THE ROLE OF LAW IN ECONOMIC THOUGHT: ESSAYS ON THE FETISHISM OF COMMODITIES*

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INTRODUCTION

These four Essays discuss the role of law in different aspects of nineteenth century economic thought. The first is about late nineteenth century American economists of a classical (as opposed to neoclassical) mainstream persuasion. The second is about neoclassical economics. The third and fourth are an exegesis and commentary on Marx's Essay on the fetishism of commodities. The Essays share three themes, though they develop them in different ways. The first is that mainstream economic thought has been a vehicle for legitimating the actual arrangements of the capitalism of the time. The second is that the plausibility of the legitimating enterprise is dependent, in a crucial though usually disguised way, on a particular set of incorrect implicit images of what law is and how it works in the economy. The third theme is that a legal realist understanding of the legal system has a destabilizing but also liberating effect both on the mainstream economists' and on the Marxist critical understanding of the distribution of welfare in a capitalist society.

I wrote these Essays in 1979, 1981, and 1985, intending them to be part of a larger study of late nineteenth century legal thought. Though they are unfinished and not fully documented, it seems a good idea to publish them now. The larger project is dormant, and though these are no more than fragments, it seems at least possible that others will find them useful as starting points in trying to figure out how this particular ideological system managed to maintain the illusion of coherence.

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A. Introduction

In Volume I of Capital, 47 Marx defines the fetishism of commodities as follows:

it consists simply in the fact that the commodity reflects the social characteristics of men’s own labour as objective characteristics of the products of labour themselves, as the socio-natural properties of these things. Hence, it also reflects the social relations of the producers to the sum total of labour as a social relation between objects, a relation which exists apart from and outside the producers. (pp. 164-65).

This brief passage is extremely puzzling. The full text of Marx’s discussion of the fetishism of commodities is about fifteen pages long, and seems to me one of the most puzzling in all the work Marx published in his lifetime. This Essay is an interpretation of the famous definition and of Marx’s accompanying discussion. It is based on study group discussions rather than on an attempt to master the exegetical literature. 48

A first basic difficulty arises as to what the word fetishism should be interpreted to mean. There is a tendency among contemporary leftists approaching the text for the first time to interpret it as meaning “worship,” with a derisory overtone suggesting that the object of worship is a false god. The fetishism of commodities then means the worship of commodities as though they were gods. And Marx’s supporting text would then be a description of the evils of materialism, of the isolated individual obsession with owning things. People become slaves to their commodities. Moreover, phrases like “the definite social relation between men themselves which assumes here, for them, the fantastic form of a relation between things” (p. 165) suggest a critique of the tendency of people under capitalism to treat other people as things, and even to understand themselves as thing-like. The fetishism of commodities would then encompass an attack on materialism in the sense of consumerism, an attack on the violations of Kantian ethics that occur when people treat others in

46. This Essay was prepared for the students in the Theory Seminar at the Legal Services Institute, Jamaica Plain, Massachusetts, in 1981. I want to thank the Institute staff and express my solidarity with their work.


48. In preparing this article for publication I made a quick review of extant discussions in English of commodity fetishism. Far and away the best thing I found was an essay by Catherine Collier-Thelene, appended as an Afterword to L. Rubin, supra note 24.
the economy as things rather than as people, and an attack on the tendency of the alienated individual to treat himself as a thing and therefore to prostitute his talents.

This cultural interpretation is also a psychological one: the mechanism of fetishism is unconscious. Throughout the discussion, Marx talks about it as a form of error, of delusion, of misperception (pp. 163, 166-67). The language often suggests that the error of misperception is even analogous to an optical illusion (pp. 165-66). The fetishism of commodities then appears as a kind of false consciousness—one of the mind-fucks of capitalism—that will vanish when a socialist regime permits more human values to flourish and removes the causes of the collective neurosis.

I don’t think this has much to do with what Marx intended. Indeed, I think this interpretation is completely, not just partially, wrong. It may be true that the critique of modern capitalism for materialism, treating people as objects, prostitution of talents and false consciousness is true, and that it is the most profound critique we can make of our society, but my view is that Marx was making an altogether different point. He was arguing instead that both the masses and the bourgeois social scientists believe something about the economic system that is untrue. They believe that under capitalism, decisions about what to produce and how to distribute it are determined “naturally” by the “values” of the commodities to be produced and distributed. Both the masses and the political economists, therefore, tend to believe that any different set of production and distribution decisions would be in some sense “unnatural.”

According to Marx, this is false. It is the people as a whole that makes production and distribution decisions, and the people as a whole could make the decisions in any number of other ways than that represented by the commodity system. Moreover, with the commodity system itself there is nothing inevitable or natural about the outcome. In short, the fetishism of commodities consists of believing that “nature,” with all its overtones of the necessary and the desirable, plays a much larger role in how the economy works than it really does. People understand much that is really the product of

49. In the Economic and Philosophical Manuscripts (1844), WRITINGS OF THE YOUNG MARX ON PHILOSOPHY AND SOCIETY 283-587 (Easton & Guddat eds. 1987), Marx develops a critique of capitalism like the one just rejected as an interpretation of commodity fetishism. I believe that he developed the latter theory as a way to fortify and empower the general cultural critique. Further, it is difficult to understand commodity fetishism otherwise than against this background. Thus I think the two critiques are intimately connected (indeed, one motivates the other). But they are not the same. For an interesting treatment of the relation between the young and the mature Marx, see L. Althusser, FOR MARX (B. Brewster trans. 1969).
social decision to flow ineluctably from the physical properties of objects.

B. The Commodity Economy vs. the Capitalist Economy

The commodity economy in which fetishism arises is quite different from the full model of a modern capitalist industrial economy. Marx describes it in terms of production by individuals (or possibly family units), each of whom owns the means of producing the commodity in question. The commodity economy is thus fully specialized: everyone is dependent on the market to supply all commodities other than the one he produces himself. On the other hand, there is no wage labor, and therefore no issue of exploitation of labor. There is division of labor, but each of the component elements in the division is a separate entrepreneur bringing his component to a market, rather than a worker within an integrated enterprise.

It is important to keep in mind that commodity fetishism exists in this particular environment, because people are often tempted to think it has to do with the exploitation of the worker—Marx’s major theme in the later parts of Capital—whereas in fact it is a “petty bourgeois” rather than a proletarian phenomenon. It has to do with the perception of the economy “naturally” held by people who own the means of production, produce a commodity, and live by using the proceeds of sale to buy the commodities of others similarly situated.

C. The Analogy to Religion

A good deal of the burden of explaining what is meant by commodity fetishism is carried by the analogy to religion. Marx asserts that the commodity purchaser is like a religious person. Polytheistic religions posit gods analogous to commodities, treat them as having a real existence, and attribute to them events that occur in the human world. In fact, the gods are figments of human imagina-

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50. Marx’s discussion of “pre-Christian religions” displays his somewhat Victorian evolutionist/historicist understanding of world history, with the European bourgeoisie of which he was a member as the most advanced social class the world had yet produced and the prior history of culture as a series of steps leading up to its accomplishments. He is not much better than the bourgeois economists he makes fun of in this regard. He gives no privileged status to the present only because it is on the point of being superseded by the future. Like the bourgeois he mocks, he sees the course of history as a unilinear progress from barbarism to civilization. In fairness, he also differs from the bourgeois social theorists in emphasizing the brutality of the modern order’s destruction of the feudal/pesant order and in that he recognized that modernization destroyed an earlier culture that had much to be said for it. It is only in the last analysis that he rejoins Hegel’s conception of the “cunning of reason,” which
tion. The analogy goes a step further: in some forms of religion, the god is believed to inhabit a physical object, a totem or fetish, like the golden calf or graven idol. Like these idols, commodities exist in the real world of physical objects. The fetishism of commodities consists of attributing to these physical objects powers that they do not possess. Further: in the case of the graven idol, the powers attributed are often powers that belong as a matter of fact to the people who create and believe in the fetish. For example, people attribute to the gods embodied in the fetishes responsibility for social harmony, for the creation and exercise of crafts and skills, for discoveries, for defeats and victories, for fertility and infertility, and for virtue and vice in the community. This is the notion (derived from Feuerbach) that in religious practice people “alienate” their own powers, by attributing them to imaginary entities outside or even opposed to themselves.

By analogy, those who suffer from commodity fetishism attribute to commodities powers to regulate relations among people that belong only to the people themselves. In religious fetishism people believe that spirits inhabiting the fetishized objects determine the mode of social organization and events in their lives. Marx is saying that in a commodity economy people believe that events they themselves bring about through concrete social activities are the necessary or natural consequences of the properties of the commodities they produce.

There are lots of problems raised by describing the fetishism of commodities as analogous to religious fetishism. One is: if these are human powers attributed to imaginary entities, what determined how the human powers were exercised? The fetishist explanation is gone, since we can no longer believe that we lost the battle because our fetish was “weaker” than their fetish. Likewise, we can’t believe that the outcome of economic life was “determined by the value of the commodities we produced.” But if we say that the outcomes are inescapably within our human power, and if we have been attributing that power to imaginary entities that could not possibly have been exercising the power (since they don’t exist), then what has been determining those outcomes?

Marx devotes the body of Capital to showing how the outcome of social interaction in the economic sphere can be highly determinate, and comprehensible, even though the people who are engaging in the activities and bringing about the outcomes believe it’s all being

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has somehow made even the crimes of bourgeois annihilation of the expropriated turn out for the long term good.
determined by imaginary entities. In other words, Marx in *Capital* provides a model of how people actually exercise powers they don’t know they have, of how that unconscious exercise of powers can lead eventually to the discovery of the powers, and of how the discovery of powers can make it obvious that we should exercise them consciously to achieve the goals we have.

Finally, if we look at the outcomes that occur when people exercise these powers unconsciously, attributing the determination of events to imaginary entities (commodities and their value), we will notice an actual pattern of distribution that favors a small group of capitalists at the expense of the mass of workers, and a pattern of production that underproduces some things people want badly (community, creative opportunities, love) and overproduces other things that are incompatible with these experiences. This combination of unfair rewards for capitalists with an evil distortion of the true priorities of production (according to Marx’s aristocratic/upper bourgeois/elite notion of the purpose of life) is something we will certainly want to change when we collectively realize that we can produce anything we want (within the limits imposed by nature) and distribute it any way we want as well.

But none of what I said in the last two paragraphs appears in the section on the fetishism of commodities. These ideas are drawn from what Marx says later in *Capital* and in his other works. In the section on the fetishism of commodities he says almost nothing about how a system will work if all are commodity producers and all believe in the impersonal necessity of the outcomes that occur naturally in such a system. He just asserts that it is fetishism to believe that the outcome is natural and necessary. This is not surprising, since in the later sections he will want to insert wage labor and capital into the model, and develop his specific theories of the technical evolution of manufacturing. It is only when these elements are added that the model is specific enough so that he can predict what people who suffer from the fetishism of commodities will end up doing. In other words, fetishism exists as soon as we have a commodity economy, even without wage labor. But Marx doesn’t predict specific results for production and distribution until he has added these further specifications of exactly how the commodity economy will work.

**D. The Contrast with Feudalism, Patriarchy, and Utopia**

Aside from the analogy to primitive religion, Marx has another didactic device for explaining what he means by the fetishism of
commodities: he compares it with the way people experience other regimes of production and distribution. He brings in three of these: feudalism, the patriarchal family (which was a current image of how society was organized before the Graeco-Roman development of the city state), and the post-revolutionary future society of independent, associated producers owning the means of production in common.

Marx's image of feudal economy was brilliant, and has had a lot of influence on subsequent theorizing about that form, although probably his picture of it was basically wrong. This is irrelevant to the question of whether it is a useful way to understand, by contrast, how people experience economic outcomes in a commodity economy. His basic notion is that in the feudal economy, production and distribution were organized through networks of personal obligation, running from vassal to lord, from lower lord to higher lord, and from lord to king. Alongside this simple hierarchy, there were complicated institutions like the Church, which had its serfs but also its autonomous bureaucratic organization, and the State. But the basic point for Marx in this passage is that under feudalism people engaged in particular productive activities because they had obligations to superiors who told them to engage in those activities. If they refused to do what they were told, why then their superiors used force to compel them to obey. In a feudal economy, if you asked a serf why the economic outcome in his region was the production of $\times$ bushels of wheat and the building of $\times$ miles of road, he would, Marx imagines, answer that these things happened because the lords decided they wanted them to happen, and had enough power to make them happen.

It is important to note that in this discussion Marx says nothing about what determines the lord's decisions about how much wheat to grow and how many miles of road to build or repair with his corvée labor. He offers no model of how outcomes are determined in a feudal economy, just as in this section he offers no model of how outcomes will be determined in a society of commodity producers afflicted by the fetishism of commodities. Moreover, he says nothing about whether his nonfetishized feudal serf perceives the lord's powers and the lord's decisions as legitimate. For all we can tell, the serf believes that he has validly alienated his powers of participation in economic decision making when he or his ancestor became a serf, and is fully in agreement that the lord should make all decisions of this kind, and that his duty is to work for as long as the lord wants him to on whatever tasks the lord thinks are appropriate, for whatever rewards happen to be customary or to be imposed at the
time. Marx's point has nothing to do with the issue of what would happen under feudalism and whether serfs viewed it as legitimate.

His point is rather that the serfs would correctly attribute the outcome to decisions made by human beings, rather than to the extra-human (natural and/or necessary) workings of the commodity system based on the intrinsic values of objects. The serf is nonfetishized because he is aware that we could do production and distribution in a number of ways, and that the choice among the alternatives is made by human beings according to human criteria.

The same is true in the patriarchal family. Imagine that within that family, say of twenty loosely related people, the group produced exactly the same mix of objects, and distributed them in exactly the same way as would occur in a commodity economy composed of the same people. We could achieve this similarity if we made sure that the patriarch in the family was the largest property owner in the commodity economy, and that the other people were given just enough property to let them earn the share they earned under the old regime. Marx is arguing that in the patriarchal economy the members explained the pattern of production and distribution by saying things like: "Father decided that we should plant wheat rather than barley this year," or, "the age cohort of adolescent males decided to do thus and so."

It might be that these decisions were wrong, or that they were made by consulting oracles or even real fetishes (as opposed to the analogical commodity fetishes) or that the Father was understood to be himself a divine oracle. None of this matters. The essential point is that in the patriarchal family no one would dream of explaining the particular outcome with respect to the choice between wheat, barley, and shoes as the necessary and natural consequence of the relative value of those things. The concept of value would be superfluous, given the direct experience of the decision making process, even if that process was dictatorial or claimed mystical legitimation.

Marx's final example of an unfetishized economic system is his idea of the future: the association of independent producers who decide collectively what to produce and how to distribute it. This system differs both from feudalism and from the patriarchal family in that it is based on voluntary association and the idea of democracy. There is neither a system of feudal personal obligations dividing people into classes of lords and serfs, nor a pseudo-natural arrangement of familial roles, such as father, wife, and child. People who are free to do it any way they want to, and know they can do it
any way they want to, get together and decide how they want to do it.

This utopian future situation has a number of things in common with feudalism and patriarchy that differentiate all three from the commodity economy. Most important, people are fully aware that questions of production and distribution are solved socially, and that there is nothing either natural or inevitable about the outcome of the social process. This is an experience of human freedom, even in the feudal and patriarchal regimes where most people are oppressed.

Second, each of the three alternatives to the commodity economy displays a communal ideology, and this may contribute to their purely intellectual superiority of fully comprehending the social as opposed to natural or necessary character of economic decisions. But only under the utopian post-revolutionary regime do people act on the basis of equality and without the political and religious myths that are as incapacitating within hierarchical communal regimes as the fetishism of commodities is within the individualist property regime.

E. The Nature of the Commodity Economy

The analogy to religion and the contrast with feudalism, patriarchy, and utopia are all useful in understanding commodity fetishism. But they don’t tell us directly what it is. Marx insists that it arises from the peculiar conditions of the commodity system, so we need to have a clear definition of that system before we can understand the mode of thought that is supposedly peculiarly appropriate to it. Three passages early in chapter one of Capital give an idea of what Marx means by the commodity economy:

He who satisfies his own need with the product of his own labor admittedly creates use-values, but not commodities. In order to produce the latter, he must not only produce use-values, but use-values for others, social use-values. (And not merely for others. The medieval peasant produced a corn-rent for the feudal lord and a corn-tithe for the priest; but neither the corn-rent nor the corn-tithe became commodities simply by being produced for others. In order to become a commodity, the product must be transferred to the other person, for whom it serves as a use-value, through the medium of exchange.) Finally, nothing can be a value without being an object of utility. If the thing is useless, so is the labour contained in it; the labour does not count as labour, and
therefore creates no value. (p. 131) (footnote omitted).  
This division of labour is a necessary condition for commodity production, although the converse does not hold; commodity production is not a necessary condition for the social division of labour. Labour is socially divided in the primitive Indian community, although the products do not thereby become commodities. Or, to take an example nearer home, labour is systematically divided in every factory, but the workers do not bring about this division by exchanging their individual products. Only the products of mutually independent acts of labour, performed in isolation, can confront each other as commodities. (p. 132).
In a society whose products generally assume the form of commodities, i.e., in a society of commodity producers, this qualitative difference between the useful forms of labour which are carried on independently and privately by individual producers develops into a complex system, a social division of labour. (p. 135).

The language of these quotations is seriously misleading as to the essential characteristics of a commodity economy, because it suggests an almost physical notion of “mutual independence” “for others” “performed in isolation” “privately” by “individual producers.” The internal evidence of the passages makes clear that physical distance or proximity has nothing to do with the characteristics of a commodity economy. It is easy to imagine commodity producers producing in the greatest intimacy.

It is true that if two producers are working on the same, indivisible object, that object cannot be a commodity as between the two of them. They will settle in advance somehow the manner of division of the joint product, or the law will settle it for them. But it isn’t true that everything except joint products are commodities, as Marx makes clear with the example of factory production, and Engels with that of the corn-tithe (p. 131). The examples shows that workers who are producing completely separate physical objects—parts of a machine, say—may not be producing them as commodities, in spite of total division of labor.

What makes a commodity a commodity is independence, separateness, individuality or privateness not in a physical, but in a legal sense. The point about commodities is that they are objects produced under a regime in which the worker “owns” his labor, his tools and raw materials, and also the product he makes from them. He then exchanges his commodity for money, and the money in turn for a whole range of other people’s commodities. What is im-

51. The passage belongs to Marx, save the parenthetical, which Engels as editor inserted into the fourth German edition.
important about the commodity system is its legal structure, rather than the physical or technological arrangement of the productive process.

It may be that the legal arrangement known as commodity production can only come into existence in a given technological and physical situation of production, and that it will inevitably cease to exist when and if that technological/physical situation changes, but that's a different matter. The point is that when Marx talks about the commodity production model, he is talking about a socio-legal, not a technological/physical model:

In order that these objects may enter into relation with each other as commodities, their guardians must place themselves in relation to one another as persons whose will resides in those objects, and must behave in such a way that each does not appropriate the commodity of the other, and alienate his own, except through an act to which both parties consent. The guardians must therefore recognize each other as owners of private property. This juridical relation, whose form is the contract, whether as part of a developed legal system or not, is a relation between two wills which mirrors the economic relation. The content of this juridical relation (or relation of two wills) is itself determined by the economic relation. (p. 178) (footnote omitted).

The first way in which an object of utility attains the possibility of becoming an exchange-value is to exist as a non-use-value, as a quantum of use-value superfluous to the immediate needs of its owner. Things are in themselves external to man, and therefore alienable. In order that this alienation . . . may be reciprocal, it is only necessary for men to agree tacitly to treat each other as the private owners of those alienable things, and, precisely for that reason, as persons who are independent of each other. But this relationship of reciprocal isolation and foreignness does not exist for the members of a primitive community of natural origin, whether it takes the form of a patriarchal family, an ancient Indian commune or an Inca state. The exchange of commodities begins where communities have their boundaries, at their points of contact with other communities, or with members of the latter. However, as soon as products have become commodities in the external relations of a community, they also, by reaction, become commodities in the internal life of the community. Their quantitative exchange-relation is at first determined purely by chance. They become exchangeable through the mutual desire of their owners to alienate them. In the meantime, the need for others' objects of utility gradually establishes itself. The constant repetition of exchange makes it a normal social process. In the course of time, therefore, at least some part of the products must be pro-
duced intentionally for the purpose of exchange. From that mo-
ment the distinction between the usefulness of things for direct
consumption and their usefulness in exchange becomes firmly es-
blished. Their use-value becomes distinguished from their ex-
change-value. On the other hand, the quantitative proportion in
which the things are exchangeable becomes dependent on their
production itself. Custom fixes their values at definite magni-
tudes. (pp. 181-82).

The point of juxtaposing these long passages is that it is easy to
jump to the wrong conclusion from the first one. It sounds as
though Marx is treating legal concepts as determined by the eco-
nomic system, as epiphenomenal in the orthodox marxist sense.
But that isn’t it at all. Quite the contrary, his whole definition of
commodity production is in terms of and therefore presupposes the
legal concepts of private property and contract. The legal catego-
ries are built into the definition of the “social formation” or “mode
of production.”

When he speaks of the “content of the juridical relation” being
determined by the economic relation, I think he just means that
within a property system the content of peoples’ contracts with one
another is determined by their economic relations, i.e., the terms of
exchange are not fixed by the legal system, but rather the legal
agreement is fixed by the economic system. This interpretation is
compatible with the notion that the commodity system itself can
only be conceived in terms of the categories of property and
contract.

It does not follow from this interpretation that we have to reject
the notion that the state and the legal system are epiphenomenal in re-
lation to the economic system. That the economic system is defined
by the fact that actors act as though they are property owners linked
by contract does not mean that there has to be either a state (in the
sense of central power, sovereign, whatever) or a legal system (in
the sense of rules followed by officials applying state force). Those
are institutional forms. The commodity system could exist without
them, so long as the actors conceived themselves in terms of the
legal concepts of property and contract. It is therefore still possible
to believe that a commodity mode of production will determine a
bourgeois state and a nineteenth century legal system (since those
institutional forms are supposedly “syntonic” with or “meet the
needs of” a commodity regime).

For myself, it seems obvious that state actors and legal actors
often try to and sometimes succeed in transforming the mode of
production, so that it doesn’t make much sense to speak of one-way
causation between base and superstructure. The more interesting point is that the base itself is defined not in terms of technology but in terms of consciousness—in terms of the way “men agree tacitly to treat each other”—so that the evolution of the base begins with something that the orthodox supposed to be part of the superstructure.

In a footnote at the end of the fetishism of commodities section, Marx puts forward his view of the relationship between economic and other social forms:

My view is that each particular mode of production, and the relations of production corresponding to it at each given moment, in short 'the economic structure of society', is 'the real foundation, on which arises a legal and political superstructure and to which correspond definite forms of social consciousness', and that 'the mode of production of material life conditions the general process of social, political and intellectual life.' In the opinion of the German-American publication, this is all very true for our own times, in which material interests are preponderant, but not for the Middle Ages, dominated by Catholicism, nor for Athens and Rome, dominated by politics. . . . One thing is clear: the Middle Ages could not live on Catholicism, nor could the ancient world on politics. On the contrary, it is the manner in which they gained their livelihood which explains why in one case politics, in the other case Catholicism, played the chief part. For the rest, one needs no more than a slight acquaintance with, for example, the history of the Roman Republic, to be aware that its secret history is the history of landed property. And then there is Don Quixote, who long ago paid the penalty for wrongly imagining that knight errantry was compatible with all economic forms of society. (pp. 175-76, n.35).

I don’t think this passage is inconsistent with what I have just been saying. In context, “the manner in which they gained their livelihood” refers to the socio-legal form of production, not to whether the people in question were engaged, say, in agriculture as opposed to mining. And it was “landed property,” not dirt, that was the theme of Rome’s secret history.

**F. Fetishism in the Minds of the Producers Themselves**

Marx begins his explanation of the phenomenon of fetishism with another invocation of the “private” and “independent” character of production in a commodity economy:

Objects of utility become commodities only because they are the products of the labour of private individuals who work indepen-
dently of each other. The sum total of the labour of all these private individuals forms the aggregate labour of society. (p. 165).

It is this legal arrangement of production that, in the next sentence, accounts for the peculiar phenomenon of fetishism:

Since the producers do not come into social contact until they exchange the products of their labour, the specific social characteristics of their private labours appear only within this exchange. In other words, the labour of the private individual manifests itself as an element of the total labour of society only through the relations which the act of exchange establishes between the products, and, through their mediation, between the producers. (p. 165).

Marx obviously does not mean the phrase "social contact" in the colloquial English language sense of friendly relations between people. I think he means that people do not get together to plan the process of production in advance. Each person simply goes ahead and produces his commodity, trusting that he will be able to sell it, and then uses the money from the sale to buy the commodities he wants from others. In spite of the fact that no one is planning the total pattern of production and distribution, it is nonetheless true that a total pattern is emerging through the separate actions of the individual commodity producers. The producer becomes aware of this pattern only through the act of exchange, which presupposes the existence of other producers, the desirability to others of the producer's own commodity, and the existence of the commodities produced by others:

To the producers, therefore, the social relations between their private labours appear as what they are, i.e. they do not appear as direct social relations between persons in their work, but rather as material [dinglich] relations between persons and social relations between things. (pp. 165-66).

In the process of exchange between legally independent commodity owners, people who are in fact partners in a collective enterprise of producing what people want to consume, experience their own activity as determined externally, as something imposed on them by the nature (value) of objects rather than as something freely chosen. Their relations are therefore material, or "thing-like," meaning mechanical and involuntary. The "social relations between things" is a tricky way of describing exchange itself, and the process of valuation by comparison that precedes it. The labor that is embodied in commodities is compared and valued by traders in markets, and that valuation determines the set of social relationships, i.e., the actual distribution of income and decisions about produc-
tion, of which the producers themselves appear to be mere appendages.

Marx provides only a sketchy description of how this process of determination of production and distribution comes about in a commodity economy. But the basic outline of the mechanism is clear: production of commodities for the market ties the producer into a complex social system in two ways. First, the producer must direct his labor in such a way that it will "satisfy a definite social need," or no one will buy what he offers for sale (p. 166). Marx has already explained that the commodity producer will be rewarded only to the extent that his commodity has utility and is produced using the smallest feasible amount of labor time (p. 129). Thus the price mechanism "has already to be taken into consideration during production" (p. 166). Second, the producer is now dependent for his satisfaction on other people producing a desirable mix of commodities for which he can exchange his speciality, and his behavior will be affected, therefore, by what is on the market as well as by the price he can command for his product (p. 166).

Although decisions about how to deploy labor time between different productive activities and how to distribute the product are inherently social, commodity producers experience the processes that determine these outcomes as outside them and beyond their control:

What initially concerns producers in practice when they make an exchange is how much of some other product they get for their own; in what proportion can the products be exchanged? As soon as these proportions have attained a certain customary stability, they appear to result from the nature of the products, so that, for instance, one ton of iron and two ounces of gold appear to be equal in value, in the same way as a pound of gold and a pound of iron are equal in weight, despite their different physical and chemical properties. The value character of the products of labour becomes firmly established only when they act as magnitudes of value. These magnitudes vary continually, independently of the will, foreknowledge and actions of the exchangers. Their own movement within society has for them the form of a movement made by things, and these things, far from being under their control, in fact control them (pp. 167-68).

The notion here is that people regulate their activities as commodity producers according to the prices of those commodities, changing the quantities and the objects in order to make as much money as possible. But they don't have any idea what causes the prices to fluctuate. Marx has earlier pointed out that exchange val-
ues "[change] constantly with time and place. Hence exchange-value appears to be something accidental and purely relative . . ." (p. 126). But it is also true that the sum of the decisions that producers make in response to prices constitutes the social decision about what the society should produce. Moreover, the labor embodied in commodities determines (according to Marx) exchange value, which in turn determines the distribution of the total socially produced pie of commodities among producers. What this means is that producers who are controlled by the price system, but experience it as arbitrary and contingent, are in the position of generating social outcomes without being aware of it.

Marx characterizes the actual control mechanism in very broad terms:

[All the different kinds of private labour (which are carried on independently of each other, and yet, as spontaneously developed branches of the social division of labour, are in a situation of all-round dependence on each other) are continually being reduced to the quantitative proportions in which society requires them. The reason for this reduction is that in the midst of the accidental and ever-fluctuating exchange relations between the products, the labour-time socially necessary to produce them asserts itself as a regulative law of nature (p. 168).]

Marx has mentioned twice already the regulative mechanisms that constrain producers to produce what society wants, and to do so in an efficient way, but he has not gone into them in any detail. They are essentially mechanisms of competition, which ensure that inefficient producers can't sell their goods for inflated prices because they will be undersold by the efficient, and that people who don't produce what people want can't sell their goods at all. But the whole point is that these "laws of nature" can do their regulative work in spite of the fact that no one is aware of them. Marx conveys this through an image and a footnote:

In the same way, the law of gravity asserts itself when a person's house collapses on top of him . . . 'What are we to think of a law which can only assert itself through periodic crises? It is just a natural law which depends on the lack of awareness of the people who undergo it.' (p. 168 & n.30).52

The notion here is that when people produce too much or too little, in their unconscious way, as they busily try to make as much money as possible, then there will be a crash, a depression or eco-

52. The portion of the passage in quotes is an editorial comment of Engels; the rest is Marx.
onomic panic which will force production back into line with the law of value. In the same way, people can build houses successfully without understanding the law of gravity, although the success will be largely due to chance or to developed rules of thumb not theoretically grounded. If a person happens to build wrong, or misapplies a rule of thumb, the law of gravity asserts itself by collapsing the house. The end result is that all houses are built in conformity with the law of gravity, although there may be no one in the society who could explain what that law is or how it works. Likewise, the production of commodities conforms itself to the law of value in spite of the fact that no one knows what it is or could say how it regulates production.

It is important to keep in mind that Marx has not described exactly how the “labour time socially necessary to produce commodities asserts itself as a regulative law of nature” whose effect is to “reduce” the different kinds of labor “to the quantitative proportions in which society requires them” (p. 168). Nor has he said anything before this point about what it means for society to “require” something, or how the requirement is expressed. In modern neoclassical economic theory, all this happens through the mechanism of supply and demand: the quantity of a commodity is determined by increasing production up to but not beyond the point at which it costs more to produce another unit than that unit is worth to the buyer who will pay most for it. If new units cost more than earlier ones, but are worth less (increasing marginal cost, decreasing marginal utility of commodities), the market process will determine an outcome.

But this apparatus didn’t exist in Marx’s time. The economists of his day, and Marx himself later in Capital, remained vague about the mechanism that fixed actual outputs. The illusion called commodity fetishism is not a failure to understand an as yet nonexistent neoclassical synthesis. It is more primitive than that. In its first stage, it consists of believing simultaneously that value is intrinsic to commodities, and that the quantity of value is arbitrary. The consequence is that the actual total pattern of economic activity appears almost random.

G. Fetishism in the Minds of the Bourgeois Economists

But there is a second stage of fetishism, which concerned Marx as much as the first. That is the stage of the economists, who have advanced far beyond the producers, but still remain thoroughly mystified. The advance of economists was to discover the law of
value: that the exchange value of a commodity is determined (in the long run) by the amount of labor “concealed” in it, as a proportion of the totally available labor time of the society. Marx was insistent that this was a “scientific conviction,” a form of thought that was “socially valid, and therefore objective, for the relations of production belonging to this historically determined mode of social production” (pp. 168, 169). He had high praise for Ricardo and the early English Classics (p. 96). But he was clear that their accomplishment had its limits:

Political economy has indeed analysed value and its magnitude, however incompletely, and has uncovered the content concealed within these forms. But it has never once asked the question why this content has assumed that particular form, that is to say, why labour is expressed in value, and why the measurement of labour by its duration is expressed in the magnitude of the value of the product. These formulas . . . appear to the political economists' bourgeois consciousness to be as much a self-evident and nature-imposed necessity as productive labour itself. Hence the pre-bourgeois forms of the social organization of production are treated by political economy in much the same way as the Fathers of the Church treated pre-Christian religions. (pp. 173-75) (footnotes omitted).

At this point, it is important to distinguish between Marx’s critique of the political economists, much respected discoverers of the labor theory of value, and his critique of vulgar economy—the degeneration of political economy as class conflict began to turn it into an apologetic instrument of the bourgeoisie rather than a branch of science. Marx is here talking about the greats, including Ricardo (p. 173, n.33). His point is that even after the discovery that “value” determines exchange value, and is in turn determined by labor time, the economists believed that value is intrinsic to the object, a quasi-physical or natural property of the object, an aspect of its thingitude. In fact, according to Marx, the value that men attribute to the object is just another way of expressing a social decision that we want to produce a given amount of it and reward those who produce it with a particular share of the total pie of commodities produced by society as a whole:

The determination of the magnitude of value by labour-time is therefore a secret hidden under the apparent movements in the relative values of commodities. Its discovery destroys the semblance of the merely accidental determination of the magnitude of the value of the products of labour, but by no means abolishes that determination’s material form (p. 168).

The belated scientific discovery that the products of labour, in so
far as they are values, are merely the material expressions of the human labour expended to produce them, marks an epoch in the history of mankind’s development, but by no means banishes the semblance of objectivity possessed by the social characteristics of labour. Something which is only valid for this particular form of production, the production of commodities, namely the fact that the specific social character of private labours carried on independently of each other consists in their equality as human labour, and, in the product, assumes the form of the existence of value, appears to those caught up in the relations of commodity production (and this is true both before and after the above-mentioned scientific discovery) to be just as ultimately valid as the fact that the scientific dissection of the air into its component parts left the atmosphere itself unaltered in its physical configuration (p. 167). Now listen how those commodities speak through the mouth of the economist:

‘Value (i.e. exchange-value) is a property of things, riches (i.e. use-value) of man. Value, in this sense, necessarily implies exchanges, riches do not.’

‘Riches (use-value) are the attribute of man, value is the attribute of commodities. A man or a community is rich, a pearl or a diamond is valuable . . . A pearl or a diamond is valuable as a pearl or diamond.’

So far no chemist has ever discovered exchange-value either in a pearl or a diamond. The economists who have discovered this chemical substance, and who lay special claim to critical acumen, nevertheless find that the use-value of material objects belongs to them independently of their material properties, while their value, on the other hand, forms a part of them as objects. What confirms them in this view is the peculiar circumstances that the use-value of a thing is realized without exchange, i.e. in the direct relation between the thing and man, while, inversely, its value is realized only in exchange, i.e. in a social process (p. 177) (footnotes omitted).

Commodity producers adjust their activities according to the market values of commodities, and those prices determine the distribution of income. If price or market value is intrinsic to commodities, then commodities are, so to speak, regulating both their own production and their own distribution through their intrinsic properties. The belief that this is how the economy works is the fetishism of commodities, and it is no less fetishism after the discovery that market prices are, over the long run, determined by labor inputs.

What, exactly, is wrong with this picture? Marx does not say with any specificity. He is very definite in refuting the notion that exchange value is inherent in commodities as objects:
The objectivity of commodities as values differs from Dame Quickly in the sense that 'a man knows not where to have it.' Not an atom of matter enters into the objectivity of commodities as values; in this it is the direct opposite of the coarsely sensuous objectivity of commodities as physical objects. We may twist and turn a single commodity as we wish; it remains impossible to grasp it as a thing possessing value (pp. 138-39) (footnote omitted).

The products of labour become commodities, sensuous things which are at the same time supra-sensible or social. In the same way, the impression made by a thing on the optic nerve is perceived not as a subjective excitation of that nerve but as the objective form of a thing outside the eye. In the act of seeing, of course, light is really transmitted from one thing, the external object, to another thing, the eye. It is a physical relation between physical things. As against this, the commodity-form, and the value-relation of the products of labour within which it appears, have absolutely no connection with the physical nature of the commodity and the material ... relations arising out of this. It is nothing but the definite social relation between men themselves which assumes here, for them, the fantastic form of a relation between things (p. 165).

Commodities have prices only as a consequence of a set of human practices that are social—a set of human customs of interaction. Commodity prices are determined by the amount of labor time it takes to produce them only because of this same set of human practices. If the practices were different, there might be no commodities, or commodities might exchange at rates that were not determined by labor time. So long as men follow those social practices, however, the effect of the commodity economy is that the exchange process "reflects the social relation of the producers to the sum total of labour as a social relation between objects, a relation which exists apart from and outside the producers" (p. 165).

It may seem that there is a contradiction between the notion that commodities "embody" socially useful labor, that their value represents "congealed" labor time, and the notion that "the commodity-form and the value-relation of the products of labour within which it appears, have absolutely no connection with the physical nature of the commodity and the material ... relations arising out of this" (p. 165). Marx insists endlessly that exchange value represents value and that value represents physical units of labor time that have been "incorporated" into the physical body of the commodity. Then he turns around and denies that value is in any way intrinsic to the commodities that embody it.
In fact there is no contradiction. Marx affirms that real people do real physical work that produces material objects that are then consumed. The issue is whether exchange value reflects an “inherent” or “natural” property of objects, or just a set of decisions about how many of them to make and who to give them to. Marx has already shown that, within his own definition, the exchange value of a given physical object can change suddenly and radically. The object itself is one and the same—no iota of its physical self has changed—but in its “commodity-self” it has suddenly doubled in value, or lost half its value. This happens whenever technological change increases or decreases the proportion of the total available labor that is necessary to produce a given number of objects of the given type. Those objects already in existence when the change occurs undergo a radical change in value, though all new objects will have from the beginning the “new value” corresponding to the new technological situation (pp. 144-46).

Marx has also shown that a change in or miscalculation of tastes can suddenly reduce or increase the value of objects already in existence. If it turns out that an object does not “fill a definite social need,” then no one will buy it, and it will have no market value at all (p. 166). The labor embodied or congealed in it is simply wasted (pp. 129-31). In other words, both technological change and change in tastes can affect the value of an object without having any impact at all on its physical nature. Value can come into existence where there was none before, and value can be utterly extinguished. It seems to follow just as a matter of logic that value is not “in” the object in any physical sense. Market values are more like tags or signs that people put on objects that give directions about what to do with them, except in this case the sign on a particular object tells us not only who is supposed to consume it, but also how commodity producers are supposed to proceed with producing other like objects.

None of this undermines the “law of value.” So long as independent producers try to maximize profit under a competitive regime, it will be true in the long run (according to Marx and his contemporaries) that market prices will be determined by standard labor inputs. The point is that it is the maintenance of a commodity system that makes this the case, rather than the qualities of the objects produced. Marx is concerned only with the illusion that the actual pattern of production and distribution is a necessary one, and not at all with the issue of its justice or injustice. Indeed, he can make his point on the assumption that a defetishized future community of producers would choose a pattern of production and distri-
bution similar to that which occurred under an earlier fetishized regime:

Let us finally imagine . . . an association of free men, working with the means of production held in common, and expending their many different forms of labour-power in full self-awareness as one single social labour force . . . . The total product of our imagined association is a social product. One part of this product serves as fresh means of production and remains social. But another part is consumed by the members of the association as means of subsistence. This part must therefore be divided amongst them. The way this division is made will vary with the particular kind of social organization . . . . We shall assume, but only for the sake of a parallel with the production of commodities, that the share of each individual producer in the means of subsistence is determined by his labour-time. Labour-time would in that case play a double part. Its apportionment in accordance with a definite social plan maintains the correct proportion between the different functions of labour and the various needs of the association. On the other hand, labour-time also serves as a measure of the part taken by each individual in the common labour, and of his share in the part of the total product destined for individual consumption. The social relations of the individual producers, both towards their labour and the products of their labour, are here transparent in their simplicity, in production as well as in distribution (pp. 171-72).

IV. CONCLUSIVE AFTERWORDS

My Essay on American classical economic thought attempted to apply and develop Marx's analysis of the fetishism of commodities. Writers like Wayland, Walker, Bowen, and Perry\(^5\) were, it seems to me, just the people Marx was attacking when he spoke of the persistence of fetishism even after Political Economy had revealed the law of value.\(^4\) And it also seems his attack on them for naturalizing the social world of production and distribution was justified when one looks in detail at what they wrote. What follows are speculations on the impact of Marx's critique, and on its limitations as a model for understanding the role of ideology in social life.

\[A. \textit{Neoclassical Economics as a Response to the Marxist Attack on Classical Economics}\]

Here is a tentative working hypothesis based on general reading.

\(^{5}\) See supra notes 4-7 (citing works of these classical economists).

\(^{4}\) See supra pp. 983-985.
I have neither fleshed it out nor tried, as yet, to document it.\textsuperscript{55} I've stated it dogmatically here just to avoid repetition of qualifiers. The hypothesis is that the particular form of the modern neoclassical synthesis, with its much chastened but still apologetic version of welfare economics, should be understood as, in part, a liberal response to the Marxist (and the derivative institutionalist)\textsuperscript{56} attack on classical political economy.

By the end of the nineteenth century, there was a spectrum of positions about the status of the capitalist economy. At one end were the classical political economists I described in the first Essay above. At the other were the Marxists, who argued that capitalism was unnatural, coercive, unjust, and (in its later crisis-ridden phase) destructive of social wealth. They also argued, on the grounds already discussed, that mainstream economics was an apologetic pseudoscience. A true understanding of the laws of capitalist development lead to the conclusion that capitalism would follow its inner logic straight to its own demise.

In the middle were the institutionalists, who saw as clearly as the Marxists the dependence of particular outcomes on the socially contingent legal/political structure of capitalism, but didn't believe in very general laws of economic life, either of a classical or a Marxist variety. They also didn't believe in revolution, but rather in socialist or social-Christian reform. They were akin to, the economist equivalents of the pragmatists in philosophy and the realists in legal theory.

The Marxist/institutionalist critique of the naturalist and apologetic character of classical political economy was a real threat to those swimming in the mainstream. It was an intellectual challenge, but also a political, specifically left-wing challenge. It came at a time when mainstream economists were developing, simultaneously, the marginalist analytic technique and the model of general equilibrium. These enormously important theoretical advances at first seemed to make it possible to refute the Marxist/institutionalist position, by showing, as Schumpeter put it, "that distribution according to the law of marginal productivity was 'fair'."\textsuperscript{57}

At the same time, the development of the apparatus of neoclassical economics was itself part of a general development toward pos-

\textsuperscript{55} I presented a longer, very tentative version of this section as a paper at the University of Wisconsin in 1978. My main sources were J. Schumpeter, supra note 2, and B. Seligman, supra note 17, at 3-253. My main intention here is to describe the general themes of the story that Seligman tells in meticulous detail.

\textsuperscript{56} For references to the institutionalists, see supra note 45.

\textsuperscript{57} J. Schumpeter, supra note 2, at 870.
ativism in the social sciences. A major tenet of that movement was that concepts like freedom, justice, and nature should play no functional role in social scientific analysis, because they were inherently "value-laden," "subjective," or "metaphysical." Furthermore, many of the new economists were liberals (as opposed to Marxist revolutionaries, reforming socialists, or conservatives). This group played the card of science, to complex effect, against everyone else.

Against the Classics, they argued for a version of marginalism and general equilibrium theory that was uncompromisingly positivist. This meant accepting some important elements of the Marxist and institutionalist critiques, and abandoning freedom, justice, and naturalness altogether. Yet a much more modest welfare economics, based on a rigorous definition of efficiency, could still powerfully legitimate liberal reforms of the market that the conservative Classics had condemned as contrary to natural law.

Against the institutionalists, the neoclassics argued that their highly abstract and rigorous form of economics was much more like science, much more powerful than a mushy situational calculus based on the infinite plurality of empirical social and legal relations. Besides, the institutionalists were persistently guilty of making objective-sounding arguments about things like the public interest. Like the Classics they criticized, the institutionalists hadn't decisively split their social ethics from their positive analysis.

Against the Marxists, the neoclassics argued that their laws were analytically superior, going head-to-head on the terrain of science. At the same time, neoclassical welfare economics, for all its modesty, could be made to suggest strongly that there were deep, inherent advantages to a regulated mixed market economy over a totally planned one, even conceding that inequality was a bad thing.

The point of all of this, for my purpose here, is that neoclassical economics was a political reaction, both against the reactionary character of classical political economy and against the particular left-wing attack that rolled together criticism of the classics for being analytically wrong, for being unscientific, and for being apologetic. Marxism (and institutionalism), in this view, created neoclassical economics, by creating the situation of jeopardy for mainstreamers that the neoclassics responded to. Marx's Essay on the fetishism of commodities was one of the most important moves in this process.

It remains true, as Schumpeter said, that neither marginalism nor general equilibrium theory was in any sense the cause of the remaining apologetic content of neoclassicism. These techniques were materials out of which a partially re legitimating new picture of the
economy could be created. I think it quite true that Marx would have used them, to his quite different purposes, had they existed in his time. But they were also much more than "just" analytic advances. They were means brought into being as part of an overall project that shaped their content.

In the neoclassical synthesis, the effacement of the role of the legal system, the modeling of economic life on bland assumptions of commodification and free exchange, and the consequent privileging of an abstract "market solution" over particularized, inefficient but equitable "regulatory" solutions, fitted both the program of making economics look as much as possible like physics or mathematics, and the program of legitimating liberal reformist responses to the social problems of capitalism. Had the innovating, resynthesizing, mainstream economists had different political motives, they might have plunged into the legal/institutional substructure of the market, rather than abstracting from it. We would have a different economic science, and, I think, a more useful one.

B. The Role of Law in the Theory of Commodity Fetishism

The short version of the fetishism of commodities is something like this: There is a "commodity mode of production" that has both a technical and a legal/conceptual element (people understand one another to be "owners"). Producers in this mode develop a form of consciousness, or understanding of their productive and distributive activities, that is appropriate to their situation. At first, they see the world governed by the value of commodities, but experience the fluctuations of value as arbitrary deviations from custom. Then they grasp value as congealed labor, and understand the fluctuations as reflecting changes in necessary labor time (or in "social needs").

This form of consciousness is fundamentally mistaken—it is a false consciousness—because in both its forms it naturalizes outcomes that are in fact contingent on the peculiar mode of social organization of production through commodity ownership. The key mistake is thinking that value is an attribute of the commodities themselves, rather than grasping that the values placed on commodities are a coded version of social decisions about what to produce and how to distribute it.

False consciousness is more than just a mistake; it blocks cognitive access to real possibilities of the situation. Because of it, people don't think of, or reject as unnatural or unworkable, alternative ways of organizing the economy that would be more humanly satisfying and more just. Because the error of fetishism blocks access to alter-
natives, it is in an important sense a cause as well as an effect of the mode of production. This completes the dialectical circle: thought constitutes as well as being constituted by the social world it seems merely to reflect.

In this general form, Marx’s analysis was an extraordinary accomplishment, and there is a sense in which it set the agenda for critical inquiry right to the present day. Much of the following commentary on commodity fetishism merely elaborates points Marx made elsewhere in his writing. Other parts reflect a twentieth century modernist critique of nineteenth century social thought in general, and are therefore as applicable to writers like Maine and Mill as to Marx. My quarrels are interstitial, meant to push the analysis along rather than to trash or derail it.58

As I pointed out in some detail above, a set of legal conceptions, though no particular set of legal institutions, is part of the definition of the commodity mode of production. “The guardians [of commodities] must therefore recognize each other as owners of private property” (p. 178). Thus, law is at the center of the analysis of the mode of production, and the particular way we understand law will have an effect on how we understand the economy. But before looking at the conception of law that is implicit in Marx’s discussion, it is well to note again that his approach in this Essay just doesn’t fit the


notions of materialism and of economic determinism that are often attributed to him.

Marx does say that legal institutions and the state are superstructural, growing out of and depending on the base, which is the social mode of production. But legal concepts are built into the base itself, and legal concepts are anything but material. Indeed, the belief in the formative power of legal concepts is often ridiculed as an archetypical form of idealism (i.e., of belief that ideas rather than material conditions drive history). Furthermore, if economic determinism is supposed to mean that economics determines society and culture, then to make Marx an economic determinist we have to exclude legal consciousness from culture, since a particular form of legal consciousness is an aspect of the economic base.

None of this means that a Marxist materialism is impossible. But such a position requires its proponent to develop a theory of how the truly material elements in the mode of production, such as technology, geography, and natural resources, lead producers to develop a particular legal consciousness. Marx himself, in the Essay under discussion, argues that “[t]he exchange of commodities begins where communities have their boundaries,” and that they then, “by reaction, become commodities in the internal life of the community” (p. 182).

This doesn’t sound to me like a developed materialist theory of why a community will treat its excess products as private property when dealing with a foreign community, or of why the internal “reaction” is inevitable once it does so treat them. There are many known examples of exchange between communities that are not based on private property notions, the “potlatch” being the most famous example. But maybe materialist explanations for the presence or absence of property consciousness under particular material circumstances are already available, and I’m just not aware of them (I doubt it).59

According to Marx, once we have the commodity mode of production, with its constitutive legal consciousness, all we need is the social institution of competition for the law of value to become a scientific truth. And it is the naturalization of the law of value that is the essence of commodity fetishism:

Something which is only valid for this particular form of produc-

tion, the production of commodities, namely the fact that the specific social character of private labours carried on independently of each other consists in their equality as human labour, and, in the product, assumes the form of the existence of value, appears to those caught up in the relations of commodity production . . . to be just as ultimately valid as the fact that the scientific dissection of the air into its component parts left the atomosphere itself unaltered in its physical configuration (p. 167).

In this respect Marx is just as different from the bourgeois economists as he thinks he is. They really did take law “for granted,” as though property and contract were background facts like the geography of a region. They ignored the possibility that property and contract might have a humanly determined, formative impact on the outcomes they thought were natural.60 The defetishization of commodities amounted to making law causally salient, and then emphasizing its human determination. This exposed the supposedly natural outcomes of the commodity economy as social artifacts.

As is always the case with the dereifying enterprise, the goal was to show that we can do things in a number of different ways, and ought consciously to choose among them, rather than merely submitting to the status quo. In this particular case, the dereifying enterprise achieved its goal, since all modern economists, including the neoclassical mainstreamers, have renounced naturalness and recognized the necessity of making some set of assumptions about the legal structure of production.

Yet when we look at the conception of law Marx chose when he brought law to the fore, it is strikingly similar to that of the classical political economists. Marx thinks he knows just what he means by property and contract, that by denominating them as the fundamen-

60. See the first Essay, supra, passim. In case you’ve forgotten, here is a last quote from Perry:

The natural laws of Production are inescapable in their operation. It is best for men to find out what these are, and then to conform to them their own economic action. If custom or legislation thwart these laws, they will take their revenge without pity, and lapse of time will only exhibit transgressors more clearly as firmly held in the grip of violated law. Nature prescribes to men the way to reach the best economic ends, by giving to all a consciousness of rights and impulses to maintain them, though it must be owned that there are impulses, too, to infringe upon rights, and also by giving that common sense by which mistakes are perceived and a sound experience gained; and the result of the play of all these for countless generations is expressed in such maxims as, Live and let live, A fair field and no favor, Honesty is the best policy. It takes two to make a bargain, and Let him who is without sin cast the first stone. Still, each generation shoots up a lusty crop of foolish and selfish men, foolish because selfish, and selfish because foolish, who think they know, how things had best be done, how Nature can be improved upon, and how those who trust themselves to them will be better off than if they trusted to their own sense of fair and right. . . .

A. Perry, supra note 6, at 196-97 (emphasis in original).
tal principles of the consciousness of commodity producers he has told us the key fact that will allow us to know the content of the mode of production. The regime of property and contract is, for him as for the Classics, a single block, something you have or don’t have, an “it” of sorts, albeit one of strictly human creation. Once we have it in place, it has its own interior logic, and that interior logic is what gives definition to the commodity mode.

For the Classics, the implicit legal background was the judge-made, common law regime of private law rules, understood as an inherently rational product of the evolution of custom, and at the same time as the coherent expression of first principles. For Marx, the background regime was the Continental, romanist system of codified property and contract rules, thought to represent the same first principles with the same inner coherence.

Like the Classics, Marx was perfectly aware that legislation was going on all the time. But, also like them, he was able to conceive this as a kind of embroidery on the surface of the essential structure. There was a sharp distinction between the conclusory discussion of contract and property consciousness as characteristics that define the commodity mode of production, and the various discussions of what Americans call police regulations in the public interest. The commodity mode remained itself through time because it embodied first principles in a coherent way, however much marginal adjustments might spoil the superficial symmetry of the facade.

Thus, Marx conceived the legal structure of the commodity mode of production as a coherent whole, with detailed subrules flowing rationally from the first principles (the whole modified in an episodic and superficial way by specific legislative interventions). It was therefore plausible just to take it as a given in analyzing economic changes within the history of that mode.

As with the Classics, the consequence of treating the background rules as a single coherent block was that Marx missed the crucial realist/institutionalist insight: there are many different regimes of specific legal subrules that are consistent with the indeterminate general notions of property and free contract. The law of value, the pricing of commodities according to labor inputs, will work differently according to which one of the alternatives the lawmakers select. Every modification of a ground rule of economic struggle modifies all allocative and distributive outcomes.

In short, Marx was a formalist (it’s hard to see how he could have been otherwise, given the time at which he wrote). He defetishized commodities by revealing the dependence of the law of value on a
particular legal structure, but only partially defetishized law itself. He denaturalized it, in the positivist mode, by emphasizing its human origin, without cracking its appearance of coherence.

As a consequence, he could only partially denaturalize the law of value. In fact, there is not one but a multiplicity of different laws of value, depending on the detailed content of the background regime. And the choice among background regimes, and consequently among allocative and distributive outcomes, is an inescapably social choice, like the decision to have a commodity regime in the first place.

This brings us to a final consequence of applying a realist/institutionalist understanding of law to the theory of the fetishism of commodities. It is not only that the choice of specific definitions for all the subrules that compose the mode of production is a social choice. It is also that this choice can only be made ad hoc.

The legal system itself, no matter how firmly committed to the twin principles of property and contract, just does not supply us with the rational apparatus we would need in order to elaborate it in response to new cases. What this means is that the mode of production, essentially dependent as it is on its legal/conceptual component, cannot determine "on its own," so to speak, its own shape through time. In this respect, legal principles are just like commodities.

When new cases arise, legal practitioners deal with them through the techniques of interpreting precedent and interpreting first principles. Sometimes everyone agrees that a particular outcome is "legally correct." The system has enough closure so that it is proper to speak of a different outcome, under the circumstances, as a "legal mistake," or as evidence of bad faith in the law maker.

But it will often be the case, and often in the cases that have the greatest consequences for the future course of allocation and distribution, that the practical manipulation of the system does not produce closure. The rules of precedent point in two directions at the same time. The supposed first principles turn out to be circular, contradictory, or just so vague that an equally good argument can be made on either side.

Over and over again, historical actors, particular men and women, decide the content of the background regime of legal rules without determining guidance from the internal criteria of the legal system. They act with a measure of existential freedom, according to the complex of legal, ethical, and political factors, including class interests and historical and social stereotypes, that contribute to any de-
cision of a matter of importance in their particular culture. In this specific sense, law reduces to the subjectivity of the law makers.61

There is nothing abstract about this subjectivity, nor is it in any sense unconditioned. It is always in relation to a situation that is experienced as given. It does not transcend history, or even what the judge had for breakfast. But it is people choosing what to do; why flinch from calling it a species of freedom?

The way I've just put it has placed the emphasis on "lawmakers," on those who have institutional power to determine legal norms. But once we abandon the idealism (present in this respect just as much in Marx as in Hegel) that attributes particular rules to general principles, it is clear that lawmaking is often a process of struggle. Organized social groups make law all the time, in combat with other organized social groups. Official institutions deploy the manipulable rhetorical resources of legal reasoning to rationalize outcomes, faits accomplis of struggle, as often as to predetermine them. Sometimes, at the extreme, our best understanding of what happened will be in terms of the balance of raw force. What gets rationalized is the superior firepower of the Pinkertons, or the superior punching ability of battering husbands.62

Breaking up the "law block," by recognizing the internal incoherence of legal doctrine, and the contingent constitutive role of law makers at all levels, eliminates an obstacle to understanding what happens when oppressed groups gain concessions through the legal system. These are not anomalies or deviations from the inner logic of capitalist law, but rather an inflection of the course of a moving

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62. There is nothing materialist about such a view; even when we refer to the force deployed as "raw," we are making a social judgment about where it falls on a scale, rather than a reference to nature or matter. The firepower of the Pinkertons, like the fist of the battering husband, is a thoroughly mediated physicality, by which I mean that the social and social-psychological contexts exert all kinds of influences on both the aggressor and the victim, decreeing for example that the battered woman be untrained in self-defense, that the crowd of workers lack a secret arms cache. See Schneider, Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense, 18 HARV. C.R.-C.L. L. REV. 623 (1980); see also H. Strassoff, The STRUGGLE FOR BLACK EQUALITY: 1954-1980 (1981). It is a smug and ultimately empty Marxism that privileges lawmaking through physical confrontation over lawmaking through bourgeois institutional forms, on the mere ground that force is somehow closer to the "base." On the other hand, the failure of academic lawyers to acknowledge social organization, say, of workers, blacks, and women, as a constitutive force that makes law, is even worse. It suggests that concessions the oppressed wring from the ruling class with their blood are spontaneous emanations of the benevolent spirit of our laws.
project. They destroy the "symmetry" or "coherence" of law only for those on the right and the left who start with a mistaken conception of how legality works. There is neither a built-in limit to how far concessions can go, nor an inevitable process of unravelling if they go too far.68

It is important to distinguish this sense of the subjectivity of law from two familiar radical notions. There is a long Marxist tradition of characterizing the state under capitalism as the executive committee of the ruling class, thereby reducing executive, legislative, or judicial action to a raw expression of class interest. There is also a long tradition of insisting that executive officers and judges under capitalism often twist, or plain break the rules in order to do in oppressed groups, thereby furthering their class interests.

Each of these critiques of legal institutions presupposes the existence and current functioning of something called the capitalist mode of production, understood to be a coherent system that is in a meaningful sense "in force." Indeed, it is against the background of this system, of its general and specific rules (e.g., that judges should find facts in a neutral manner), that the critics assail the class bias of state officials.

The subjectivity to which the realists called attention, which they revealed through their critique of conceptualism, was and is of a different character. We are now talking about the rules seen as constituting the mode of production. The legal system does not come to bear on the working economy of capitalism through general principles, but through particular rules applied in particular cases.

The legal component of the mode of production is, in so much as it actually functions in the world, the collection of particular rules, not the general principles. Inescapably subjective or political decisions in cases (often very important cases) where the system fails of closure represent not biased deviations from the norms of capitalism, but the subjective reconstitution of those norms. This would not be a very interesting point if we could say that the principles, while not coming directly to bear on the cases, come to bear indirectly. Indeed, in the formalist mode of understanding law, every functioning rule of the legal system is closely linked to the defining

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notions of property and free contract by the process of deduction (or more sloppy derivation) of particular from general propositions.

In this understanding, it is perfectly appropriate to see the commodity system as the same thing through time, since the general principles assimilate new cases through new particularizations that leave its “essential character” unchanged. So long as its basic principles are property and contract, we have “the commodity mode of production,” no matter what content those principles have assumed to fit the variety of possible concrete situations. And if the commodity mode is the same through time, it is not implausible that we can discover the laws that govern its evolution.

But the whole point of recognizing the element of subjectivity, of nonclosure in the legal system according to its own criteria, is that we sometimes can’t identify, in the new cases, which decision actually enforces the norms of property and contract, because there are two quite opposite plausible arguments as to what those concepts mean here. The gradual accretion of decisions that are in this way ungroundable in first principles is also the gradual reconstitution of the mode of production, as it exists practically at any given moment in time.

But don’t the general principles provide enough general guidance, as well as enough specific, tightly derivable outcomes, so that we can regard the subjectively based, ungrounded decisions as mere interstitial filling in of a well established outline? I don’t think this question can be answered in the abstract.

For some purposes, for example purposes of contrast with Inca civilization, it seems perfectly reasonable to treat the legal system of the United States as “essentially the same” today as it was in 1685, and as “essentially the same” as the legal systems of France and Germany. Furthermore, for this purpose it seems reasonable to characterize all these systems as the commodity mode of production, on the ground that they are all recognizably organized around property and contract notions that were not present among the Incas.

On the other hand, suppose that we are anxious to discover the laws of development of the capitalist economy. It doesn’t seem at all plausible to me that we will want to ignore the massive differences between these commodity regimes, each of which is or was, at least arguably, equally faithful to the guiding abstractions of property and contract. In other words, I would assert that the indeterminacy of the internal criteria of legality is great enough as a matter of fact so that, for purposes of the kind of social theory Marxists are interested
in, we must regard the notion of the commodity form as hopelessly imprecise.

The commodity form in a particular economy is an artifact of a flexible human practice of legal adaptation that is adrift in time, so to speak, rather than directed along definite lines by guiding abstractions. The degree of drift is great enough so that, if we are interested in the distribution of income or the allocation of resources, we must be attentive to its particular course, accepting its historical contingency when viewed from the point of view of the aspiration to science in social theory. And though we may learn to

64. On this point, see J. Sartre, Critique of Dialectical Reason 15-41 (A. Sheridan-Smith & J. Réé trans. & ed. 1976). The single best formulation I have seen is that of Colliot-Therenne, supra note 48, at 426-29, which I will quote at some length, since it does not seem to be familiar to American readers interested in this subject:

But, however different the implicit paradigm of the Marxian approach may be in comparison with the formal models inspiring political economy today, it shares a major hypothesis with them. When it is applied to the sphere of socio-economic relations, the Marxian paradigm imposes on them the form of a closed totality endowed with 'natural' laws, that is, laws independent of possible interventions of the political, juridical, or social instances. Marx has taken up, without hesitation, the postulate from bourgeois political economy according to which the world of socio-economic relations is inhabited by a spontaneous dynamic, is regulated by an immanent order... It was indeed a deep conviction of Marx himself that it should be possible in principle to clear away the semantic wool surrounding the concept of 'natural' and to isolate a purely theoretical meaning of the apologetic interpretations. For him the great merit of classical political economy was to have recognized the 'Naturwissenschaft' of the processes of commodity-producing economy; its main defect was to have ignored its historical character. But we must emphasize this: the 'Naturwissenschaft', the quality peculiar to the phenomena of commodity-producing economy, is the means by which those phenomena can be the subject of reflection within a closed system of scientific laws. Or again, the form which scientific study ought to take—the deployment of explanation starting from a single founding law—is determined by the supposed property of the object which Marx calls its 'Naturwissenschaft'. As a result, to acknowledge this property meant the limitation, right from the start, of the possibilities of the critique of political economy. Doubtless this critique could reveal the sociological presuppositions of bourgeois economic theory. There was no great difficulty in showing that the behaviors of economic agents, which theory took to be the expression of natural passions (in particular the search for the maximization of profit), are imposed on them by the specific historical structures of capitalist commodity production. But it was not possible to go beyond the stage of putting into historical perspective the capitalist system of production and the internal arrangements of the economic theory it permitted. In particular, after having posed that the system of capitalist commodity relations was endowed with a law of internal regulation, it was quite out of the question to demonstrate that its deconstruction was inevitable.

One wonders whether the supposed autonomy of the field of the Economic, that is, the attribution to the sphere of economic relations of an intrinsic legality which isolates it in an abstract way from the other modalities of social relations (in particular, the juridical and political modalities) is not an excessively narrow interpretation of the theses of historical materialism as they are presented in the first part of The German Ideology or in the classic formulation in the Preface to A Contribution to the Critique of Political Economy... Now these relations of production are defined as entailing juridico-political (even ideological) conditions as well as economic ones. The free subjects who meet in the act of exchange of commodities or in the labour contract (a particular form of exchange), are free only through the agency of a legislation and a
understand that course of drift better than we now do, it won't be through the refinement of the notions of property and contract that define the commodity regime in the abstract.

I conclude that a realist/institutionalist understanding of law destabilizes Marx's notion of the commodity mode of production in much the same way that it destabilizes the law of value. As I have interpreted it, this understanding of law is the enemy, in our understanding of social and economic life, of false necessity, in the same way that Marx's analysis of commodity fetishism is the enemy of false necessity.

power which appear in this light to be just as much conditioning as conditioned. Marx in fact is on occasion ready to recognize that certain types of relations of production can have extra-economic constraints as their condition of existence. . . . The concept of commodity fetishism, once again, had the task of accounting for the reifying mystification undergone by the relations of production in the commodity producing economy. Yet how are we to understand this mystification? If the 'naturalness' of economic laws is definitely illusory, the critique of political economy must deny the very existence of the object of political economy and not simply its claim to validity for all historical epochs. On the contrary, by according the categories of bourgeois economy an objective validity, even if a relative one (Capital, I, pp. 80-81), it may be that Marx himself has in the end fallen into the trap of the ideology secreted by the functioning of capitalist society, an ideology which assigns to the Economic precisely that place where the discourse of Capital is still situated.