93 (Collected Works, 5: 91).
44 Marx, Thesen über Feuerbach, in Frühe Schriften, 2: 4 (Collected Works, 5: 5).
original communal property (the *ager publicus*) that ancient Romans cultivated, he argued, not as dispossessed laborers, but as owners (*nicht als Arbeiter, sondern als Eigentümer*) for purposes of subsistence (*Erhaltung des Einseln*), not the creation of exchange-value (*Wertschöpfung*). In this revealing passage of the *Grundrisse*, Marx lapsed into English to make his point: “Das Individuum ist placed in such conditions of gaining his life as to make not the acquiring of wealth his object, but self-sustainance [sic] and its own reproduction as a member of the community . . . .” To underscore the practical character of Roman arrangements, Marx quoted in this connection the great historian Barthold Georg Niebuhr, who remarked of Numa Pompilius that, after being assured of divine approval of his election, he turned his attention not to religious but to human business (*nicht Tempeldienst, sondern menschlich*). “He distributed the land conquered in war by Romulus and left to be occupied . . . . All great law-givers, and above all moses, founded the success of the arrangements for virtue, justice, and good morals upon landed property, or at least on secure hereditary possession of land, for the greatest possible number of citizens.” Afterwards, this tribal and communal condition was destroyed by migration, conquest, and the differentiation into higher and lower tribes (*gentes*), and so began the period of recorded history—“the history of class warfare,” according to the opening words of the *Communist Manifesto*.

Long before the experience of revolution, then, Marx realized that his pursuit of true philosophy had to take a different path from those of his juristic and philosophic mentors. By 1845 he was already contemplating a “critique of politics and economics” to rival the systems of the legal tradition, though he did not begin to lay out “the whole shit,” as he called it, until the late 1850s. Like the treatise on jurisprudence planned in adolescence, this work began with the sphere of private law. This time, however, the target was not property but capital, and the basic issue was not the theoretical “condition of persons,” as in civilian convention but rather with exchange-value and money, which had made such abstract questions irrelevant in Marx’s mind, and then with landed property and wage labor. Thereafter, again as in the youthful work, Marx intended to move into the public sphere, beginning with the state seen, of course, from a broader perspective (*naturae politico-economicae*, as he characterized his approach to Engels), followed by discussions of international trade and the world market. This enterprise, of course, constitutes another story entirely and must be understood in a very different context.

In general, the purpose of these remarks has not been to resurrect another “Young Marx,” nor even to revise any particular interpretation of the old one;
it has merely been to open up a neglected perspective on the genesis and early development of Marxist social thought. Marxism has, of course, generated a massive scholasticism—glosses, commentaries, and interpretations by hostile as well as friendly students—but little of this has even attempted to offer a strictly historical construction. Even when various ideological totems and taboos have been avoided, the tendency has been to place Marx exclusively in the traditions of classical economics and philosophy, especially of German idealism. Although this approach is not improper in itself, it is insufficient as a basis of appreciating the richness of Marx's intellectual heritage. His conception of the world emerged from a surpassingly deep and wide-ranging assault upon Western humanistic, historical, and legal scholarship, going far beyond the names that have become familiar from general post-Marxian surveys of philosophy and economic, social, and political thought.47 Only by entering into the less familiar terrain of old regime scholarship can one hope to appreciate fully the extent of Marx's intellectual base and of the conceptual struggles underlying his mature philosophy.

Within Marx's intellectual heritage, jurisprudence may not occupy a central position, but it does have a kind of temporal priority. The young Marx was steeped in legal erudition and his thoughts about social problems shaped by legal issues, especially those attendant upon the historical school and its opponents, though students of Marx have not tried to follow up his early enthusiasms and distastes.48 What is more, jurisprudence provided not only an early focus for Marx's studies but a system of thought that continued to possess at least a negative importance. If it did not furnish him with the "true philosophy" he had been taught to expect, it did give him a satisfying target—a comprehensive secular religion and a paradigm of idealist social thought, in a pejorative sense of "ideology"—for his atheistic as well as his materialistic and socialistic urges. If it did not contain the divine fire, the means of understanding and of changing human society, it did offer him a socially meaningful way of venting his Promethean hatred of "all the gods" and of finding a way out of the trap of idealism. The juridical problems of possession and property led directly to the key, which was the iconoclastic new discipline of economics. In this Marx was to find his Promethean fire, the arche of his own true philosophy, perhaps of his religion, and a way of exorcizing all the gods that had oppressed mankind—an enterprise altogether worthy of classical jurisprudence as conceived of by the very young Marx.

47 Survivals of old concerns are also illustrated in Marx's later studies of anthropology, a subject originally part of academic jurisprudence as well as philosophy; see notes 9 and 30, above, and The Ethnological Notebooks of Karl Marx, ed. Lawrence Krader (Assen, 1974).

48 The importance of Marx's legal studies and his associations with Gans and Savigny have been pointed out by his biographers, especially Isaiah Berlin and August Cornu; but it has been so uniformly neglected by interpreters of the young Marx and of the documentable genesis of his thought up to 1842 who have favored the specifically Hegelian connection that I have not thought it relevant to refer to the works of Georg Lukács, Herbert Marcuse, David McClellan, and others, much less to analyses of the sources of Marxian economic and formally philosophic thought. For a more general discussion, see J. E. Seigel, "Marx's Early Development: Vocation, Rebellion, and Realism," Journal of Interdisciplinary History, 3 (1972-73): 475-508, which will appear in revised form in his forthcoming book.